"Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications

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Summary

Senate procedure permits most matters to be decided by a simple majority of Senators voting (with a quorum present). Yet Senate procedure generally lacks means for a simple majority to limit consideration and proceed to a vote. As a result, Senate minorities can attempt to block proposals by preventing a vote from occurring, a practice known as filibustering. Filibuster opponents have long sought to institute rules permitting a voting majority to limit consideration, most recently, in relation to judicial nominations. The Senate has seldom been able to adopt such limits, however, because any such proposal is itself subject to filibuster. In addition, the Senate has held that its existing procedures remain continuously in effect, which prevents it from considering a change proposal under limits more stringent than those already in effect. In this way, the existing procedures that lack consideration limits tend to entrench themselves against their own change.

Advocates of majority consideration limits have often sought ways to assure the ability of the Senate to reach a vote on procedural changes. Inasmuch as such a course of action would break through the obstacles posed by existing procedures, it has been called a "nuclear option." A "nuclear option" would presumably either make novel use of existing procedures or engage in ones previously not recognized in Senate practice. The plan most often discussed has been to raise a point of order asserting that the Senate must be able to reach a vote on nominations (or procedural changes) in order to exercise effectively its constitutional "advice and consent" power (or rulemaking power). By sustaining such a point of order, the chair would establish precedent for limiting consideration of those matters. Opponents of the ruling could appeal, and could attempt to filibuster to prevent a vote on the appeal, but the Senate could confirm the ruling by adopting a nondebatable motion to table the appeal.

Under established procedure, however, only the Senate itself has authority to settle points of order in ways that alter precedent or interpret the Constitution. The chair is to follow precedent in ruling, and is to submit points of order raised under the Constitution, or where no precedent exists. If a point of order is submitted, however, or a ruling against a point of order is appealed, the point of order can be sustained only by vote, and the vote might be blocked by filibuster. Tabling the question in this situation would have the effect of affirming previous practice. Only certain additional limits on consideration of a point of order raised while another is pending might afford means of overcoming this difficulty.

Under most conditions, the Senate might be unable to reach a vote on a procedural question that would institute consideration limits, except by setting aside the principle that the chair adheres to precedent, or that the rules remain always in effect. Once these principles were set aside, however, it might become possible for any voting majority of the Senate to institute further procedural changes in other subsequent situations. In the past, both the Senate and the House have ultimately always declined to institute change by accepting standards that would permit this result. This report will not be updated.

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Introduction

Filibusters and Limits on Consideration

In recent years, final Senate action on several presidential nominations for federal judgeships has been impeded by filibusters or threatened filibusters. In response, some leading Senators have called for the Senate to change its procedures to prevent filibusters, or make them harder to sustain, at least on this class of business. Filibusters are possible largely because for most matters, including nominations, existing Senate procedures establish neither limits on the time available for consideration nor means by which a voting majority may impose such limits. In this sense, existing Senate rules largely lack provision for effective majoritarian consideration limits. Accordingly, advocates of change in this area have focused on procedural changes that would afford more effective means for a majority to limit consideration.

Existing Senate rules and procedures, however, also place potentially substantial obstacles in the way of adopting changes in these rules and procedures. In particular, the lack of effective majoritarian consideration limits also applies to the procedures under which the Senate normally considers proposals for procedural change. As a result, advocates of more effective consideration limits have sought alternative means of instituting procedural changes that would not be subject to these difficulties.

"Nuclear" and "Constitutional" Options

Beginning in the 108th Congress (2003-2004), the term "nuclear option" has often been used to refer to a procedural course of action that would meet this requirement of bypassing the obstacles posed by the usual procedures for considering procedural changes. Critics of this form of action, however, have used this term also to connote that unilateral resort to such a course by a majority might undermine "traditional" practices of comity within the Senate, especially the expectations of predictability through consensual arrangements that have hitherto been held to characterize the body. Because of this connotation, some advocates of this form of action have come to prefer the term "constitutional option." This designation appears to connote that most of the courses of action currently under consideration would rely on an appeal to constitutional requirements as grounds for instituting consideration limits.[1]

[1] Some recent examples of the usage of these terms include the following. Martin B. Gold and Dinkle Gupta, "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," Harvard Journal of Law and Public Policy, vol. 27, fall 2003, pp. 206-271; Jim McClure and Malcolm Wallop, "Don't Go Nuclear," *The Wall Street Journal*, Mar. 15, 2005, p. A20; Sarah Binder and Steven Smith, "This Battle Isn't New: The Filibustering of Judicial Nominations," *St. Louis Post-Dispatch*, Mar. 8, 2005, p. B6; Charles Babington, "GOP Moderates Wary of Filibuster Curb," *Washington Post*, Jan. 16, 2005, p. A5; Keith Perine, "Snowe Weakens Frist's Hand for Senate "Nuclear Option," *CQ Today*, Feb. 16, 2005, pp. 1, 14; R. Lawrence Butler, "The Nuclear Option: ... But Destroy the Senate," *The Hill*, Feb. 8, 2005, p. 13; Neil A. Lewis, "Senator Critical of Proposal on Filibusters," *New York Times*, Feb. 25, 2005, p. A16; "The Senate on the Brink," editorial, *New York Times*, Mar. 6, 2005, p. 12; Jeffrey Toobin, "Blowing Up the Senate," *The New Yorker*, Mar. 7, 2005, pp. 42-46; Robert Novak, "Byrd's Nuclear Option," *Washington Post*, Dec. 20, 2004, p. A23; Jeffrey Rosen, "Supreme Mistake," *The New Republic*, Nov. 8, 2004, p. 19; Carl Hulse, "Clash on Judicial Nominations Could Spill Into Lawmaking," *The New York Times*, Mar. 7, 2005, p. A14; Keith Perine, "Conservatives Defend 'Nuke' Option To Protect a High Court Nominee," *CQ Weekly*, Sept. 18, 2004, p. 2150.

This report reserves the term "constitutional option" for those courses of action that depend specifically on constitutional points of order, as explained in the section on "The "Constitutional Option"." The term "nuclear option" is here used only to indicate that such a course of action would constitute an alternative to "conventional" proceedings because of its capacity to cut comprehensively through the normal difficulties of achieving procedural change. In this usage, any form of "nuclear option" would afford the Senate means to circumvent the obstacles to change posed by the usual forms of proceeding.

This usage leaves open whether a course of action could achieve its result without compelling the Senate to set aside requirements of its existing procedures in the process. A course that did require action at variance with established principles underlying the system of Senate procedure might be considered "nuclear" in a more fundamental sense. The reason, as explained in the section on "Overcoming Entrenchment," is that it would presumably constitute precedent for subsequent departures of the same kind. It is one purpose of the following discussion to identify the extent to which various courses of action described would or would not be "nuclear" in this strong sense.

Synopsis

The chief intent of this examination is to identify some specific courses of procedural action that might be used to carry out a "nuclear option" in the broad sense just defined. It focuses on clarifying the specific features of each course that might enable the Senate to avoid the obstacles to change posed by more conventional ways of proceeding. It indicates what provisions of existing procedures might pose difficulties for implementing various courses of action, as well as possible procedural responses by which proponents of such action might address these difficulties.

The discussion also identifies the features that specifically distinguish some of these courses of action as "constitutional options." In addition, however, it identifies points at which the courses of action might require proceedings at variance with existing requirements. On the basis of this examination, it is possible in conclusion to identify some implications that resort to a "nuclear option" might have for the subsequent condition of Senate procedure.

Showing how a course of procedural action represents a "nuclear option" involves identifying the ways in which it may bypass or overcome the obstacles posed by the usual procedures. To enable this examination, the discussion begins by describing the nature of these obstacles and indicating how they are grounded in the existing structure of Senate procedure. These observations make it possible to explain more specifically not only what a "nuclear option" must accomplish, but also why resort to proceedings of this kind may appear attractive or necessary in the first place.

The "Entrenchment" of Senate Procedure

The question of enhancing the ability of the Senate to limit consideration of matters has dominated the procedural history of the body for well over a century. Part of the reason for this persistence is that Senate procedures have always lacked effective limits on consideration. This lack of consideration limits may often enable opponents of a proposal to block its approval, even if it is supported by a majority, by extending its consideration indefinitely, thereby preventing the

Senate from ever being able to reach a vote on it. It is delaying actions of this kind that are colloquially, but universally, known as filibustering.[2]

This lack of effective consideration limits also applies to the procedures normally used for consideration of proposals for procedural change. In particular, it extends to the consideration of any proposal to institute additional consideration limits. Proposals to constrain filibustering can be filibustered. In this way, the existing lack of consideration limits operates as a continuing obstacle to the establishment of new consideration limits.

The persistence in the Senate of the question of limiting consideration, however, also arises from a second cause. Certain elements of the Senate's procedural system have the effect of requiring that its established procedures remain continuously in effect. As a result, a proposal to institute more effective means of limiting consideration would have to be considered in accordance with the already existing procedures. The principle that existing Senate procedures remain always in effect then combines with the lack of consideration limits under existing procedures to make it hard for the Senate to adopt more effective consideration limits. It is in this sense that Senate rules have been described as "entrenched" against their own change.[3]

This section considers more specifically these two features of Senate procedure, which together bring about its entrenchment. It examines first the procedural provisions that result in the general lack of consideration limits, then the principles that result in the continuous force of the existing system of procedure. On the basis of this discussion it will be possible to consider what characteristics a "nuclear option" would have to possess in order to succeed in overcoming the entrenchment of Senate procedure so as to permit the adoption of additional limits on consideration.

Lack of Overall Consideration Limits

Senate procedure is governed not only by the Standing Rules of the chamber, but also by standing and special orders, pertinent provisions of the Constitution and of statute,[4] the body of precedent formed by past rulings on procedural questions, and informally accepted practices. For most matters, none of these procedural standards either places any restrictions on how long consideration may last, or explicitly establishes any means for a simple majority of Senators voting to impose such restrictions. In general, only by a super-majority may the Senate apply the limits on consideration specified in Senate Rule XXII, an action known as invoking cloture.[5]

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[2] See CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach.

[3] This argument is developed in the context of the problem of limiting consideration in Catherine Fisk and Erwin Chemerinsky, "The Filibuster," *Stanford Law Review*, vol. 49, Jan. 1997, pp. 181-254, especially at pp. 245-254.

[4] Prominent examples of constitutional provisions that operate with procedural force in Congress include the requirements of Article I, section 5, relating to quorums, roll call votes, and keeping the *Journal*. The chief form of statutory provisions with procedural effect is expedited procedures governing consideration of specified items of business. Prominent examples are provisions in Title III of the Congressional Budget Act of 1974 (P.L. 93-344, 2 U.S.C. 631 through 644, as amended) regulating consideration of congressional budget resolutions and other budgetary measures, and the "fast track" procedures of the Trade Act of 1974 (sec. 151. of P.L. 93-618, 19 U.S.C. 2191) for considering certain trade agreements, known pursuant to Title XXI of P.L. 107-210 (19 U.S.C. 3801 f.) as "trade promotion authority."

