The Senate's "Nuclear" Precedent: Implications for Efforts to Control the Filibuster

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Abstract:

The U.S. Senate established a new interpretation of its rules in November 2013. Described as exemplifying the "nuclear option" for procedural change, the Senate established that a simple majority could impose time limits on consideration of most nominations. We examine these proceedings in context of other episodes of establishing precedent in the Senate from 1979 through 2011, as well as of attempts from 1953 to 1975 to amend the cloture rule. Our analysis refutes the common assertions that what fundamentally distinguishes the two forms of action is that super-majority support is required to amend the Rules, while a simple majority may set precedents, and that therefore establishing precedent must entail "breaking the rules in order to change them." Instead, extending previous work by one co-author, we show that in either case, the requirement of the cloture rule for a super-majority to limit consideration forms a key procedural obstacle to change. In either case, therefore, what would enable a simple majority to act is whether the crucial question can be placed before the Senate under a time limit that can be imposed without super-majority support. In this light we examine how change advocates in the various episodes we discuss attempted to meet this condition, and, again extending earlier analysis by a co-author, we assess whether or not they were able to do so, especially in 2013, without violating existing procedures.

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On November 21, 2013, the Senate took action which established that a simple majority of Senators could impose time limits on the consideration of almost any nomination. This action by the Senate instituted an important shift in Senate procedure, for the chamber has never recognized any generally applicable means for a simple majority to limit debate.[3] Accordingly, it generated a great deal of attention from scholars and journalists alike. Writing for the *Washington Post*, Jonathan Bernstein (2013) described it as a "major, major, event" and argued it would significantly alter the way the nation was governed. The *New York Times* dubbed it "the most fundamental alteration of its rules in more than a generation (Peters 2013)." And political scientist Steven S. Smith (2014, 265) referred to it as being "among the three of four most important events in the procedural history of the Senate."[4]

The action was controversial in part because the Senate accomplished it not by amending its rules, but instead by overturning, on appeal, a decision of the chair. The decision held that Senate rules required a super-majority of three fifths of the full chamber to impose limits on consideration. By its vote on the appeal, the Senate established a parliamentary precedent under which the vote of a simple majority can limit consideration of any nomination except one to the Supreme Court. Formally, this action represented a re-interpretation by the Senate of its existing rules, determining that those rules empower a simple majority to limit consideration of the specified nominations.[5]

These proceedings have been said to exemplify a "nuclear option" for procedural change. In recent years, this term has been used to refer to courses of action that enable procedural change without requiring the support of more than a simple majority at any point in the process.[6] Both

[3] Some writers assert that a lack of limits on consideration did not enter Senate procedure until 1806, when the chamber abolished its motion for the previous question. Unlike the motion with the same name in today's House of Representatives (and under *Robert's Rules of Order*), however, the motion abolished was not one that allowed a simple majority to bring the chamber to a vote (Binder and Smith 1997; Byrd 1988; Cooper 1962; Haynes 1938; Wawro and Schickler 2006).

[4] Additionally, political scientist Sarah Binder (2013) speculated the move would have a significant short-term effect on judicial nominations. And Gregory Koger (2013) argued it demonstrated how a "simple majority of senators can restrict filibustering whenever they choose."

[5] Senate rules make few questions non-debatable or otherwise limit their consideration, and the only generally applicable procedure those rules afford for imposing such limits is Rule XXII, the "cloture rule," which, in general, requires a super-majority vote. The Senate first adopted a cloture rule in 1917; before then, Senate rules had included no generally applicable procedure for limiting consideration. Since 1975, the super-majority required for most matters has been three fifths of all Senators (60 Senators, if there is no more than one vacancy). In practice, the Senate often limits time on a matter by unanimous consent, as well, but this action too, self-evidently, requires the support of more than a simple majority. Whenever no limit on consideration is in effect, opponents of a proposal may be able to prevent the Senate from reaching the point at which the vote to adopt it could occur. In the most basic sense, such action is what is meant by filibustering. For discussion of implications of the November 2013 proceedings for the consideration of nominations, see Heitshusen (2014).

[6] The Senate has found it difficult to institute more effective means of limiting consideration, because the rules that require a super-majority vote in order to limit consideration apply to proposals for procedural change as well as to other business. Some usage, accordingly, suggests that the appellation "nuclear" is considered appropriate in these cases because any proceedings that would permit the Senate to adopt procedural changes without concurrence from any voting minority.

scholars and politicians have debated the legitimacy, necessity and implications of the "nuclear option." During the debate preceding the November 21st action, Senate Majority Leader Harry Reid (D-NV) argued there was ample precedent for the maneuver. Reid, citing to a memo circulated by Senator Jeff Merkley (D-OR), noted "the 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 (*Congressional Record Daily*, 113th Congress, November 21, 2013, S8415)."[7]

Minority Party Republicans disagreed. Senator Chuck Grassley (R-IA) dubbed it a "naked power grab and nothing more than a power grab" (*Congressional Record Daily*, 113th Congress, November 21, 2013, S8420). Senator Bob Corker (R-TN) likened Reid's leadership to that of Russian President Vladimir Putin (Lesniewski 2014). Senator John McCain (R-AZ) argued that "if only a majority can change the rules, then there are no rules (*Congressional Record Daily*, 113th Congress, November 21, 2013, S8442)." And Minority Leader Mitch McConnell (R-KY) accused Reid and Senate Democrats of "break[ing] the rules of the Senate in order to change the rules of the Senate (*Congressional Record Daily*, 113th Congress, November 21, 2013, S8415)."

This paper considers to what extent the proceedings of November 2013 may have been "nuclear" in this sense of enabling procedural change with no more than simple majority support. It also examines the extent this capacity may be characteristic of earlier proceedings whereby the Senate has instituted new precedents. We begin by discussing the existing political science literature on Senate rules. We then examine several notable episodes cited by senators and scholars as precedents for the November 2013 proceedings. We conclude by considering to what extent the November 2013 proceedings may have opened up prospects for further procedural change through similar courses of action.

Existing Literature

Prior to the events of November 21, 2013, political scientists had long debated why the chamber refrained from changing its rules in order to institute time limits on business. Generally, scholars have fallen into one of two camps on this issue. The first of these camps argues that the lack of substantive rules reform results chiefly from the constraining influence of inherited institutions (Binder 1997; Binder and Smith 1997; Binder, Madonna and Smith 2007; Madonna 2011). These inherited institutions, combined with political and environmental costs, have facilitated the ability of minorities to thwart reform-minded majorities.

This literature points to three primary inherited institutions as serving to constrain the parties' procedural choice. First, the United States Constitution specifies staggered terms for United States senators.[8] Accordingly, the Senate operates as a "continuing body" and -- unlike the House

[7] See Merkley (2013). Not all Democrats agreed with the applicability of the precedents cited in Merkley's memo. Senator Carl Levin (D-MI) —one of three Democrats to vote against overturning the ruling of the Chair—argued the majority was changing the rules with "a method that has been used before in this to change the very rules of this body" (*Congressional Record* [daily ed.], 113th Congress, November 21, 2013, S8423).'

[8] See Article I, Section 3, Clause 1 of the United States Constitution for staggered Senate terms. This was done in order to provide stability within the government (Story 1833). It was also suggested the clause allowed older senators to mentor incoming members (Amar 1988).

– has been able to choose not to adopt new rules at the start of each Congress (Binder 1997, 167-168; Beth 2005). Second, scholars have suggested, the 1806 decision to drop the previous question motion limited the chambers' ability to institute a simple-majority measure for ending debate (Binder 1997; Binder and Smith 1997; Binder and Smith 1998).[9] Finally, the Constitution places the Vice President as the head of the Senate. Scholars have argued that senators have been hesitant to vest chamber power in a position held by a non-member (Gamm and Smith 2000; Lynch and Madonna 2010).[10] This arrangement contrasts with that of the House of Representatives, where the Speaker is electorally accountable to the full chamber.[11]

The presence of these inherited chamber rules has led Senate rules to develop through a path dependent process with diminishing returns (Binder et al. 2007; Roberts and Smith 2006).[12] High political and environmental costs prevented minorities from exploiting debate rules in the 19th and early 20th centuries.[13] However, an increase in chamber workload and a decrease in environmental costs have made exploiting debate rules easier. Accordingly, while majorities may prefer reforming chamber rules, inherited institutions have raised the costs of doing so.

This theory contrasts with work suggesting that the lack of substantive rules reform reflects the preferences of majorities (Gold and Gupta 2005; Koger 2010; Wawro and Schickler 2004; 2006; 2010). This account emphasizes the endogenous nature of the Senate's rules.[14] They suggest that the relative ease with which the majority can "go nuclear," combined with norms of reciprocity and environmental costs, dissuade minorities from over-exploiting existing rules.[15] Thus, the Senate has operated under a form of "remote majoritarianism," which has rendered rules reform unnecessary.

