

THE SENATE IN TRANSITION OR HOW I LEARNED TO STOP WORRYING AND LOVE THE NUCLEAR OPTION¹

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The right of United States Senators to debate without limit—and thus to filibuster—has characterized much of the Senate’s history. The Reid Precedent, Majority Leader Harry Reid’s November 21, 2013, change to a simple majority to confirm nominations—sometimes called the “nuclear option”—dramatically altered that right. This article considers the Senate’s right to debate, Senators’ increasing abuse of the filibuster, how Senator Reid executed his change, and possible expansions of the Reid Precedent.

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1. With apologies to Stanley Kubrick, director and co-writer of DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures 1964).

INTRODUCTION

The Senate is an institution in transition.² In its opposition to President Obama, the Senate Republican Caucus, under Republican Leader Mitch McConnell, raised obstruction and filibustering³ to a new level. The majority of the times that the Senate has invoked cloture in its history were during the eight years that Senator McConnell was Minority Leader.⁴ To advance President Obama's nominees, Democrats had to file three-quarters of all cloture motions ever filed (or reconsidered) on judicial nominations in the history of the Nation.⁵

2. This piece was written before the 2016 United States election.

3. On the filibuster, see generally RICHARD BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS & CLOTURE IN THE SENATE* (2014); Martin B. Gold, *Floor Debates*, in *SENATE PROCEDURE & PRACTICE* 33–64 (3d ed. 2013); RICHARD A. ARENBERG & ROBERT B. DOVE, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* (2012); CONG. RESEARCH SERV., *SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE SENATE OF THE UNITED STATES & LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE)* (Comm. Print 2011); LAUREN COHEN BELL, *FILIBUSTERING IN THE U.S. SENATE* (2010); *Examining the Filibuster: Hearings Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010); GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE & SENATE* (2010); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004); ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 92–105 (2002); SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE* (1997); Bill Dauster, *It's Not Mr. Smith Goes to Washington: The Senate Filibuster Ain't What It Used to Be*, WASH. MONTHLY, Nov. 1996, at 34–36; FLOYD M. RIDDICK & ALAN S. FRUMIN, *Cloture Procedure*, in *RIDDICK'S SENATE PROCEDURE: PRECEDENTS & PRACTICES* 282–334 (1992); 2 ROBERT C. BYRD, *THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 93–163 (1991); FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* (1940).

4. See *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Aug. 11, 2016). During the eight years from 2007 through 2014, when Senator Mitch McConnell led the Republican minority, Senators filed cloture petitions 644 times, voted on cloture 494 times, and invoked cloture 352 times, annual rates more than twice those of the decade before. *Id.* During that eight-year period, Senators filed fully 37% of all cloture motions ever filed, voted on 37% of all votes on cloture motions, and invoked cloture 52% of all the times that the Senate has invoked cloture in its history. *Id.* Some argue that counting cloture petitions is an imperfect measure of the frequency of filibusters. See, e.g., ARENBERG & DOVE, *supra* note 3, at 14–15. Even if that is true, the number of cloture motions filed is still the best and most readily quantifiable proxy measure for the frequency of filibusters.

5. Memorandum from Richard S. Beth, Elizabeth Rybicki, & Michael Greene, Congressional Research Service, to the Office of Senate Democratic Leader, the Honorable Harry Reid, on Cloture Attempts on Nominations during the 113th Congress (2013–2014) and the 114th Congress (through October 30, 2015) 2 (Nov. 6, 2015) (on file with author).

Majority Leader Harry Reid responded to Republican obstruction with the Reid Precedent, the November 21, 2013, move to change from a supermajority to a simple majority to confirm nominations⁶—sometimes called the “nuclear option.”⁷ The Reid Precedent was an important step to break through gridlock. Future Senates will likely build on the Precedent. Although these changes may alter the character of the Senate, they will also make the Senate more democratic.

I.

THE NATURE OF THE SENATE

The Senate is a special place. Senators often call it the “world’s greatest deliberative body.”⁸ Vice President Aaron Burr called it “a sanctuary; a citadel of law, of order, and of liberty.”⁹ Prime Minister William Gladstone is said to have called it “the most remarkable of all the inventions of modern politics.”¹⁰

6. See 159 CONG. REC. S8417 (daily ed. Nov. 21, 2013) (point of order and appeal of the ruling of the Chair by Senator Reid).

7. See, e.g., Paul Kane, *Reid, Democrats Trigger “Nuclear” Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html; Gail Collins, *The Public Needs a Nap*, N.Y. TIMES, NOV. 21, 2013, at A35 (“Every once in a while the majority gets fed up with all this stonewalling and threatens to change the rules. This is known as the ‘nuclear option’ because change is worse than atomic war.”); Sahil Kapur, *Nuclear Option Triggered: Dems Make Historic Change To Filibuster Rules*, TALKING POINTS MEMO (Nov. 21, 2013), <http://talkingpointsmemo.com/dc/harry-reid-nuclear-option-senate>.

8. See, e.g., 162 CONG. REC. S3905 (daily ed. June 15, 2016) (statement of Sen. Blumenthal); *id.* at S3065 (daily ed. May 24, 2016) (statement of Sen. Reid); *id.* at S1802 (daily ed. Apr. 7, 2016) (statement of Sen. Hatch); 161 CONG. REC. S8199 (daily ed. Dec. 1, 2015) (statement of Sen. Reid); *id.* at S7034 (daily ed. Sept. 30, 2015) (statement of Sen. Merkley); *id.* at S6923 (daily ed. Sept. 24, 2015) (statement of Sen. Murphy); *id.* at S6775 (daily ed. Sept. 17, 2015) (statement of Sen. Reid); *id.* at S6684 (daily ed. Sept. 16, 2015) (statement of Sen. Sullivan); *id.* at S6547 (daily ed. Sept. 10, 2015) (statement of Sen. Hatch); *id.* at S6438 (Sept. 8, 2015) (statement of Sen. Reid); *id.* at S6275 (daily ed. Aug. 4, 2015) (statement of Sen. Schatz); *id.* at S2392 (daily ed. Apr. 23, 2015) (statement of Sen. Hatch); 160 CONG. REC. S6468 (daily ed. Dec. 10, 2014) (statement of Sen. Reid); 159 CONG. REC. S21 (daily ed. Jan. 4, 2013) (statement of Sen. Merkley); 155 CONG. REC. S316 (daily ed. Jan. 12, 2009) (statement of Sen. Specter); 151 CONG. REC. S5 (daily ed. Jan. 4, 2005) (statement of Sen. Frist); 143 CONG. REC. S10733 (daily ed. Oct. 9, 1997) (statement of Sen. Kerry); 142 CONG. REC. S12153 (daily ed. Oct. 2, 1996) (statement of Sen. Thurmond).

9. 8 ANNALS OF CONG. 71 (1805).

10. GEORGE HENRY HAYNES, *THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE*, at vii (1938).

At its best, it showcases the highest level of debate on the nation's important issues.¹¹ Arguably, it worked to forestall the Civil War.¹² It has been famous for its courtesy and collegiality.¹³ It can serve as the conscience of the nation.

At its worst, it blocks social change that most Americans want.¹⁴ It impeded the abolition of slavery,¹⁵ kept America isolationist,¹⁶ beat back Progressive era reforms,¹⁷ stymied anti-lynching laws,¹⁸ blocked the advance of civil rights,¹⁹ and slowed access to health care.²⁰ And it has empowered entrenched minorities at the expense of democracy.

As a compromise necessary to forge the Constitution, the Founders created the Senate as the less democratic of the two Houses of Congress.²¹ Because each state, regardless of population, has two Senators,²² the people of populous states have proportionally less repre-

11. For example, the debate on the use of military force in Iraq. *See, e.g.*, 148 CONG. REC. S10233–72 (daily ed. Oct. 10, 2002) (debate of the use of military force in Iraq); *id.* at S10145–62, S10164–217 (daily ed. Oct. 9, 2002); *id.* at S10063–108 (daily ed. Oct. 8, 2002); *id.* at S10006–31 (daily ed. Oct. 7, 2002); *id.* at S9933–38 (daily ed. Oct. 4, 2002).

12. *See, e.g.*, CARO, *supra* note 3, at 17–22.

13. *See, e.g.*, RICHARD BAKER, 200 NOTABLE DAYS: SENATE STORIES 1787 TO 2002, at 54 (2012); CARO, *supra* note 3, at 94.

14. *See, e.g.*, CARO, *supra* note 3, at xxiii.

15. *See, e.g.*, WAWRO & SCHICKLER, *supra* note 3, at 159–79; ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 52–53 (2d ed. 2003).

16. *See, e.g.*, ARENBERG & DOVE, *supra* note 3, at 22–24 (blocking authority to arm merchant ships); CARO, *supra* note 3, at 38–45 (rejecting the League of Nations); *id.* at 68–73 (inter-war isolationism).

17. *See, e.g.*, CARO, *supra* note 3, at 45–49.

18. *See, e.g., id.* at 93, 97.

19. *See, e.g., id.* at xiii–xiv, 33.

20. *See, e.g.*, Paul Starr, *What Happened to Health Care Reform?*, AM. PROSPECT (Dec. 1995), <http://prospect.org/article/what-happened-health-care-reform>; Adam Clymer, Robert Pear & Robin Toner, *The Health Care Debate: What Went Wrong? How the Health Care Campaign Collapsed—A Special Report; For Health Care, Times Was A Killer*, N.Y. TIMES, (Aug. 29, 1994), <http://www.nytimes.com/1994/08/29/us/health-care-debate-what-went-wrong-health-care-campaign-collapsed-special-report.html?pagewanted=all>.

21. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 231–355 (Adrienne Koch ed. 1987) (1840). Despite the efforts of delegates, including James Madison and Alexander Hamilton, to create a Congress proportionally representative of the population (embodied in the Virginia Plan), by July 2, 1787, the Convention deadlocked, as smaller states demanded equal representation in Congress by each state (embodied in the New Jersey Plan). On July 5, 1787, a committee of the Convention proposed the Great Compromise, which the Convention debated and modified, finally on July 23, 1787, adopting the Connecticut Compromise, in which the Senate was made up of two Senators from each state, as a political expedient.

22. U.S. CONST. art. I, § 3.

sensation in the Senate than the people of less populous states.²³ The majority of Americans who live in the nine most populous, more urban states are represented by just eighteen of the one hundred Senators.²⁴ A resident of the least populous state (Wyoming) has sixty-six times the representation in the Senate that a resident of the most populous state (California) has.²⁵ Senators representing just eighteen percent of the Nation's population constitute a majority of the Senate.²⁶ The unrepresentative demographic characteristics of the Senators themselves accentuate these undemocratic structural features.²⁷ There are just two African Americans, three Hispanics, and twenty women among the one hundred Senators,²⁸ even though African Americans make up thirteen percent, Hispanics make up seventeen percent, and women make up fifty-one percent of America.²⁹

The Senate is distinctive in its power as an upper chamber of a bicameral legislature.³⁰ Many Western nations limited their upper chambers in favor of their more democratically selected lower

23. See, e.g., DAHL, *supra* note 15, at 46–54; DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* 292 (1996).

24. According to estimates for 2014, out of the 318.2 million Americans, 162.7 million live in the nine states of California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, Georgia, and North Carolina, taken together. See U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014: 2014 Population Estimates*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPANNRES&src=pt (last visited Dec 18, 2015).

25. According to estimates for 2014, there are 38.8 million Californians and 0.6 million Wyomingites. See *id.*

26. Together, the residents of the twenty-six least-populous states of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, Idaho, West Virginia, Nebraska, New Mexico, Nevada, Kansas, Utah, Arkansas, Mississippi, Iowa, Connecticut, Oklahoma, Oregon, Kentucky, and Louisiana elect fifty-two Senators, but according to estimates for 2014 represent only 57 million of the 318.2 million Americans. Americans who live in the District of Columbia and the territory of Puerto Rico are counted among the 318.2 million, but are not represented in the Senate. See *id.*

27. See, e.g., Russell Berman, *The U.S. Senate Is Still One of the World's Whitest Workplaces*, *THE ATLANTIC* (Dec. 8, 2015), <http://www.theatlantic.com/politics/archive/2015/12/the-us-senate-still-one-of-the-worlds-whitest-workplaces/407488/>.

28. See *id.*

29. According to estimates for 2014, out of the 314.1 million Americans, 39.6 million are African American, 53.1 million are Hispanic, and 159.6 million are women. See U.S. CENSUS BUREAU, *ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2010–2014 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_DP05&src=pt (last visited Dec. 24, 2015).

30. See, e.g., Gold, *supra* note 3, at 1.

houses.³¹ Not so the Senate. The United States thus preserves a less representative legislative structure than almost all developed democracies.³²

The Senate is distinctive in its lack of a requirement for Senators to stick to the subject during floor debate.³³ And the Senate is distinctive in its freedom for Senators to engage in nearly unlimited debate: to filibuster.³⁴ The filibuster and the Senate's response through its Cloture Rule³⁵ have made the Senate a place that requires a supermajority to act. As a Member of Congress once said, "In the Senate, you can't go to the bathroom without sixty votes."³⁶

The Cloture Rule's requirement for a supermajority vote to end debate can further accentuate the undemocratic nature of the Senate.³⁷ To the extent that the Cloture Rule requires sixty Senators to end debate and advance a matter,³⁸ it empowers forty-one Senators to block matters. Thus the representatives of as little as eleven and one half

31. Contrast the British Parliament, which limited the power of the House of Lords. See *The Parliament Act of 1911 (as amended by the Parliament Act of 1949)* 12, 13 & 14 Geo. 6. c. 103 (UK).

32. See, e.g., Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 *PERSP. ON POL.* 841, 844–46 (Dec. 2011); DAHL, *supra* note 15, at 49.

33. Contrast the House of Representatives, where House Rules generally require amendments to be germane. See THOMAS J. WICKHAM, *CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 113-181, at 718 (2015).

34. See, e.g., Gold, *supra* note 3, at 1.

35. SENATE COMM. ON RULES & ADMIN, *STANDING RULES OF THE SENATE*, S. DOC. NO. 113-18, at R. XXII, ¶ 2 (2013) [hereinafter *STANDING RULES*].

36. See 146 *CONG. REC.* S4174 (daily ed. May 18, 2000) (statement of Sen. Feingold).

37. See, e.g., Matt Miller, *It's the Filibuster, Stupid*, *WASH. POST* (Sept. 27, 2012), https://www.washingtonpost.com/opinions/matt-miller-its-the-filibuster-stupid/2012/09/27/53a5f9ba-082f-11e2-a10c-fa5a255a9258_story.html?utm_term=.1aabee1eb9c3; Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 *HARV. J. ON LEGIS.* 467, 467–69 (2011); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 *CONN. L. REV.* 1041, 1053 (2011); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 *CONN. L. REV.* 1003, 1006 (2011); Gerard N. Magliocca, *Reforming the Filibuster*, 105 *NW. U. L. REV.* 303, 303–04 (2011); Harold Meyerson, *Can Boxer and Feinstein Be Filibuster Busters?*, *L.A. TIMES* (Jan. 14, 2010), <http://articles.latimes.com/2010/jan/14/opinion/la-oe-meyerson14-2010jan14>; Matthew Yglesias, *Failure Buster*, *AM. PROSPECT* (Apr. 12, 2005), <http://prospect.org/article/failure-buster>; Editorial, *Time To Retire the Filibuster*, *N.Y. TIMES* (Jan. 1, 1995), <http://www.nytimes.com/1995/01/01/opinion/time-to-retire-the-filibuster.html>. Note, however, that as Benjamin Eidelson has observed, the filibuster can, on occasion, counteract the maldistribution of the Senate. See Benjamin Eidelson, *The Majoritarian Filibuster*, 122 *YALE L.J.* 980 (2013).

38. See *STANDING RULES*, *supra* note 35, at R. XXII, ¶ 2.

percent of the Nation's population can block matters subject to filibuster.³⁹

II.

THE FOUNDERS' SENATE

The Founders created checks and balances.⁴⁰ But the Founders did not create the filibuster.

The Founders knew how to create supermajority requirements when they wanted to. In five instances,⁴¹ the Constitution requires a two-thirds vote—to convict an impeached officeholder,⁴² to expel a Member of Congress,⁴³ to override a presidential veto,⁴⁴ to ratify a treaty,⁴⁵ and to amend the Constitution.⁴⁶ But the Constitution requires no supermajority to pass a law for the President to sign⁴⁷ or to confirm the President's nominations.⁴⁸

The Constitution grants the appointment power to the President.⁴⁹ The Constitution provides that the President:

[S]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.⁵⁰

39. Together, the residents of the twenty-one least-populous states of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, Idaho, West Virginia, Nebraska, New Mexico, Nevada, Kansas, Utah, Arkansas, Mississippi, and Iowa elect forty-two Senators, but according to estimates for 2014, represent only 36.5 million of the 318.2 million Americans. See U.S. CENSUS BUREAU, *supra* note 24.