[5] Senate Rule XXII, paragraph 2. In U.S. Senate, *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the Senate, One Hundred Seventh Congress*, S. Doc. 107-1, 107th Cong., 1st sess., prepared by Andrea LaRue under the direction of Kennie L. Gill, Committee on Rules and Administration (continued...)

Otherwise, the Senate may in general place agreed restrictions on consideration of a question only by unanimous consent.[6]

Some accounts suggest that the most likely purpose of resort to a "nuclear option" under current conditions would be to permit the Senate to limit consideration of a nomination by a simple majority vote, rather than a super-majority.[7] In fact, however, Senate procedures already require only a simple majority for the approval of almost any substantive proposal, including a nomination. (The requisite number has often lately been referred to as "51 votes" although, in fact, it is smaller when not all Senators vote.) The effect of Senate procedures, in general, is to require a super-majority not for the approval of items of business, but only for the imposition of limits on their consideration, so as to ensure that votes on their approval can occur.

Under these arrangements, even if a proposal is supported by a majority, opponents may be able, by filibuster, to prevent the Senate from reaching a vote on it, unless supporters are numerous enough to invoke cloture. It is from desire to avoid possible filibusters that Senate practice has historically fostered the settlement of issues through collegial processes of seeking consensual agreement.

Inasmuch as filibusters are defined by the intent of the participants to block action, their conduct is not limited to the use of any specified form of procedure. Although filibusters are commonly thought of as carried out through extended debate, they may also be conducted by a wide variety of other procedural means. Correspondingly, although cloture is widely understood as a motion for bringing debate to a close, it also restricts certain other actions that could be used for purposes of delay.[8]

Senate procedure also permits debate on many procedural motions. In particular, a motion that the Senate proceed to consider a bill or resolution is debatable under most circumstances (by contrast, however, present practice permits the Senate to proceed to consider a nomination on a non-debatable motion). For this reason, if opponents of a matter persist in a filibuster, reaching a final

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(Washington: GPO, 2002), sec. 5.1. See "Cloture Procedure" in U.S. Congress, Senate, *Riddick's Senate Procedure: Precedents and Practices*, S.Doc. 101-28, 101st Cong., 2nd sess., by Floyd M. Riddick and Alan S. Frumin, revised and edited by Alan S. Frumin (Washington: GPO, 1992), pp. 282-334; CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach.

[6] The Senate might also impose restrictions on consideration through a motion to suspend the rules. This motion, however, is itself fully debatable, as well as being subject to certain other conditions that provide opportunities for delay, and, like cloture, it requires a super-majority vote. In recent times the Senate has rarely resorted to its use. Senate Rule V, paragraph 1, in *Senate Manual*, sec. 5.1. See "Suspension of the Rules" in *Riddick's Senate Procedure*, pp. 1266-1272.

[7] See, for example, Robert Novak, "Byrd's Nuclear Option," *Washington Post*, Dec. 20, 2004, p. A23; William Safire, "Office Pool, 2005," *New York Times*, Dec. 29, 2004, p. A23; Keith Perine, "Snowe Weakens Frist's Hand for Senate 'Nuclear Option'," *CQ Today*, Feb. 17, 2005, pp. 1, 14; Neil A. Lewis, "Senator Critical of Proposal on filibusters," *New York Times*, Feb. 25, 2005, p. A16; Carl Hulse, "Clash on Judicial Nominations Could Spill Into Lawmaking," *New York Times*, Mar. 7, 2005, p. A14; Keith Perine, "Conservatives Defend 'Nuke' Option To Protect a High Court Nominee," *CQ Weekly*, Sept. 18, 2004, p. 2150; Bruce Fein, "The Nuclear Option: It Would Save the Constitution...," *The Hill*, Feb. 8, 2005, p. 13; Senator Kay Bailey Hutchison and C. Boyden Gray, remarks on "Hardball with Chris Matthews," MSNBC, Nov. 5, 2004, available at http://msnbc.msn.com, visited Nov. 8, 2004.

[8] Nor is cloture always used only to overcome a filibuster. In recent times, Senate leaders have often sought cloture even when no overt filibuster was yet in evidence, and even in the absence of any apparent threat to filibuster, but simply as a means of regulating floor proceedings. See CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach.

vote may require supporters to secure super-majority support for cloture or other limits on consideration multiple times, on each of several essential questions that may arise in the course of consideration. For a few specific questions, nevertheless, Senate rules or other procedures do establish limits on consideration, and, as discussed in the next section, some of these might play a role in the implementation of a "nuclear option,"

All these conditions of consideration apply to the conduct of Senate business generally; they are not specific to the consideration of proposals for procedural change. Only because the Senate's general rules of procedure also apply specifically to the consideration of proposed changes in procedure do they contribute to the entrenchment of the existing procedures. Specifically, the lack of effective majoritarian consideration limits in existing procedure tends to entrench itself by constituting the chief obstacle to its own change.

In certain respects, moreover, the system of Senate procedure places greater obstacles in the way of bringing the Senate to a vote on a proposal to amend the Standing Rules than for other matters. As with most other matters, the Senate can adopt amendments to its Standing Rules by a simple majority of those voting. On most matters, however, the vote required to invoke cloture is three-fifths of the full Senate membership (60 votes, if no vacancies exist), while for amendments to the Standing rules it is two-thirds of Senators voting (67, if there are no vacancies and all Senators vote). This more demanding requirement contributes specifically to the entrenchment of the Standing Rules against change.[9]

Effects of the Continuing Body Doctrine

The lack of consideration limits in Senate procedures would not suffice to entrench those procedures unless the Senate also required that existing procedures are to govern consideration of proposals for their own change. The chief embodiment of this requirement is the Senate's practice of treating its rules as remaining continuously in effect, even from one Congress to the next, and even in the absence of any action to reaffirm them. This practice arises largely as a consequence of the way the Senate understands its status under what has been called the "continuing body doctrine."

The Continuity of the Senate

To say that Senate is a continuing body is, in itself, to state not a doctrine, but merely a fact. Under the Constitution, a majority of the Senate constitutes a quorum,[10] and only one-third of senatorial terms expire at the end of each Congress.[11] Even at the beginning of a new Congress, as a result, and even before newly elected Senators are sworn in for new terms of office, a quorum of the Senate remains in being, and the body remains capable of functioning and acting. By this criterion, a Senate, with membership sufficient to do business, has been in continuous existence

[9] Senate Rule XXII, paragraph 2, *Senate Manual*, sec. 22.2.

[10] Constitution, Art. I, sec. 5.

[11] Constitution, Art. I, sec. 3.

ever since the body first achieved a quorum on April 6, 1789.[12] That the Senate is a "continuing body" in this sense was explicitly enunciated at least as early as 1841.[13]

Practical Implications of Continuity

At various times in its history, however, the Senate has understood the implications of the fact of its continuity in different ways, and it is the understanding of these implications that may be considered the "continuing body doctrine." Under current practice of long standing, the Senate regards itself not only as a continuing body, but as a continuously organized one. The elected officers of the Senate appear always to have been regarded as continuing in office from one Congress to the next unless replaced by affirmative action of the body.[14] In current practice, the Senate appoints its committees at the beginning of each Congress, but assignments are regarded as carrying over in the new Congress until changed (or renewed) by action of the Senate.[15] When the Senate first established standing committees, however, its initial practice was to regard assignments as expiring at the end not only of each biennial Congress, but of each annual session.[16]

It appears, by contrast, that the Senate has always regarded its Standing Rules as continuing in effect from Congress to Congress without affirmative action on its own part. The Senate implicitly decided this question by not acting to re-adopt, revise, or replace its original rules of 1789 at the convening of the first session of the Second Congress in October 1791.[17] Since then, the Senate has amended its rules on numerous occasions and has adopted several comprehensive recodifications, not always at the beginning of a Congress. It has generally done so with at least the tacit understanding that it was acting pursuant to the procedures established in the already existing rules.

This understanding reflects a presumption that the continuity of the Senate entails the continuity of its rules. In 1959, the Senate explicitly incorporated this principle into its Standing Rules by providing that "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[18] This action, which accompanied certain

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[12] This argument is summarized in Fisk and Chemerinsky, "The Filibuster," p. 245.

[13] Senator James Buchanan, remarks in the Senate, *Congressional Globe*, vol. 9, Mar. 8, 1841, p. 240. Quoted in Luther Stearns Cushing, *Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America* (Boston: Little Brown, 1856; reprinted, n.p.: Fred B. Rothman Co, 1989), p. 993.

[14] *Riddick's Senate Procedure*, p. 955 (under "Officers of the Senate"). As an exception, the President pro tempore was in early times elected for the occasion only. Robert C. Byrd, "President Pro Tempore of the Senate," *Encyclopedia of the United States Congress*, vol. 3 (New York: Simon and Schuster, 1995), p. 1604.

[15] Senate Rule XXV, paragraph 1, in *Senate Manual*, sec. 25.1. *Riddick's Senate Procedure*, p. 382, 395, 397 (Under "Committees").

[16] George H. Haynes, *The Senate of the United States: Its History and Practice*, vol. I (Boston: Houghton Mifflin, 1938), pp. 271-272. For examples see: U.S. Congress, Senate, *Journal of the Senate of the United States of America*, 14th Cong., 2nd sess. (Washington: William A. Davis, 1816), Dec. 5, 1816, pp. 30-31; Dec. 10, 1816, pp. 38-39; Ibid., 15th Cong., 2nd sess. (Washington: E. de Krafft, 1818), Nov. 18, 1820, p. 21; Nov. 20, 1818, p. 23; Ibid., 16th Cong. 2nd sess. (Washington: Gales & Seaton, 1820), Nov. 16, 1820, p. 18; Nov. 20, 1820, p. 22.

[17] U.S. Congress, Senate, *Journal of the Senate of the United States of America*, 2nd Cong., 1st sess. (Washington: Gales & Seaton, 1820), Oct. 24, 1791, pp. 323-324. See also U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America* (Washington: Duff Green, 1828), pp. 78-84 (special session in the Second Congress, Mar. 4, 1791).

[18] Rule V, paragraph 2; *Senate Manual*, sec. 5.2. U.S. Congress, Senate, Committee on Rules and Administration, *Standing Rules of the United States Senate and Statutory Provisions Relating to Operation of the Senate*, April 10, (continued...)

changes making cloture easier to obtain,[19] had the effect of giving the force of rule to an interpretation of the continuing body doctrine that supports the entrenchment of Senate rules.

The Senate also treats other components of its system of procedure as maintaining continuity. Standing orders, like the Standing Rules, are accepted as remaining perpetually in force unless their terms specify otherwise. No doubt exists that provisions of the Constitution having procedural force remain continuously effective, and the Senate implicitly accords the same treatment to provisions of statute that operate procedurally. Finally, it is implicit in the precedential character of procedural rulings by the chair and the full Senate that, once made, they continue to guide proceedings subject only to subsequent decisions and actions of the body.[20] All these understandings also contribute to the tendency of the system of Senate procedures toward its own entrenchment.