[9] See footnote 2 for a critique.

[10] See Article I, Section 3, Clause 4 of the United States Constitution for the placement of the Vice President as the head of the Senate and Article I, Section 2, Clause 5 for the selection of the Speaker of the House. This power was granted to the Vice President for several reasons. First, the office was devoid of other substantial responsibilities. Second, supporters of the provision argued that it would constitute the fairest way to break a tie vote in the Senate (Hatfield 1997).

[11] Accordingly, Binder (1997) argues that ideologically cohesive House majority parties had far less trouble delegating power to the Speaker of the House.

[12] See Pierson (2000; 2004) for a discussion of path dependency.

[13] Exploiting unlimited debate rules to defeat a bill or extract compromises regarding its content requires members either to prevent a final vote by holding the floor for extended periods of time or at least be credibly able to threaten to do so. As a result, environmental factors have historically played a major role in limiting the success of obstruction. These include the number of other senators that will support a filibuster on the floor, the quality of the air conditions within the chamber, and total time spent in Washington (Maltzman, Sigelman and Binder 1996). Political factors include potential electoral consequences and the potential impact extended debate may have on the future legislative agenda.

[14] For example, Koger and Campus (2014, 6) argue that: "Simply put, filibustering is usually the weapon of a minority in legislatures with endogenous rules. Accordingly, a frustrated majority may deprive the minority of its ability to obstruct."

[15] The argument that the nuclear option deters minority behavior is supported by Koger (2010, 10), who argues that the "nuclear option may deter legislators from engaging in a filibuster that they would otherwise win."

The thesis shares many common elements with the inherited institutions argument. Specifically, Wawro and Schickler (2004; 2006; 2010) argue that procedural choice is strongly influenced by a cost-benefit analysis. This includes many of the same environmental costs discussed by Binder and Smith (1997). However, they liken the decision to exploit unlimited debate rules to a game theoretic war of attrition. These wars only occur if there is incomplete information about the cost-benefit calculi on either side.[16] Thus, observed instances where chamber debate rules are being exploited (also referred to as "manifest filibusters") provide informational benefits to all parties.

However, the authors argue these informational benefits only exist if the minority bears high physical/environmental costs. Consistent with work by Oppenheimer (1985), they note that these costs decrease the closer the Senate gets to mandatory adjournment. The existence of norms of restraint and threats of "going nuclear" served to curtail the minority's ability to curtail obstruction near the end of the session (Wawro and Schickler 2006). However, these norms broke down in the early 20th century, leading to more successful end-of-session obstruction.[17]

This debate is particularly important as scholars tie chamber decision rules to policy output. Specifically, scholars arguing inherited institutions have left debate rules largely immune to reform majorities suggest this has led to diminishing policy output (Binder and Smith 1997). They conclude by explicitly calling for procedural reform. In contrast, scholars arguing that the Senate reflects the will of chamber majorities suggest policy consequences are less severe. This view expresses uncertainty regarding the utility of reform efforts.[18]

Applications and Limitations

While the inherited institutions and remote majoritarianism theories specify largely distinct accounts of procedural choice in the United States Senate, testing these theories has proven difficult for several reasons. First, as noted above, both theories yield similar predictions for the use of obstruction in the early Senate.[19] In the modern Senate, the theories also yield identical

[16] The cost-benefit calculi include levels of resolve from both sides. Specifically, "the resolve level of bill supporters (opponents) depends primarily on how much more (less) they prefer the proposed bill to the status quo" (Wawro and Schickler 2006, 35).

[17] Specifically, these norms were closely tied to the size of the chamber. In the 19th century Senate, members found it beneficial to engage in close working relationships with their colleagues. As the chamber expanded, these relationships weakened (Wawro and Schickler 2006). See Binder et al. (2006) for a counter argument. Additionally, Wawro and Schickler (2004; 2006) argue the adoption of a formal cloture rule served to codify the collapse of the reciprocity norm and facilitated more obstruction.

[18] Wawro and Schickler (2006) suggest the informational benefits of obstruction are constructive for the Senate for several reasons. First, consistent with work by Buchanan and Tullock (1962), it allows the chamber to defeat "inefficient" policies (i.e. those favored by a majority less intense than their minority counterparts). Second, it serves as a cue to the attitudes of minority constituents. They argue further that unlimited debate rules foster compromise and that, "this need to compromise may, in practice, enhance the extent to which Senate outcomes reflect the public's views (Wawro and Schickler 2006, 280)." Finally, they add that "from a separation of powers standpoint, supermajority rule in the Senate is one of the few remaining barriers to presidential dominance in a context of highly polarized parted and unified control of Congress and the presidency (Wawro and Schickler 2006, 281)."

[19] Environmental factors included high physical costs for senators looking to hold the Senate floor while political

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null predictions for use of the nuclear option. Specifically, Binder et al. (2007) have argued the political costs for invoking a nuclear option would be too severe for reform-minded majorities. Wawro and Schickler (2006) argue that the minority would curb its behavior in the face of threats to invoke the nuclear option. This would render any such change unnecessary.

The theories yield differing predictions in terms of the frequency with which members exploit unlimited debate rules in the modern era. Binder and Smith (1997) argue that changes in environmental and political conditions have resulted in more incidents of obstruction. This has resulted in many bills and nominations being killed by minorities. The remote majoritarianism thesis suggests that this should only be true for issues where the majority has less resolve than the minority. This makes any evidence regarding the number of "manifest" filibusters difficult to interpret.[20] Since empirical evidence is particularly challenging to acquire and evaluate in this debate, scholars have focused on interpreting incidents involving obstruction.

The bulk of the episodes examined involve manifest filibusters in 19th and early 20th Century Senate.[21] Generally, scholars focus on whether or not a majority existed for a specific bill or

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factors like chamber workload and electoral incentives were fairly low. Because of this, Binder and Smith (1997) predict limited success for obstructionists in this 19th century Senate. Similarly, Wawro and Schickler (2006) argue that norms against obstruction were robust and the threats of unorthodox rules changes were consistently high during this era. Thus, they also predict limited success for obstructionists in the era. Scholars acknowledge, however, that obstructionists experienced greater success when the physical costs of exploiting unlimited debate rules diminished near the end of a legislative session (Binder and Smith 1997; Oppenheimer 1985; Wawro and Schickler 2006).

[20] Examining counts of manifest filibusters is difficult for a number of reasons. First, determining whether or not a filibuster (or dilatory motion) has taken place is almost entirely arbitrary. While some scholars define a filibuster as an outright attempt to kill a bill, others will count attempts to delay the vote or extract concessions as filibustering. Both perspectives require some subjective judgment about what constitutes legitimate debate. Accurate accounts of filibusters (and roll call votes) are more readily available in the most modern congresses, when sources like *Congressional Quarterly* give detailed summaries of legislation. For the 19th and much of the 20th centuries, scholars like Burdette (1940) had to rely on less reliable sources.

Third, when a successful manifest filibuster occurs, it often kills not only the underlying bill, but other pieces of legislation that would have been considered later in the session. Thus, looking at only the measure subjected to the filibuster minimizes the impact of the obstruction. Additionally, the majority is only going to force a manifest filibuster on an issue of the greatest salience/importance to its agenda (this is detailed more in the argument section). Thus, the influence on obstruction on less salient (but still important) issues is unnoticed and these policy consequences add up throughout a Congress. Finally, and perhaps most importantly, there is a clear selection bias with such data. The threat of obstruction often keeps legislation off the floor, and there is no way to accurately account for this phenomenon (for additional discussion see Beth (1995), Bell and Overby (2007) and Bell (2011).

[21] See, for example, Bawn and Koger 2008; Binder and Smith 1997; Binder et al. 2007; Koger 2007; Wawro and Schickler 2006; 2010. One exception, Gold and Gupta (2005), highlights a number of more recent episodes where they believe the Senate majority party utilized a "nuclear option" to limit individual members' ability to delay proceedings. Specifically, they argue that during his tenure as Majority Leader, "Senator Robert C. Byrd (D-WV) initiated four precedents that allowed a simple majority to change senate procedures without altering the text of any standing rule" (Gold and Gupta 2005, 262). These precedents include a precedent to end post-cloture filibusters (1977); a precedent limiting amendments to appropriations bills (1979); a precedent governing consideration of nominations (1980); and a precedent concerning Rule XXII's voting procedures (1987). They argue that two of these precedents "overturned procedures then standing, and two others would appear to contravene via (continued...)

reform proposal. While informative, many of these detailed case studies are limited by the implicit decision to treat "majorities" and "minorities" as fixed, unitary actors. This is problematic given that while existing theories disagree on the effect of inherited institutions, reciprocity norms and the feasibility of nuclear options, there tends to be a consensus that procedural choice is largely dependent on a cost-benefit analysis.