40. See, e.g., U.S. CONST. art. I, § 1 (bicameral legislature); *id.* § 7 (presidential veto).

41. U.S. CONST. art. I, §§ 3, 5, 7; *id.* art. II, § 2; *id.* art. V. In addition, the Fourteenth Amendment requires a two-thirds vote to allow former Federal officeholders who joined the Confederacy to return to Federal office. U.S. CONST. art. XIV § 3. And the Twenty-fifth Amendment requires a two-thirds vote to declare the President unable to discharge the powers and duties of the Presidency. U.S. CONST. art. XXV § 4.

42. U.S. CONST. art. I, § 3.

43. *Id.* § 5.

44. *Id.* § 7.

45. *Id.* art. II, § 2.

46. *Id.* art. V.

47. *Id.* art. I, § 7.

48. *Id.* art. II, § 2.

49. *Id.*

50. *Id.*

When the Constitution gives the nomination power to the President, the Constitution does not provide for a supermajority for the Senate to provide its advice and consent.⁵¹

The very same clause that gives the President the appointment power also provides for consideration of treaties.⁵² With regard to treaties, Article 2, Section 2, provides of the President, “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”⁵³ So in the same clause—in the very same sentence—that the Founders provided for a two-thirds vote to ratify treaties, the Founders made no provision for a supermajority to confirm nominations.⁵⁴ The implication is clear that the Founders expected the Senate to confirm nominations with a majority vote.

The very first Senate was the Senate that would have known best what the Founders intended. Out of twenty-four Senators in 1789, the first Senate included nine signers of the Constitution.⁵⁵ In the first Senate, the Senate Rules included a motion for the previous question, which ends debate and calls for an immediate vote.⁵⁶ A simple majority could move to bring a matter to a vote.⁵⁷ Only in 1806 did the Senate drop the rule allowing a motion for the previous question.⁵⁸

Former Howard Baker counsel Martin Gold and former Bush Justice Department lawyer Dimple Gupta recounted:

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Richard Bassett of Delaware, Pierce Butler of South Carolina, William Few of Georgia, William S. Johnson of Connecticut, Rufus King of New York, John Langdon of New Hampshire, Robert Morris of Pennsylvania, William Paterson of New Jersey, and George Read of Delaware. *See* William diGiacomantonio, *Constitution Day: Signers Who Went to Congress*, U.S. CAP. HIST. SOC’Y (Sept. 17, 2014), <https://uschs.wordpress.com/2014/09/17/constitution-day-signers-who-went-to-congress/>; U.S. SENATE HISTORICAL OFFICE, SENATORS OF THE UNITED STATES 1789–PRESENT: A CHRONOLOGICAL LIST OF SENATORS SINCE THE FIRST CONGRESS IN 1789 (2015), <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (listing all Senators).

56. *See* 1 ANNALS OF CONG. 20–21 (1789) (Joseph Gales, ed., 1790) (Rule IX as adopted by the first Senate); *see also, e.g.*, Gold, *supra* note 3, at 48; Gold & Gupta, *supra* note 3, at 213.

57. *See, e.g.*, Gold, *supra* note 3, at 48; Gold & Gupta, *supra* note 3, at 213–15. Some, however, contend that the motion was used only as a motion to postpone. *See, e.g.*, Gold, *supra* note 3, at 45; ARENBERG & DOVE, *supra* note 3, at 19; JOSEPH COOPER, THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE 26 (1962). Even if it was limited in practice at the time, it is hard to imagine that, had it been retained, it would not have evolved as the motion evolved in other legislatures.

58. *See, e.g.*, Gold, *supra* note 3, at 48; Gold & Gupta, *supra* note 3, at 215–16.

The possibility that a minority of Senators could hold unlimited debate on a topic against the majority's will was unknown to the first Senate. The original Senate Rules—then only twenty in number—allowed a Senator to make a motion “for the previous question.” This motion permitted a simple majority of Senators to halt debate on a pending issue:

The previous question being moved and seconded, the question for the chair shall be: “Shall the main question now be put?” and if the nays prevail, the main question shall not then be put.⁵⁹

Thus the Senate that included signers of the Constitution chose to adopt a rule that was the antithesis of the filibuster. The Founders did not create the filibuster. And the Founders did not establish the Senate to obstruct nominations. The Founders gave the nominating power to the President, and the Founders expected the Senate to vote on nominations.

III.

THE CLOTURE RULE

The power to filibuster came about because the Senate Rules did not limit debate. The House of Representatives, for example, has a motion for the previous question, which allows a majority to end debate.⁶⁰ The absence of such a motion since 1806 has allowed Senators to filibuster.⁶¹

The British Parliament adopted a motion for the previous question in 1604, America's House of Representatives adopted it in 1789, and as historian Robert Caro reported, “By 1948, some version of this motion had been incorporated into the functioning of forty-five of America's forty-eight state legislatures, and of most of the legislative bodies in the world's other countries as well.”⁶²

In practice, as Gold relates, “Nineteenth-century filibusters were fatal when employed, as there was no procedural means for the Senate to overcome them.”⁶³ Caro wrote: “For many years after 1806—for 111 years, to be precise—the only way a senator could be made to stop talking so that a vote could be taken on a proposed measure was

59. Gold & Gupta, *supra* note 3, at 213 (quoting Rule IX as adopted by the first Senate); *see also* 1 ANNALS OF CONG. 20–21 (1789) (Joseph Gales, ed., 1790) (setting forth the Rules adopted by the first Senate).

60. *See* WICKHAM, *supra* note 33, at 810 (§ 994, R. XIX, cl. 1).

61. *See, e.g.*, BETH & HEITSHUSEN, *supra* note 3, at 1; Gold, *supra* note 3, at 40; CARO, *supra* note 3, at 92.

62. CARO, *supra* note 3, at 92.

63. Gold, *supra* note 3, at 46.

if there was unanimous consent that he do so, an obvious impossibility.”⁶⁴

On March 4, 1917, after an eleven-Senator filibuster blocked the arming of merchant ships during World War I, President Woodrow Wilson complained of “[a] little group of willful men, representing no opinion but their own,” who he said, “have rendered the great government of the United States helpless and contemptible.”⁶⁵ In 1917, the Senate responded to President Wilson’s criticism by adopting the Cloture Rule, now Rule XXII.⁶⁶ As it now reads, Rule XXII, paragraph 2, says any time a Senator presents the Senate with a cloture petition signed by sixteen Senators, it starts a several-day process that can eventually bring debate to a close.⁶⁷ One hour after the Senate comes into session on the second day after the petition is filed, the Senate must confirm that a quorum is present and then conduct a roll-call vote on the question: “Is it the sense of the Senate that the debate shall be brought to a close?”⁶⁸ If three-fifths of Senators “duly chosen and sworn” vote to invoke cloture—sixty votes if no Senate seats are vacant—then the matter becomes the unfinished business to the exclusion of all other business.⁶⁹ If the matter is to amend the Standing Rules of the Senate, however, then two-thirds of the Senators present and voting must vote to invoke cloture.⁷⁰ If the Senate does invoke cloture, then the Senate can debate the matter for another thirty hours before it must vote on the pending amendments and the matter itself.⁷¹ During those thirty hours, points of order and appeals from the decision of the Presiding Officer must be decided without debate.⁷²

The Cloture Rule contains an ingenious self-defense mechanism, as by its terms it applies to attempts to amend the Standing Rules to change the Cloture Rule. Caro described the problem as it applied to early twentieth-century efforts to tighten the rule:

[T]he filibuster was protected by a very powerful force: itself. Since the loophole in Rule 22 [as originally drafted] allowed any motion to bring a bill to the floor to be filibustered, bringing a civil rights bill to the floor would require a change in Rule 22. And

64. CARO, *supra* note 3, at 92.

65. *Text of the President’s Statement to the Public*, N.Y. TIMES, Mar. 5, 1917, at A1.

66. *See, e.g.*, Gold, *supra* note 3, at 49; ARENBERG & DOVE, *supra* note 3, at 24; CARO, *supra* note 3, at 93.

67. STANDING RULES, *supra* note 35, at R. XXII, ¶ 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

changing Rule 22 would require a motion to change it—which could be filibustered. This was perhaps the ultimate legislative Catch-22: any attempt to close the loophole allowed the loophole to be used to keep it from being closed. And because of it there was no realistic possibility that the filibuster would be changed.⁷³

Thus any effort to reform the filibuster and address abusive delay through amending the Standing Rules faces the obstacle of Rule XXII that “on a measure or motion to amend the Senate rules . . . the necessary affirmative vote shall be two-thirds of the Senators present and voting.”⁷⁴

IV.

FILIBUSTER ABUSE

For more than half a century after the Senate adopted the Cloture Rule, Senators used cloture sparingly.⁷⁵ From 1917 through 1970, Senators filed cloture petitions fifty-eight times, only slightly more than once a year, on average, and actually voted on cloture only forty-nine times, less than once a year, on average.⁷⁶ Rarer still, the Senate invoked cloture only eight times in that fifty-four-year period—about once every seven years.⁷⁷

In the thirty-six years from 1971 through 2006, Senators filed cloture petitions 928 times, averaging about twenty-six times a year; voted on cloture 667 times, averaging eighteen and one half times a year; and invoked cloture 270 times, averaging seven and one half times a year.⁷⁸

The intensity of cloture filings increased dramatically during the eight years from 2007 through 2014, when Senator Mitch McConnell led the Republican minority.⁷⁹ During those eight years alone, Senators filed cloture petitions 644 times, more than eighty times a year; voted on cloture 494 times, nearly sixty-two times a year; and invoked cloture 352 times, averaging forty-four times a year.⁸⁰ During those eight years, Senators filed, voted on, and invoked cloture at an annual rate more than twice that of the decade before.⁸¹ During that eight-year period, Senators filed fully 37% of all cloture motions ever filed,

73. CARO, *supra* note 3, at 93.

74. STANDING RULES, *supra* note 35, at R. XXII, ¶ 2.

75. See U.S. SENATE, *supra* note 4.

76. See *id.*

77. See *id.*

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.*

voted on 37% of all votes on cloture motions, and invoked cloture 52% of all the times that the Senate has invoked cloture in its history.⁸² Thus, most of the times that the Senate has ever invoked cloture in its history were during the eight years that Senator McConnell was Minority Leader. The Republican Caucus under the leadership of Senator McConnell engaged in what scholars and Democratic Senators viewed as an unprecedented level of obstruction.⁸³ Observers saw Senator McConnell as implementing a strategy of denying President Obama any significant accomplishments, and making use of the filibuster as an everyday tactic in that quest.⁸⁴

Obstruction by the Republican Caucus under Senator McConnell was particularly intense when it came to President Obama's nominations. Out of all cloture motions ever filed (or reconsidered) on nominations in the Nation's history, 71% were on President Obama's nominations.⁸⁵ Of all the cloture motions ever filed (or reconsidered) on judicial nominations, 73% were on President Obama's nominations.⁸⁶ Of all the cloture motions ever filed (or reconsidered) on district court nominations, 97% were on President Obama's nominees.⁸⁷

Some of this obstruction of President Obama's nominations occurred after Senator Reid changed the Senate's rules, but the pattern of Republican obstruction of President Obama's nominees was manifest before then. From the beginning of the time when cloture was available for nominees until the time of the Reid Precedent, cloture had been filed on 168 nominees; half of them—eighty-two—were in the Obama

82. *See id.*

83. *See, e.g.,* Thomas E. Mann & Norman J. Ornstein, *Let's Just Say It: The Republicans Are the Problem*, WASH. POST (Apr. 27, 2012), https://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUIT_story.html?utm_term=.4b4f66043adc; 160 CONG. REC. S6875 (daily ed. Dec. 16, 2014) (statement of Sen. Menendez); *id.* at S6249 (daily ed. Dec. 2, 2014) (statement of Sen. Menendez); *id.* at S5886 (daily ed. Nov. 12, 2014) (statement of Sen. Reid); *id.* at S5596 (daily ed. Sept. 16, 2014) (statement of Sen. Reid); *id.* at S5410 (daily ed. Sept. 9, 2014); *id.* at S5210 (daily ed. July 31, 2014) (statement of Sen. Leahy); *id.* at S4368 (daily ed. July 10, 2014) (statement of Sen. Reid); 159 CONG. REC. S8633 (daily ed. Dec. 11, 2013) (statement of Sen. Reid); *id.* at S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); *id.* at S5749 (daily ed. July 17, 2013) (statement of Sen. Leahy); *id.* at S5625–28 (daily ed. July 11, 2013) (statement of Sen. Reid); *id.* at S3286 (daily ed. May 9, 2013) (statement of Sen. Reid); *id.* at S803–04 (daily ed. Feb. 25, 2013) (statement of Sen. Leahy).

84. *See, e.g.,* Editorial, *Mitch McConnell's Lopsided Leadership Legacy*, BOSTON GLOBE (May 13, 2015), <https://www.bostonglobe.com/opinion/editorials/2015/05/13/mitch-mcconnell-lopsided-leadership-legacy/uRgzrRgS6wharfoRgaHTpO/story.html>.

85. *See* Beth, Rybicki & Greene, *supra* note 5.

86. *See id.*

87. *See id.*

Administration.⁸⁸ Senate Republicans required cloture to be filed on thirty-four of President Obama's judicial nominees, twice the number of nominees that required cloture under President Bush's eight years in office.⁸⁹ In the history of the Republic up until the Reid Precedent, cloture had been filed on twenty-three district court nominees—twenty were President Obama's nominees.⁹⁰

The Constitution says that the President gets to nominate, and the Senate gets to vote.⁹¹ By refusing to allow the Senate to do its job, Republican Senators made it more and more difficult for President Obama to do his job.⁹² Repeatedly, Republicans ground the Senate to a halt. Republicans used the filibuster to nullify the President's Constitutional power to nominate people to the courts and the Government. This was not a change of degree, but a change in the kind of obstruction.⁹³

Republicans repeatedly blocked President Obama's Circuit Court judicial nominees.⁹⁴ In 2011, they blocked Goodwin Liu for the Ninth Circuit⁹⁵ and Caitlin Halligan for the D.C. Circuit.⁹⁶ In 2012, they blocked Robert Bacharach for the Tenth Circuit.⁹⁷ In 2013, they

88. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); RICHARD S. BETH & ELIZABETH RYBICKI, CONG. RESEARCH SERV., NOMINATIONS WITH CLOTURE MOTIONS, 2009 TO THE PRESENT (Nov. 21, 2013).

89. See RICHARD S. BETH, CONG. RESEARCH SERV., RL32878, CLOTURE ATTEMPTS ON NOMINATIONS: DATA & HISTORICAL DEVELOPMENT 11–16 (2013).

90. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); see BETH, *supra* note 89, at 11–16.

91. U.S. CONST. art. II, § 2.

92. The Constitution gives the Senate the job to provide “Advice and Consent.” *Id.* When the Senate fails to do so, it prevents the President from doing the job that the Constitution gives the President to “appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” *Id.* And by thus blocking the filling of Government positions, the Senate deprives the President of the staff support that the Constitution thus envisions the President should have to do the President's job of exercising the “executive Power” that the Constitution vests in the President. See *id.* §§ 1–2.

93. See, e.g., 162 CONG. REC. S2110 (daily ed. Apr. 18, 2016) (statement of Sen. Reid); *id.* at S1480 (daily ed. Mar. 15, 2016) (statement of Sen. Murray).

94. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid).

95. See 157 CONG. REC. S3146 (May 19, 2011) (cloture not invoked 52–43 in vote no. 74).

96. See 157 CONG. REC. S8361 (Dec. 6, 2011) (cloture not invoked 54–45 in vote no. 222).

97. See 158 CONG. REC. S5650–51 (daily ed. July 30, 2012) (cloture not invoked 56–34 in vote no. 186). Republican Senator Tom Coburn then said, “We just disallowed one of the best candidates for the appellate court in my 8 years since I have been in the Senate.” *Id.* at S5651. The Senate later confirmed him after President Obama renominated him in the subsequent Congress. 159 CONG. REC. S805 (daily ed. Feb. 25, 2013) (93–0 in vote no. 22).

blocked Caitlin Halligan (again),⁹⁸ Patricia Millett,⁹⁹ Nina Pillard,¹⁰⁰ and Robert Wilkins¹⁰¹ for the D.C. Circuit. Neutral observers conceded that President Obama's nominees were people of high quality. Republican Senators blocked them saying that the Nation did not need more judges.¹⁰²

Republicans blocked Representative Mel Watt, a twenty-year veteran of the House and a senior Financial Services Committee Member, from leading the Federal Housing Finance Agency¹⁰³ because Republicans did not like the Dodd-Frank law.¹⁰⁴ This was the first time since the Civil War era that a sitting Member of Congress had been rejected for an administration position.¹⁰⁵ For nearly two years, Senate Republicans blocked the confirmation of Richard Cordray to lead the Consumer Financial Protection Bureau, once again because they did not like the Dodd-Frank law.¹⁰⁶ For months, Republicans blocked President Obama's nominees to the National Labor Relations Board (NLRB) in an effort to keep the NLRB from doing its job.¹⁰⁷ Throughout the Government, jobs were not being filled, policy was not being carried out, and nominees had to wait or withdraw their

98. See 159 CONG. REC. S1146 (daily ed. Mar. 6, 2013) (cloture not invoked 51–41 in vote no 30).

99. See 159 CONG. REC. S7708 (daily ed. Oct. 31, 2013) (cloture not invoked 55–38 in vote no. 227). The Senate later confirmed her after setting the Reid Precedent, as discussed below, *infra* note 147.