Contrast with the House of Representatives

The status of the Senate as a continuing body, and the implications it draws from that status, may be highlighted by contrast with corresponding practices of the House of Representatives. In just the sense that the Senate is a continuing body, the House is not, for the terms of all House Members expire with the biennial expiration of the constitutional term of a Congress. Consistent with this circumstance, the House adheres to the principle that one House cannot bind a subsequent House,[21] and consequently the organizational arrangements of the House in one Congress do not automatically carry over to the next. When a new House of Representatives convenes after an election, it understands itself as an inchoate, unorganized body that must proceed to its own organization as its first order of business. Its initial proceedings include the election of its Speaker and other officers, the adoption of rules, and the approval of committee assignments for all Members.[22]

The rules the House adopts typically consist of an amended version of the code in effect in the previous Congress.[23] That code includes effective means for limiting consideration of measures, especially in admitting the motion for the previous question as a device for concluding consideration and proceeding to an immediate vote.[24] While considering the adoption of rules, however, the House regards itself as proceeding not under its previously existing rules, but under

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1979 (Washington: GPO, 1979), p. 54, note 1 (to Senate Rule XXXII, paragraph 2). See *Riddick's Senate Procedure*, p. 1220-1224 (Under "Rules").

[19] The circumstances of this action are further described in the section on "Asserting the Non-Continuity of Rules," below.

[20] Paul Rundquist, then Specialist in the Congress in the Government and Finance Division of CRS,. suggested the pertinence of these considerations.

[21] "Assembly of Congress" in Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 2003), ch. 5, sec. 6; U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Eighth Congress*, H.Doc. 107-284, 107th Cong., 2nd sess., compiled by Charles W. Johnson, Parliamentarian (Washington: GPO, 2003), sec. 59 (Parliamentarian's notes on Constitution, Art. I, sec. 5, rulemaking power of each House).

[22] Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907), vol. I, sec. 187. "Assembly of Congress" in Brown and Johnson, *House Practice,* ch. 5, sec. 4.

[23] "Assembly of Congress" in Brown and Johnson, *House Practice*, ch. 5, sec. 6.

[24] "Previous Question" in Ibid., ch. 39; see esp. sec. 1.

"general parliamentary law."[25] The House recognizes the motion for the previous question as a part of general parliamentary law, thereby affording itself a means of concluding consideration and proceeding to a vote on the resolution to adopt the rules.

As with the Senate, however, the House implicitly accepts the principle that present procedural rulings should conform to previous precedent. The House treats this principle itself as a part of the general parliamentary law; it could even be said that the House justifies its adherence to general parliamentary law before the adoption of rules by appealing to the precedent of its having done so in the past. On similar grounds, the House has long continued the practice of having the Clerk of the previous House call the new House to order and preside until the election of a Speaker.[26] By these means the House enables itself to maintain a continuity of practice without entrenching its rules against their own change. In particular, these practices enable the House to maintain effective means of limiting consideration while still observing the principle that it is not bound by the rules adopted by the House in a previous Congress.

Entrenchment in Practice Only

One implication of the preceding discussion is that the principles and provisions that bring about the entrenchment of Senate procedures do not suffice to render that entrenchment absolute. No imperative mandate purports to declare Senate procedures immune from change or positively to prevent the Senate from altering them.[27] Instead, Senate procedures are entrenched in practice only, as a consequence of a combination of certain provisions they contain and principles on which they rest. Even pursuant to procedures as they now stand, the Senate could in practice alter any of those procedures (except, of course, for constitutional requirements) unless opponents were able to prevent the Senate from reaching a vote. If, furthermore, the Senate did alter its procedures so as to provide for limits on the consideration of proposals for procedural change, it would thereby enable a voting majority, in general, thereafter to adopt whatever additional change proposals it favored. Under those conditions Senate procedures would cease to be entrenched in the sense just described.

The conditions that entrench existing procedures come into play only when opponents of a proposed change that commends majority support are able to prevent a vote. As a result, Senate procedures are entrenched only to the extent that, because of the lack of majoritarian consideration limits, a voting majority may still be unable to achieve procedural changes. A number of legal and constitutional arguments might be raised against the propriety even of this entrenchment in practice. Yet any such argument might afford the Senate no concrete assistance in overcoming the practical condition of entrenchment, unless it could be brought to bear in an effective way in the context of actual Senate proceedings—meaning, presumably, that it would be invoked as an element of a "nuclear option."

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[25] "Assembly of Congress" in Ibid., ch. 5, sec. 7.

[26] Ibid., ch. 5, sec. 4.

[27] The filibuster is invoked as an example of entrenchment in recent discussions of the propriety of statutory provisions declaring law immune from change. See Eric A. Posner and Adrian Vermeule, "Legislative Entrenchment: A Reappraisal," *Yale Law Journal*, vol. 111 (2002), pp. 1694-1695; and John O. McGinnis and Michael B. Rappaport, "Symmetric Entrenchment: A Constitutional and Normative Theory," *Virginia Law Review*, vol. 89 (2003), pp. 407-408. These discussions do not appear to distinguish declaratory provisions purporting to prohibit alterations in statute from the kind of entrenchment in practice under discussion here. Morton Rosenberg, Specialist in American Public Law in the American Law Division of CRS, called attention to this literature.

Requisites of a "Nuclear Option"

Overcoming Entrenchment

In light of the preceding discussion, resort to a "nuclear option" may be understood as an attempt to overcome the existing entrenchment of Senate procedures and enable a voting majority to institute desired procedural changes (specifically, provisions for limits on consideration). To achieve this purpose, it appears, a "nuclear option" would have to afford some means of ensuring that the Senate could reach a vote on a procedural change proposal, which would evidently mean providing some way to overcome at least one of the two conditions that combine to bring about entrenchment. A course of action could provide a "nuclear option" either by (1) overcoming the scarcity of majoritarian consideration limits afforded by existing procedures or (2) departing from the principle that the existing system of procedure as a whole remains always in effect.

From this perspective, it appears that a "nuclear option" might achieve its effects by engaging in either (1) an innovative or unorthodox use of some existing procedures or (2) proceedings not governed by the existing system of Senate procedure. Roughly speaking, proceedings of the first kind would involve means of overcoming the existing scarcity of consideration limits; those of the second kind would disregard the principle that established procedures remain continuously applicable. Successful action in either form would result in the institution of changes from the system of Senate procedure as previously established, and either approach would represent a "nuclear option" in the sense that it would overcome the obstacles to procedural change presented by the Senate's existing procedural system.

Setting aside existing procedures in the course of considering procedural changes, however, might be considered "nuclear" in an additional sense as well. A course of action of this kind would not only result in the alteration of established procedure, but engaging in it would, in itself, already constitute an alteration from established procedure. Under these conditions, change would be realized not only as an *outcome* of a process of considering proposals for change, but in the very *occurrence* of the process. This form of "nuclear option" would, by definition, constitute an extraordinary proceeding, in the strict sense of taking place *outside the ordinary* conditions of proceeding. Its occurrence, in itself, would already constitute peremptory, ad hoc action to remove the Senate from regulation by its previously established procedures. As a result, the subsequent effects of this form of action on the system of Senate procedure would come through not only the changes it would institute, but also those that would occur simply through carrying it out.

The remainder of this section examines some specific forms of action that have recently been discussed as possible elements of a "nuclear option." It assesses whether a successful "nuclear option" could be constructed through novel or alternative uses of some established elements of procedure, or would require extraordinary proceedings. These considerations will permit subsequent examination of some specific courses that a "nuclear option" might take. On this basis, potential implications of carrying out proceedings that would be "nuclear" in the "strong" sense of involving peremptory departure from existing procedures will be discussed.

Consideration Limits Under Existing Procedures

The previous discussion of entrenchment suggests that the chief requisites of a feasible "nuclear option" would be (1) that a proposal for procedural change be subject to adoption with the support of a simple majority of Senators voting; and (2) that its consideration be subject to limitation also by a simple voting majority, so as to ensure that a vote can be reached. The first requirement is easily met by the regular procedures of the Senate; it is the second that presents difficulties. To meet the second requirement, it appears that applicable procedures would have to either (1) permit a voting majority to impose limits on the time available for consideration of a matter; or (2) provide generally for such limits, including by making the matter non-debatable.

In addition, if an existing procedure does not impose an overall time limit on consideration of a proposal, but only permits a majority to limit consideration, it can assure a vote on the underlying proposal only if it assures that the Senate can reach a vote on the question of limiting consideration. Such a procedure, accordingly, would also have to include some effective means of limiting consideration of the question of limiting consideration. As with the underlying matter itself, the procedure could limit consideration of this new question either by imposing a general limit or by permitting a vote to impose one. If it does so only by permitting a vote to impose a limit, however, the same requirement would again apply to the procedure for considering the question of imposing the limit.

It follows that any effective procedure for limiting consideration must include some provision establishing a general consideration limit for some question involved in the process. If it provides for no such limit, the Senate could be prevented from getting to the point at which it could begin the series of votes that would ultimately result in imposing consideration limits on the underlying substantive matter. In addition, each of the series of questions involved in limiting consideration of the matter, and not only the final vote on the matter itself, would have to be subject to the decision of a simple voting majority.

Motion to Table

The motion to table constitutes a partial exception to earlier generalizations about the lack of majoritarian consideration limits in the Senate. The motion to table a matter is not debatable, may be adopted by majority vote, and, if adopted, has the same effect as a vote to defeat the proposal.[28] As a result, it can, in a sense, be used to impose consideration limits on the underlying question. For example, if opponents of a proposal offer a series of amendments in an attempt to protract consideration, a voting majority can dispose of each amendment by moving, and immediately agreeing, to table it.

The motion to table, however, terminates consideration of a proposal only by defeating it. Rejection of the motion leaves the proposal pending before the Senate and still open to further consideration. Accordingly, the motion to table cannot directly be used to expedite approval of a proposal. For this reason, it might be possible for a "nuclear option" to benefit from the use this motion, while still remaining consistent with previously established procedure, only if the Senate could be brought to consider a question whose *defeat* would either result in adopting the desired procedural change, or at least facilitate its adoption by limiting its consideration.

[28] *Riddick's Senate Procedure*, p. 1273 (under "Table").

Point of Order

The process by which the Senate decides parliamentary questions also involves elements that can have the effect of limiting consideration. Typically, a parliamentary question, or question of order, comes before the Senate in the form of a point of order. A point of order is a claim, raised from the floor by a Senator, that some pending procedural action is inconsistent with pertinent rules or other procedural standards. Under most circumstances, the presiding officer may settle a point of order by ruling on whether the claim it raises is procedurally correct. A question of order may also be presented, without any point of order being raised, if an ambiguous or unsettled situation arises in the course of proceedings. Most questions arising in this way also may be settled by a ruling of the chair. In either case, the ruling of the chair becomes final unless any Senator appeals it to the full Senate. An appeal is settled by a simple majority of Senators voting, and this vote either confirms or reverses the initial ruling of the chair.

The initial action of the chair on a point of order is, in effect, subject to limits on consideration, because Senate practice permits debate on a pending point of order only at the discretion of the chair.[29] Under most circumstances, on the other hand, appeals of a ruling by the chair are debatable.[30] As a result, opponents of the decision that the Senate seems likely to make on an appeal may be able to filibuster to prevent the Senate from reaching a vote on the appeal. If insufficient support exists to invoke cloture on the appeal, the Senate might be able to limit its consideration only by tabling it.