The difference between having that cost-benefit analysis be calculated by a "majority" and a "minority" actor and by 100 separate individual actors is extremely significant. It minimizes the impact of micro-level factors that likely influence support or opposition for reform or obstruction. This includes factors like normative attitudes regarding existing rules, like utility gained from the measures currently being obstructed; utility gained by how the change might influence future policy output, the effect such a change would have on an individual's policy leverage, any potential electoral ramifications.[22]

These micro-level factors suggest that it is unlikely that all members have strong, fixed preferences regarding Senate rules. The preferences of an individual senator change in relationship to contextual factors and the legislative agenda, which makes it far more difficult for coalition builders to assemble and maintain a majority coalition. Thus, as Senator Dick Durbin (D-IL) has argued, the difficulty for reform-minded senators is not simply getting the votes but also "holding them through the process" (Shiner and Sanchez 2012). In what follows, we examine several prominent recent episodes cited by scholars and senators as precedents for majority coalitions altering Senate rules in a manner consistent with the November 21st action. We argue these precedents differ from the November 21 case in important ways and apply to this most recent episode in limited and asymmetrical ways. Before addressing these episodes, however, we examine the technical facets of procedural reform in the Senate and detail historical attempts to alter the Senate's rules through 1975.

Majority Voting Without Limits on Consideration

Much recent commentary on procedural change in the Senate asserts that the difficulty of changing Senate rules arises because such action requires a two-thirds super-majority. In actuality, however, the Senate can adopt a resolution amending its Standing Rules with only a simple majority vote.[23] Only a simple majority is required, as well, for the Senate to agree to a motion to proceed to consider such a resolution ("motion to proceed"), and the same conditions apply to the consideration of procedural changes in several other forms, such as a resolution establishing a standing order or a bill establishing an expedited procedure for consideration of a

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reinterpretation the plain language of an existing Standing Rule (Gold and Gupta 2005, 262)." See Beth (2005) for further discussion.

[22] For recent work examining the public's attitudes toward Senate procedure, see Park and Smith (2013) and Smith, Ostrander and Pope (2013).

[23] A "simple majority" means a majority of Senators voting on the question, with a quorum present. Under the Constitution (Art. I, sec. 5), a quorum is a majority of all Senators (now 51, assuming no vacancies). Accordingly, although the simple majority requirement in the Senate is often today referred to as "51 votes," in fact a question would be approved by a simple majority if the vote were 48 to 43, or (in principle) even 26 to 25.

specified class of measure (Davis 2005). In this respect, proposals to change Senate rules are like most other questions that the Senate may consider:[24] if a vote occurs, a simple majority of Senators can win it.

The difficulties of changing Senate rules are rooted, rather, in their pervasive lack of general limits both on the time for considering questions and of generally available means to impose them in individual cases.[25] Even if a simple majority of Senators support a proposal to change the rules, they may be unable to bring the Senate to the point at which a vote to adopt the proposal can occur. As with any other debatable question, opponents can attempt to filibuster, either by extending debate or by engaging in other parliamentary actions, in order to prevent the determinative vote from ever occurring. In response, supporters of the proposal may need to try to assemble a super-majority to invoke cloture. In this way, the prospect that successful action will, at some point, require obtaining the support of a super-majority arises from the lack of generally applicable limits on the time for consideration of matters under Senate rules.

In practice, the Senate has often been able to alter its rules without finding it necessary to use cloture to limit consideration of the proposed change, because filibusters either did not occur or were ineffective. The potential need to surmount a "super-majority hurdle" has most often been realized on proposals that would amend the cloture rule or otherwise establish enhanced means of limiting consideration. In these cases the rules that the proposal seeks to change are the same ones that pose obstacles to its adoption. It is in this sense that Senate rules governing limits on consideration have been said to "entrench" themselves against their own alteration (Beth 2005; Fisk and Chemerinsky1997).

This "entrenchment" of the cloture rule is not absolute, for the rule does not purport to prevent its own alteration; it only imposes a super-majority requirement on the process of doing so.[26] Thus, the fundamental need of its proponents is not specifically to overcome a "super-majority hurdle" but to find some means of limiting consideration of the proposal to ensure the vote by which a simple majority could adopt it. In principle, this condition might be met without a super-majority vote to invoke cloture, either if the proposal were considered under some limits generally

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[24] Specific exceptions are provided by constitutional provisions (for example, treaties require a two-thirds vote) and procedural standards adopted by the Senate (for example, the waiver of most points of order under the Congressional Budget Act requires three fifths of the full Senate). For more detailed discussion of Senate procedures for procedural change, see Beth (2011).

[25] Generally, in the usage of Congress, any matter on which a chamber is to vote as a "question," including, for example, a bill, amendment, nomination, motion, or any other action that requires the assent of the body. "Consideration" includes not only debate, but also all procedural actions or other proceedings that take place while a question is pending before the chamber.

[26] Moreover, the super-majority requirement is only potential, for it is realized only to the extent that opponents of the proposal are well enough able to maintain (or threaten) a filibuster that supporters deem it necessary to seek cloture. In recent years it has also become common for proponents of matters to avoid a threatened filibuster by accepting a unanimous consent agreement to require 60 votes for adoption of the proposal itself in return for limits on consideration. Under these conditions, assertions about "requirements" for super-majority support to change Senate rules can best be understood as implicit references to the *potential* need to secure super-majority support in order to impose *limits on the consideration of* such changes, and thereby ensure that a (simple majority) vote on the proposal itself can occur. This interpretation is applicable also to the common, more general assertion that it now takes 60 votes for the Senate act on anything at all.

prescribed by Senate rules, or if the Senate imposed such limits through a vote on some procedural question that can be decided by a simple majority, and that would itself be considered under some generally prescribed limits.[27]

The key to permitting a simple majority to accomplish a change in Senate procedure appears to be that either the proposal itself, or at least some question that would ultimately permit a simple majority to limit its consideration, would itself be considered under consideration limits.[28] Either of these approaches would meet the description of a "nuclear option," in that it would permit the Senate to adopt procedural changes with the support of no more than a simple majority at any point in the process.

However, as detailed in our discussion of the literature, because Senate rules limit consideration in so few circumstances supporters of enhanced consideration limits have experienced persistent difficulty in implementing either of these approaches. As a result, they have sometimes attempted instead to enable action by a simple majority by advancing novel procedural arguments contending that consideration limits should apply to their proposals. This approach also involves difficulties. In particular, such claims have usually been raised under circumstances in which the procedural question was itself subject to debate, and its supporters often proved unable to find means of limiting its consideration and bringing the Senate to the vote by which it would accept the principle that would lead to limiting consideration of the underlying proposal.

In response to such conditions, proponents of consideration limits have sometimes attempted to implement a "nuclear option" by bringing the Senate to treat their procedural claims as having effect in advance of any Senate action to accept them. For example, they have sometimes offered a motion that proposed to limit consideration not only of an underlying proposal, but also of their own motion itself. In principle, any procedural directives proposed by a motion could authoritatively govern Senate action only if, *after* considering the motion, the Senate then actually adopted it. Yet the only point at which provisions limiting consideration of that very motion could possibly be carried out would be earlier, *before* the vote to adopt the motion, while its consideration was still in progress.

A motion of this kind, accordingly, could achieve its intended purpose only if its proposed limits on its own consideration were treated as applying already in the process of that consideration, even though at that point they would not yet carry any authority. Such treatment would have to reflect a presumption, in advance, that the motion was going to be adopted. Properly, however, until the motion was actually adopted, its consideration could be governed only in accordance with previously established and currently existing Senate rules. In this sense, such proceedings could be viewed as requiring the Senate to act in violation of its existing rules in order to reach a

[27] It might also be possible to construct a longer chain of procedural questions, the approval of each of which would close or limit consideration of the next, ending with a vote to limit consideration of the underlying question that would accomplish the desired procedural change. It appears, however, that in any such cases, proceedings would still have to be initiated with some question that (1) would limit consideration of the next, (2) could be adopted by a simple majority, and (3) was itself considered under limits on consideration.

[28] The following discussion uses "consideration limits" to include rules that make a question non-debatable or provide means for the Senate to terminate consideration immediately, as well as those that establish, or provide means for the Senate to establish, some definite future terminus to consideration.

vote on altering those rules. It is in this context that proceedings have been criticized as "breaking the rules in the process of changing them (Beth 2005)" One purpose of this paper is to consider whether or not the actions of November 2013, as well as other recent or proposed actions that have been referred to as instances of a "nuclear option," may have involved "breaking the rules in order to change them" in this sense.