100. See 159 CONG. REC. S7949 (daily ed. Nov. 12, 2013) (cloture not invoked 56–41 in vote no. 233). The Senate later confirmed her after setting the Reid Precedent, as discussed below, *infra* note 150.

101. See 159 CONG. REC. S8092 (daily ed. Nov. 18, 2013) (cloture not invoked 53–38 in vote no. 235). The Senate later confirmed him after setting the Reid Precedent, as discussed below, *infra* note 153.

102. See, e.g., 159 CONG. REC. S8415 (daily ed. Nov. 21, 2013) (statement of Sen. McConnell).

103. See 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); *id.* at S5240 (daily ed. Oct. 31, 2013) (cloture not invoked 56–42 in vote no. 226).

104. See, e.g., 159 CONG. REC. S7584 (daily ed. Oct. 29, 2013) (statement of Sen. Reid).

105. *Mel Watt Nomination To Head The Federal Housing Finance Agency (FHFA) Denied*, NAACP (Oct. 31, 2013), <http://www.naacp.org/latest/mel-watt-nomination-to-head-the-federal-housing-finance-agency-fhfa-denied/> (last visited Dec. 21, 2015).

106. E.g., 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013) (statement of Sen. Reid); Edward Wyatt, *Dodd-Frank Under Fire a Year Later*, N.Y. TIMES (July 18, 2011), http://www.nytimes.com/2011/07/19/business/dodd-frank-under-fire-a-year-later.html?_r=0.

107. See, e.g., Josh Hicks, *How Obama's NLRB Nominees Became Central to Senate Filibuster Deal*, WASH. POST (July 17, 2013), <https://www.washingtonpost.com/news/federal-eye/wp/2013/07/17/how-obamas-nlr-nominees-became-central-to-the-senates-filibuster-deal/>.

nominations altogether. Advocates of filibuster reform believed that the President deserves to get a yes-or-no vote on his nominees.

V.

THE REID PRECEDENT

The Senate Republicans' action to block President Obama's nominees encouraged Senate Democrats to change the procedure by which the Senate confirmed nominations and thus led to the Reid Precedent. Ezra Klein and Evan Soltas captured the mood of much of the Democratic Caucus when they wrote: "Filibuster reform is just another word for nothing left to lose."¹⁰⁸

After months of careful work to secure the commitments of his Senate Colleagues, on November 21, 2013, Majority Leader Reid took the floor to make the case that the Senate was broken, saying: "[I]t is time to get the Senate working again—not for the good of the current Democratic majority or some future Republican majority, but for the good of the United States of America."¹⁰⁹ Senator Reid argued, "During this Congress—the 113th Congress—the United States has wasted an unprecedented amount of time on procedural hurdles and partisan obstruction. As a result the work of this country goes undone."¹¹⁰ He argued that the Republican Caucus had shirked its basic duty to confirm nominees, blocking nominees to try to bring about wholesale changes in law and blocking judicial nominees because they did not want President Obama to appoint any judges to certain courts.¹¹¹ He argued that "the Republican Caucus has turned 'advise and consent' into 'deny and obstruct.'"¹¹²

Senator Reid said, "The American people are fed up with this kind of obstruction and gridlock. The American people—Democrats, Republicans, Independents—are fed up with this gridlock, this obstruction. The American people want Washington to work for American families once again."¹¹³ He explained: "The change we propose today would ensure executive and judicial nominations an up-or-down vote on confirmation—yes, no. The rule change will make cloture for

108. Ezra Klein & Evan Soltas, *Wonkbook: Three Reasons Filibuster Reform Might Actually Happen Today*, WASH. POST (Nov. 21, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/11/21/wonkbook-three-reasons-filibuster-reform-might-actually-happen-today/>.

109. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at S8415.

all nominations other than for the Supreme Court a majority threshold vote—yes or no.”¹¹⁴ And he argued:

The Senate is a living thing, and to survive it must change, as it has over the history of this great country. To the average American, adapting the rules to make the Senate work again is just common sense. . . .

To remain relevant and effective as an institution, the Senate must evolve to meet the challenges of this modern era.¹¹⁵

Republican Leader McConnell responded, saying that Democrats were trying to divert attention from President Obama’s health-care law.¹¹⁶ Senator McConnell argued:

Once again, Senate Democrats are threatening to break the rules of the Senate—break the rules of the Senate—in order to change the rules of the Senate. And over what? Over what? Over a court that does not even have enough work to do?

Millions of Americans are hurting because of a law Washington Democrats forced upon them, and what do they do about it? They cook up some fake fight over judges—a fake fight over judges—who are not even needed.¹¹⁷

Senator McConnell continued:

As I said, in short, unlike the first 2 years of the Obama administration, there is now a legislative check on the President. The administration does not much like checks and balances, so it wants to circumvent the people’s representatives with an aggressive regulatory agenda, and our Democratic colleagues want to facilitate that by filling up a court that will rule on his agenda—a court that does not even have enough work to do, especially if it means changing the subject from ObamaCare for a few days.¹¹⁸

Senator McConnell argued that it would be impossible to restrict the Reid Precedent to nominations other than Supreme Court nominations, saying: “As the ranking member of the Judiciary Committee Senator Grassley pointed out yesterday: If the majority leader changes the rules for some judicial nominees, he is effectively changing them for all judicial nominees, including the Supreme Court, as Senator Grassley pointed out yesterday.”¹¹⁹

Senator McConnell concluded by warning of retaliation in future Congresses:

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at S8415–16.

119. *Id.* at S8416.

Let me say we are not interested in having a gun put to our head any longer. If you think this is in the best interests of the Senate and the American people to make advice and consent, in effect, mean nothing—obviously you can break the rules to change the rules to achieve that. But some of us have been around here long enough to know that the shoe is sometimes on the other foot.

. . . If you want to play games, set yet another precedent that you will no doubt come to regret—I say to my friends on the other side of the aisle, you will regret this, and you may regret it a lot sooner than you think.¹²⁰

Senator Reid then moved to proceed to the motion to reconsider the vote by which the Senate had failed to invoke cloture on President Obama's nomination of Patricia Millett to the D.C. Circuit Court of Appeals.¹²¹ Under the regular order, this process would set up three votes in a row—on the motion to proceed, the motion to reconsider, and cloture.¹²² In the first vote, the Senate voted fifty-seven to forty to proceed to the motion to reconsider, with Republican Senators Susan Collins and Lisa Murkowski joining all Democratic Senators in voting to proceed.¹²³

The President Pro Tempore, Senator Patrick Leahy, acting as the Presiding Officer, announced that the motion to proceed was agreed to, and Senator Reid moved to reconsider the vote by which cloture was not invoked on the Millett nomination.¹²⁴ Republican Leader McConnell interposed two parliamentary inquiries about facts with regard to nominations, and the President Pro Tempore responded.¹²⁵ Leader McConnell then moved to adjourn the Senate until 5 p.m.¹²⁶ Under Rule XXII, a motion to adjourn to a certain time takes precedence over the motion to reconsider,¹²⁷ and thus Leader McConnell was able to delay the reconsideration vote by interposing the motion to adjourn. The Senate rejected the motion to adjourn by a forty-six to fifty-four vote.¹²⁸ The Senate then voted on the motion to reconsider cloture on the Millett nomination, voting fifty-seven to forty-three to reconsider, with Republican Senators Collins and Murkowski once again joining all Democratic Senators in voting to reconsider.¹²⁹

120. *Id.*

121. *Id.*

122. See RIDDICK & FRUMIN, *supra* note 3, at 1124.

123. 159 CONG. REC. S8416–17 (daily ed. Nov. 21, 2013).

124. *Id.* at S8417.

125. *Id.*

126. *Id.*

127. STANDING RULES, *supra* note 35, at R. XXII, ¶ 1.

128. 159 CONG. REC. S8417 (daily ed. Nov. 21, 2013).

129. *Id.*

The President Pro Tempore announced that the motion to reconsider was agreed to.¹³⁰ The motion to invoke cloture on the Millett nomination was then pending before the Senate, and the Senate was in a posture under which Rule XXII required appeals from the ruling of the Presiding Officer to be decided without debate.¹³¹ Majority Leader Reid then raised a point of order “that the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote.”¹³² The President Pro Tempore, on the advice of the Senate Parliamentarian interpreting Senate procedure as it then was, ruled: “Under the rules, the point of order is not sustained.”¹³³ Leader Reid then appealed the ruling of the Chair.¹³⁴ Leader McConnell then interposed five parliamentary inquiries, and the President Pro Tempore responded to each inquiry, including confirming that the Senate would, if it continued, set a precedent.¹³⁵ Following the standard form dictated by Senate precedent,¹³⁶ the President Pro Tempore then put the question before the Senate: “Shall the decision of the Chair stand as the judgment of the Senate?”¹³⁷ The Senate voted forty-eight in favor and fifty-two opposed, thus overturning the ruling of the Chair.¹³⁸ Democratic Senators Carl Levin, Joe Manchin, and Mark Pryor voted with Republican Senators opposing overturning the Chair.¹³⁹ The President Pro Tempore announced the result that the decision of the Chair was not sustained, and the Senate had thus changed Senate procedure for future nominations.¹⁴⁰ The Reid Precedent was set.

Senator McConnell then raised the mirror-image point of order “that nominations are fully debatable under the rules of the Senate unless three-fifths of the Senators chosen and sworn have voted to bring debate to a close.”¹⁴¹ The President Pro Tempore ruled: “Under the precedent set by the Senate today, November 21, 2013, the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority.”¹⁴² Senator McConnell

130. *Id.*

131. *STANDING RULES*, *supra* note 35, at R. XXII, ¶ 2.

132. 159 *CONG. REC.* S8417 (daily ed. Nov. 21, 2013).

133. *Id.*

134. *Id.*

135. *Id.* at S8417–18.

136. *See* RIDDICK & FRUMIN, *supra* note 3, at 1450.

137. 159 *CONG. REC.* S8418 (daily ed. Nov. 21, 2013).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

appealed that ruling of the Chair, and the President Pro Tempore once again put the question, “Shall the decision of the Chair stand as the judgment of the Senate?”¹⁴³ The Senate then voted fifty-two to forty-eight to sustain the decision of the Chair, affirming the Reid Precedent just set.¹⁴⁴

The pending question before the Senate was once again the motion to invoke cloture on the Millett nomination, and the Senate voted fifty-five to forty-three to invoke cloture.¹⁴⁵ Applying the new majority-vote threshold for cloture on nominations, the President Pro Tempore announced that the motion to invoke cloture was agreed to.¹⁴⁶

The Senate went on to confirm Judge Millett on December 10, 2013, by a vote of fifty-six to thirty-eight.¹⁴⁷ Thereafter, Majority Leader Reid moved to reconsider the nomination of Representative Mel Watt to be Director of the Federal Housing Finance Agency,¹⁴⁸ and the Senate confirmed him.¹⁴⁹ Then Majority Leader Reid moved to reconsider the nomination of Nina Pillard to the D.C. Circuit Court of Appeals,¹⁵⁰ and the Senate confirmed her.¹⁵¹ The next month, Majority Leader Reid moved to reconsider the nomination of Robert Wilkins to the D.C. Circuit Court of Appeals,¹⁵² and the Senate confirmed him.¹⁵³

VI.

CHANGING PROCEDURE THROUGH PRECEDENT

Senator McConnell repeatedly complained that the Reid Precedent was “breaking the rules to change the rules.”¹⁵⁴ In fact, Senator Reid used one of the Senate’s time-honored means of changing the rules. The Senate had used these means for as long as there had been a Senate.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at S8584 (daily ed. Dec. 10, 2013).

148. *Id.*

149. *Id.* at S8593.

150. *Id.* at S8594.

151. *Id.* at S8667 (daily ed. Dec. 11, 2013).

152. 160 CONG. REC. S209 (daily ed. Jan. 9, 2014).

153. *Id.* at S282 (daily ed. Jan. 13, 2014).

154. *E.g.*, 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013); *id.* at S4536 (daily ed. June 18, 2013).

In his well-respected text on *Senate Procedure and Practice*, Martin Gold, the former counsel to Majority Leader Howard Baker, wrote:

Senate procedure rests on four pillars, each an exercise of the Senate's power to govern itself pursuant to article I, section 5, of the U.S. Constitution:

1. The Standing Rules of the Senate
2. Special procedures found in rule-making statutes
3. Precedents that interpret the Standing Rules, interpret provisions in rule-making statutes, and interpret other precedents
4. Unanimous consent orders.¹⁵⁵

The Standing Rules of the Senate are, of course, the first pillar. But precedents form a pillar, as well. Within the Senate, the Standing Rules function like statutes, and precedents function like case law. Both provide binding authority.

The Standing Rules of the Senate explicitly provide for changing Senate procedure through the creation of precedents. Rule XX, on "Questions of Order," lays out a process for appeals to determine procedural questions:

A question of order may be raised at any stage of the proceedings . . . and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate. When an appeal is taken, 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, and without debate . . .¹⁵⁶

The Cloture Rule, paragraph 2 of Rule XXII, also explicitly provides for appeals. The Cloture Rule says: "Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate."¹⁵⁷ Similarly, the Standing Rules of the Senate also provide for appeals in Rules XVII¹⁵⁸ and XIX.¹⁵⁹ One can hardly call appealing the ruling of the Chair "breaking the rules" when the Standing Rules of the Senate explicitly provide for appeals.

The foremost authority on Senate procedure, written by two former Senate Parliamentarians, is *Riddick's Senate Procedure*, which the late Senator Thomas Eagleton called, "the nearest thing to the Bi-

155. Gold, *supra* note 3, at 2.

156. STANDING RULES, *supra* note 35, at R. XX.

157. *Id.* at R. XXII.

158. *Id.* at R. XVII.

159. *Id.* at R. XIX.

ble that the Senate has.”¹⁶⁰ *Riddick’s* also discusses how the Senate creates Senate procedure through points of order and appeals. In the article on “Points of Order,” *Riddick’s* says:

[A]ny Senator when recognized may make a point of order against any attempted procedure or action to be taken by the Senate, and the Chair is required to rule thereon without debate

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.¹⁶¹

Riddick’s also discusses appeals of the ruling of the Chair. In its article on “Appeals,” *Riddick’s* says:

Any ruling by the Chair in response to a point of order made by a Senator is subject to an appeal

Any Senator, may take an appeal from a ruling of the Chair Unless the Chair is supported by a majority vote of the Senate, the decision of the Chair is overruled. This decision of the Senate becomes a precedent for the Senate to follow in its future procedure until altered or reversed by a subsequent decision of the Chair or by a vote of the Senate.¹⁶²

A page later, *Riddick’s* plainly says, “Decisions of the Chair are subject to appeal and by a majority vote the Senate may reverse or overrule any decision by the Chair.”¹⁶³

Similarly, Gold and Gupta explain how the Senate has used precedent to establish Senate procedure. Gold and Gupta wrote:

Periodically, a majority has exercised the Senate’s constitutional rulemaking power to establish new precedents altering Senate procedure. For example, a majority has established precedents to limit members’ capacity to offer dilatory amendments, to propose legislative amendments to appropriations bills, to debate motions to proceed to nominations, and to use dilatory tactics to disrupt roll call votes.¹⁶⁴

Gold and Gupta here listed only a few of the many cases when the Senate has changed Senate procedure through precedent.¹⁶⁵

160. Niels Lesniewski, *Riddick’s Tome Unlocks Quirky Senate Powers*, ROLL CALL (Oct. 12, 2011), http://www.rollcall.com/issues/57_40/Riddicks-Tome-Unlocks-Quirky-Senate-Powers-209360-1.html

161. RIDDICK & FRUMIN, *supra* note 3, at 987.

162. *Id.* at 145.

163. *Id.* at 146.