Tabling an appeal, however, confirms the initial ruling of the chair. If the Senate wishes to reverse the chair's ruling, it can do so only by voting directly on the appeal itself. For Senators wishing to establish a position contrary to the ruling of the chair, accordingly, it appears that the motion to table would afford no aid. In the face of a filibuster, indeed, the Senate might have no effective means to reach a vote on an appeal that would reverse an initial ruling. Under these circumstances, the Senate may be able to limit consideration of an appeal only with the effect of simultaneously confirming an initial ruling of the chair.

A parliamentary question, accordingly, is like a motion to table in that effective consideration limits are usually available only for one of its possible dispositions. For parliamentary questions, however, the protected disposition is the one consistent with the initial ruling of the chair. Under these conditions, it appears that raising a parliamentary question could be an effective part of a "nuclear option," without departure from the requirements of already established procedure, only when an initial ruling of the chair would be *favorable* to the adoption of the desired procedural change, or at least to limiting consideration of the proposal for change.

Nested Point of Order

Senate rules, however, also establish certain additional conditions under which it might be possible to impose limits on the consideration of parliamentary questions.[31] In particular, Senate Rule XX, dealing with "Questions of Order," includes a provision that "when an appeal is taken

[29] Ibid., pp. 987, 989-990 (under "Points of Order").

[30] Ibid., p. 148 (under "Appeals").

[31] Appeals are not debatable also when the Senate is proceeding under cloture. Rule XXII paragraph 2, in *Senate Manual*, sec. 22.2. See *Riddick's Senate Procedure*, p. 300 (under "Cloture Procedure"). The situation in which a "nuclear option" might be attempted, however, would not likely be one in which cloture could be obtained.

[from a decision of the chair], any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer without debate; and every appeal therefrom shall be decided at once, without debate...."[32] Under suitable conditions, this provision could permit consideration of a parliamentary question to be limited, whether or not the initial ruling was favorable.

Suppose, for example, that proponents of a "nuclear option" raised a point of order intended to establish consideration limits, and the chair overruled it. Proponents of consideration limits might appeal this unfavorable ruling, then raise a new point of order claiming that consideration limits should apply to the appeal. Even if the chair overruled this new point of order as well, its proponents could again appeal. Inasmuch as the second point of order would be nested within the first, the prohibition of Rule XX against debate on the nested appeal would ensure that the Senate could reach a vote on that question.

Through its vote on the nested appeal, the Senate could then impose limits on consideration of the initial appeal and enable itself to reach a vote thereon. Through its vote on the initial appeal the Senate could then affirm the consideration limits asserted by the original point of order. Under these circumstances it might be possible to construct a way of pursuing a successful "nuclear option" that did not require either an initial favorable ruling by the chair or any peremptory departure from established procedures.

Precedential Force of Parliamentary Rulings

The possibility that limits could be brought to bear on the consideration of parliamentary questions makes them attractive as a vehicle for securing changes in Senate procedure. They are attractive for this purpose also, however, because rulings on parliamentary questions are, specifically, decisions about procedure: they may have the effect of establishing standards for subsequent proceedings. For this reason they may potentially afford an alternative to formal amendment of the rules as a means of procedural change.

Exactly because rulings on parliamentary questions are procedural decisions, however, their use as a means of achieving procedural change also presents certain potential obstacles. The procedural standards that regulate these questions not only prescribe the process by which they may be settled, but also place certain constraints on their substantive content. The principles behind Senate procedural practice do not enfranchise the body to settle parliamentary questions according to its own preferences in the immediate circumstances in the same way that it may decide ordinary questions of policy that come before it. Instead, Senate procedure implicitly presumes that rulings on parliamentary questions will represent interpretations of the meaning and force of some existing rules or other procedural standards, and that those made by the chair, at least, will accord with previous interpretations embodied in established precedent. To the extent that a course of action aimed at enhancing consideration limits required proceedings at variance with these principles, it would involve peremptory departure from established procedure.

[32] Senate Rule XX, paragraph 1, in *Senate Manual*, sec. 20.1.

Rulings of the Chair

The Senate treats rulings on parliamentary questions as establishing precedent for subsequent action in comparable situations. Although a parliamentary ruling brings about no actual amendment of Senate Rules, its standing as a precedent renders it, in effect, a part of the overall system of Senate procedure. It is in large measure this precedential force of parliamentary rulings that makes the use of parliamentary questions appear attractive as an element of a "nuclear option." If the chair ruled that limits applied to the consideration of a pending matter, advocates of limiting consideration would presumably invoke the ruling as a precedent for applying comparable limits to the consideration of similar matters in corresponding future circumstances. To the extent that this precedent modified the way in which the system of Senate procedure was applied and implemented, it would operate as a "nuclear option" to bring about procedural change.

The implicit justification for according precedential force to parliamentary rulings, however, is the presumption that such rulings will reflect authoritative interpretations of established rules and other procedural standards. The Senate can consider it appropriate for earlier rulings to guide later action precisely because it can expect those rulings to be made in conformance with established procedural standards (including previous interpretations embodied in precedent). For this reason, it is an established presumption of Senate procedure that the chair is to rule on parliamentary questions in ways consistent with already established procedural standards.

The precedential force of parliamentary rulings, accordingly, entails not only that present rulings establish guidelines for future ones, but also that previous rulings guide present ones. If the success of a "nuclear option" required the chair to rule in a way at variance with existing procedure, the course of action involved would appear to exemplify not an innovative or unorthodox use of existing procedures, but an extraordinary proceeding at variance with established standards.

Specifically, if a parliamentary situation arose requiring the chair to rule whether some existing procedural standard mandated limits on consideration, the principle of precedent would presumably require the chair to rule consistently with past rulings on comparable questions in similar situations. A ruling by the chair that imposed consideration limits not previously recognized in Senate procedure might be considered as involving a violation of this principle. If previous precedent recognized no limits on consideration applicable to the instant situation, and the chair ruled in favor of consideration limits, its action would appear to constitute an extraordinary proceeding involving peremptory departure from the established system of Senate procedure.

In this respect, the scarcity of consideration limits in existing Senate procedure sets the problem not only for the process by which a "nuclear option" could be carried out, but also for the substantive result it might achieve. A key impediment to the effective use of parliamentary rulings in a "nuclear option" might be the difficulty of finding a procedural basis for the chair to rule in favor of limits on consideration while remaining consistent with existing procedural standards.

In some circumstances, nevertheless, the constraint on the chair to conform parliamentary rulings to established precedent might not prevent the use of such rulings to accomplish procedural change. Where existing precedents are ambiguous, conflicting, or silent, a new ruling by the chair or the Senate may appropriately affirm an interpretation that alters the precedential basis for subsequent decisions. This principle opens up the possibility that a point of order might enable

the chair to interpret existing procedures in a way that would either increase the capacity of the Senate to place limits on consideration or facilitate subsequent efforts to do so, while yet avoiding peremptory departure from existing standards in the process of doing so.

Decisions by the Senate

When the Senate itself settles a parliamentary question, it is not constrained by precedent in the same way as the chair is. Pursuant to the constitutional provision that "each House may determine the Rules of its proceedings,"[33] the Senate understands itself as the ultimate authority over the meaning and intent of its own rules. Senate procedure accordingly permits the body always to make a final decision on a parliamentary question through its own vote, and rulings by the full Senate are considered the most authoritative form of precedent. For the same reason, the Senate has not regarded itself as constrained in its rulings by previous precedent in the same way as is the chair, which operates only as an agent of the Senate. The Senate's handbook of procedural practice explains:

> Any ruling by the chair not appealed or which is sustained by vote of the Senate, or any verdict by the Senate on a point of order, becomes a precedent of the Senate which the Senate follows just as it would its rules, unless and until the Senate in its wisdom should reverse or modify that decision.[34]

Under these standards, procedural interpretations established by rulings of the Senate not only may constitute precedents to govern subsequent procedural action, but may also embody actual changes in the procedural basis of Senate practice. By means of such rulings, the Senate has, on occasion, established interpretations of parliamentary questions that were not simply implicit in, and might even be at variance with, previous interpretations. A parliamentary decision by the Senate might permit a "nuclear option" to achieve the effect of altering Senate procedural standards while yet avoiding any proceedings inconsistent with procedures already in effect.

The Senate may exercise its authority to settle parliamentary questions about its own procedures in several different ways. Perhaps the most generally applicable way is through the right of any Senator to appeal an initial ruling of the chair to a decision of the full Senate. Senate practice also sets forth, however, that the chair, instead of ruling on a point of order, may always submit the question it presents to the Senate for a decision. The chair does not often exercise this option, but appears to have done so especially when presented with a "question of first impression," that is, a situation in which no previous precedent has established any interpretation of the point at issue. The apparent rationale of this practice is that, inasmuch as the authority of a rule rests ultimately on the constitutional power of the Senate to adopt it, the initial decision on its interpretation is appropriately left to the same body.[35]

In addition, however, Senate practice also holds that the chair ought to submit to the Senate any question of order raised on constitutional grounds. The possibility of a constitutional point of order exists because the Senate understands the constitutional provisions that operate to regulate

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[33] Constitution, Art. I, sec. 5.

[34] *Riddick's Senate Procedure*, p. 987 (under "Points of Order"); see also the sections on "Points of Order," pp. 987-996, and "Appeals," pp. 145-149.

[35] Richard S. Beth, "Points of Order and the Conduct of Senate Business," paper presented at the annual convention of the American Political Science Association, San Francisco, September 1990, p. 10.

aspects of its procedure as integral components of its procedural system. The Senate nevertheless considers that, although its procedural system accords the chair authority to interpret the Standing Rules, it grants no such authority in relation to the Constitution. The Senate itself, by contrast, stands as a coequal component of one of the three separate branches of the federal government. It is accordingly appropriate for the Senate to exercise authority in relation to the Constitution.[36]

The "Constitutional Option"

The authority of the Senate to alter precedent in settling any parliamentary question may afford a means of securing procedural change without requiring any proceedings inconsistent with precedent. At the same time, the possibility of grounding a parliamentary question in a provision of the Constitution may offer supporters of consideration limits a means of pursuing their goal without having to appeal to procedural requirements not already in being. Proceedings invoking these principles would be characteristic of what may appropriately be called a "constitutional option" for procedural change.

Supporters of consideration limits might raise a parliamentary question proposing that some identified provision of the Constitution be interpreted as entailing a requirement for limits on the consideration of business then pending. The Senate might then settle this constitutional question in a way that sustained the proposed interpretation even in the absence of previous precedent supporting it.

Action of this kind might offer greater possibilities than other forms of "nuclear option" for securing procedural change without requiring extraordinary proceedings. A decision of the Senate instituting consideration limits for specified matters, based on an interpretation of constitutional provisions and representing the settlement of a constitutional question, could be viewed as harmonious with existing procedural standards both in substance and in process. In these respects, the course of action resulting in this decision might be considered not to involve any extraordinary proceedings outside the bounds of established procedure. The chief requisite for the feasibility of such a course of action might be identifying a provision of the Constitution that could appropriately be interpreted as supporting the desired limitations. In addition, as the next section discusses, Senate procedures governing action on constitutional points of order impose additional impediments to the effective use of this approach.