In some cases of this kind, the consideration limits that a measure proposes to apply to its own consideration are the same ones that the measure proposes to institute as a general rule. Procedural proposals with this retroactive quality are sometimes described as attempting to bring about their own effectiveness through a process of "bootstrapping," in the sense that they could be said to attempt to raise a proposed procedural change to effectiveness "by its own bootstraps." "Bootstrapping," in this sense of attempting to use a merely prospective rule in order to secure its own establishment, might be viewed as the converse of the "entrenchment" through which already existing rules tend to secure themselves against their own disestablishment.

Difficulties of Amending the Rules

The prospect that Senate action on proposals to institute more effective means of limiting the consideration of business could be blocked by filibuster has frustrated efforts to impose such limitations at least since the time of Henry Clay.[29] Especially between 1953 and 1975, proponents of such restrictions repeatedly sought to achieve them by amending the Standing Rules to reduce the super-majority required for cloture from two thirds to three fifths or even to a simple majority. These efforts suffered persistent difficulties in finding a form of proceedings under which consideration could be limited in such a way as to enable a simple majority to act. In the course of the period, proponents of change responded to these difficulties by attempting more elaborate forms of proceeding, but these often proved to involve attempts at bootstrapping or other violations of existing rules in the process of acting.

In these earlier efforts to institute enhanced consideration limits, proponents attempted to establish the means for action by a simple majority constitutional grounds. They urged that the Senate must in practice be capable of reaching a vote on proposals to change the rules without having to surmount a super-majority hurdle. They also asserted that these conditions should apply at least, or especially, at the outset of a new Congress. Pursuant to this argument, proponents of change typically began their efforts at the start of a new Congress, often asserting that they were acting "under the Constitution" and attempting to preserve the prerogatives of the first day.[30] The Senate never adopted this argument, however, instead treating its Rules as

[29] Clay actively sought such changes while serving in the Senate during several periods between 1806 and 1852. See Binder, Madonna, and Smith (2007), Wawro and Schickler (2006) and Madonna (2011) for contrasting views on whether obstruction played a causal role in the defeat of Clay's proposed rules changes.

[30] Specifically, liberal reformers like Senators Clinton Anderson (D-NM) and Hubert Humphrey (D-MN) argued that Article I, section 5 of the Constitution required that the Senate be able to adopt rules without having to overcome a super-majority hurdle. Anderson pointed to the 1917 adoption of Rule XXII as a precedent in support of the argument for adoption of a total body of new rules. Humphrey argued that "there is not one article in the Constitution which is any more specific than article I, section 5, which pertains to the rules of the two Houses. There is no double talk contained in it. The article says that "each House may determine the rules of its proceedings." That (continued...)

remaining continuously in effect, on grounds that it is a "continuing body."[31] It has also consistently proceeded with the position that, as long as the actual vote on rules or other procedural changes itself requires the support only of a simple majority, the potential need to surmount a super-majority hurdle in the process of considering such questions presents no constitutional problem. According to this understanding, any difficulty presented by the self-entrenching tendency of the rules has only a practical character, and not one of principle.

At the point when proponents of enhanced consideration limits began their efforts in the 1950's, the self-entrenching tendency of the cloture rule took a highly formidable form, for the rule prohibited cloture on motions to proceed to consider amendments to the Standing Rules.[32] In 1953 and 1957, as a result, supporters of consideration limits did not offer such a motion to proceed, but instead moved that the Senate "in accordance with ... the Constitution ... take up for immediate consideration the adoption of rules ... ." In accordance with its established general procedures, the Senate treated the motion to proceed as debatable, with the result that supporters were unable to bring the Senate to a vote on it.[33]In this way, the framing of proponents' motion in terms of an appeal to the Constitution proved not to afford any concrete means of limiting consideration of the motion itself.[34]

(...continued)

is exactly what the Senator from New Mexico [Mr. ANDERSON] contends, namely, that the Senate may adopt rules to govern its proceedings (*Congressional Record*, 99th Congress, January 6, 1953, 119)."

[31] The so-called "continuing body doctrine" asserts that the continuity of the Rules is a consequence of the continuous existence of a majority quorum in the membership of the Senate, even before Senators beginning a new term are sworn at the start of a Congress (see Kammerman 1953). It may be argued that although the Senate is patently a continuing body in the sense that a quorum is continuously in being, this continuity does not automatically imply that the rules remain continuously in effect; it only makes it possible for the Senate consider them as continuous. In actual practice, nevertheless, the Senate has always treated its rules as remaining in effect in each new Congress (Beth 2005).

[32] This prohibition was established in 1949. The previous year, Southern Democrats, under the leadership of Senator Richard Russell (R-GA), were obstructing consideration of a motion to proceed to consider an anti-poll tax bill. Senate Majority Leader Kenneth Wherry (R-NE) filed a cloture petition leading Russell to raise a point of order that cloture did not apply to motions to proceed. President pro tempore Arthur Vandenberg (R-MI) upheld the point, arguing that ``the existing Senate rules regarding cloture do not provide conclusive cloture'' and concluding that "the Senate has no effective cloture rule at all" (*Congressional Record*, 94th Congress, August 2, 1948, 9603). An appeal was taken by Senator Robert Taft (R-OH), but dropped after some debate (Gold and Gupta 2005; Lynch and Madonna 2010; Mann 1996). In 1949, Vice President Alben Barkley (D-KY) overturned Vandenberg's ruling, arguing that he "could not believe that the Senate in debating this rule intended to freeze its own rules in perpetuity, so that is could never vote to change them so long as there was a determined group of Senators opposed to any change, who were willing to prevent the Senate from even considering a change in the rules except by unanimous consent, and it would almost amount to that" (*Congressional Record*, 95th Congress, March 10, 1949, 2175). A motion to table an appeal of Barkley's ruling failed, leading to adoption of a compromise resolution that allowed cloture motions to be filed on motions to proceed, but raised the threshold from a two-thirds majority of senators present and voting to two-thirds of the Senate and specified that cloture did not apply to changes in the chambers' rules (Binder and Smith 1997).

[33] In both years, instead, the Senate ultimately disposed of the motion by laying it on the table. *Congressional Record*, vol. 99, Jan. 3, 1953, 11; *Congressional Record*, vol. 103, Jan. 3, 1957, 9; Committee on Rules and Administration, 2011, 22-24.

[34] Such a limitation might have resulted only if the Senate had acted in some fashion to accept the constitutional (continued...)

This difficulty appears, as well, in the "advisory opinion" that Vice President Nixon offered from the chair during the 1957 proceedings. Nixon affirmed that "the right of a current majority of the Senate at the beginning of a new 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." Yet he also went on to assert that if the Senate chose to "proceed with the adoption of rules," it could do so "under whatever procedures the majority of the Senate approves (*Congressional Record*, 95th Congress, January 4, 1957, 178-179)." This observation left unspecified by what means the Senate could be brought to the point of the vote by which such a majority could approve such procedures. Even as an "advisory opinion," moreover, this action might itself be regarded as a departure from established Senate procedure, which holds that the chair generally does not pronounce on procedural questions addressed to parliamentary situations in which the Senate is not actually engaged, but that are merely prospective or hypothetical.

Cloture for Motions to Consider Rules Changes

The procedural situation confronting advocates of consideration limits changed in 1959 when the Senate adopted two amendments to its Standing Rules. Senate proceedings on these amendments occurred entirely in accordance with the chamber's regular procedures, and accordingly made no contribution to the search for means by which the Senate might enable itself to proceed to a vote with the support only of a simple majority. Limits on consideration were established through a unanimous-consent agreement, which proved feasible to obtain because the amendments afforded concessions to both advocates and opponents of more effective consideration limits. Both changes, however, affected the self-entrenching tendency of Senate rules, one by reducing and one by enhancing that tendency.

The first amendment expanded the scope of cloture to include motions to proceed to consider amendments to the Standing Rules. This change reduced the effective entrenchment of the cloture rule by offering the prospect that at least with the support of a super-majority, a vote on an amendment to the Rules could be ensured. The second amendment, by contrast, added to Senate Rules a new provision explicitly stating that they "continue from one Congress to the next Congress unless they are changed as provided in these rules" (Committee on Rules and Administration 2011, 24-25, 193-197). This provision fortified the effective entrenchment of the Rules by operating as a denial of the claim that the start of a new Congress afforded a special opportunity for a simple majority to institute procedural changes without the intervention of a super-majority hurdle.

It might be argued that this new provision of Rules also involved a kind of "bootstrap." Only if Senate rules remain in force from Congress to Congress could a Rule stating that they do so be in effect at the start of a new Congress. It was just this continuity of the rules that the argument for change by simple majority at the start of a Congress was originally intended to contest. The

(...continued)

principle implicitly being asserted. In this sense, the implicit appeal to the constitutional principle could be regarded as an attempted bootstrap.

continuity of the rules, however, could also be affirmed independently of the new Rule, by an appeal to the uniform previous practice of the Senate.