164. Gold & Gupta, *supra* note 3, at 209.

165. For further discussion from Gold and Gupta on precedents, see *id.* at 262–69.

Riddick's does not list every single Senate precedent. But *Riddick's* lists seventeen precedents affirming the Senate's ability to create precedent through appeals.¹⁶⁶ The method by which Senator Reid changed Senate procedure in the Reid Precedent was thus not new. Speaking on the day of the Precedent, Senator Tom Udall aptly called the Reid Precedent both an "unusual step, and not unprecedented."¹⁶⁷

In the previous Congress, the Senate had employed much the same process.¹⁶⁸ In response to repeated Republican motions to suspend the rules to evade the Cloture Rule's limits on amendments post-cloture, on October 6, 2011, Senator Reid raised a point of order that a motion to suspend the rules to offer an amendment should be considered dilatory after the Senate has invoked cloture.¹⁶⁹ The Presiding Officer ruled against Senator Reid's point of order, and Senator Reid appealed the ruling.¹⁷⁰ Because the Senate had invoked cloture on the bill under consideration, the appeal was not debatable.¹⁷¹ The Senate voted to reverse the ruling of the Chair, thereby establishing a precedent prohibiting the use of motions to suspend the rules post-cloture.¹⁷² The procedural posture in November 2013 was very much like that in October 2011.

Senator Reid was not the only Majority Leader to have changed Senate procedure through precedent. Majority Leader Trent Lott did so twice—in 1996¹⁷³ and 2000.¹⁷⁴ Majority Leader Robert Byrd did so in 1986¹⁷⁵ and 1987.¹⁷⁶ Majority Leader Bob Dole did so in 1985.¹⁷⁷

Other Senators who appealed a ruling of the Chair and with the support of a Senate vote overturned the ruling of the Chair include Senator Kay Bailey Hutchison in 1995,¹⁷⁸ Senator Bob Smith in 1992,¹⁷⁹ Senator Tim Wirth in 1991,¹⁸⁰ Senator Brock Adams in 1990,¹⁸¹ Senator Richard Shelby in 1989,¹⁸² Senator Frank

166. RIDDICK & FRUMIN, *supra* note 3, at 146–47 n.2.

167. 159 CONG. REC. S8436 (daily ed. Nov. 21, 2013).

168. *See* 157 CONG. REC. S6315 (daily ed. Oct. 6, 2011).

169. *Id.*

170. *Id.*

171. STANDING RULES, *supra* note 35, at R. XXII, ¶ 2.

172. *See* 157 CONG. REC. S6315 (daily ed. Oct. 6, 2011).

173. *See* 142 CONG. REC. 27148 (Oct. 3, 1996).

174. *See* 146 CONG. REC. 8257–86 (May 17, 2000).

175. *See* 132 CONG. REC. 26139–54 (Sept. 25, 1986).

176. *See* 133 CONG. REC. 12252–56 (May 13, 1987).

177. *See* 131 CONG. REC. 35871 (Dec. 11, 1985).

178. *See* 141 CONG. REC. 8180–87 (Mar. 16, 1995).

179. *See* 138 CONG. REC. 19471–76 (July 27, 1992).

180. *See* 137 CONG. REC. 33790–96 (Nov. 22, 1991).

181. *See* 136 CONG. REC. 8591–93 (Apr. 27, 1990).

Lautenberg in 1989,¹⁸³ Senator Warren Rudman in 1984,¹⁸⁴ Senator Jeremiah Denton in 1983,¹⁸⁵ Senator Ted Stevens in 1981¹⁸⁶ and 1983,¹⁸⁷ Senator James McClure in 1983,¹⁸⁸ and Senator Dick Lugar in 1982.¹⁸⁹ Appeals reversed rulings of the Chair five times in 1980 alone.¹⁹⁰

In a memorandum on “The frequency of changing Senate procedures by simple majority vote” that Senator Jeff Merkley presented to his Democratic Colleagues, Senator Merkley found:

[T]he Senate appears to have changed its procedures by simple majority (by voting to sustain or overturn a ruling of the Presiding Officer, the precise procedure under consideration today) 18 times since 1977, an average of once every other year.¹⁹¹

Drawing on this analysis, in November 2013, Senator Reid told the Senate, “[T]he Senate has changed its rules 18 times, by sustaining or overturning the ruling of the Presiding Officer, in the last 36 years—during the tenures of both Republican and Democratic majorities.”¹⁹² Indeed, at the time of the Reid Precedent, the Senate had overturned the ruling of the Chair at least thirty-three times since 1929.¹⁹³

182. See 135 CONG. REC. 29164–70 (Nov. 15, 1989).

183. See *id.* at 20462–63 (Sept. 14, 1989).

184. See 130 CONG. REC. 19527–28 (June 28, 1984).

185. See 129 CONG. REC. 31665–74 (Nov. 9, 1983).

186. See 127 CONG. REC. 21912–13 (Sept. 24, 1981).

187. See 129 CONG. REC. 29503–11 (Oct. 27, 1983).

188. See *id.* at 22423–28 (Aug. 3, 1983).

189. See 128 CONG. REC. 14834 (June 23, 1982).

190. See 126 CONG. REC. 33557–58 (Dec. 11, 1980); *id.* at 31060–63 (Nov. 25, 1980); *id.* at 13876–77 (June 10, 1980); *id.* at 13864–69 (June 10, 1980).

191. Memorandum from Senator Jeff Merkley to Colleagues (July 11, 2013) (on file with author).

192. 159 CONG. REC. S8414 (daily ed. Nov. 21, 2013).

193. See 157 CONG. REC. S6315 (daily ed. Oct. 6, 2011); 146 CONG. REC. 8257–86 (May 17, 2000); 142 CONG. REC. 27148 (Oct. 3, 1996); 141 CONG. REC. 8180–87 (Mar. 16, 1995); 138 CONG. REC. 19471–76 (July 27, 1992); 137 CONG. REC. 33790–96 (Nov. 22, 1991); 136 CONG. REC. 8591–93 (Apr. 27, 1990); 135 CONG. REC. 29164–70 (Nov. 15, 1989); *id.* at 20462–63 (Sept. 14, 1989); 133 CONG. REC. 12252–56 (May 13, 1987); 132 CONG. REC. 26139–54 (Sept. 25, 1986); 131 CONG. REC. 35871 (Dec. 11, 1985); 130 CONG. REC. 19527–28 (June 28, 1984); 129 CONG. REC. 31665–74 (Nov. 9, 1983); *id.* at 29503–11 (Oct. 27, 1983); *id.* at 22423–28 (Aug. 3, 1983); 128 CONG. REC. 14834 (June 23, 1982); 127 CONG. REC. 21912–13 (Sept. 24, 1981); 126 CONG. REC. 33557–58 (Dec. 11, 1980); *id.* at 31060–63 (Nov. 25, 1980); *id.* at 13876–77 (June 10, 1980); *id.* at 13864–69 (June 10, 1980); *id.* at 4729–32 (Mar. 15, 1980); *id.* at 1201–03 (Jan. 30, 1980); 95 CONG. REC. 10742–67 (Aug. 4, 1949); *id.* at 10262–78 (July 27, 1949); *id.* at 2125–31, 2214–75 (Mar. 10–11, 1949); 94 CONG. REC. 6552–61 (May 27, 1948); 93 CONG. REC. 8423–30 (July 3, 1947); 93 CONG. REC. 5219–39, 5293–94 (May 4–5, 1948); 90 CONG. REC. 3037–49 (Mar. 24, 1944); 88 CONG. REC. 9335 (Dec. 4, 1942); 70 CONG. REC. 4558 (Feb. 27, 1929).

In his memorandum to Democratic Senators, Senator Merkley wrote:

The most relevant example for our current debate comes from March 5, 1980, when Majority Leader Byrd used the exact same procedure to eliminate filibusters on motions to proceed to nominations. The Presiding Officer ruled that Rule XXII and precedents under it allowed debate (and therefore filibusters) against motions to proceed to specific nominations, but Senator Byrd appealed the ruling and it was overturned on a 38–54 vote.

Majority Leader Byrd also established new rules by simple-majority vote that were in direct contradiction to the plain language of the written Standing Rules of the Senate. On November 9, 1979, he established a requirement that the Presiding Officer rule on questions of germaneness when a point of order against legislating on appropriations bills is raised. Rule XVI clearly requires that the Presiding Officer submit such questions to the Senate without ruling, but Senator Byrd asserted a point of order that the Presiding Officer should not submit the question to the Senate in certain circumstances. The Presiding Officer sustained the ruling. It was appealed but the ruling was sustained by a vote of 44–40.¹⁹⁴

Senator Merkley went on to cite additional examples.¹⁹⁵

194. Memorandum from Senator Jeff Merkley, *supra* note 191.

195. *See id.* Senator Merkley cited the following examples:

1977 The Senate limits post-cloture filibusters by establishing that the Chair must take the initiative to rule out of order amendments that are dilatory or otherwise out of order under cloture

December 12, 1979 The Senate establishes that if the Senate stays in session past midnight on the intervening day after a cloture motion is filed, then the cloture vote doesn't occur until an hour after convening on the next legislative day (ruling sustained 43–32)

November 9, 1979 The Senate establishes that the Chair should rule on whether an amendment is legislating on appropriations rather than submitting it to the Senate and allowing a defense of germaneness if the underlying House appropriations bill has no legislative language to which the amendment is germane (ruling sustained 44–40)

March 5, 1980 The Senate establishes that that motions to proceed to nominations and treaties cannot be filibustered (ruling reversed 38–54)

June 11, 1980 The Senate established that during post-cloture time, a motion to reconsider a vote by which a tabling motion had failed by large margins is dilatory (ruling sustained 53–31)

June 10, 1980 The Senate established that a quorum call during post-cloture time is dilatory even though a motion to reconsider has been made since a quorum was last demonstrated (ruling sustained 52–34)

August 5, 1980 The Senate established that a cloture motion takes precedence over a time agreement ordered by unanimous consent on the same measure (ruling sustained 72–16)

August 20, 1980 The Senate established that a cloture motion may be filed on a pending amendment even if it has lower precedence than an

Five of the previous instances that the Senate had overturned the Chair had involved delay and the cloture process in particular.¹⁹⁶ But it is nonetheless true that most of the times that the Senate has overturned the ruling of the Chair in recent practice have involved matters of lesser consequence. Many of those instances have involved interpretations of the scope of conference committees,¹⁹⁷ committee juris-

amendment that is the immediately pending question (ruling sustained 74–15)

September 25, 1986 The Senate established that procedural motions or requests do not constitute speeches for purposes of the two-speech rule (ruling reversed 5–92)

December 11, 1985 The Senate allows a conference report on the basis that everything included is “relevant,” even though multiple provisions have been ruled to violate the scope of the conference committee’s authority (ruling reversed 27–68)

April 28, 1987 The Senate establishes that the Presiding Officer should defer to the Budget Committee Chair on whether an amendment violates Section 201(i) of the Budget Act (ruling sustained 50–46)

May 13, 1987 The Senate establishes that a Senator may not decline to vote when it is done for the purposes of delaying the announcement of that vote (ruling reversed 46–54)

March 16, 1995 The Senate allows legislating on appropriations bills (ruling reversed 42–57) [this precedent was reversed in 1999 by resolution]

May 23, 1996 The Senate establishes that a budget resolution with reconciliation instructions for a measure increasing the deficit is appropriate (ruling sustained 53–47)

October 3, 1996 The Senate broadens the scope of allowable material in conference reports (ruling reversed 39–56) [this precedent was reversed in 2000 by language in an appropriations bill]

June 16, 1999 The Senate sustained a ruling that a motion to recommit a bill with instructions to report back an amendment had to be filed before the amendment filing deadline (ruling sustained 60–39)

May 17, 2000 The Senate establishes that it is the Chair’s prerogative to rule out of order non-germane precatory (sense-of-the-Senate or -of-Congress) amendments (ruling reversed 45–54)

October 6, 2011 The Senate establishes that motions to suspend the rules in order to consider non-germane amendments post cloture are dilatory and not allowed (ruling reversed 48–51)

Id.

196. See 157 CONG. REC. S6315 (daily ed. Oct. 6, 2011) (motions to suspend the rules post-cloture); 133 CONG. REC. 12252–56 (May 13, 1987) (requests to decline to vote as dilatory); 132 CONG. REC. 26139–54 (Sept. 25, 1986) (procedural motions or requests post-cloture); 126 CONG. REC. 4729–32 (Mar. 15, 1980) (eliminating filibuster on the motion to proceed to a nomination); 95 CONG. REC. 2125–31, 2214–75 (Mar. 10–11, 1949) (whether motions were subject to cloture); 88 CONG. REC. 9335 (Dec. 4, 1942) (whether a quorum call was dilatory).

197. See 142 CONG. REC. 27148 (Oct. 3, 1996); 131 CONG. REC. 35871 (Dec. 11, 1985).

dictions,¹⁹⁸ whether a particular amendment was germane,¹⁹⁹ or whether an amendment violated the prohibition of legislating on an appropriations bill.²⁰⁰

So changing Senate procedure through an appeal of the ruling of the Chair was not “breaking the rules to change the rules.” The Standing Rules of the Senate and the precedents of the Senate provide for doing so. Senator Reid acted fully within the Rules of the Senate in creating the Reid Precedent on November 21, 2013. But the Reid Precedent nonetheless made a significant change in Senate procedures. And that change will have significant consequences for future Senates.

The tools to expand the Reid Precedent are readily available to any future Majority Leader. A future Majority Leader need only raise a point of order and appeal the ruling of the Chair when appeals are not debatable. A Majority Leader can create such a posture by, among other means, filing a cloture petition on a matter, holding the cloture vote, and entering a motion to reconsider the vote by which the Senate fails to invoke cloture. Then, upon reconsideration, the future Majority Leader can move to reconsider the vote by which the Senate failed to invoke cloture and before invoking cloture on reconsideration, raise a point of order that the vote for cloture on particular matters is by majority vote. Thus a future Majority Leader can replicate and broaden the Reid Precedent whenever that future Leader has the votes of a majority of the Senate to do so.

VII.

THE CONSTITUTIONAL OPTION

The Reid Precedent did not rely on another route to changing the filibuster, often called “the Constitutional Option” to amend the Standing Rules of the Senate. Both the Reid Precedent and the Constitutional Option to amend the Standing Rules have been referred to as

198. See 135 CONG. REC. 20462–63 (Sept. 14, 1989); 129 CONG. REC. 29503–11 (Oct. 27, 1983); 94 CONG. REC. 6552–61 (May 27, 1948); 93 CONG. REC. 8423–30 (July 3, 1947); 93 CONG. REC. 5219–39, 5293–94 (May 4–5, 1948).

199. See 136 CONG. REC. 8591–93 (Apr. 27, 1990); 126 CONG. REC. 13876–77 (June 10, 1980); *id.* at 13864–69 (June 10, 1980); *id.* at 1201–03 (Jan. 30, 1980);

200. See 146 CONG. REC. 8257–86 (May 17, 2000); 141 CONG. REC. 8180–87 (Mar. 16, 1995); 138 CONG. REC. 19471–76 (July 27, 1992); 137 CONG. REC. 33790–96 (Nov. 22, 1991); 135 CONG. REC. 29164–70 (Nov. 15, 1989); *id.* at 20462–63 (Sept. 14, 1989); 130 CONG. REC. 19527–28 (June 28, 1984); 129 CONG. REC. 31665–74 (Nov. 9, 1983); *id.* at 22423–28 (Aug. 3, 1983); 128 CONG. REC. 14834 (June 23, 1982); 127 CONG. REC. 21912–13 (Sept. 24, 1981); 126 CONG. REC. 33557–58 (Dec. 11, 1980); *id.* at 31060–63 (Nov. 25, 1980); 95 CONG. REC. 10742–67 (Aug. 4, 1949); *id.* at 10262–78 (July 27, 1949); 90 CONG. REC. 3037–49 (Mar. 24, 1944); 70 CONG. REC. 4558 (Feb. 27, 1929).

the “nuclear option.” But while the Reid Precedent is readily repeatable, the Constitutional Option to change the Standing Rules of the Senate at the beginning of a Congress has yet to be successfully implemented.

The Constitutional Option to amend the Standing Rules of the Senate refers to the theory that the Senate could at the beginning of a Congress revert to general parliamentary law, under the Constitution itself, and operate without the constraint of the supermajority required by Senate Rule XXII.²⁰¹ Opponents of the Constitutional Option argue that the Senate is a continuing body whose rules and procedures carry over from one Congress to the next and bind the deliberations of future Congresses until changed.²⁰²

For example, in 1921, Senator Henry Cabot Lodge expressed the idea of a continuing Senate:

[The Senate] has never been, legally speaking, reorganized. It has been in continuous and organized existence for 132 years, because two-thirds of the Senate being always in office, there has never been such a thing as the Senate requiring reorganization as is the case with each newly elected House. . . . There may be no House of Representatives, but merely an unorganized body of members elect; there may be no President duly installed in office. But there is always the organized Senate of the United States.²⁰³

Senator Thomas Walsh of Montana, an early proponent of the Constitutional Option, responded to the idea of a “continuing Senate” in 1917:

The idea of a “continuing Senate” is at war with the theory of parliamentary government the world over. It is an essential conception in such a system that at intervals representatives assemble in one or more houses, transact such business as demands their attention, and then as a legislative body pass out of existence, a new assembly coming into being in conformity with organic law, or at the call of the sovereign authority.²⁰⁴

Vice Presidents have, on rare occasion, enunciated the theory of the Constitutional Option while sitting as President of the Senate. In

201. See, e.g., Gold, *supra* note 3, at 44–63; Gold & Gupta, *supra* note 3, at 217–60; Memorandum and Brief Concerning the Need for a New Anti-Filibuster Rule Permitting a Majority of the Total Senate To Close Debate, and, Supporting the Proposition that the Senate of the Ninetieth Congress Has Power To Enact Such a Rule at the Opening of the New Congress by Majority Vote, Unfettered by Any Restrictive Rules of Earlier Congresses (January 1967) (on file with author).