Rulemaking Power as Basis

Proceedings exemplifying a form of "constitutional option" have actually occurred in the Senate at earlier periods, especially in connection with Senate consideration of proposals to make cloture easier to obtain between 1949 and 1975. During this period, proponents of consideration limits persistently argued that the constitutional power of the Senate to determine its own rules cannot be regarded as exhausted by its exercise on any past occasions. Instead, they held, this power can be effective only if the capacity for its exercise remains continuously and effectively available to the Senate in practice. The effective exercise of the rulemaking power, they contended, requires that the Senate be able to proceed to a vote on proposals to change the rules, and therefore that it must be able to limit the consideration of these proposals.

[36] *Riddick's Senate Procedure*, pp. 52-54 (under "Amendments"); pp. 685-686 (under "Constitutional Amendments"); pp. 989, 992 (under "Points of Order"); p. 1215 (under "Revenue").

On this view, any mechanisms that operate to entrench the Rules of the Senate against change, including pertinent interpretations of the continuing body doctrine, tend to operate in derogation of the constitutional rulemaking power. To the extent that entrenchment prevents the Senate from making decisions about its own rules, advocates of change argued, it is unconstitutional in its effects.[37] Through this argument, proponents of consideration limits attempted to use the constitutional grant of rulemaking power as a means to overcome the entrenchment of Senate procedure and enable it to proceed to a vote on amendments to the cloture rule. For reasons discussed in the section on "Attempts to Amend the Cloture Rule, 1953-1975" below, however, the Senate ultimately always drew back from affirming that the Constitution implicitly imposed any limits on the consideration of rules change proposals.

The principle that the chair does not rule on constitutional points of order, however, was illustrated several times during the proceedings on these proposals. Vice Presidents Richard Nixon (in 1957), Hubert Humphrey (in 1967), and Nelson Rockefeller (in 1975) each declined to rule whether the Constitution required the Senate to be able to reach a vote on rules change proposals.[38] In 1969, on the other hand, Vice President Humphrey announced that cloture had been invoked on a rules change proposal by the vote of a simple majority. He justified his making this ruling by arguing that he thereby vindicated the constitutional power of the Senate to act on the rules change proposal, yet did not arrogate from the Senate its authority to interpret the Constitution, because the Senate could exercise that authority through an appeal.[39]

"Advice and Consent" Power as Basis

Current discussion, by contrast, seems more often to presume that a "constitutional option" might be attempted in connection with Senate consideration not of a proposed procedural change, but of a judicial nomination. It would, accordingly, appeal to a different clause of the Constitution, namely, the provision of Article II, section 2, that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" officers in the executive and judiciary branches. Advocates of this form of "constitutional option" propose to infer that the responsibility of the Senate to "advise and consent" to nominations must entail its ability to vote on them. To be effective in practice, they contend, the ability to vote must entail the capacity to proceed to a vote, and therefore the capacity to limit consideration.[40]

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[37] Fisk and Chemerinsky, "The Filibuster," pp. 210-211. Margo Carlisle, "Changing the Rules of the Game in the U.S. Senate," *Policy Review*, no. 7, winter 1979, pp. 79-92.

[38] Richard M. Nixon, "Rules of the Senate," remarks from the chair in the Senate, *Congressional Record*, vol. 103, Jan. 4, 1957, p. 179. Fisk and Chemerinsky, "The Filibuster," p. 212.

[39] U.S. Congress, Senate, *Journal of the Senate of the United States of America*, 91st Cong., 1st sess. (Washington: GPO, 1970), Jan. 14, 1969, pp. 13-14.

[40] It is not within the scope of the present study to consider the merits of this claim. It does not appear to have been advanced on the Senate floor at any earlier historical period, but is discussed in the prepared statement of John C. Eastman, "Hijacking the Confirmation Process: The Filibuster Returns to its Brigand Roots," before U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, hearing on "Judicial Nominations, Filibuster, and the Constitution: When a Majority is Denied its Right to Consent," May 6, 2003, available at http://judiciary.senate.gov/hearing.cfm?id=744, visited Mar. 25, 2005. Also see prepared testimony of John C. Eastman, written statement of Michael J. Gerhardt, and testimony of Douglas W. Kmiec before U.S. Senate, Committee on Rules and Administration, hearing on "Proposals to Amend Senate Rule XXII," June 5, 2003, available at http://rules.senate.gov/hearings/2003/060503_hearing.htm, visited Mar. 25, 2005. Other examples of this argument appear in the following. Paul A. Gigot, "The Republican Moment," *The Wall Street Journal*, Jan. 20, 2005, p. A14; Charles Babington, "GOP Moderates Wary of Filibuster Curb," *Washington Post*, Jan. 16, 2005, p. A5; Bruce Fein, "The Nuclear Option: It Would Save the Constitution...," *The Hill*, Feb. 8, 2005, p. 13; Jeffrey Toobin, "Blowing Up the Senate," *The New Yorker*, Mar. 7, 2005, (continued...)

Consideration Limits on Submitted Questions

In the respects just discussed, the requirement that the Senate itself settle parliamentary questions raised under the Constitution, together with the authority of the Senate to revise precedent in settling parliamentary questions, may offer greater possibilities for securing procedural change without requiring extraordinary proceedings. Courses of action involving the submission of a point of order to the Senate, nevertheless, may be subject to difficulty in bringing the Senate to the vote that would accomplish procedural change except through preemptive departure from established procedures.

When the chair submits a parliamentary question to the Senate for decision, only a majority of Senators voting is required to settle the matter. Under these conditions, however, because the chair is no longer to rule, the principle that debate occurs only at the chair's discretion no longer applies. Instead, the question is then subject to debate pursuant to the general rules of the Senate, and accordingly to filibuster.[41] The Senate may table a submitted point of order, but whereas tabling an appeal upholds the initial ruling of the chair, tabling a submitted question has the effect of rejecting the claim it makes. If, for example, a point of order claimed that limits should apply to consideration of a matter, tabling it would reject imposing such limits. Rejecting a motion to table, however, would leave the point of order open for further debate, so that a determination by the Senate might be prevented by filibuster.

These considerations suggest that the precedent for submitting constitutional points of order to the Senate might pose an obstacle to the achievement of change through a "constitutional option." The earlier discussion suggested that a "nuclear option" could be successfully achieved through raising a non-constitutional parliamentary question only if the chair initially made a favorable ruling on the question. In the case of a constitutional point of order, the chair's immediate submission of the question to the Senate would preclude any initial favorable ruling. The Senate could limit consideration of the submitted question only by adopting a motion to table it, which would have the effect of rejecting the procedural claim the question raised. Under these conditions, it appears, a "constitutional option" might be able to succeed within the constraints of existing procedure only if *rejection* of the submitted point of order would secure new consideration limits.

In addition, it is not clear how Rule XX might apply to a nested point of order raised under the Constitution. No available precedent appears to illuminate whether or not the precedential principle against the chair's ruling at all on a constitutional question would override the requirement of Rule XX that the chair rule immediately on a nested point of order. Moreover, if

(...continued)

pp. 42-46; Senator Kay Bailey Hutchison and C. Boyden Gray, remarks on "Hardball with Chris Matthews," MSNBC, Nov. 5, 2004, available at http://msnbc.msn.com, visited Nov. 8, 2005. A contrary position appears in Sarah Binder and Steven Smith, "This Battle Isn't New: The Filibustering of Judicial Nominations," *St. Louis Post-Dispatch*, Mar. 8, 2005, p. B6. Past Senate practice does not appear to reflect acceptance of a principle that the Constitution requires floor consideration of and voting on all nominations. See 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.

[41] *Riddick's Senate Procedure*, pp. 52-54 (under "Amendments"); p. 148 (under "Appeals"), p. 686 (under "Constitutional Amendments"), pp. 724-726 (under "Debate"), 989-990, 991-992 (under "Points of Order"). The cloture rule provides that appeals are not debatable when the Senate is proceeding under cloture. Senate Rule XXII, paragraph 2, in *Senate Manual*, sec. 22.2. The situation in which a nuclear option was being attempted, however, would presumably not be one in which cloture could be obtained.

the chair submitted a nested constitutional point of order, no available precedent appears to clarify whether the requirement of Rule XX for an immediate vote on an appeal would be interpreted as extending also to the vote on the submitted question.

If the chair could rule on a nested constitutional point of order, a successful "constitutional option" might not require an initial favorable ruling. Even if the chair considered itself bound to overrule the point of order, in accordance with existing precedents on the subject, proponents of change could appeal, and Rule XX would presumably enable them to secure an immediate vote on the appeal. The Senate could then achieve the goals of the "constitutional option" by settling the question in a way that altered precedent. If, on the other hand, the precedent for submitting constitutional questions would be controlling, but Rule XX were to be applied to submitted questions as well as to appeals, proponents of the "constitutional option" might be able to achieve their ends, because the rule would permit the Senate to reach a vote on the submitted question, and thereby allow a majority to settle it in a way that altered precedent. If Rule XX were held neither to permit the chair to rule on a nested constitutional question nor to limit Senate consideration of the submitted questions, however, the difficulty of imposing limits on consideration of the submitted question would pose an obstacle to success of the "constitutional option."

Possible Proceedings in a Contemporary "Nuclear Option"

The considerations advanced in the preceding section may be summarized by examining how they might be brought to bear in a contemporary attempt to institute more effective consideration limits through a "nuclear option." Recent public accounts most often contemplate a course of events in which supporters of change would raise a point of order with the intent of securing a ruling that would have the effect of establishing consideration limits for a pending matter. Specifically, this point of order might claim that further debate on a pending judicial nomination would be dilatory and therefore that an immediate vote was required.[42]

Point of Order Sustained by Chair

If the chair were to sustain such a point of order, the effect would presumably be to impose consideration limits on the pending nomination (or other pending question, such as a rules change proposal). This action would presumably assure that the Senate could reach a vote on the underlying question and decide it by a simple majority. In addition, the ruling would constitute a precedent for imposing similar limits on consideration in similar subsequent situations.

[42] For non-technical descriptions of a "nuclear option" consistent with this account, see the following: Charles Babington, "GOP Moderates Wary of Filibuster Curb," *Washington Post*, Jan. 16, 2005, p. A5; Keith Perine, "Snowe Weakens Frist's Hand for Senate "Nuclear Option," *CQ Today*, Feb. 16, 2005, pp. 1, 14; R. Lawrence Butler, "The Nuclear Option: ... But Destroy the Senate," *The Hill*, Feb. 8, 2005, p. 13; Neil A. Lewis, "Senator Critical of Proposal on Filibusters," *New York Times*, Feb. 25, 2005, p. A16; "The Senate on the Brink," editorial, *New York Times*, Mar. 6, 2005, p. 12; Jeffrey Toobin, "Blowing Up the Senate," *The New Yorker*, Mar. 7, 2005, pp. 42-46; Robert Novak, "Byrd's Nuclear Option," *Washington Post*, Dec. 20, 2004, p. A23; Jeffrey Rosen, "Supreme Mistake," *The New Republic*, Nov. 8, 2004, p. 19; Carl Hulse, "Clash on Judicial Nominations Could Spill Into Lawmaking," *The New York Times*, Mar. 7, 2005, p. A14; Keith Perine, "Conservatives Defend 'Nuke' Option To Protect a High Court Nominee," *CQ Weekly*, Sept. 18, 2004, p. 2150.