Constitutional Points of Order and the Motion to Table

The expanded scope of the cloture rule enabled advocates of consideration limits to adopt procedural approaches more closely aligned with established Senate practice. After 1959, instead of offering any motion that the Senate immediately consider the adoption of Rules, advocates normally proceeded by simply moving that the Senate proceed to consider a resolution amending the Rules, then moving for cloture on this motion to proceed.[35] In some cases, however, before attempting cloture, advocates of consideration limits also essayed other, more innovative approaches to circumventing the implications of the amendment declaring the Standing Rules continuous. The approaches used in the 1960's introduced into the effort to enhance consideration limits two procedural actions that later proved pivotal in attempts to institute procedural change by establishing new precedents: constitutional points of order and motions to lay on the table.

In 1963, while the Senate was considering a motion to proceed to consider amendments to the cloture rule, its proponents moved "under the Constitution" that the chair put the question "without further debate" on the motion to proceed (*Senate Journal* 1963, 87). Opponents immediately raised a point of order that no such motion was authorized by Senate rules. Inasmuch as this point of order contested the implicit claim that the motion was authorized by the Constitution, Vice President Johnson ruled that the point of order raised a constitutional question. As he then went on to point out, the Senate has always held that authority to rule on constitutional questions relating to Senate procedure resides only in the Senate itself, and not in the chair (Riddick and Frumin 1992, 989; Heitshusen 2013). This practice allows the Senate to decide each such question freely, in accordance with its own lights at the time, whereas parliamentary rulings by the chair are supposed to reflect the rules and precedents as they stand at the time of the ruling.

Vice President Johnson accordingly submitted to the Senate the question, "Does a majority of the Senate have the right under the Constitution to terminate debate at the beginning of a session and proceed to an immediate vote on a rule change notwithstanding the provisions of the existing Senate rules?" (*Senate Journal* 1963, 87) This framing squarely posed the question whether the Senate would accept the theory that the Constitution required that simple majorities be able to accomplish rules changes at the outset of a Congress. If a simple majority of the Senate voted to answer the submitted question affirmatively, it would establish a precedent that a motion to close debate immediately on a motion to consider a rules change was in order at the outset of a Congress, and pursuant to that precedent, the vote of a simple majority in favor of the motion to

[35] Most of these efforts, however, terminated when cloture failed to obtain the requisite super-majority. Although the amended cloture rule made it possible to impose limits on process of considering amendments to the rules, it still failed to offer a way for a simple majority to reach such a result.

close debate could ensure that the Senate would reach a vote by which a simple majority could adopt the motion to proceed.[36]

In general, however, points of order submitted to the Senate are debatable (Riddick and Frumin 1992, 989, 991-992), which meant that opponents might, by filibustering, be able to prevent the occurrence of vote that would affirm the validity of the motion to close debate. Instead, however, opponents moved to lay the submitted question on the table. The motion to table is non-debatable, so the Senate proceeded at once to vote on this motion, and adopted it. To lay a question on the table constitutes its final, negative disposition. By tabling the constitutional question submitted in this case, therefore, the Senate established a precedent that it had no constitutional right, even at the outset of a Congress, to terminate debate by a simple majority on a procedural change.

During similar proceedings in 1967, by contrast, Vice President Humphrey submitted the constitutional question to the Senate in a form that offered an opportunity for proponents of the motion to proceed to use the motion to table. On this occasion, when opponents raised their point of order against the motion to close debate, the question the Vice President submitted was simply whether the Senate would sustain the point of order. In this situation, proponents were able\ to make use of a motion to lay the submitted question on the table, for the adoption of this motion would have the same effect as a direct vote to reject the point of order, which would establish that the motion to close debate immediately was in order. In these circumstances, the non-debatability of the motion to table ensured the occurrence of a vote by which a simple majority could affirm the validity of the motion to close debate, thereby allowing the Senate to vote on that motion.

On this occasion, however, the Senate rejected the motion to table, then went on to vote to sustain the point of order. By this action the Senate again held out of order the motion for an immediate vote, and as a result, the effort to change the rules once again ultimately failed. This failure, however, resulted not from any procedural difficulties, but only from lack of majority support. These proceedings, accordingly, demonstrated a process by which proponents of enhanced consideration limits might be able to use the non-debatable motion to table to ensure the occurrence of the series of votes through which, ultimately, the Senate could adopt an amendment to the rules without the support of more than a simple majority being required at any point. Such proceedings, it appears, would enable the Senate to alter its procedures through a "nuclear option" without necessitating any departures from existing Senate rules in the process.

The 1963 and 1967 proceedings, nevertheless, also demonstrated a constraint on the potential for using the motion to table as a means to limit consideration of a proposed rules change. Although adopting a motion to table constitutes a negative decision on the question tabled, rejecting the motion does not constitute an affirmative decision on the question. Nor does it even limit consideration of the underlying question; it only enables that consideration to continue. Rejection of the motion to table the procedural question submitted to the Senate in 1963, for example, would not have limited consideration of the motion for an immediate vote on the motion to proceed. For this reason, as long as it is *agreement* to a procedural question that would limit

[36] Presumably, a simple majority could then have carried through similar proceedings on the resolution amending the Rules itself, ending with adoption of the more effective consideration limits proposed.

consideration of an underlying proposal, a motion to table the procedural question affords no aid in ensuring the occurrence of a vote on the proposal. Only when *rejection* of the procedural question will have the effect of limiting consideration of the underlying proposal may the non-debatability of the motion to table be utilized to ensure that the vote will occur.

In addition, however, even if the Senate had rejected the point of order against proponents' novel motion for an immediate vote, its action might have been held to establish only that the motion was in order, not necessarily that it was also non-debatable. A debatable motion to vote might still not have ensured a vote on the underlying question except when super-majority support could be secured to invoke cloture on the motion to vote itself. Yet making a presumption that a motion to terminate debate on an underlying question must also mean that this motion itself is non-debatable would seem to involve a "bootstrap" argument, treating a limit on consideration as being in effect simply because it was proposed. To this extent, proceedings of the form attempted in 1967 still could not be considered as providing a means by which a simple majority could achieve procedural change without violating existing rules in the process.

Asserting Cloture by a Simple Majority

In 1969, advocates of consideration limits attempted to use the cloture motion itself as a means for a simple majority to limit consideration of their motion to proceed. This approach, however, turned out to involve apparent violations of existing rules more explicit than those of previous years. When the Senate voted in favor of cloture on the motion to proceed by 51-47, Vice President Humphrey ruled that cloture had been invoked, even though this tally fell well short of the two-thirds majority required by Rule XXII. The Vice President explicitly identified his ruling as involving a constitutional question, but justified making the ruling, rather than submitting the question to the Senate, by an argument which he had offered earlier, in response to a parliamentary inquiry at the time the cloture motion was filed.

As with Vice President Nixon in 1957, this response neglected the principle that the chair generally does not pronounce on parliamentary situations that are only prospective or hypothetical. The argument Vice President Humphrey nevertheless offered was that only by making an initial ruling could he enable the Senate to "exercis[e] its right to decide the constitutional question" and thereby "give substance to the right of the Senate to determine or change its rules and to determine whether the two-thirds' requirement of rule XXII is an unconstitutional inhibition on that right at the beginning of a new Congress" (*Senate Journal*, 1969, 13-14. 50). The Vice President pointed out that once the chair ruled that cloture had been invoked, Senators could appeal from his ruling. The Senate would then be able to proceed at once to vote on the appeal, because the chair would "place the appeal before the Senate for an immediate vote since Rule XXII provides that appeals ... under cloture ... shall be decided without debate." If, on the other hand, he were to rule that cloture had been rejected, he would "inhibit[ ] ... the Senate from exercising its right to decide the constitutional question," presumably because, if cloture had not been invoked, the appeal by proponents of change would be subject to debate. In that situation, a filibuster might prevent the Senate from reaching the vote by which it could sustain the ruling of the chair, and thereby from establishing that a simple majority could limit consideration of the motion to consider amendments to the rules.

This form of proceeding had the effect of substituting an appeal for a submitted point of order as the means by which the Senate would decide the constitutional question. As discussed in the previous section, however, when a procedural question is submitted to the Senate, the motion to table can be useful to supporters of the underlying question only when a negative disposition of the question submitted will aid their cause. When a decision of the chair is appealed, on the other hand, laying the appeal on the table rejects the appeal and sustains the initial ruling of the chair. In this situation, the motion to table can be of aid only to the side favored by the initial ruling. In the 1969 situation, accordingly, a simple majority would be able to limit consideration of the motion to proceed only if one of two conditions was met: either the chair would first have to rule in a way favorable to limiting consideration, so that supporters of the motion could affirm the ruling by using the non-debatable motion to table the appeal, or else the appeal would have to be raised under conditions in which its own consideration was limited, so that the Senate could be assured of voting directly on the appeal.