202. See Gold, *supra* note 3, at 48;

203. CARO, *supra* note 3, at 40.

204. Gold, *supra* note 3, at 48.

1957, Vice President Richard Nixon offered an advisory opinion in response to a parliamentary inquiry from Senator Hubert Humphrey of Minnesota, saying:

It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.

Any provision of the Senate rules adopted in a previous Congress that has the expressed or practical effect of denying a majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional.²⁰⁵

On several occasions, at the beginning of new Congresses in 1953, 1957, 1959, 1961, 1963, 1967, 1969, 1971, and 1975, proponents of the Constitutional Option have tried to bring about a change in the Cloture Rule using this inherent Constitutional authority to change the rules at the beginning of a new Congress, but other Senators ultimately stymied their efforts.²⁰⁶ More recently, at the beginning of new Congresses in 2011 and 2013, Senators Tom Harkin of Iowa, Jeff Merkley of Oregon, and Tom Udall of New Mexico have renewed these efforts.²⁰⁷

The Reid Precedent did not rely on the theory of the Constitutional Option to amend the Standing Rules at the beginning of a Congress, and thus does not serve as a precedent for implementing the Constitutional Option to change the Standing Rules of the Senate at the beginning of a new Congress.

VIII.

POSSIBLE REACTIONS TO THE REID PRECEDENT

The Senate could react to the Reid Precedent in a number of ways. It could either scale back or expand the Precedent. Possible expansions could include applying it to legislation as well as nominations, to nominations to the Supreme Court, to discharging committees of nominations, to confirming nominations notwithstanding the objec-

205. 103 CONG. REC. 178 (1957). *See also* 105 CONG. REC. 96 (1959).

206. *See, e.g.*, Gold, *supra* note 3, at 48–63; Gold & Gupta, *supra* note 3, at 217–60.

207. *See* 157 CONG. REC. S19–54 (daily ed. Jan. 5, 2011); 159 CONG. REC. S10–12 (daily ed. Jan. 3, 2013); *id.* at S21–22 (daily ed. Jan. 4, 2013); *id.* at S27–32 (daily ed. Jan. 22, 2013); *id.* at S266–70 (daily ed. Jan. 24, 2013).

tions of home-state Senators, and to confirming nominations notwithstanding the objections of the Senate Minority Leader.

A. Republican Reaction

In the immediate wake of the Reid Precedent, Senate Republicans slowed the confirmation process as much as they could.²⁰⁸ Majority Leader Reid nonetheless marched through as many confirmations as time would allow, arguably changing the Federal judiciary for decades to come.²⁰⁹ More progressive case law in the early twenty-first century will likely be one of the legacies of the Reid Precedent.

Within the Senate, as Republican Senators looked forward to a Republican-controlled Senate after the 2014 elections, some questioned whether Majority Leader McConnell would employ the Reid Precedent to help Republicans pass matters through the Senate, but Republican Senators were divided on what to do.²¹⁰

After the 2014 elections that gave Republicans the Senate majority, Senator Alexander said, “I was greatly opposed to what Senator Reid and the Democratic majority did on November 21st. And I don’t think you respond to bad behavior with more bad behavior.”²¹¹ Senator John McCain of Arizona said, “After the way we complained about what they did, it would be rank hypocrisy” to keep the majority-vote standard.²¹² “We said this was outrageous what they did,” Senator McCain said.²¹³ “Not only how they did it, but what they did, OK? Some of my Republican colleagues seem to have forgotten that. Some

208. See, e.g., Jennifer Bendery, *Six Months Later, Filibuster Reform Means Republicans Delay Nominees They Confirm Anyway*, HUFFINGTON POST (May 21, 2014), http://www.huffingtonpost.com/2014/05/21/senate-filibuster-reform-obama-nominees_n_5358863.html.

209. See, e.g., Alex Rogers, *Obama’s Judicial Legacy May Have Been Settled This Week*, TIME (Dec. 19, 2014), <http://time.com/3640970/barack-obama-judges-courts/>; Niels Lesniewski, *How the Nuclear Option Changed the Judiciary*, ROLL CALL (Dec. 19, 2014), <http://www.rollcall.com/news/home/nuclear-option-judiciary-nominations>; Burgess Everett, *How Going Nuclear Unclogged the Senate*, POLITICO (Aug. 22, 2014), <http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238>.

210. See Alan Fram, *GOP May Keep Weaker Senate Filibuster Rule*, ASSOCIATED PRESS (Dec. 5, 2014) <http://bigstory.ap.org/article/f16144a084574ddf8048ee6344971c ce/gop-may-keep-easier-senate-filibusters-next-year>; Sahil Kapur, *Will Mitch McConnell Carry Out His Threat To Nuke The Filibuster?*, TALKING POINTS MEMO (Dec. 4, 2014), <http://talkingpointsmemo.com/dc/mitch-mcconnell-filibuster-114th-congress>.

211. Kapur, *supra* note 210.

212. Fram, *supra* note 210.

213. Burgess Everett & Seung Min Kim, *GOP May Abolish Supreme Court Filibusters*, POLITICO (Jan. 24, 2015), <http://www.politico.com/story/2015/01/gop-may-abolish-supreme-court-filibusters-114540>.

selective amnesia.”²¹⁴ Senator Lindsey Graham of South Carolina backed reverting to the sixty-vote threshold, saying, “When you have to reach across the aisle” to win needed votes, “you’re probably going to get a better product than when you don’t.”²¹⁵

Senators like Orrin Hatch of Utah and Ted Cruz of Texas, however, indicated that they wanted the Senate to stay with the majority-vote threshold set by the Reid Precedent.²¹⁶ Senator Hatch said, “They changed the rule, and frankly, I can live with the change. But I’d be against any kind of a change to [the rules for nominations to] the Supreme Court now or to any kind of legislation.”²¹⁷ Hatch told conservative legal scholars at a Federalist Society meeting after the 2014 election:

We shouldn’t return to the old rule. We should teach these blunderheads that they made a big mistake. And we have the votes to stop bad judges if we want to. And frankly I intend to win with our candidate the presidency in 2016 and we will give them a taste of their own medicine.²¹⁸

Republican Senator Richard Shelby of Alabama said, “A lot of people think it would be a disadvantage to us” to revive the sixty-vote threshold, “What if we had a president?”²¹⁹ Similarly, Judiciary Committee Chairman Chuck Grassley favored keeping the majority-vote threshold of the Reid Precedent, especially because Senate control could change again in 2016, saying, “Republicans could go back. But Democrats [could] go back, so you’re going to have one set of rules for Republicans and one set of rules for Democrats? Republicans are going to be hurt either way.”²²⁰ Senator John Thune of South Dakota, a Member of the Republican Senate leadership, predicted: “My guess is even people who might have been inclined to go back are being persuaded more all the time that that’s not practical.”²²¹ At a post-election forum sponsored by *The Wall Street Journal*, Senator McConnell acknowledged that rules changes tend to move in only one direction, saying, “It’s impossible to unring a bell.”²²²

214. *Id.*

215. Fram, *supra* note 210.

216. Manu Raju, *GOP Unlikely to Reverse ‘Nuclear Option’*, POLITICO (Dec. 3, 2014), <http://www.politico.com/story/2014/12/gop-senate-filibuster-113308>.

217. Kapur, *supra* note 210.

218. *Id.*

219. Fram, *supra* note 210.

220. See Everett & Kim, *supra* note 213.

221. Fram, *supra* note 210.

222. See *id.*

In January 2015, Republican Senators Lamar Alexander, Roy Blunt, and Mike Lee floated a proposal to expand the Reid Precedent to apply to Supreme Court nominees, but only if two-thirds of the Senate voted to change Rule XXII.²²³ Majority Whip John Cornyn endorsed the plan to proceed through the regular order, saying: “Senators Lee and Alexander have this idea that I think makes a lot of sense, which is to take it back through committee and pass a rule change that enjoys broad support.”²²⁴ Senator Alexander explained, “The problem with what the Democrats did in November of 2013 was not what they did, but the way they did it.”²²⁵ Senator Reid’s spokesman Adam Jentleson replied that “Democrats appreciate the vote of confidence from Republicans in the wisdom of our rules change.”²²⁶ Republicans dropped their rules proposal due to lack of support.²²⁷ Republicans took no action to roll back the Reid Precedent during their time in control of the Senate in 2015–2016.

B. Legislation

Days before the Reid Precedent, Republican Leader McConnell threatened to counter any such change with a like change for legislation generally:

There is not a doubt in my mind that if the majority breaks the rules of the Senate, to change the rules of the Senate with regard to nominations, the next majority will do it for everything. . . .

I wouldn’t be able to argue a year and a half from now, if I were the majority leader, to my colleagues that we shouldn’t enact our legislative agenda with a simple 51 votes, having seen what the previous majority just did. I mean, there would be no rational basis for that.²²⁸

In the same colloquy, Senator Alexander threatened a parade of horrors that Republicans would enact if Republicans were able to pass anything they wanted with a majority vote, including (1) repealing ObamaCare, (2) creating a voucher program for elementary education, (3) completing a nuclear waste repository in Yucca Mountain, Nevada, (4) restraining the Consumer Financial Protection Bureau, (5) drilling in the Arctic National Wildlife Refuge and building the Key-

223. See Everett & Kim, *supra* note 213.

224. *Id.*

225. *Id.*

226. *Id.*

227. Daniel Strauss & Burgess Everett, *Filibuster Divides GOP 2016 Contenders*, POLITICO (July 6, 2015), <http://www.politico.com/story/2015/07/filibuster-divides-gop-2016-contenders-119750>.

228. 159 CONG. REC. S4541 (daily ed. June 18, 2013).

stone Pipeline, (6) enacting a \$1 trillion deficit-reducing change to entitlement programs, (7) enacting a nationwide right-to-work law, (8) prohibiting EPA regulation of greenhouse gases, (9) repealing inheritance taxes, and (10) repealing Davis-Bacon Act requirements for paying the prevailing wages on public works projects.²²⁹

Throughout much of 2015, many Republican Members of the House of Representatives, frustrated as House Members often are with the inability of their Senate Colleagues to keep pace with their Chamber, pressed Senate Republicans to extend the Reid Precedent to legislation. In February 2015, as House Republicans sought to force Senate Democrats to take up their version of a Department of Homeland Security funding bill, some House conservatives called on Senate Majority Leader McConnell to turn to the nuclear option.²³⁰ When NBC's Chuck Todd asked House Majority Leader Kevin McCarthy whether he would trigger the nuclear option, he answered, "That's not nuclear, when 57 percent of the American representation says [the bill is] wrong. That's not in the Constitution. I think they should change the rules."²³¹ In September 2015, Representative Raúl Labrador found reason to eliminate the filibuster in legislation to scuttle the Iran agreement, saying that it was time for the Senate to "go nuclear on this, forget about the filibuster."²³² Also in September 2015, several House

229. See *id.* at S4537–38.

230. See Matt Fuller, *House Conservatives Call on Senate to Change Filibuster Rules for DHS*, ROLL CALL (Feb. 12, 2015), <http://www.rollcall.com/news/home/house-conservatives-call-on-senate-to-change-filibuster-rules-for-dhs>. At a panel discussion with conservative lawmakers, Republican Representative Raúl Labrador of Idaho said, "Mitch McConnell can change the rules of the Senate. And this is important enough for Mitch McConnell to change the rules of the Senate." *Id.* Republican Representative Mick Mulvaney of South Carolina indicated that he was open to setting a new Senate precedent for simple majority votes, saying, "The rule is by tradition. And the rule [has] not been sacrosanct since the beginning—the rule has been changed from time to time." *Id.*

231. *House Majority Leader: The Senate Should Change Filibuster Rules*, NBC NEWS (Mar. 1, 2015), <http://www.nbcnews.com/meet-the-press/house-majority-leader-senate-should-change-filibuster-rules-n315171>.

232. Matt Fuller (@MEPFuller), TWITTER (Sept. 9, 2015, 9:13 AM), <https://twitter.com/MEPFuller/status/641645548496359424>. Representative Labrador told a September Conversations with Conservatives event, "One of the ways we have suggested is to actually have a motion of approval where we show we don't approve the deal. The Senate should then force a vote on a motion of approval, and they should go nuclear in the Senate and allow that to happen." Lauren Fox, *From Frustrated Conservatives, a Call to Take Away the Modern Filibuster*, THE ATLANTIC (Sept. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/09/from-frustrated-conservatives-a-call-to-take-away-the-modern-filibuster/445824/>. Similarly, Representative Mulvaney told the event:

If we preserve these filibuster rules on both this [defunding Planned Parenthood] and, say, Iran, then everybody in here has the right to ask,

Republicans wrote to Majority Leader McConnell urging him to do away with the filibuster.²³³ House Republican Conference Vice Chairwoman Lynn Jenkins of Kansas released a statement calling for the end of the sixty-vote threshold, saying, “Harry Reid opened the door to this last Congress. It’s time Senate Republicans walked through that door.”²³⁴ “Our nation cannot afford a government continually held hostage by Democrats unwilling to hold a vote on the critical issues facing America,” Jenkins continued.²³⁵ “These votes are simply too important to continue to be ignored.”²³⁶ At a House Republican Leadership news conference, House Majority Leader McCarthy said, “Yes, we are upset with who sits in that White House, but we have power in the House, we have power in the Senate, if the Senate would simply change a rule.”²³⁷ Leader McCarthy said, “It’s not the Constitution. You ought to let their people have the voice.”²³⁸ When reporters challenged Representative Matt Salmon about a strategy to send the Sen-

“How would things have been different if Harry Reid were still in charge?” And the answer would be: “There is no difference. It is exactly the same and the election did not have any consequences.”

Id.

233. Julian Hattem, *House GOP Wants McConnell to Go Nuclear on Iran Agreement*, THE HILL (Sept. 16, 2015), <http://thehill.com/policy/national-security/253766-house-gop-puts-pressure-on-mcconnell-to-go-nuclear> [hereinafter Hattem, *House GOP Wants McConnell to Go Nuclear*]. A day after he sent a letter to Senator McConnell asking him to change the Senate’s rules, Representative Vern Buchanan of Florida said, “This was something with the Iran deal, the fact that it didn’t get debated, it didn’t get voted on—there’s a lot of people that are very, very upset about this.” *Id.* Representative Steven Palazzo of Mississippi wrote Senator McConnell calling for a change in rules for the Iran bill, writing, “If Minority Leader Reid was willing to use this tactic to push through something as simple as judicial nominees despite the objections of Republicans, it is time that Republican leadership utilize the procedure as a matter of national and global security.” *Id.* Representative Lamar Smith of Texas circulated a letter among fellow lawmakers saying, “Some pieces of legislation, like the Iran nuclear deal, are simply so consequential that they demand revisions to the Senate’s procedures.” *Id.* “Our request to eliminate the filibuster for some votes simply underscores that in a democracy the majority should decide,” he added, saying, “The super-majority now required to advance legislation is 60 votes, which is not serving our country well.” *Id.* Some fifty-seven House Republicans signed Representative Smith’s letter, including Judiciary Committee Chairman Bob Goodlatte, Rules Committee Chairman Pete Sessions, and Homeland Security Committee Chairman Michael McCaul. Julian Hattem, *57 House GOPs Call for Senate to Go ‘Nuclear’ on Iran Deal*, THE HILL (Sept. 17, 2015), <http://thehill.com/policy/national-security/254130-57-house-gops-call-for-senate-to-go-nuclear-on-iran-deal>.