At the time the chair made this ruling, however, opponents of limits on consideration might appeal it to the full Senate. The appeal would be debatable, but even if supporters of change were unable to limit its consideration by invoking cloture, they might do so by moving to table it. The motion to table could be approved without debate and by a simple majority of Senators. Approval of the motion would confirm the initial ruling of the chair and the precedent thereby established for new means of limiting consideration of the specified type of business.

In this way proponents of change could establish new consideration limits by using ones already built into the practices of the Senate that govern proceedings on points of order. To the extent that existing Senate procedure does not provide for the limits on consideration that the ruling would establish, however, it might be possible to implement this form of "nuclear option" only with the cooperation of a chair willing to engage in extraordinary proceedings, at variance with existing Senate practice, by making a ruling counter to previous precedent. To that extent, this course of action would be "nuclear" in the emphatic sense of involving peremptory changes in procedure outside the regulations of existing procedures.

Adverse Ruling in Accordance With Precedent

If the chair instead determined to adhere to the established principle that it rule in accordance with precedent, it might find itself obliged to rule against the point of order, thereby rejecting the claim that consideration limits should apply to the underlying business. Supporters of change might respond by appealing the ruling, and if a majority supported the appeal, the Senate would overrule the chair and establish in precedent the consideration limits claimed in the original point of order.

Again, however, the appeal would be debatable, so that opponents might be able by filibuster to prevent the matter from reaching a vote. In these circumstances, a motion to table the appeal would afford supporters of change no assistance. If the motion to table were adopted, the action would affirm the original adverse ruling; if it were rejected, the filibuster could continue. This sequence of events exemplifies how existing Senate rules can be used to effect their own entrenchment against change.

Point of Order Submitted

A third possibility is that the chair might decline to rule on the point of order, and instead submit it to the decision of the Senate. A point of order contending that the "advice and consent" clause of the Constitution requires the Senate to be able to reach a vote might well be held to constitute a question of first impression. In addition, both this point of order and one based on the rulemaking power would appear explicitly to involve constitutional questions. For the chair to rule on either point of order would accordingly seem to require action in disregard of the line of precedent supporting the submission of certain parliamentary questions.

In this situation, as with an appeal, supporters of consideration limits might obtain their ends if a majority voted to sustain the submitted point of order. Once submitted to the Senate, however, the point of order would be debatable. Opponents might, through filibuster, be able to prevent a vote on the submitted point of order, and thereby forestall establishment of the desired precedent. Under these conditions, supporters could not advance their cause by moving to table their submitted point of order, for Senate agreement to this motion would have the effect of overruling

the point of order, while its rejection would leave the point of order before the Senate in debatable form.

This difficulty would presumably arise only for a point of order that presented a constitutional claim or a question of first impression. Yet it is not easy to see what grounds, other than the constitutional, would afford a viable basis for asserting an implicit mandate for limits on consideration not already recognized in the system of Senate procedure, yet would not entail an appeal to any previously unrecognized principle. Even if such grounds could be found, the state of previous precedent would still have to permit the chair to sustain the required interpretation without contravening existing standards. Otherwise, once again, the attempt to secure change could succeed only through the willingness of the chair to render a favorable ruling counter to precedent.

Point of Order by Opponents

It is also possible that advocates of consideration limits could construct a situation in which opponents would have to raise a point of order in order to forestall the establishment of new consideration limits. Even under these conditions, however, it appears that the success of a "nuclear option" would still depend on the willingness of the chair to provide an initial ruling favorable to limits on consideration, even if counter to precedent. The only difference might be that in these circumstances, the favorable ruling would be one overruling, rather than sustaining, the point of order.

For example, supporters of change might begin by offering not a point of order, but a motion that the Senate vote at once on the underlying question before the Senate. If the Senate entertained and adopted this motion, its action would apply limits to consideration of the pending question, and also would constitute precedent for admitting similar motions on similar questions on subsequent occasions. Opponents might be able to prevent this result only by raising a point of order against the proposed motion on grounds that existing Senate procedure authorizes no such motion.

Whatever ruling the chair made on this point of order, opponents of the ruling could appeal. The Senate could limit consideration of the appeal only by tabling it, which would also affirm the initial ruling. If the chair overruled the point of order, accordingly, opponents of consideration limits might be compelled to press their position by appealing the ruling, which would enable supporters to vindicate theirs by tabling the appeal. As already noted, however, such a ruling might necessarily constitute an extraordinary proceeding not sanctioned by established precedent. If the initial ruling remained consistent with existing practice by sustaining the point of order against the motion to proceed to a vote on the underlying matter, the Senate could not achieve consideration limits by tabling the appeal, but only by reversing the chair on appeal. Reaching this result would require an up-or-down vote on the appeal itself, and, as above, opponents of consideration limits could attempt to prevent this vote from occurring by filibuster.

The only evident means of avoiding such a result, without requiring peremptory departure from existing procedure, might arise if the chair determined to admit the motion to proceed to a vote on constitutional grounds. In that case, opponents' point of order against the motion would presumably present a constitutional question, and Senate practice would presumably require the chair to submit it to the Senate. The Senate might then be able to establish a precedent supporting consideration limits by tabling the submitted point of order. Even in this case, however, unless some existing non-constitutional procedural standards could appropriately be interpreted as

admitting a motion to proceed to a vote, the action of the chair in entertaining such a motion in the first place would already appear to constitute an extraordinary proceeding outside the bounds of established practice.

Nested Points of Order

Few published discussions of the "nuclear option" appear to consider whether the Senate Rule on nested points of order might alter the considerations so far presented. The previous section suggested that, if a nested point of order were raised on constitutional grounds, the precedents directing the submission of constitutional points of order would appear to conflict with the provisions of Rule XX mandating immediate settlement. On the other hand, if the nested point of order were raised on non-constitutional grounds, the additional restrictions on consideration provided for by Rule XX might affect the outcome.

One example of a possible non-constitutional nested point of order could be one addressing whether a pending constitutional point of order should be submitted to the Senate. For example, if the chair submitted a point of order claiming constitutional warrant for limits on consideration of a judicial nomination, supporters of such limits might raise a nested point of order claiming that the chair should proceed to rule, in order to forestall a possible filibuster that could prevent the Senate from reaching a vote on the initial point of order. Conversely, if the chair offered to rule on the constitutional point of order, opponents of consideration limits might contest this action by raising a nested point of order on grounds of the precedent that constitutional points of order are to be submitted to the Senate for decision.

In either of these cases, the nested point of order might be held to present not a constitutional issue, but only a question about the precedent for submitting constitutional points of order. Without departure from the standards embedded in previous practice, accordingly, the chair might be able to rule on the nested point of order. Also consistently with established precedent, the chair could sustain this point of order, ruling that the initial, constitutional, point of order must be submitted. Supporters of the initial point of order would then be able to appeal this ruling, and under Rule XX, the appeal would be subject to an immediate vote, inasmuch as it was nested within the initial point of order. By reversing the chair's ruling on appeal, the Senate would authorize the chair to rule on the original constitutional point of order.

In this situation, however, the chair would still have to rule favorably on the initial point of order, for otherwise the Senate would remain unable to secure consideration limits by voting to table any appeal. Yet such a ruling might entail a peremptory departure from precedent on the part of the chair. Moreover, if the sequence of events required that the chair initially attempt to rule on a constitutional question, this action, too, could be considered to involve an extraordinary proceeding at variance with established procedure.

Under some circumstances, in addition, these proceedings might require the Senate to establish a new principle that the prohibition of Rule XX against debate on an embedded point of order applied to questions submitted as well as to appeals. Finally, this course of events would also require the Senate to concede to the chair authority to make rulings on constitutional questions. Although both decisions would lie within the plenary power of the Senate to interpret its own rules, the last, at least, would alter a historic practice that the Senate has always treated as being solidly anchored in its constitutional standing as a branch of Congress.

A nested non-constitutional point of order might also arise in a more complicated way if the chair submitted to the Senate a point of order claiming that the Constitution required consideration limits for judicial nominations. If a filibuster prevented the Senate from reaching a vote on this submitted point of order, supporters of the point of order might then raise a second point of order, claiming that this filibuster was unconstitutionally preventing the Senate from exercising either its "advice and consent" power or its authority to determine the meaning of its own rules. Either of these new points of order would clearly also appear to involve a constitutional question, so that the chair might feel compelled to submit it also to the Senate. Supporters of the new point of order, however, might then raise a third point of order that this new (second) submitted question should be held nondebatable under Rule XX, on the grounds that its consideration was nested within that of the original (first) point of order. The chair might not have to submit this third point of order to the Senate, because it would be raised not under the Constitution, but under Rule XX. Instead, the chair could rule on the matter.

Whichever way the chair ruled, opponents of the ruling could appeal, but Rule XX would presumably apply to prevent debate of this nested appeal on a non-constitutional question. Under these conditions the Senate would be assured of reaching a vote on the appeal, and by this means a voting majority could sustain the third point of order. This action would have the effect of limiting consideration of the previous (second) point of order. By sustaining the second point of order, in turn, the Senate could impose limits on consideration of the first, and by sustaining the first it would institute limits on the consideration of the underlying nomination.

Ultimately, as a result, this course of action would assure the Senate of reaching a vote on the question of imposing consideration limits and of settling that question by a voting majority. It might thereby enable the Senate to secure alterations in its effective procedure without either having to obtain a super-majority vote or requiring action contrary to precedent. The Senate would decide the claim raised by the original point of order, and the chair would not be required to decide questions either that precedent holds should be submitted nor in a way contrary to established precedents. In this situation, the only peremptory action to change Senate procedure would occur through the Senate's own exercise of its essentially plenary discretion under its constitutional power to determine the sense of its own rules.

The result of these proceedings might remain indeterminate only if the chair submitted the third point of order to the Senate as question of first impression. It might well be held a question of first impression whether a submitted nested point of order was subject to the same consideration limits provided by Rule XX for appeals. Under these conditions, a filibuster might then prevent a vote on the submitted question. Supporters of change might be able to respond to this filibuster only by offering a further (fourth) point of order claiming the same applicability of Rule XX with respect to the newly submitted (third) point of order. In that case it does not appear how a regress, in which the same question was repeatedly raised, and repeatedly submitted as a question of first impression, might be cut off.

Implications of Using Extraordinary Action to Overcome Entrenchment

Peremptory Departure from Established Procedure

The possible courses of action examined in the previous section all represent variations of a "nuclear option" in the broadest sense defined at the outset. Each might succeed in overcoming the obstacles to change in Senate procedure presented by the requirements of that procedure itself. Most of these courses of action, however, appear also to require proceedings that would be "nuclear" in the emphatic sense of not being regulated by established procedure. Only certain courses of action involving a nested point of order seem to allow for the possibility of a process in which a procedural question might be decided by the Senate, in accordance with its plenary constitutional power over its own rules, without requiring any departure from established procedure governing the decision of procedural questions.