In the 1969 proceedings, however, the first condition was satisfied only because the chair engaged in an apparent violation of the established principle that constitutional questions be submitted to the Senate for decision. The second condition was apparently met only through a form of "bootstrapping," for in order to treat the appeal as non-debatable, the chair had to presume it already established that cloture had, indeed, been invoked by a simple majority. Even if this question had not been regarded as a constitutional one, this ruling stood in apparent contradiction to the explicit text of the rule, and in that way appeared to violate the parliamentary presumption that the chair will rule in accordance with established precedent and practice. In several respects, accordingly, these proceedings could be regarded as departing from existing procedures in the course of attempting to alter them.

This proceeding, nevertheless, did not achieve its purpose, again for lack of support by a simple majority. A simple majority did vote in favor of cloture, opponents of enhanced consideration limits did appeal the Vice President's ruling, and the Senate proceeded immediately, under his argument, to a vote on the appeal. In this vote, however, the Senate reversed the chair, establishing a precedent that a cloture could not be invoked by a simple majority on a motion to proceed to consider an amendment to the rules.

Although corresponding proceedings at the beginning of the following Congress, in 1971, took a different course, they ultimately reinforced this decision. At the time when a motion for cloture was filed on the motion to proceed, Vice President Agnew declined to respond to a parliamentary inquiry about his intended course of action, on grounds that the chair ought not rule on hypothetical situations. Later, when the cloture motion received no more than a simple majority, he held, consistently with the 1969 decision of the Senate, that cloture had not been invoked, and when proponents of consideration limits appealed this ruling, the appeal was treated as debatable, on grounds that cloture had not been invoked. Under these conditions, the prospect once again arose that with the support of only a simple majority, the Senate might not be able to reach the point of voting to reverse the chair on appeal, which would have permitted majority cloture for rules changes at the start of a Congress. Instead, the Senate ultimately laid the appeal on the table, thereby sustaining the ruling of the chair that cloture was not invoked by a simple majority in such situations (*Senate Journal*, 1971, 160-161).

Motions Governing Their Own Consideration

In 1975, advocates of enhanced limits on consideration again began by moving that the Senate proceed to consider their resolution to amend the Rules, but they were unable to bring their motion to a vote before the Senate adjourned and the motion accordingly fell. After repeating these proceedings several times without success, they took a new approach, offering a compound motion which provided not only (1) that the Senate proceed to consider their resolution, but also (2) that the Senate vote immediately on ending debate on this motion and (3) that, if a simple majority voted to end debate, the chair immediately put the question on the motion to proceed.[37]

This form of motion to proceed may be viewed as involving an explicit "bootstrap," for it attempts to establish conditions for its own consideration, even though such conditions could be treated as regulating that consideration only by presuming in advance that the motion was going to be adopted. Vice President Rockefeller, nevertheless, entertained the compound motion. In the fashion that had become familiar, the majority leader then raised a point of order against the motion, the Vice President submitted the point of order to the Senate as constitutional, and supporters of the motion moved to table the submitted point of order. In contrast to past years, however, the Senate agreed to table the point of order, thereby deciding that the compound motion was in order.

The Vice President, moreover, construed the Senate's action not only as holding the compound motion in order, but also as warranting the application of its terms to its own consideration. He accordingly proceeded to put the question on the motion without debate. This action promised to enable supporters of the motion to secure its adoption by a simple majority, but only by implementing the "bootstrap" character of the proceeding. In this respect, the chair's action amounted to a decision that a bootstrapping motion was proper.

Opponents, however, demanded the division of the compound motion, so as to separate consideration of the simple motion to proceed from that of the provisions regulating consideration of the motion.[38] The Senate accordingly proceeded to consider the first division of the motion, the motion to proceed. Standing alone, however, the simple motion to proceed was held debatable. As a result, no division of the motion ever reached a vote, and the entire compound motion fell at the next adjournment. This proceeding enabled opponents to prevent the non-debatable motion to table the point of order against the compound motion from rendering the compound motion itself non-debatable, and thereby rendered the attempted "bootstrap" ineffectual.

When supporters of consideration limits then nevertheless attempted to continue their efforts, opponents attempted take control of the proceedings by offering their own compound motion for consideration of the resolution to amend the rules. Their motion included provisions that (1) debate on the motion be limited only through cloture; (2) the chair submit any point of order raised during consideration; and (3) any Senate vote on a submitted point of order come directly

[37] The Senate had accepted the usual unanimous consent request that no rights existing at the "start of a Congress" be affected by these adjournments. *Senate Journal* 1975, 5; Committee on Rules and Administration 2011, 201; *Congressional Record*, 94th Congress, Feb. 20, 1975, 3835.

[38] Under paragraph 3 of Senate Rule XV, a question is divisible on demand of any Senator if it contains distinct, logically separable, propositions.

on the point of order itself and not on a motion to table. Although these provisions of the motion, just as much as those in the earlier compound motion, represented an attempt to regulate its own consideration, no point of order was raised against it, perhaps because the terms of consideration for which it provided were all at least consistent with existing Senate rules.

On demand of the Senator who offered this new compound motion, it was immediately divided, and the Senate proceeded to consider its first component, the simple motion to proceed. Proponents of consideration limits responded by offering their own motion to govern consideration of the motion to proceed. Like the self-governing provisions of their own earlier compound motion, their new motion provided that the Senate at once vote, first on this new motion itself and then, if this motion was adopted, on opponents' new motion to proceed. The majority leader raised a point of order against proponents' motion, but the Senate laid the point of order on the table, thereby holding the motion in order. The Vice President again held that under the terms of the motion, the question thereon was to be put at once. Opponents appealed this ruling on grounds that holding the motion to be in order did not itself constitute an affirmation of its own assertion that it was non-debatable. Proponents, however, again succeed in laying this appeal on the table, thereby affirming that despite the "bootstrap" character of their motion, the terms of consideration it proposed did govern its own consideration.

This decision imposed limits on consideration of the motion to regulate consideration of the pending motion to proceed to consider the proposed amendment to the cloture rule. It thereby opened a path for action by which a simple majority could reach a vote to take up the proposal, and presumably to adopt it. The motion to regulate consideration of the motion to proceed, however, never reached a vote, for this prospect of action by a simple majority led to a negotiated accommodation between the two sides. One element of this accommodation was that the Senate adopted an amendment to its Rules permitting a three-fifths' majority of the full membership of the Senate to invoke cloture on all matters except amendments to the Standing Rules. This requirement remains the basic one in effect today.

The other key outcome of this accommodation, however, was that the Senate agreed to reconsider and reverse its ruling that the motion offered by supporters of consideration limits, imposing limits on its own consideration as well as on that of the motion to proceed, was in order. This holding, which once again rejected the principle that a simple majority may close debate on a proposal to change the rules, at least at the beginning of a Congress, still constitutes the most recent decision of the Senate on that question. On the other hand, the Senate took no explicit action to reverse its initial ruling admitting the compound motion originally offered by supporters of consideration limits, nor did it explicitly repudiate the principle that a motion could set terms for its own consideration.

Changing Procedure by Amending the Rules

The efforts from 1953 through 1975 to amend the cloture rule demonstrated the difficulty of finding a form of proceeding that could be limited to ensure it would end in a simple majority vote while still remaining consistent with the existing rules of the body. Advocates of consideration limits were unsuccessful in finding a way to raise a procedural question through which a simple majority could have limited consideration of their proposal, under conditions in which existing rules either imposed limits on consideration of that procedural question or

permitted a simple majority to impose such limits. As a result, the course of action followed either failed to bring the Senate to a point at which a (simple majority) vote to agree to the procedural question could occur or else it enabled such a result only through proceedings apparently at variance with established Senate procedures.

The most frequent form taken by these apparent departures from established procedures was some variety of bootstrapping, involving an attempt to apply limits on consideration to proceedings that were taking place before the Senate had acted to establish those limits. The proceedings of 1953, 1957 and 1963 involved attempts at bootstrapping only through their implicit presumption that the Constitution made non-debatable either a motion to proceed to consider proposals for enhanced consideration limits or a motion to vote at once on such a motion to proceed. Because the Senate treated the pertinent motions as debatable, the actual course of proceedings in these years effectively remained consistent with existing Senate procedures. For just that reason, however, the proceedings failed to provide a means of ensuring that a simple majority could act. Similarly in 1971, the Senate acted consistently with existing procedures when it voted to sustain the ruling of the chair that a simple majority had not invoked cloture. It did so, however, by adopting the non-debatable motion to table an appeal. Inasmuch as the appeal itself was treated as debatable, these proceedings again failed to provide a means, consistent with existing rules, by which the Senate could have been assured of reaching a vote by which a simple majority could have made the opposite decision.