234. Emma Dumain & Niels Lesniewski, *McConnell Faces More Calls for ‘Nuclear Option’ in Senate*, ROLL CALL (Sept. 18, 2015), <http://www.rollcall.com/news/home/nuclear-option-mcconnell-senate>.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

ate a continuing resolution that would defund Planned Parenthood as a policy rider—that it would not withstand a veto in the White House, let alone a Senate filibuster—the Arizona Republican answered, “I think there needs to be a lot of added pressure . . . on Mitch McConnell to look at the nuclear option and expanding it from what Harry Reid did.”²³⁹

Representative Mark Meadows of North Carolina expressed frustration based on the popular perception of what a filibuster should be: “The Senate leader needs to look at filibusters to be just that—filibusters where people have to stand and talk.”²⁴⁰ Representative Meadows continued, “Most of us watched Jimmy Stewart [in *Mr. Smith Goes to Washington*] and that was our idea of what a filibuster was, not casting a vote and seeing if you get to sixty votes and going out and having a steak.”²⁴¹ House Majority Leader McCarthy seemed to agree.²⁴²

In November 2015, House Republicans continued to call for change in the Cloture Rule.²⁴³ Representative Trent Franks of Arizona introduced a resolution, cosponsored by thirteen Representatives, saying:

[T]he Senate should negotiate and adopt, under its existing rules of a supermajority vote to invoke cloture, a parliamentary procedure to replace the cloture motion to call up legislation and make it pending before the Senate, with a “non-debatable motion to proceed to consider” that allows for the minority to offer a reasonable number of germane amendments, subject to debate, once the measure is pending for consideration.²⁴⁴

And in December, Virginia Representatives Morgan Griffith and Bob Goodlatte called for changing the rules.²⁴⁵

239. *Id.*

240. See Hattem, *House GOP Wants McConnell to Go Nuclear*, *supra* note 233.

241. *Id.*

242. Mark Hensch, *McCarthy Rips GOP-led Senate*, THE HILL (Sept. 18, 2015), <http://thehill.com/homenews/house/254173-mccarthy-rips-gop-led-senate>. Leader McCarthy also recalled his film education on Senate procedure, saying:

We all watched *Mr. Smith Goes to Washington* and we understood what a filibuster is—you stood on the floor and talked. Today, that’s not the case. Inside the Senate you have to have 60 votes instead of a majority. You know what? That’s not in the Constitution. That’s a rule.

Id.

243. See Lindsey McPherson, *House GOP Keeps Pushing to Change Filibuster Rules*, ROLL CALL (Nov. 6, 2015), <http://www.rollcall.com/news/home/house-keeps-pushing-change-filibuster-rules>.

244. H.R. Res. 545, 114th Cong. (2015).

245. Alicia Petska, *Bob Goodlatte, Morgan Griffith Key to Changes in House Rules: When Roanoke-area Legislators Speak About New Rules, Other Members of the House of Representatives Listen*, ROANOKE TIMES (Dec. 13, 2015), <http://www.roanoke.com/news/local/bob-goodlatte-morgan-griffith-key-to-changes-in-house-rules/>

As the Presidential contest heated up in 2015, several Republican Presidential candidates advocated using the Reid Precedent.²⁴⁶ Presidential candidate Senator Ted Cruz, however, told conservative radio host Hugh Hewitt in June that he believed “ending the legislative filibuster would ultimately undermine conservative principles.” Senator Cruz added, “I think the legislative filibuster, the supermajority requirement in the Senate, more often than not slows bad liberal, radical ideas.”²⁴⁷

article_e0c4f692-cb2f-5b8b-abe4-99aa682ef0aa.html. Representative Griffith said: “If we can make the process in the House work better and shame the Senate into making their process work better then—in five years, ten years, fifty years, 100 years from now—nobody will remember how it got done, but the Republic will be stronger.” *Id.* Representative Goodlatte said, “I think the Senate has to take a really serious look at how Congress as a whole is being weakened by their inability to act because of these rules.” *Id.* Representative Goodlatte recalled Republicans’ talking points during the 2014 elections:

We would say we had piled up 400 votes on Harry Reid’s desk, but if you elect a Republican Congress we’ll be able to put those bills on Barack Obama’s desk. That’s happened in a few instances, but by the end of this Congress there are going to be hundreds of bills piled up on Mitch McConnell’s desk.

Id.

246. Governor Rick Perry, Governor Bobby Jindal, Carly Fiorina, and Governor Mike Huckabee all told conservative radio host Hugh Hewitt that they would use the Reid Precedent to get rid of the filibuster and repeal the Affordable Care Act. Strauss & Everett, *supra* note 227. Governor Chris Christie told Hewitt in September, “You bet I’d get rid of the filibuster.” Steven Dennis, *Chris Christie Slams ‘Done Nothing’ Republican Congress*, ROLL CALL (Sept. 3, 2015), <http://www.rollcall.com/news/home/chris-christie-slams-done-nothing-republican-congress>. In an interview with CNBC’s John Harwood, Governor Scott Walker said that he wanted the Senate to get rid of the filibuster, and thought that the Senate should be able to pass “anything” with a simple majority vote. Andrew Prokop, *Scott Walker to Senate: Get Rid of the Filibuster, Repeal Obamacare With 51-vote Majority*, VOX (Sept. 1, 2015), <http://www.vox.com/2015/9/1/9241669/scott-walker-filibuster>. Governor Walker explained, “[T]he Constitution doesn’t require 60 votes for anything in the United States Senate. States all across America operate on simple majorities. The checks and balances are between the chambers and between the legislative branches.” At a presidential primary debate, Governor Walker said of legislation to defund Planned Parenthood: “Forget about the 60-vote rule,” and, “Pass it with 51 votes, put it on the desk of the President and go forward and actually make a point. This is why people are upset with Washington.” Opinion, *Republican Filibuster: Blowing Up the Senate’s 60-vote Rule Would Gain No Policy Victory*, WALL ST. J. (Sept. 20, 2015), <http://www.wsj.com/articles/republican-filibuster-1442789204>. On CNN’s program *State of the Union*, Governor John Kasich told Jake Tapper about the Iran agreement: “I think they ought to go to the nuclear option in the United States Senate. It ought to be decided by 51 votes, not by 60 votes or some filibuster.” Governor Kasich said, “There ought to be a vote, and there ought to be extreme measures taken in the United States Senate to achieve it. It is really critical.” Paige Hymson, *John Kasich: Invoke ‘Nuclear Option’ to Stop Iran Deal*, CNN (Sept. 20, 2015), <http://www.cnn.com/2015/09/20/politics/john-kasich-iran-nuclear-deal/>.

247. Prokop, *supra* note 246.

On the Senate floor, Senator Jerry Moran of Kansas, while saying that “I have been a supporter of the rules that allow for a filibuster, that require sixty votes for the Senate to advance an issue,” nonetheless appeared to agree with the calls for a majority vote on the Iran agreement, saying:

In my view, the time has come for us to consider this issue of how the filibuster works. It is because this issue is so important and the outcome of this debate so valuable to the future of our country and the security of the world that in this case, we need to move forward with a majority vote to allow this agreement to be rejected.²⁴⁸

In response to growing pressure from Republican Senators angered with the filibuster, in October 2015, Leader McConnell resorted to a time-honored Washington solution,²⁴⁹ and appointed a special task force to explore changes to the filibuster rule, including whether to eliminate filibusters on motions to proceed to legislation.²⁵⁰ Leader McConnell called on his ally Senator Alexander and Senate Rules Committee Chairman Roy Blunt, along with three freshman Senators, James Lankford of Oklahoma, Cory Gardner of Colorado, and Thom Tillis of North Carolina, to form the task force.²⁵¹ Senator Alexander hoped to implement changes at the start of 2016, when neither party could be sure of who would control the Senate after the 2016 election.²⁵² Senator Lankford said, “At times, the rules and practices of the Senate have left Americans and Members of the Senate deeply frustrated. Senate systems that should serve the Nation are currently blocking debate and slowing progress, instead of promoting it.”²⁵³ Freshman Senator Steve Daines of Montana raised the issue at the Caucus, asking what could be done to get more bills moving.²⁵⁴ A senior Senator said freshmen were pushing to get rid of the filibuster on the motion to proceed, but senior Senators pushed back, warning

248. 161 CONG. REC. S6634 (daily ed. Sept. 15, 2015).

249. As Representative Shirley Chisholm once said, “Congress seems drugged and inert most of the time. Even when the problems it ignores build up to crises and erupt in strikes, riots, and demonstrations, it has not moved. Its idea of meeting a problem is to hold hearings or, in extreme cases, to appoint a commission.” Colby Itkowitz, *Hating Congress? That’s Always Been in Vogue*, WASH. POST (Aug. 9, 2014), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/08/09/hating-congress-thats-always-been-in-vogue/>.

250. Alexander Bolton, *Senate Republicans Open Door to Weakening the Filibuster*, THE HILL (Oct. 12, 2015), <http://thehill.com/homenews/senate/256631-senate-gop-opens-door-to-weakening-the-filibuster>.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

that Republicans would regret curbing or eliminating the filibuster when Democrats regained the majority.²⁵⁵ Senator Alexander showed signs of changing his position, recalling his efforts in 2011 and 2013:

I argued at the time that what we needed was a change of behavior more than a change of rules. But I've changed my mind about that. And I think the world around us has changed and that the Senate itself has changed and that we probably need a change in rules.²⁵⁶

As part of budget negotiations in late October 2016, Majority Leader McConnell proposed a plan that would prevent Senators from being able to filibuster a motion to proceed to appropriation bills that had received bipartisan support in the Appropriations Committee.²⁵⁷ When he failed to gain inclusion of the proposal in the year-end spending bill, Leader McConnell asked the Alexander-Blunt task force to review the proposal.²⁵⁸ Leader McConnell's chief deputy, Senator John Cornyn of Texas, explained:

I think there's a big concern that I think this deal goes a long way to help alleviate, by getting those caps into next year. But if the minority can basically force us into an omnibus or (a continuing resolution) by just filibustering the individual appropriation bills, that's really pretty damaging to the institution and our ability to conduct business. So there is a serious look being taken to that.²⁵⁹

Similarly, some Republican voices argued for eliminating the filibuster for all appropriations bills and for all judicial nominations, though retaining it for other legislation.²⁶⁰

By November of 2015, some junior Republican Senators had begun to express publicly their desire for change to the Cloture Rule, targeting the sixty-vote threshold to start debate on spending measures.²⁶¹ Senator Mike Rounds of South Dakota said, "I think it's appropriate to be able to debate a bill without having to have a sixty-vote margin. I think when they originally put the rules in place, it was a

255. *Id.*

256. *Id.*

257. See Tom LoBianco & Manu Raju, *McConnell Hopes to Stop Dems from Blocking Spending Bills*, CNN (Oct. 28, 2015), <http://www.cnn.com/2015/10/28/politics/mitch-mcconnell-senate-rules-change/index.html>.

258. *Id.*

259. *Id.*

260. Liam Donovan, *The Omnibus Dilemma*, MEDIUM (Dec. 22, 2015), <https://medium.com/@LPDonovan/the-omnibus-dilemma-b2bd52cdf34#.va0xzc6tl>; Jay Cost & Randy E. Barnett, *Fix the Filibuster, But Don't Destroy It*, WEEKLY STANDARD (Nov. 2, 2015), <http://www.weeklystandard.com/fix-the-filibuster/article/1051191>.

261. See Seung Min Kim, *Republicans Weigh Battle over Filibuster Rules*, POLITICO (Nov. 5, 2015), <http://www.politico.com/story/2015/11/senate-republicans-filibuster-rule-change-215501>.

mistake not to have made that change in the first place.”²⁶² Senator Daines endorsed eliminating the sixty-vote threshold to bring spending bills to the floor, saying, “What it does is it allows us to get these bills on the floor for debate.”²⁶³ Senator Daines said, “The Senate has been referred to as the greatest deliberative body. This would help that deliberative body deliberate more by getting the bills on the floor for debate.”²⁶⁴ Senator Shelby warmed to the idea, saying, “I like the idea of 51 to move. I used to [*sic*] would not.”²⁶⁵ Senator Shelby added: “You know, it’s not the law. It’s not the statute. It’s not the Constitution.”²⁶⁶ And Senator Tim Scott of South Carolina expressed interest in changing the rules even more broadly, saying: “I’m actually pretty bullish on changing all the rules as I know them, quite frankly. Nominations, everything . . . I’m open to anything that makes this body actually functioning.”²⁶⁷

The Alexander-Blunt task force appeared to focus on lowering the threshold for cloture on a motion to proceed on appropriations from sixty to a majority.²⁶⁸ Senator Tillis, a Member of the task force, said, “It’s not the extreme position. This is really: How do you make the process more efficient and what kinds of things can you do to maintain the basic rules of the game but allow us to get a few more plays in?”²⁶⁹ Senator Ron Johnson of Wisconsin agreed, saying, “I think that’s not a bad idea.”²⁷⁰ But Senator Johnson limited his endorsement to the motion to proceed, saying, “That’s an idea certainly worth considering, but only on the motion to proceed.”²⁷¹

Other Senior Republicans appeared more reticent. “I tend to be an institutionalist who really is hesitant to change the rules, because I think it usually boomerangs on you,” said Senator Susan Collins of Maine.²⁷² “And a lot of times, it’s done for short-term political advantage without taking into account the history of the Senate,” she continued.²⁷³ Senator McCain continued to warn that changes to the filibuster rules would lead to a “slippery slope.”²⁷⁴ “Every one of

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *See id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

these Republican Senators now that are saying we should consider 51 votes on appropriations bills were hard against 51 votes for judicial appointees two years ago,” Senator McCain said. “So where’s the consistency?”²⁷⁵

Ultimately, the 2015–2016 Republican majority under Senator McConnell did not extend the Reid Precedent to legislation generally, and that outcome can be partly attributed to division among Senate Republicans. But it can also be attributed to simple pragmatism—with President Obama still in the White House, eliminating the filibuster for legislation would still not allow Republicans to enact the laws they wanted. The Republican-leaning *Wall Street Journal* editorial page expressed this pragmatic view in September 2015:

If Republicans do want to convert the Senate into a high-end version of the House, where even a near-majority is powerless, then they should at least do so when they can accomplish something significant with a Republican President. The precise wrong time is 14 months ahead of an election that may result in a new Democratic President and Senate majority under leader-in-waiting Chuck Schumer.

Now that Mr. Reid has cashiered the filibuster for nominees, we agree that Republicans should follow that precedent the next time there’s a GOP President. A GOP Senate majority should refuse to let Democrats filibuster a conservative Supreme Court nominee. But giving up the filibuster over policy now would be a futile gesture that liberals would exploit to expand government in the future.²⁷⁶

The *Wall Street Journal* thus points to when a future Senate majority will likely extend the Reid Precedent to legislation, pious protestations to the contrary notwithstanding. A Majority Leader will likely expand the Reid Precedent to apply to legislation when the same party controls the Presidency and both Houses of Congress.²⁷⁷ In the meantime, expanding the Reid Precedent would result in little real change, as the check of a Presidential veto or the House’s inaction would still be available to nullify the Senate’s actions. In an era of divided Government, when the two political parties share control of the Congress and the Presidency, the Senate majority party will reap little benefit from extending the Reid Precedent to legislation generally. In the meantime, the Senate will remain an institution in transi-

275. *Id.*

276. *Republican Filibuster*, *supra* note 246.

277. See Bolton, *supra* note 250 (“And if the GOP wins the White House in 2016 and controls both chambers, the pressure on McConnell to end the filibuster will grow even stronger.”).

tion. But a Senate majority may find value in expanding the Reid precedent as it applies to nominations in five ways.

C. *Supreme Court Nominations*

The most likely extension of the Reid Precedent is to nominations to the Supreme Court, to which the Reid Precedent does not apply. After the Senate adopted the Reid Precedent and Republicans took control of the Senate, Justice Antonin Scalia died, creating a vacancy on the Supreme Court.²⁷⁸ Within hours of Justice Scalia's death, Senate Majority Leader McConnell issued a statement saying, "[T]his vacancy should not be filled until we have a new president," and Judiciary Committee Chairman Grassley quickly agreed.²⁷⁹ When Senators returned to Washington, D.C., the next week, Senate Republican Leaders said that there would be no confirmation hearings, no vote, and not even courtesy meetings with President Obama's nominee to replace Justice Scalia.²⁸⁰ All the Republican Senators who sat on the Judiciary Committee signed a letter to Leader McConnell saying, "[W]e wish to inform you of our intention . . . to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia's vacancy," and "this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017."²⁸¹

Undeterred, on March 16, 2016, President Obama nominated to the Supreme Court the Chief Judge of the D.C. Circuit Court of Appeals, Merrick Garland.²⁸² Leader McConnell promptly called Judge Garland to say that he would neither receive him in his Capitol office nor take any action on his nomination.²⁸³ Before President Obama's nomination of Judge Garland, on average, a Supreme Court nominee had been confirmed, rejected, or withdrawn within twenty-five days.²⁸⁴ The Senate had never taken more than 125 days from the time

278. Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies at 79*, N.Y. TIMES, Feb. 14, 2016, at A1.

279. Mark Landler & Peter Baker, *Battle Begins over Successor as Obama Vows To Press On*, N.Y. TIMES, Feb. 14, 2016, at A1.

280. David M. Herszenhorn, *G.O.P. Senators Say Obama Court Pick Will Be Shunned*, N.Y. TIMES, Feb. 24, 2016, at A1.

281. *Judiciary Committee Letter Opposing Supreme Court Hearings*, N.Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/interactive/2016/02/23/us/politics/document-Senate-SCOTUS-Letter.html>.

282. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Pick Engages Supreme Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1.