Most of the courses of action examined in the last section, nevertheless, involve proceedings at variance with existing procedure at least to the extent of initial action by the chair on a parliamentary question in disregard of procedural principles well established in Senate practice. The action typically required is a ruling by the chair, on a parliamentary question, that would have the effect of imposing limits on consideration of a pending matter. In the proceedings under consideration, such a ruling appears requisite for placing the question of imposing limits before the Senate in a form on which established practice already permits limits on debate.

In some of these cases, it is the substance of the chair's ruling that might have to disregard precedent, for the requisite ruling would run counter to established interpretations of procedure that the Senate had previously taken as governing practice in the area. If the chair ruled consistently with established precedent, the "nuclear" result of instituting new consideration limits could be reached only through a vote of the Senate. In other cases, the disregard of precedent would arise from the process of making the ruling, for the proceedings would require the chair to depart from the established practices that would mandate the question to be submitted to the Senate for a decision. If the chair conformed to established practice by submitting a constitutional question to the Senate, the "nuclear" result could be reached only through a Senate vote in favor of the submitted point of order.

A ruling that ran counter to precedent either in its substance or in its process would represent "nuclear" action not only in the sense of overcoming the usual obstacles to procedural change, but also in the sense that the act of making the ruling would occur at variance with previous Senate practice. Extraordinary proceedings of these kinds, accordingly, would not only result in change, but would themselves constitute a change from previous practice introduced through peremptory action.

Extraordinary Action and the Standing of Precedent

Resort by the Senate to proceedings involving peremptory departure from established standards might have sweeping consequences for the overall operation of the system of Senate procedure. By making use of extraordinary means of proceeding such as those discussed, the Senate would establish precedent for its subsequent use of similar courses of action to achieve further

procedural change. The effects of this form of action on the role of precedent and on the entrenchment of the rules might summarily alter the procedural conditions governing any subsequent proceedings aimed at further procedural change. The effective procedural practice of the Senate for the future could be altered, not simply pursuant to Senate approval of a proposal having this purpose, but as a summary effect of proceedings in considering such a proposal (or, for that matter, some other business).

A precedent for peremptory action to alter procedures might even have the potential to occasion lasting disruptions of the capacity of the Senate for orderly deliberation.[43] The presence of such a precedent might, in principle, enable a voting majority of the Senate to alter any procedure at will by raising a point of order and either securing a favorable ruling or being able to limit debate on the appeal or submitted question. By such means a voting majority might subsequently impose limitations on the consideration of any item of business, prohibiting debate or amendment to any desired degree. Such a majority might even alter applicable procedures from one item of business to the next, from one form of proceeding to a contrary one, depending on immediate objectives.

In a similar way, the occurrence of a ruling by the chair in disregard of precedent might be taken as precedent permitting the chair to rule counter to precedent in the future. This discretion might conceivably be assumed even by a Vice President occupying the chair and acting on behalf of a President with political views contrary to that of a Senate majority.

Possibilities like these indicate that Senate acceptance of extraordinary proceedings as a means of procedural change could have effects entirely vitiating the entrenchment of Senate Rules. These consequences might not only make it possible for voting majorities to exercise effective control over the content and interpretation of Senate procedures, but also raise the possibility of altogether eliminating any regularity of proceedings in the practice of the Senate. Realization of this possibility would be inconsistent with Jefferson's principle that "it is much more material" to the good order of a deliberative body "that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or the captiousness of the Members."[44]

Under some circumstances, on the other hand, the Senate may be able to achieve procedural change without resort to extraordinary proceedings. For example, if the parliamentary question that brings about a ruling favorable to consideration limits rests on an ambiguous or unsettled point of procedure, the implications of the process by which change is achieved may not be as sweeping. On several previous occasions, the Senate has engaged in procedural actions that had the effect of changing the practice of the body by establishing novel interpretations of Senate procedure. It does not appear that these past occurrences have had the effect of rendering the body of Senate procedure as a whole volatile or subject to capricious change. In contrast to some of the courses of action described above, nevertheless, at least some of these past proceedings involved the settlement of a procedural question by action of the full Senate, and few appear to have involved direct appeal to a constitutional principle in ways that ran counter to existing practice. In these respects, past occurrences of "nuclear options" may not be entirely comparable with those now under discussion.

[43] Most public descriptions of a "nuclear option," however, do not appear to use the term in recognition of these potentially sweeping summary effects. Examples include sources cited in the previous note.

[44] Thomas Jefferson, "Jefferson's Manual of Parliamentary Practice," sec. I, in *House Manual*, sec. 285.

Attempts to Amend the Cloture Rule, 1953-1975

The potential implications of resort to proceedings not governed by established procedural standards may be illustrated by considering the attempts made by supporters of consideration limits to amend the cloture rule after the middle of the 20th century. From the late 19th century onward, opponents of consideration limits had often been able to prevent their establishment in the Senate by filibustering or threatening to filibuster. These events afford concrete illustrations of how the entrenchment of Senate rules may be maintained by preventing the Senate from reaching a vote on change proposals. The difficulties they presented, however, also led advocates of consideration limits to seek new means to enabling the Senate to reach a vote on their proposals, and their recurrent efforts illustrate many of the procedural possibilities examined in the previous section.

Most prominently, supporters of change engaged in attempts to contest the entrenchment of Senate Rules by some form of appeal to the constitutional rulemaking power. From 1953 through 1975, advocates of the amendments to the cloture rule attempted in various ways to establish the principle that, pursuant to the rulemaking power, at least at the beginning of a Congress, a simple voting majority of the Senate should be able to impose limitations on the consideration of amendments to the rules. These proceedings accordingly may accordingly be viewed as examples of a "constitutional option," and may illuminate some considerations that a contemporary "constitutional option," as well as a "nuclear option" more generally, might face.[45]

Asserting the Non-Continuity of Rules

In the 1950s, advocates of change expressed their constitutional claim by arguing that, in order to allow the Senate to exercise its rulemaking power, its rules should be regarded as not continuing automatically in effect in a new Congress. At the opening of Congress in 1953, 1957, and 1959, supporters embodied this argument in a motion that the Senate, pursuant to the Constitution, proceed to consider the adoption of rules. In each year, however, the Senate rejected this motion by tabling it.[46] Presenting the constitutional claim in this form, accordingly, permitted the Senate to reach a decision on it, but only to the extent of rejecting it. In 1959, moreover, the Senate then proceeded, under the rules already in place, to adopt a resolution that amended the cloture rule, but also added to Senate Rules the statement that those Rules remain continuously in effect in a new Congress.[47]

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[45] CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer. Carlisle, "Changing the Rules of the Game," pp. 79-92.

[46] Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, S.Doc. 100-20, 100th Cong., 1st sess., vol. 2, edited by Wendy Wolff (Washington: GPO, 1991), pp. 128-129; CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; U.S. Senate, Committee on Rules and Administration, *Senate Cloture Rule*, committee print S.Prt. 99-95, 99th Cong., 1st sess., prepared by the Congressional Research Service (Washington: GPO, 1985), pp. 22-25; "Senate Rules," *Congressional Quarterly Almanac, 85th Cong., 1st sess., 1957* (Washington: Congressional Quarterly, 1957), p. 655; "Senate Rules Change," *Congressional Quarterly Almanac, 86th Cong., 1st sess., 1959* (Washington: Congressional Quarterly, 1959), p. 212.

[47] Byrd, *Addresses on the History of the Senate*, vol. 2, p. 129; Committee on Rules and Administration, *Senate Cloture Rule*, p. 25; "Senate Rules Change," *Congressional Quarterly Almanac, 86th Cong., 1st sess., 1959* (Washington: Congressional Quarterly, 1959), pp. 213-214.

Majority Cloture on Rules Changes

This new statement in Senate Rules posed an obstacle to continued use of the same approach to achieve further change. In the following years, as a result, advocates of change developed other means of challenging the entrenchment of Senate Rules. These relied more explicitly than before on the rulemaking power. At the opening of Congress in 1967, 1969, and 1971, supporters of consideration limits began by moving that the Senate proceed to consider a resolution amending the cloture rule. Under existing Senate rules, this motion is in order, but debatable. Proponents accordingly went on to ask that the rulemaking power be interpreted as authorizing a voting majority to limit consideration of a motion to consider rules changes at the beginning of a Congress. If the Senate had accepted this interpretation, and had gone on to adopt the motion to consider, proponents could have repeated similar proceedings in order to limit consideration of the resolution itself.

In 1967, the motion of proponents was that, pursuant to the rulemaking power, the Senate vote immediately on the pending motion to proceed. Opponents of this motion raised a point of order against it, which Vice President Humphrey submitted to the Senate as a constitutional question. Proponents then moved to table the submitted point of order, which would have affirmed that the rulemaking power authorized a majority to limit consideration of rules change proposals. The Senate, however, defeated the tabling motion, then sustained the point of order, thereby declining to affirm the constitutional claim in this form.[48]

In 1969 and 1971, accordingly, change advocates instead moved for cloture on the motion to proceed, but also raised the contention that, pursuant to the rulemaking power, a simple voting majority should be held sufficient to invoke cloture on a rules change proposal at the beginning of a Congress. In both years, cloture was supported by a simple majority, but not by the two-thirds required by Rule XXII on rules changes. In 1969, Vice President Humphrey then announced that consideration would proceed under cloture. Opponents, however, appealed this decision, and the Senate reversed it, thereby again declining to affirm that the rulemaking power authorized a majority to limit consideration of a rules change.[49] In 1971, the chair ruled that, under the 1969 precedent, the support of a simple majority did not suffice to invoke cloture. Change advocates appealed this decision, but the Senate tabled the appeal, thereby sustaining the chair and reaffirming the precedent against limiting debate under authority of the rulemaking power.[50]

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[48] Byrd, *Addresses on the History of the Senate*, vol. 2, p. 130; CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; Committee on Rules and Administration, *Senate Cloture Rule*, p. 27; "Senate Cloture Rule," *Congressional Quarterly Almanac, 90th Cong., 1st sess., 1967* (Washington: Congressional Quarterly, 1968), pp. 182-185.

[49] Byrd, *Addresses on the History of the Senate*, vol. 2, pp. 130-131; CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; Committee on Rules and Administration, *Senate Cloture Rule*, pp. 28-29; "Senate Again Fails to Ease Filibuster Rule," *Congressional Quarterly Almanac, 91st Cong., 1st sess., 1969* (Washington: Congressional Quarterly, 1970), pp. 30-32; "Humphrey Ruling Fails to Ease Senate Filibuster Rule," *Congressional Quarterly Weekly Report*, vol. 27, Jan. 27, 1969, pp. 138-141.

[50] Byrd, *Addresses on the History of the Senate*, vol. 2, p. 131; Committee on Rules and Administration, *Senate Cloture Rule*, pp. 29-30; "Senate Again Rejects Changes in Cloture Rule," *Congressional Quarterly Almanac, 92nd Cong., 1st sess., 1971* (Washington: Congressional Quarterly, 1972), pp. 13-16.

Presumptively Non-Debatable Motion to Proceed

After these occurrences, change advocates abandoned the approach of moving first for an immediate vote, then for a procedural ruling that would permit that vote. Instead, in 1975, they combined these efforts into a single motion that the Senate both proceed to consider a resolution to amend the cloture rule and vote immediately on this motion to proceed.