In 1969 and 1975, by contrast, the Senate was able to reach a vote on a question that would assure the ability of a simple majority to reach a vote to adopt enhanced consideration limits. These efforts failed only because the Senate then voted against the outcome that would have brought about this result (and in 1975 this vote came only upon subsequent reconsideration of the pertinent question). In each of these cases, however, the Senate was able to reach the crucial vote only through means that can clearly be viewed as bootstrapping. In 1975, the key actions were the motions that attempted to set terms for their own consideration; in 1969, the key was the chair's assertion that the appeal of the ruling that cloture had been invoked was non-debatable because cloture had been invoked. The 1969 proceedings also seem inconsistent with additional procedural principles, including those holding that the chair does not rule on constitutional questions, will rule in accordance with established precedent, and does not pronounce on merely prospective or hypothetical situations. The 1957 "advisory opinion" also seems inconsistent with the last of these principles.

Among the proceedings of these years, only those of 1967 seem to have demonstrated a path enabling the Senate to amend its rules without potentially requiring more than simple majority support. In that year a simple majority could have adopted a non-debatable motion to table a point of order, which the chair had properly submitted to the Senate as a constitutional question, against a motion to close debate immediately on a motion to consider amendments to the Rules. The effort appears to have failed only because no majority voted for the motion to table. Nevertheless, even if the Senate had agreed to table the point of order, it still might have treated the novel motion to close debate immediately as itself debatable, in which case the proceedings still would have failed to ensure the occurrence of the crucial vote. On the other hand, if the Senate had treated this motion as non-debatable, it would have ensured a vote, but only by means that could be considered a form of bootstrapping. To this extent, even the 1967 proceedings may

not have definitively demonstrated a path by which the Senate could ensure a simple majority of reaching a vote by which it could institute enhanced consideration limits.

The "Nuclear Option" and its Difficulties

Apparently in light of the difficulties encountered in establishing the effective ability of a simple majority to change the rules at the beginning of a Congress, after supporters of consideration limits succeeded in securing amendments to the cloture rule in 1975, attempts to amend the rules to institute further consideration limits ceased to be a recurrent feature of Senate proceedings. Additional amendments to the cloture rule in 1976, 1979, and 1986 focused instead on refining the conditions of debate and amendment post-cloture (Committee on Rules and Administration, 2011, 31-36, 209-225). The question of how a simple majority might be able to achieve further limits on consideration became salient again in 2004 in connection with efforts to secure confirmation of controversial appointments to the Federal judiciary. At this point, advocates of consideration limits began to contemplate ways of making use of the Senate's authority to make procedural decisions, not as a way of securing limits on the consideration of proposals to amend the rules, but instead as a means of directly instituting such limits. In particular, they contemplated raising a point of order that, if sustained, would establish a precedent with the effect of instituting the desired procedural changes.

This approach was attractive to change proponents because it is well established in the practice of the Senate that the chamber has the ultimate authority to decide any procedural question that comes before it, and such decisions constitute its highest form of precedential authority.[39] In practice, the Senate has occasionally acted in this way to interpret its rules by its votes on appeals of procedural rulings of the chair or on points of order submitted to it for decision. In general, the Senate requires the vote only of a simple majority in order to decide a procedural question. Action by this means, promised to make possible procedural change without the concurrence of a voting minority, and it was apparently in part for this reason that this approach came to be called the "nuclear option (Perrine 2004)"

In general, procedural questions presented to the Senate for decision are subject to debate, and the Senate could limit consideration only by a super-majority vote for cloture. In this respect, the concept of altering procedures by establishing precedent did not, in itself, resolve the problem of how a simple majority could ensure the occurrence of the vote by which a simple majority could establish the desired changes in procedure. In the form projected in 2004-2005, the means of enabling action by a simple majority was provided by the motion to table. Change proponents would raise a point of order that would, if sustained, establish a precedent legitimating some more effective means of imposing limits on consideration. Opponents of the new interpretation would be able to forestall establishment of the precedent only by appealing the decision to a vote of the full Senate. However, proponents of the change could move to lay the appeal on the table. The Senate would immediately proceed to vote on this non-debatable motion, and a simple majority vote for the motion to table would reject the appeal, thereby sustaining the ruling of the

[39] "[A]ny 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." Riddick and Frumin, 1992, 987.

chair and affirming the desired precedent. This use of the motion to table, accordingly, would pre-empt the possibility of a filibuster that could prevent a simple majority from acting.

The possibility of successful action by these means depended essentially on the initial ruling by the chair in support of the point of order. A ruling against the point of order would reject the proposed new interpretation, in which case it could become established as precedent only if the Senate reversed the ruling of the chair on appeal. Supporters of the new interpretation could raise such an appeal, but in this situation a motion to table the appeal would not serve their purposes. A vote in favor of the motion to table would reject the appeal, thereby confirming the chair's ruling against the proposed new interpretation, but a vote against tabling would leave the appeal before the Senate in a debatable condition. This situation would reproduce the same difficulties faced by consideration of an amendment to the Rules, in which it might become impossible to reach the vote by which a simple majority could establish new limits on consideration unless a super-majority first voted for cloture.

Senate practice presumes it is the duty of the chair to rule consistently with previous interpretations of Senate Rules and procedures (Bach 1991). However, the means of limiting consideration that a new interpretation would make available would presumably represent a reversal of those previous interpretations. In such circumstances, a ruling by the chair favorable to the position of change advocates would presumably itself constitute a violation of existing procedural standards. Yet only such a ruling would permit the motion to table to be used to enable a simple majority to bring about the vote by which a simple majority could establish the desired precedent. It is the recognition of this difficulty, among others, that has sometimes been reflected in the charge that a nuclear option would necessarily involve "breaking the rules in order to change them" (Beth 2005, 2013)[40]

The variant of the "nuclear option" known as the "constitutional option" did not overcome these difficulties, but rather exacerbated them. This form of action contemplated basing the point of order that would impose the desired consideration limits on constitutional grounds. As already discovered in the earlier efforts to amend the cloture rule, however, Senate practice mandates the chair submit such questions directly to the Senate for decision (Riddick and Frumin 1992, 989; Heitshusen 2013) As already illustrated, the Senate can decide a submitted constitutional question by a simple majority vote, but the submitted question is normally debatable. In this situation again, the motion to table could be used to ensure the ability of a simple majority to act only if the chair initially ruled to uphold the point of order, yet for the chair were to rule at all would already constitute a violation of established Senate practice.

As a means of instituting procedural change, finally, the approach of establishing new precedent might be considered to suffer from a further disadvantage in contrast to the explicit amendment of rules. An amendment to the Rules may specify with some explicitness a general principle

[40] For these reasons, the contrast between changing Senate procedures by amending the Rules and by establishing precedent cannot adequately be described in terms of the presence or absence of a potential super-majority hurdle. Through either course of action, procedural change would normally require only a simple majority, but as long as the proposition that would accomplish the change is debatable, the vote may not occur unless the Senate imposes limits on consideration, and it may not be possible for a simple majority either to impose such limits, or even to reach the vote by which it could do so. For this reason, difficulties of achieving procedural change in the Senate are not overcome simply by shifting from amending the rules to precedential action as a means of change.

governing action, the circumstances in which it applies, and the actions by which it may be implemented. A procedural ruling, on the other hand, more nearly resembles a judicial decision, in that its purpose is to determine the application of existing standards to a specific case or controversy. The specific procedural situation addressed by a point of order may not always permit framing the procedural question at issue in such a way as to specify comprehensively either the scope of the ruling or the principle intended to be established. As a result, a ruling that responds to the specific configuration of circumstances may have an open-ended character, in that its application to other situations, more or less similar, may be subject to subsequent interpretation. If a ruling establishes that a certain motion is out of order in some particular circumstances, for example, further questions may later still be raised whether the motion is out of order also under different, but more or less similar, circumstances; and further proceedings may be required to reach a satisfactory settlement of such questions.