283. *Id.*

284. Gregor Aisch, Josh Keller, K.K. Rebecca Lai, & Karen Yourish, *Supreme Court Nominees Considered in Election Years Are Usually Confirmed*, N.Y. TIMES (Mar.

of nomination to vote on a nominee to the Court.²⁸⁵ After Judge Garland's nomination languished for 126 days, advocates submitted a letter to Guinness World Records to certify that Senate Republicans held the record for the longest delay of a U.S. Supreme Court confirmation in history.²⁸⁶ On July 19, at the Republican National Convention in Cleveland, Majority Leader McConnell said of picking Justice Scalia's successor: "I made [a] pledge that Obama would not fill this seat."²⁸⁷ Senator McConnell told the Convention: "[T]hat honor will go to Donald Trump next year."²⁸⁸

Democratic Senators, scholars, and editorial writers roundly criticized the Republican Senate's obstruction of Judge Garland's nomination as historic, outrageous, and unprecedented.²⁸⁹ By the summer of

16, 2016), <http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html>.

285. *Id.*

286. Rachel Stockman, *Garland Confirmation Process Submitted to Guinness as Longest SCOTUS Delay Ever*, LAWNEWZ (July 20, 2016), <http://lawnewz.com/high-profile/garland-confirmation-process-submitted-to-guinness-world-records-as-longest-scotus-delay-ever/>.

287. Editorial, *End the Outrageous Delay on Garland's Nomination*, L.A. TIMES (Aug. 9, 2016), <http://www.latimes.com/opinion/editorials/la-ed-garland-gop-20160809-snap-story.html>.

288. John T. Bennett, *McConnell: Trump Will Fill Scalia's Supreme Court Seat: Renewed Vow Casts Doubt on Post-election Confirmation for Garland*, ROLL CALL (July 20, 2016), <http://www.rollcall.com/news/politics/mcconnell-trump-will-fill-scalias-scotus-seat#sthash.rB5KcYiI.dpuf>.

289. *See, e.g.*, 162 CONG. REC. S5141 (daily ed. July 14, 2016) (statement of Sen. Casey) ("outrageous and unprecedented obstruction"); *id.* at S5102 (daily ed. July 14, 2016) (statement of Sen. Reid) ("historic judge blockade . . . nothing to be proud of"); *id.* at S5046 (daily ed. July 13, 2016) (statement of Sen. Warren) ("bad"); *id.* at S4975 (daily ed. July 12, 2016) (statement of Sen. Baldwin) ("obstruction"); *id.* at S4796 (daily ed. July 6, 2016) (statement of Sen. Leahy) ("unrelenting campaign of partisan obstruction"; "holding . . . hostage"); *id.* at S4539 (daily ed. June 23, 2016) (statement of Sen. Stabenow) ("refuse to do their constitutional duty"); *id.* at S4522–23 (daily ed. June 23, 2016) (statement of Sen. Durbin) ("first time in the history"; "reckless refusal"); *id.* at S3623 (daily ed. June 8, 2016) (statement of Sen. Franken) ("preposterous"); Letter from Law School Deans to Majority Leader Mitch McConnell, Minority Leader Harry Reid, Judiciary Committee Chairman Charles Grassley, and Judiciary Committee Ranking Member Patrick Leahy (Mar. 14, 2016), <http://www.dpcc.senate.gov/files/documents/SCOTUSLetters/LawDeansLetter.pdf>; Statement of Constitutional Law Scholars on the Supreme Court Vacancy (Feb. 24, 2016), <http://www.acslaw.org/sites/default/files/Con%20Law%20Scholars%20on%20Scotus%20Vacancy.pdf>; *End the Outrageous Delay on Garland's Nomination*, *supra* note 287; *System Wasn't Designed for Tie Votes*, THE BURLINGTON HAWK-EYE (June 27, 2016), http://www.thehawkeye.com/opinion/editorials/system-wasn-t-designed-for-tie-votes/article_2861c8fa-4ada-500e-8027-abfa2f850ea3.html; Editorial, *Supreme Court Nondecision on "Obamacare" Points to the Need for Senate Action on the Garland Nomination*, TULSA WORLD (May 20, 2016), http://www.tulsaworld.com/opinion/editorials/tulsa-world-editorial-supreme-court-nondecision-on-obamacare-points-to/article_3bd532c7-7dea-5292-923e-9017dd04f0af.html.

2016, some Democrats said that they had had enough of Leader McConnell's obstruction and wanted to alter Senate rules to finally break the logjam.²⁹⁰ "We need to change the rules of the Senate to keep one person from dragging things out and to keep having every vote require 60," said Senator Jeanne Shaheen, who saw a signature energy bill repeatedly die at the hands of filibuster before her 2014 reelection.²⁹¹

If Senate Republicans continue to block President Obama's nomination of Judge Garland through the 114th Congress, which ends January 3, 2017, and Democrats win back the Senate and the White House, then many Democratic Senators will press incoming Majority Leader Chuck Schumer to extend the Reid Precedent to President Hillary Clinton's nominee to the Court.²⁹² Under such a scenario, moderate Republican Senators would need to think hard about whether they wanted to help provide the sixty votes to overcome a filibuster and confirm President Clinton's nominee to obviate an expansion of the Reid Precedent to Supreme Court nominees. Even if moderate Republicans do so, Democratic Senators would still need to consider whether they would want to expand the Reid Precedent to increase President Clinton's flexibility to nominate progressives to the Court.

D. *Discharging Committees of Nominations*

The obstruction of Judge Garland's nomination was at one level an application of Leader McConnell's decision and the Republican Caucus's support. But at another level, the obstruction of Judge Garland's nomination also resulted simply from Chairman Grassley's refusal to allow the Judiciary Committee to consider Judge Garland's nomination.²⁹³ The Senate Rules do not easily allow the Senate to discharge a committee of a nomination or even to force a vote on

290. Burgess Everett & Edward-Isaac Dove, *Chuck Schumer's Audacious Prediction*, POLITICO (July 29, 2016), <http://www.politico.com/story/2016/07/chuck-schumer-interview-226385>.

291. *Id.*

292. See Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016), <http://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741> ("[I]t's hard to imagine a future Senate majority allowing a filibuster of a Supreme Court nominee from a president of the same party.").

293. The Senate's rules require all nominations to be referred to the appropriate committees. *STANDING RULES*, *supra* note 35, at R. XXXI, ¶ 1. So Chairman Grassley's choice not to schedule action on a nomination in effect blocked Senate consideration. See, e.g., 162 CONG. REC. S1300 (daily ed. Mar. 7, 2016) (statement of Sen. Reid) ("Grassley is threatening to use his powerful post as chairman of the Judiciary Committee to block a hearing on any nominee."). The Ranking Democratic Member of the Judiciary Committee, Senator Patrick Leahy, has called the practice of Chairmen killing nominees by committee inaction a "pocket filibuster." See 156 CONG. REC. S17 (daily ed. Jan. 20, 2010) (statement of Sen. Leahy).

discharging the nomination. A future majority could extend the Reid Precedent to address this shortcoming.

Senate Rule XVII provides that “All . . . motions to discharge a committee from the consideration of a subject . . . shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct.”²⁹⁴ But *Riddick’s Senate Procedure* reports that “There is no specific provision in the standing rules of the Senate providing for a definite procedure for the discharge of its committees from further consideration of the matters referred to them.”²⁹⁵

A Senator may make a motion to discharge a nomination only in Executive Session (when the Senate conducts business on nominations and treaties submitted by the President).²⁹⁶ If the majority allowed the Senate to go to Executive Session, any Senator could then move to discharge a nomination (to move consideration of the nomination out of the committee and on to the full Senate).²⁹⁷ Once a Senator makes a motion to discharge, any other Senator can cause the motion to lie over a day.²⁹⁸ The motion to discharge is debatable,²⁹⁹ so Senators could filibuster the motion, and a Senator could file cloture on the motion. So the motion to discharge could resolve into another sixty-vote proposition. All this presumes that the majority party allows the Senate to proceed to Executive Session without tight constraints under a unanimous consent agreement. If the Senate is not in Executive Session, any Senator could make a motion to proceed to Executive Session. That motion is not debatable, and thus a majority vote would prevail. If the majority party did not want to consider a nomination, a majority of Senators could vote the motion down or table the motion.

One possible application of the Reid Precedent would be for a Senator to move to proceed to Executive Session to consider a motion to discharge a particular nomination. On the advice of the Parliamentarian, the Presiding Officer would likely say that there is no such compound motion.³⁰⁰ A Senator could appeal the ruling of the Chair. In the context of a motion to proceed to Executive Session, such an

294. STANDING RULES, *supra* note 35, at R. XVII, ¶ 4.

295. RIDDICK & FRUMIN, *supra* note 3, at 802.

296. *Cf. id.* at 803. *Riddick’s* reports, “While the Senate is in executive session, a motion to discharge a committee made as in legislative session is not in order upon objection being made,” indicating that motions to discharge must be made when considering the appropriate Executive or Legislative calendar. *Id.*

297. *See id.*

298. *See* STANDING RULES, *supra* note 35, at R. XVII, ¶ 4; RIDDICK & FRUMIN, *supra* note 3, at 804.

299. *See* RIDDICK & FRUMIN, *supra* note 3, at 738.

300. *Cf. id.* at 802. *Riddick’s* reports, “Coupling of Motions Not in Order: In 1957 the Vice President held that a combined motion to discharge a committee and make a

appeal would not be debatable and would be decided by a majority vote. If a majority of the Senate wanted to create a compound motion to proceed to Executive Session and to discharge a nomination, then the Senate could thus follow the Reid Precedent to create such a motion by overturning the ruling of the Chair.

Creating such a process would only be necessary, however, if the Chair of the committee with jurisdiction over the nomination acted contrary to the will of the majority of the Senate. This might occur if the Chair represented a minority of the majority party, as for example, when Senator James Eastland of Mississippi, a conservative Southern Democrat, chaired the Judiciary Committee from 1956 to 1978. Although the Senate held no vote to demonstrate the fact, Chairman Grassley did not appear to be acting contrary to the Senate's Republican majority. In most cases, one might expect Chairs of committees to reflect the will of the majority of the Senate, making such a change of Senate procedure unnecessary.

E. Overruling Home-State Senators

Senate Republican obstruction of President Obama's judicial nominations was by no means limited to the nomination of Judge Garland to the Supreme Court.³⁰¹ Republican Senators from a few deeply conservative states—known in the White House as “orphan states”³⁰²—insisted that President Obama fill vacancies with the conservative activists of their choosing or no one at all.³⁰³ For example, at this writing, Senators Ted Cruz and John Cornyn of Texas generated more than one third of judicial emergency vacancies by refusing to cooperate in the selection of Federal judges.³⁰⁴

bill a pending order of business was in violation of the rules,” indicating that motions to discharge cannot yet be combined with other motions. *Id.*

301. See, e.g., Grunwald, *supra* note 292; Charlie Savage, *Despite Filibuster Limits, A Door Remains Open To Block Judge Nominees*, N.Y. TIMES, NOV. 29, 2013, at A18.

302. Grunwald, *supra* note 292.

303. *Id.*

304. *Id.* See also Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES, APR. 29, 2014, at A13 (“In Texas, which has 10 vacant federal judgeships and two Republican senators, John Cornyn and Ted Cruz, a federal judge has not been confirmed by the full Senate since April 2012.”); Editorial, *The Senate's Discourtesy to Judges*, N.Y. TIMES, MAR. 31, 2014, at A20 (“Texas has nine court vacancies, but its two senators won't work with the White House on any nominees.”); Savage, *supra* note 301 (“[V]acancies without nominees are disproportionately likely to be in states like Texas that are represented by Republican senators.”).

They have been empowered to do so through a Senate Judiciary Committee custom known as the “blue slip.”³⁰⁵ Under the blue slip custom, the Judiciary Committee Chair sends a blue-colored form to home-state Senators seeking their assent to district court, circuit court, U.S. attorney, and U.S. marshal nominations in their state.³⁰⁶ If a home-state Senator has no objection to a nominee, then the Senator returns the blue slip to the Chair with a positive response; if a Senator

305. See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL34405, *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES* 10 (2013). On the blue slip custom generally, see, for example, MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, *THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT* (2003); Grunwald, *supra* note 292; Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES, Apr. 29, 2014, at A13; *The Senate’s Discourtesy to Judges*, *supra* note 304; Carl Hulse, *Post-Filibuster, Obama Faces New Anger Over Judicial Choices*, N.Y. TIMES, Feb. 28, 2014, at A14; Savage, *supra* note 301; Kate Zernike, *Menendez Drops His Opposition to Obama’s Pick for a Federal Appeals Court*, N.Y. TIMES, Jan. 14, 2012, at A16; Kate Zernike, *Senator Says His Concerns with Nominee Aren’t Personal*, N.Y. TIMES, Jan. 7, 2012, at A17; Kate Zernike, *In Act of Defiance, a Democrat Stalls an Obama Court Nominee*, N.Y. TIMES, Jan. 6, 2012, at A1; *Who’s Filibustering Now?*, N.Y. TIMES, Mar. 8, 2009, at A22; Opinion, *Senator Frist Approaches the Brink*, N.Y. TIMES (May 18, 2005), http://www.nytimes.com/2005/05/18/opinion/senator-frist-approaches-the-brink.html?_r=0; Sean Wilentz, Letter to the Editor, *The Battle Over the Filibuster*, N.Y. TIMES (Apr. 29, 2005), <http://www.nytimes.com/2005/04/29/opinion/the-battle-over-the-filibuster-7-letters.html>; Neil A. Lewis, *The Nation: Here Come the Judges; First the Senate, Now the Courts of Appeals*, N.Y. TIMES (Dec. 1, 2002), <http://www.nytimes.com/2002/12/01/weekinreview/the-nation-here-come-the-judges-first-the-senate-now-the-courts-of-appeals.html>; Christopher Marquis, *Senators Reach an Agreement on Nominees for Supreme Court*, N.Y. TIMES (June 30, 2001), <http://www.nytimes.com/2001/06/30/us/senators-reach-an-agreement-on-nominees-for-supreme-court.html>; Opinion, *Doing Business in the Senate*, N.Y. TIMES (June 19, 2001), <http://www.nytimes.com/2001/06/19/opinion/doing-business-in-the-senate.html>; Alison Mitchell, *New Senate Leader Agrees to Hold Votes on 2 Judicial Issues*, N.Y. TIMES (June 20, 2001), <http://www.nytimes.com/2001/06/20/us/new-senate-leader-agrees-to-hold-votes-on-2-judicial-issues.html>; Opinion, *A Battle for the Courts*, N.Y. TIMES (May 11, 2001), <http://www.nytimes.com/2001/05/11/opinion/a-battle-for-the-courts.html>; Opinion, William Safire, *Battle of the Blue Slips*, N.Y. TIMES (May 10, 2001), <http://www.nytimes.com/2001/05/10/opinion/essay-battle-of-the-blue-slips.html>; Neil A. Lewis, *Washington Talk: Democrats Ready for Judicial Fight*, N.Y. TIMES (May 1, 2001), <http://www.nytimes.com/2001/05/01/us/washington-talk-democrats-ready-for-judicial-fight.html>; Editorial, *Blocking Judicial Ideologues*, N.Y. TIMES (Apr. 27, 2001), <http://www.nytimes.com/2001/04/27/opinion/blocking-judicial-ideologues.html>; *Kennedy Says He Will End Veto of U.S. Judges by Their Senators; 152 New Judge Slots*, N.Y. TIMES, Jan. 26, 1979, at A9; Anthony Marro, *Federal Bench Qualifications: Merit and Political Connections; Mr. Carter’s Many Choices Will Involve Both, Although During His Campaign He Talked About Merit Only*, N.Y. TIMES (Aug. 14, 1977), <http://www.nytimes.com/1977/08/14/archives/mr-carters-many-choices-will-involve-both-although-during-his.html>; Richard L. Madden, *Javits Delaying A Judgeship Here; Says He Wants to Study Setup of Federal Court*, N.Y. TIMES, Dec. 14, 1967, at 68.

306. RUTKUS, *supra* note 305, at 10.

objects, then the Senator can not return the blue slip or return it with a negative response.³⁰⁷ Many, but not all, Judiciary Committee Chairs have required a return of a positive blue slip by both of a state's Senators before allowing consideration of a nomination.³⁰⁸ This custom gives Senators of any party a veto over any home-state judicial nominee whom they oppose.³⁰⁹

The blue slip custom appears to have started at the same time as the adoption of the Cloture Rule in 1917, although the Cloture Rule did not apply to judicial nominations until 1949.³¹⁰ The adoption of the Cloture Rule did not cause the blue slip custom to begin, but the two have in common the idea that the Senate can block action through a filibuster. The custom of a special role for a home-state Senator in the nomination and confirmation process is essentially a negative one when the Senator opposes, and thereby seeks to block, a nominee's confirmation, where the Senator, by invoking what is misleadingly called "Senatorial Courtesy," looks to other Senators to join the home-state Senator in opposing the nomination.³¹¹ More frequently, the Senator's role is a positive one when the home-state Senator makes recommendations to the President about whom to nominate and the custom of "Senatorial Courtesy" encourages the President to be receptive to the Senator's recommendations to avoid selecting nominees opposed by the home-state Senator and potentially other Senators in support of their Colleague.³¹² Over time, Senators have come to feel that the President should defer to home-state Senators—at least when they are of the President's party—in the selection of home-state judicial appointees.³¹³ And even when neither of a state's Senators is of the President's party, the blue-slip custom fosters the expectation of a special consultative role for home-state Senators in the appointment process.³¹⁴

In the wake of the Reid Precedent, a Senate Majority has less to fear from the implicit threat³¹⁵ of a minority party filibuster of a President's judicial nomination in the absence of approval of the home-state Senators. Thus the Reid Precedent invites the Judiciary Commit-

307. *Id.*

308. *Id.*

309. *Id.*

310. See SOLLENBERGER, *supra* note 305, at 5.

311. See RUTKUS, *supra* note 305, at 6.

312. *See id.*

313. *See id.* at 7.