The second part of this motion proposed treating the entire motion as non-debatable and subject to adoption by a simple majority. Combining both propositions in this way overtly manifests the "nuclear" character of the proposed action, in that the second part of the motion proposed to prescribe terms for the consideration of the motion as a whole. If the motion were to be considered pursuant to the previously existing rules, it presumably could not make such a prescription. The prescription could become effective only through adoption of the motion, yet the proceedings that this prescription would regulate would have to have taken place already, during consideration of the motion.[51] Instead, a motion of this kind can be effective only if its own offering is accepted as bringing about a summary, peremptory change in the rules under which its consideration will occur. Its offering, in itself, accordingly, amounts to an attempt to bring about a tacit settlement of the procedural claim it raises.

Although little subsequent commentary appears to have addressed this self-referential character of the 1975 motion, it became an important determinant of the outcome. Because the second part of the motion in effect embodied the procedural claim supporters sought to establish, opponents had to counter that claim by raising a point of order that the motion as a whole was out of order, on grounds that existing rules did not permit a simple majority to close consideration. When Vice President Rockefeller submitted this point of order to the Senate as a constitutional question, proponents moved to table it. The tabling motion enabled proponents to place before the Senate in non-debatable form the basic claim that a voting majority should be able to limit consideration of a rules change proposal.

The Senate initially adopted the motion to table the point of order, thereby endorsing the position that a majority could limit debate in relation to a rules change proposal. By this action the Senate, in effect, accepted for the first time the procedural claim of proponents under the rulemaking power. This action might be expected to have led to an immediate vote on the motion that had been held in order. Opponents, however, then demanded a division of the question on the combined motion, so that its first part, the motion to proceed, would be considered separate from its second part, embodying the procedural prescription that the motion be decided by a simple majority without debate. This division destroyed the self-referential character of the procedural prescription. As a result, the Vice President held the motion to proceed, the first part of the original package motion, to be debatable. Opponents then undertook extended debate on this motion to proceed.[52]

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[51] The House of Representatives, for example, consistently observes the principle that a resolution establishing a "special rule" for consideration of a measure cannot prescribe terms for its own consideration. Instead, such terms are established, where necessary, by adoption of a second "special rule" providing for consideration of the first.

[52] Byrd, *Addresses on the History of the Senate*, vol. 2, pp. 131-132; CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; Committee on Rules and Administration, *Senate Cloture Rule*, pp. 30-31; U.S. Congress, Senate, *Journal of the Senate of the United States of America*, 94th Cong., 1st sess. (Washington: GPO, 1975) Feb. 20, 1975, pp. 119-120; "Filibuster Rule Modified," *Congressional Quarterly Almanac, 94th Cong., 1st sess., 1975* (Washington: Congressional Quarterly, 1976), pp. 36, 38; "Reformers Lose Chance to Modify Filibuster," *Congressional Quarterly Weekly Report*, vol. 31, Feb. 22, 1975, p. 412; (continued...)

To overcome this difficulty, supporters of change ultimately agreed to accept a proposal under which the Senate would vote on a compromise proposal to strengthen the cloture rule, but also on reconsidering the tabling of the original point of order. The Senate adopted the motion to reconsider, and, on reconsideration, rejected the motion to table, thereby bringing the original point of order back before the Senate. The Senate then voted to sustain the point of order, thereby reversing its endorsement of the claim that a simple majority had authority to limit consideration of rules change proposals.[53]

Corresponding Considerations in the House

At an earlier period in its development, the House of Representatives confronted potential conflicts between securing the exercise of its constitutional rulemaking power and maintaining stability in its proceedings that were similar to those addressed by current discussions in the Senate. By the early years of the 20th century, the development of House procedures had centralized control of the floor agenda in the Speaker, in part through his *ex officio* chairmanship of the Committee on Rules. So nearly absolute was this control that not only the minority party, but dissident factions in the majority party as well, became severely disaffected. The leadership, however, was able to use the Speaker's control of the floor to prevent consideration of proposed changes that would mitigate that control.

Dissidents attempted to obtain consideration for rules changes in part by arguing that constitutional rulemaking power of the House made measures to change the rules "constitutionally privileged" for consideration. This argument bears strong resemblance to that advocated by supporters of procedural change in the Senate in the mid-20th century, even though the issue in the Senate was the procedural control exercised by a minority rather than by an agent of the majority. In 1910, Representative George Norris seized a parliamentary opportunity to offer, as "privileged under the Constitution," a proposal to reconstruct the Committee on Rules. Speaker Joseph Cannon ruled, consistently with established House practice, that no such privilege attached to measures to change the rules, and that the measure would have to be referred to his Committee on Rules. The House reversed the ruling on appeal and proceeded to consider and adopt the resolution.

The reconstructed Committee on Rules subsequently proposed, and the House adopted, several important and enduring innovations in House rules, including the discharge rule. As initially written, however, the discharge rule proved not only ineffective, but also susceptible to dilatory use. In the following session of the same Congress (1911), therefore, Representative Charles Fuller offered, as constitutionally privileged, a resolution to amend this rule. In accordance with the 1910 precedent, Speaker Cannon ruled this resolution privileged, but his ruling was appealed and the House reversed it.

(...continued)

"Reformers Consider Filibuster Compromise," *Congressional Quarterly Weekly Report*, vol. 31, Mar. 1, 1975, pp. 448-449, 452, 460-461.

[53] Byrd, *Addresses on the History of the Senate*, vol. 2, p. 132; CRS Report RL32684, *Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; Committee on Rules and Administration, *Senate Cloture Rule*, pp. 31-32; U.S. Congress, Senate, *Journal of the Senate*, 94th Cong. 1st sess., Mar. 3, 1975, pp. 151-152; Mar. 4, 1975, p. 157; Mar. 5, 1975, pp. 158-159; Mar. 7, 1975, pp. 169-170; "Senate Close to Accord on Filibuster Change," *Congressional Quarterly Weekly Report*, vol. 31, Mar. 8, 1975, pp. 502-504; "Early Tests Expected on Filibuster Change," *Congressional Quarterly Weekly Report*, vol. 31, Mar. 15, 1975, pp. 545-547.

The House thereby not only vindicated the Speaker's earlier initial ruling of 1910, but restored the previous principle that the constitutional power to make rules did not entail any right to consider every possible proposal to do so. *Cannon's Precedents* accordingly recounts these events under the heading: "A proposition to amend the rules is not privileged.... In exercising its constitutional privilege to change the rules the House has confined itself within certain limitations."[54] In re-establishing this principle, the House seems to have judged that according constitutional privilege to rule change proposals could permit the chamber to be tied up continually with such measures, irrespective of merit and perhaps for dilatory purposes. It could also have resulted in continual and possibly capricious changes in procedure instituted by temporary majorities for their immediate benefit. Some Members who voted both to overturn the precedent in 1910 and to restore it in 1911 explained their action on the grounds that the first vote was a "revolutionary act" that was necessitated by circumstance, but that the principle involved was not sustainable as a settled doctrine.

Procedural Stability and Procedural Control

Prospective Effects on Senate Practice

The events of 1910 may be seen as representing the House's historic attempt to come to grips with one of the most fundamental problems of a free government under law: that of how to provide effectively by law for change in law, and specifically of how to proceed when the law that prevents change is the law whose change is sought. It is the reflexive, or "catch-22," character of entrenchment that often makes it appear soluble only by going "outside the system" to cut through the dilemma.

Current proposals for action by "nuclear option" have a form that resembles that of the action taken by the House in 1910, because the dilemma they address has a reflexive form similar to that of the House in 1910. As do contemporary advocates of consideration limits in the Senate, supporters of change in the House argued that the autonomy of a deliberative body requires it to be able to entertain proposals to change rules when it deems necessary. As do Senate advocates today, House reformers presented their claim as a shift from an inappropriate to a more correct principle of action. But the House in 1911 concluded that unrestricted floor access for rules changes was subject to such abuses as to be unworkable as a settled principle.

The events of 1975 in the Senate could be viewed as representing a corresponding development of thought in that body. In order to promote the attempt of that year to change the cloture rule, the Senate initially affirmed the propriety of permitting a simple majority to close consideration of a rules change at the beginning of a Congress, by tabling a point of order against a motion that would have had that effect. These proceedings enabled the Senate to adopt amendments to the cloture rule that tended to facilitate limiting consideration. At that point, however, the Senate accepted a reconsideration of the original point of order, and decided to sustain it, thereby rejecting the principle that a voting majority could close consideration of rules changes and consequently reaffirming the entrenchment of Senate rules.

[54] Clarence Cannon, *Cannon's Precedents of the House of Representatives* (Washington: GPO, 1935), vol. VIII, sec. 3376-3377.

Ultimately, as a result, although the Senate had on some occasions seemed prepared to accept some version of the claim based on the rulemaking power, it always drew back in the end from ultimately confirming this claim, instead affirming principles that supported entrenchment. It is possible to see this course of events as manifesting the willingness of Senators to accept resort to the constitutional rulemaking power as a "revolutionary" principle, but their unwillingness to maintain it as a permanent possibility in the practice of the Senate.

In present circumstances, before the Senate makes a departure from accepted principles in favor of ones that might be unsustainable in the long run, in order to achieve certain specific goals, the body might wish to satisfy itself that the magnitude of the problem to be addressed genuinely warranted, and its intractability genuinely required, such action. If consideration of this question concludes that the Senate could not successfully regulate itself in the long run on the basis of the proposed principle, then invoking that principle to meet immediate needs would presumably have to be justified instead on the grounds of something like "revolutionary expediency." Like the House in 1910, the Senate might have to justify its action on the grounds that the situation precluded any other means of amelioration. It is, of course, a concept that lies squarely at the heart of the American tradition that in such circumstances, "revolutionary" action may appropriately be justified by appeals to explicitly stated arguments of exactly the kind just sketched—a concept both articulated in and exemplified by the Declaration of Independence itself.

Procedural Change Under Established Constraints

The preceding reflections suggest that, if a "nuclear option" involved abandonment of the practice of adherence to precedent in parliamentary rulings, it could have the effect of replacing the current almost impenetrable resistance of Senate procedure to change (if the change is controversial) with a nearly uncontrollable volatility. Establishment of a more sustainable balance between procedural stability and the Senate's control of its own rules might require action by other than extraordinary means.

Presumably, the Senate would wish to have effective means of changing its rules at need and to adapt them to the needs of the times, but it might not wish to foster continual change on an *ad hoc* basis in response to shifting immediate demands. If a rule regulating the consideration of proposals for change could be crafted in a way that afforded an appropriate balance between these values, the Senate might be able to adopt it through its regular processes for amending its rules. A procedure adopted in this way could respond to considerations about what specific ways of proceeding would effectively permit action while still securing the possibility of meaningful exchange of views as the basis for finding broadly acceptable solutions.

If a procedure were established by these means, the Senate might also be able to frame it in a way that would take account, in an explicit and appropriate way, of the status of the Senate as a continuing body. It might provide, for example, that a change supported by a majority too small to invoke cloture could be adopted, but could not take effect until six years after its adoption. Such an arrangement would permit change in the long run while inhibiting changes by a temporary majority for immediate purposes.

For Further Reading

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