314. *See id.* at 10.

315. The threat is implicit because the Senate almost always avoids it through the custom of "Senatorial Courtesy."

tee Chair to give less deference to the position of minority party home-state Senators. At the least, when home-state Senators refuse to work with the President in the selection of acceptable nominees, the Judiciary Committee Chair could proceed notwithstanding the failure of home-state Senators to return a blue slip, and the Reid Precedent would allow the majority to then confirm the nominee.

F. *Overruling the Minority Leader*

Senate customs also give the Senate minority party power in another nominations setting that the Reid Precedent could affect, as well. For twenty-six Federal boards and commissions, the law limits the number of appointed members who may belong to the same political party, usually to no more than a bare majority of the appointed members—for example, two of three or three of five.³¹⁶ For three of these twenty-six organizations—the Election Assistance Commission, the Federal Election Commission, and the United States International Trade Commission—the number of member positions is even and no more than half may be of the same party.³¹⁷

The Federal Election Commission provides an example of how Senate nomination customs, supported by the threat of a filibuster, affect these bipartisan boards and commissions.³¹⁸ When Congress created the Commission in 1974, the Leaders of Congress could appoint four of the six voting Commissioners and the President could appoint the other two.³¹⁹ Of the Commissioners selected by Congress, the statute provided that two were appointed by the President Pro Tempore of the Senate “upon the recommendations of the majority leader of the Senate and the minority leader of the Senate.”³²⁰ In 1976, in *Buckley v. Valeo*, the Supreme Court held that most of the powers conferred on the Commission could be exercised only by “Officers of the United States” appointed by the President under Article II, Section 2, Clause 2, of the Constitution, and therefore could not be exercised

316. MICHAEL GREENE & JARED C. NAGEL, CONG. RESEARCH SERV., R-44043, PRESIDENTIAL APPOINTMENTS TO FULL-TIME POSITIONS ON REGULATORY AND OTHER LEGISLATIVE BOARDS AND COMMISSIONS, 113TH CONGRESS 2–3 (May 20, 2015).

317. *Id.* at 3.

318. Full disclosure: The author served as Legislative Director for Senator Russ Feingold when Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (Mar. 27, 2002), also called McCain–Feingold, and the author’s wife, Ellen L. Weintraub, serves as a Commissioner on the Federal Election Commission.

319. Federal Election Campaign Act of 1971, 2 U.S.C. § 437c(a)(1) (as amended in 1974, since amended); *Buckley v. Valeo*, 424 U.S. 1, 113, 161–62 (1976).

320. *Buckley*, 424 U.S. at 113, 161–62.

by the Commission as it was then constituted.³²¹ Although Congress amended the law to conform the appointments process to the Constitution as the *Buckley* Court interpreted it, in practice, Presidents have usually deferred to Congress and to the political parties for the selection of Commissioners much as in the original nomination process.³²² In practice, this means that the Senate Majority or Minority Leader who belongs to the party different from that of the President recommends names to fill the slots designated for the party of that Leader, and the President customarily follows those recommendations.³²³

As a result of Leader McConnell's selection of Commissioners who do not share the Commission's mission,³²⁴ the six-member Commission has become nearly dysfunctional, as the three Republican appointees regularly vote together to block efforts to penalize campaign finance law violators, producing three-to-three standoffs on enforcement.³²⁵ Leader McConnell has thus used his power to select Republi-

321. *Id.* at 143.

322. Mark Murray, *Help Wanted: The FEC's Familiar Refrain*, NAT'L J., Mar. 7, 1998, at 520; PROJECT FEC, DEMOCRACY 21, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 15–16 (2002).

323. See Richard A. Oppel Jr., *McCain Plans Bid To Force Election Panel Appointment*, N.Y. TIMES, (June 25, 2002), <http://www.nytimes.com/2002/06/25/us/mccain-plans-bid-to-force-election-panel-appointment.html>. In 1980, Congress memorialized this structure with regard to appointments made by the President Pro Tempore by adopting an amendment offered by then-Majority Leader Robert Byrd in the lame-duck session just before he was to become the Minority Leader, codified in 2 U.S.C. § 199, which provides:

(a) Any provision of law which provides that any member of a commission, board, committee, advisory group, or similar body is to be appointed by the President pro tempore of the Senate shall be construed to require that the appointment be made—

(1) upon recommendation of the Majority Leader of the Senate, if such provision of law specifies that the appointment is to be made on the basis of the appointee's affiliation with the majority political party,

(2) upon the recommendation of the Minority Leader of the Senate, if such provision of law specifies that the appointment is to be made on the basis of the appointee's affiliation with the minority party, and

(3) upon the joint recommendation of the Majority Leader of the Senate and the Minority Leader of the Senate, if such provision of law does not specify that the appointment is to be made on the appointee's affiliation with the majority or minority political party.

2 U.S.C. § 199 does not by its terms apply to appointments by the President under Article II, as that would no longer be constitutional after *Buckley v. Valeo*, but it reflects the broader practice that the two Leaders have continued to observe.

324. See, e.g., PROJECT FEC, *supra* note 322, at 66–69.

325. See, e.g., Editorial, *The Elections Cop Invites Mischief*, N.Y. TIMES (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/opinion/the-elections-cop-invites-mischief.html>; Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), <http://www.nytimes.com/2014/08/26/us/politics/election->

can Commissioners, backed up by the threat of a filibuster of any other nominees, to ensure that half of the Commission opposes carrying out the duties for which Congress created the Commission.³²⁶

In the wake of the Reid Precedent, when the President and the Senate Majority Leader are of the same party, they could reconsider whether to allow the Senate Minority Leader to select minority party members of bipartisan Federal boards and commissions. At the least, the President might choose to reject nominees recommended by the Minority Leader until the Minority Leader recommended nominees who did not oppose the mission of the board or commission. If the Minority Leader refused to do so, the President could exercise the powers granted to the President under Article II of the Constitution as interpreted by the Supreme Court in *Buckley v. Valeo*. Alternatively, the President could name nominees recommended by an independent commission.³²⁷ The Reid Precedent gives a Senate majority of the same party as the President the power to enforce such a new paradigm if the President chooses to implement it.

Critics of such a paradigm would likely argue that it would defeat the intent of the boards and commissions' purposefully bipartisan design and transform boards and commissions into partisan tools of a President's party.³²⁸ In the case of the Federal Election Commission, critics would argue that the current structure, allowing one political party to block action, helps prevent partisans from using the agency to hamper political opponents and thereby protects First Amendment rights.³²⁹ But Leader McConnell and the Senate Republican Caucus that backs him have parlayed the threat of nomination filibusters into the ability to hobble boards and commissions like the FEC and NLRB, in effect overturning the statutes that created them. This should not be

panel-enacts-policies-by-not-acting.html; Editorial, *Cynical Non-Enforcers*, N.Y. TIMES (Mar. 10, 2011), <http://www.nytimes.com/2011/03/11/opinion/11fri4.html?ref=federalectioncommission>; Bernie Becker, *Election Commission Decisions Deadlocking on Party Lines*, N.Y. TIMES (Sept. 26, 2009), <http://www.nytimes.com/2009/09/27/us/politics/27elect.html>; Editorial, *An Even More Dysfunctional F.E.C.*, N.Y. TIMES (Jan. 19, 2009), <http://www.nytimes.com/2009/01/20/opinion/20tue3.html>.

326. See, e.g., PROJECT FEC, *supra* note 322, at 66–69.

327. President Carter proposed such a process for selecting judges. See Marro, *supra* note 305.

328. See, e.g., Luke Wachob, Letter to the Editor, *The Makeup of the F.E.C.*, N.Y. TIMES (Sept. 9, 2014), <http://www.nytimes.com/2014/09/10/opinion/the-makeup-of-the-fec.html>.

329. See *id.*

within the sole power of a minority of one of the two Chambers of one of the three branches of the Government.³³⁰

G. *Time To Debate*

Finally, some nominations deserve more time than others. In the 113th Congress from 2013 to 2014, the Senate recognized this by adopting a special rule for that Congress that limited debate post-cloture on a subcabinet nomination to no more than eight hours, equally divided between the two sides, and on a district court nomination to no more than two hours, equally divided.³³¹ A future Senate could choose to adopt this rule as a permanent measure. If the Senate minority did not agree to such a resolution, then the majority could follow the Reid Precedent to reduce post-cloture debate time by precedent.

CONCLUSION

What has changed and what will change because of the Reid Precedent? In the short run, Senate Democrats confirmed more Federal judges, allowing President Obama to exercise his Constitutional powers to affect the judiciary.³³² President Obama has appointed 329 judges to lifetime jobs, more than one third of the judiciary, and these judges are moving American jurisprudence in a more progressive direction.³³³ President Obama flipped the partisan balance of the nation's 13 courts of appeals; when he took office, only one had a majority of Democratic appointees, and now nine do.³³⁴ The Senate's confirmation of judges like Patricia Millett, Nina Pillard, and Robert Wilkins to the D.C. Circuit Court of Appeals contributed to that result, and that would not have happened without the Reid Precedent. President Obama's nominees have been more diverse than those of any predecessor—43 percent of President Obama's judges have been women, 36 percent have been non-white, and 11 have been openly gay.³³⁵

Critics argue that the Reid Precedent would allow a President with a Senate of the same party to appoint a more ideological judi-

330. The Constitution requires that to enact a law, both Houses of Congress must pass it and either secure the President's signature or override the President's veto. *See* U.S. CONST. art. I, § 7. The action of a single House of Congress cannot accomplish that for which the Constitution's bicameral system requires passing a law. *See* *INS v. Chadha*, 462 U.S. 919 (1983).

331. S. Res. 15, 113th Cong. § 2 (2013).

332. *See, e.g.*, Grunwald, *supra* note 292.

333. *Id.*

334. *Id.*

335. *Id.*

ary.³³⁶ Advocates for the filibuster argue that the filibuster fosters “The Senate’s role as a counterweight against overzealous majorities, its role in oversight of the executive, and its effectiveness as an arena for reasoned deliberation, moderation, and compromise.”³³⁷ But when President Obama nominated Merrick Garland, a moderate whom Republicans had cited as the sort of judge whom a Democratic President should nominate,³³⁸ Senate Republicans still exercised all power available to them to block the nomination.

Defenders of the filibuster argue that availability of the filibuster “drive[s] the Senate in the direction of consensus building,” “restrain[s] otherwise unfettered majorities,” and “force[s] more careful examination of even rampantly popular majority policies.”³³⁹ But during Senator McConnell’s time as Leader, he has allowed his Caucus to do precious little “consensus building” with Democrats. Senator McConnell has led obstruction (sometimes unsuccessfully, as with the Affordable Care Act and Dodd-Frank) of nearly every Obama initiative—from increasing the minimum wage³⁴⁰ to requiring gun background checks³⁴¹ to controlling climate change³⁴²—and relegated the Senate to the most modest of goals.

Most fundamentally, defenders of the filibuster argue along with the late Senator J. William Fulbright that “The greatest single virtue of a strong legislature is not what it can do but what it can prevent.”³⁴³ But this view results from a very jaundiced view of the American people.

336. See, e.g., *id.* (“[A] Hillary Clinton elected with a Democratic Senate would be free to sub out Garland for ‘the love child of Eric Holder and Elizabeth Warren.’”).

337. ARENBERG & DOVE, *supra* note 3, at 68.

338. See, e.g., Jerry Markon, *Merrick Garland’s Been Considered for the Supreme Court Before. Is This His Year?*, WASH. POST (Mar. 10, 2016), https://www.washingtonpost.com/world/national-security/merrick-garlands-been-considered-for-the-supreme-court-before-is-this-his-year/2016/03/10/0b141bcc-e6d5-11e5-a6f3-21ccdbc5f74e_story.html (noting in 2010, when Garland was under consideration for a Supreme Court vacancy, Sen. Orrin Hatch said Garland would be “a consensus nominee.”).

339. ARENBERG & DOVE, *supra* note 3, at 68.

340. See, e.g., Niels Lesniewski, *GOP Filibusters Minimum Wage Hike*, ROLL CALL (Apr. 30, 2014), <http://www.rollcall.com/news/home/gop-keeps-minimum-wage-debate-from-senate-floor>.

341. See, e.g., *Senate Rejects All 4 Gun Measures*, Roll Call (June 20, 2016), <http://www.rollcall.com/news/policy/gun-amendments>.

342. See, e.g., Coral Davenport, *Senate Votes to Block Obama’s Climate Change Rules*, N.Y. TIMES (Nov. 17, 2015), <http://www.nytimes.com/2015/11/18/us/politics/senate-blocks-obamas-climate-change-rules.html>.

343. ARENBERG & DOVE, *supra* note 3, at 67; 146 CONG. REC. 8420 (2000) (statement of Sen. Russ Feingold).

The expansion of the Reid Precedent would not give power to “otherwise unfettered majorities,”³⁴⁴ because multiple Constitutional checks and balances would continue to exist. A December 2011 essay by Professors Alfred Stepan and Juan Linz of Columbia and Yale, respectively, compared twenty-three long-standing democracies in advanced economies to determine which countries’ governments have more players with veto power.³⁴⁵ Stepan and Linz conclude:

When we examine our set of 23 long-standing democracies in advanced economies, we find that slightly more than half of these countries (12.5) actually have only one electorally generated veto player. This is so because, with the exception of France, they are all unicameral (or if bicameral, the upper house does not have a veto) and parliamentary; thus, the only veto player whose consent is needed is the prime minister’s majority in the lower house. There are 7.5 countries with two veto players, two countries (Switzerland and Australia) with three veto players, and only one country, the United States of America, with four electorally generated veto players. Thus, the United States is politically exceptional in the high number of electorally based veto players who potentially can block social change, by blocking key bills or amendments.³⁴⁶

Thus, even if the Senate chose to become more majoritarian, the United States Constitution would still have more impediments to governmental action than any of the twenty-two other democracies in advanced economies that we consider our peers.

There is likely a reason why other democracies have not followed the U.S. Constitution in building in as many checks and balances as our Founders did. The reason may be grounded in popular desire for government to solve social problems that people might have tolerated in earlier times. Government inaction may have been more attractive in the eighteenth century than it is in the twenty-first century. As President Obama told *Vox*, “The filibuster in this modern age probably just torques it too far in the direction of a majority party not being able to govern effectively and move forward its platform.”³⁴⁷

In his perceptive book, *The Age of Austerity*, Tom Edsall argues that for American conservatives, “a logical strategy for the haves may be to preserve and protect property, income, and assets from the demands of others.”³⁴⁸ It is those who oppose social change who have

344. ARENBERG & DOVE, *supra* note 3, at 68.

345. See Stepan & Linz, *supra* note 32, at 844–45.

346. *Id.* at 844.

347. Prokop, *supra* note 246.

348. THOMAS BYRNE EDSALL, *THE AGE OF AUSTERITY: HOW SCARCITY WILL RE-MAKE AMERICAN POLITICS* 149 (2012).

most to gain from a filibuster that defends the status quo. On the other hand, Edsall argues: “For four decades conservatives have won elections by mobilizing white voters, especially white married Christians. This bedrock GOP foundation is steadily eroding, while Democratic voting blocs—Hispanics, African Americans, other minorities, and single women—are expanding as a share of the electorate.”³⁴⁹ It is the advocates for the new, diverse American electorate who have the most to gain from greater democracy.

In the end, the Reid Precedent is a good thing, and future Senates should expand on it for the reason that Justice Louis Brandeis espoused: “Democracy is moral before it is political.”³⁵⁰ Making the Senate work more democratically is right because democracy has a moral basis. Democracy is grounded in the equal value of all people. And preserving the rights of a minority at the expense of the majority empowers those in the minority as if their interests were more important than those of the majority. In the end, we should make the Senate more democratic for the same reason that we believe in democracy—you have to have faith in the people.

349. *Id.* at 10.

350. LOUIS D. EIGEN & JONATHAN P. SIEGEL, *MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS* 108 (1st ed. 1993) (1901 quote attributed to Louis Brandeis).