The Merkley Memo and Changing Procedures by Establishing Precedent

As we discuss above, Majority Leader Reid (D-NV) justified the November 21 action in part on a memo written by Senator Jeff Merkley (D-OR). Merkley's (2013) memo argued "the 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." We have not been able to establish whether all the cases cited by Merkley exemplified "nuclear" proceedings in the sense we are using the term. Not all of them, in any case, addressed the establishment of further limits on consideration, and in most cases the proceedings excited less controversy than did the earlier efforts to amend the cloture rule. Nevertheless, many of these proceedings raise some of the same questions about the extent to which the Senate could both remain consistent with previously existing rules and yet also ensure the capacity of a simple majority to act. Accordingly, we examine seven of the most prominent cases cited to help clarify the conditions under which a simple majority may institute alterations in Senate procedures.[41]

Limits on the Defense of Germaneness, 1979

Several of the precedent-making actions of this period addressed the extent to which amendments changing general, permanent law ("legislative amendments") may be offered to appropriation bills, the purpose of which is supposed to be limited to providing funding for the operation of specified programs for a given fiscal year or other period. The general standard established by Senate Rule XVI is that a legislative amendment to a general appropriations bill is in order only if it is germane to legislative language already present in the bill. The Chair may rule only on whether the language is legislative and any question of germaneness is to be decided by vote of the Senate. In practice, if a point of order is raised against an amendment to an

[41] Case selection was determined by whether the episode was cited not only by Merkley, but other scholars as well (see Bach 1979; Binder and Smith 1997, Gold and Gupta 2005, Koger 2010, Wawro and Schickler 2006). Future iterations of this paper will seek to address the 1977 precedent limiting post-cloture filibusters (on this case, see Bach 1979; Koger 2010, 177-178; Merkley 2013, Wawro and Schickler 2006, 268-269).

appropriation bill on grounds that it is legislative, the sponsor may "raise the defense of germaneness," and if the Senate then votes the amendment germane, the original point of order becomes moot and the Senate considers the amendment (Bach 1982; Riddick and Frumin 1992, 161-171) Because the Senate will always decide such questions of germaneness anew in each case, these decisions are not considered precedentially binding on the Chair in other circumstances. As a result, this practice enables the Senate to hold germane any amendment to an appropriation bill that it wishes to consider without damaging the coherence of its general precedents on germaneness.

Late in 1979, the Senate was considering an amendment to the defense appropriations bill under a time limit established by unanimous consent. Under such time limit, a point of order may not be raised against the amendment until the time expires or is yielded back. When that point was reached, the manager of the bill raised the point of order that the amendment was legislative and its sponsor raised the defense of germaneness. However, Majority Leader Robert C. Byrd (D., W.Va.) raised a point of order asserting that the defense of germaneness was not available because there was no legislative language in the bill to which the amendment could be germane. The Senate permitted brief debate on the point of order by unanimous consent, during which the chair noted a ruling in favor of this new point of order---

> would have the effect of adding to the existing precedents a threshold question, that being whether or not there is House language for the amendment to be germane to, and if there is no House language, the Chair would not submit the question of germaneness to the Senate, but at that time rule on the point of order---

that the amendment was legislative. The chair then proceeded to uphold the point of order, the sponsor of the amendment appealed, the majority leader moved to table the appeal, and the Senate adopted this motion, 44-40, thereby upholding the chair and establishing the precedent described (see Riddick and Frumin 1992, 167; *Congressional Record*, 96th Congress, November 9, 1979, 31892-94). [42]

In ruling on the Majority Leader's point of order, the chair noted that it presented a "question of first impression," meaning that the Senate had no previous precedent on point. Senate practice permits the Chair to submit such questions directly to the judgment of the Senate, but does not require it to do so. In this instance, as a result, upholding the point of order did not require the Chair either to contravene any established practice or to contradict any previous precedent. This favorable ruling, in turn, was necessary to enable the Senate to affirm the new precedent by voting to table the appeal. In this case, accordingly, it was the non-debatability of the motion to table the appeal that provided the limit on consideration which assured the ability of a simple majority to act. Yet the motion to table could play this role in the first place only because the situation permitted the Chair to rule in favor of the point of order without transgressing any rules. Accordingly, this proceeding might not afford a model in accordance with which simple

[42] According to Gold and Gupta (2005, 264) in this case former Senate Majority Leader Robert Byrd (D-WV) "led a majority of Senators present in setting a precedent that ran directly contrary to the plain language of Senate Standing Rule XVI, the rule governing consideration of general appropriation bills. Merkley's memo describes it as "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 32-32)." See also Gold (2008, 109-110).

majorities could achieve procedural change in accordance with existing rules in the presumably more usual case in which the required decision would run counter to procedures already well established.

Timing of Cloture Votes during Continuous Session, 1979

On December 11, 1979, cloture was moved on a pending measure to impose a windfall profits tax on crude oil.[43] On the following day, the Senate remained in session past midnight considering the measure, and at 1 a.m. the chair laid the cloture motion before the Senate pursuant to the directive of the rule to so "one hour after the Senate meets on the following calendar day but one." Majority Leader Byrd, however, raised a point of order asserting that "for purpose of the operation of the rule, the word 'meets' comprehends a new beginning; ... that the Senate, having been in session since yesterday at 10 a.m., has not yet met on this day [December 13]; and [under these circumstances] ... the word 'meets' becomes operative at the hour of daily meeting of the Senate ..."(*Senate Journal*, 1979, 776; *Congressional Record*, vol. 125, Dec. 12, 1979, 35692).

The chair held the point of order non-debatable, but entertained debate for its own information, as Senate precedents permit. During this debate, opponents contended that the chair's initial action was proper under a 1964 response to a parliamentary inquiry that was apparently the Senate's only previous pronouncement on the subject, and objected that "rather than try to amend the rule, we are being asked to overturn what the Senate has done in the past" without the one-day notice required by Senate Rules for amendments to the Rules (*Senate Journal*, 1979, 776; *Congressional Record*, vol. 125, Dec. 12, 1979,. 35693-35698). After this debate, opponents moved to table the point of order, which would have permitted the cloture vote to proceed, but the Senate rejected this motion. The chair then submitted the point of order to the Senate "because the Senate has never spoken to the issue," and again held that the submitted point of order was non-debatable. The Senate sustained the point of order, 43-32, establishing that when the Senate is in continuous session, proceedings for a cloture vote are to begin, on the day the petition ripens, not at 1 a.m. but, instead, one hour after the time the Senate would otherwise have met (*Senate Journal*, 1979, 777).[44]

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[43] Technically, cloture had been moved on a full-text substitute for H.R. 3919, the Crude Windfall Profit Tax Act of 1979. Merkley (2013) describes this case as one in which the Senate established that if it was "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 32-32)." The ruling occurred during a lengthy debate over the measure, which was backed by President Carter, who had decided to phase out Federal controls over the price of domestic crude oil. H.R. 3919 sought to tax a portion of the billions the oil companies would make over the next several years (see "7% Oil Output Advantage Estimated from Senate `Windfall' Tax", *New York Times*, November 13, 1979). The Senate substitute imposed an administration-backed "minimum tax" on segments of the oil industry. The minimum tax was estimated to add $31 billion in government revenues, bringing the total revenues to more than $185 billion (Dewar 1979; Weaver 1979). Minority Party Republicans obstructed passage of the bill and substitute, leading Majority Leader Byrd to order cots installed in rooms near the Senate chamber the night of December 12 (Dewar 1979; Weaver 1979).

[44] The vote was followed by remarkable proceedings in which the Majority Leader took the chair to explicate the precedent the Senate he had just persuaded the Senate to establish. *Congressional Record*, vol. 125, Dec. 12, 1979, 35698-35701.

These proceedings involved no departures from established Senate rules, but the consideration limit that assured the simple majority vote resulted from the declaration of the chair that the submitted point of order was not debatable. Although the chair did not specify the reason, the point of order was raised at a point when the chair had laid a cloture motion before the Senate for a vote, a proceeding which the cloture rule specifies is to be "without debate." For that reason, the Senator recognized at the time of the chair's action had been held to have lost the floor. Opponents of the point of order objected that if the point were to be sustained, the Senator would have been deprived of the floor for a proceeding that was later held not to be in order in the first place.[45] For the chair to have permitted debate on grounds of this merely prospective possibility, however, could have been considered a form of bootstrapping. In this case, it was not bootstrapping, but its avoidance, that brought about limits on consideration of the procedural point. In this way, these proceedings suggested that consideration of a point of order could be limited by raising the point pending a cloture vote. To this extent, it indicated a possible course of action through which the Senate could alter its procedures through precedential action in a way that both was consistent with existing procedures and also avoided any prospect that the support of more than a simple majority would be required.

Non-Debatable Motion to Take Up a Nomination, 1980

Perhaps the first occasion on which the Senate used the mechanism of altering precedents in order to institute further limits on consideration was in the establishment of a non-debatable motion to consider a nomination.[46] It appears also to have been through this episode that the possibility of altering Senate procedure by instituting new precedents entered the awareness of the Senate in a focused and enduring way. This action took place through a series of steps in 1979 and 1980, but the key action occurred in March 1980.

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[45] In the event, after the Senate voted against proceeding with the cloture vote, the chair again recognized the Senator in question. Another failed cloture vote followed. A compromise shaving approximately $7 billion in revenues off the substitute was eventually agreed to and the bill was signed into law the following year (Dewar 1979b, see P.L. 96-248).

[46] Gold and Gupta (2005, 266) describe it accordingly: "Prior to March 1980, it had 'been determined by a precedent that a motion to go into executive session, being non-debatable, [would] automatically put the Senate on the first treaty.' A motion to proceed to any other Executive Calendar matter would be debatable. This well-established procedure presented potential difficulties for Byrd, who wished to push through the confirmation of Robert E. White as Ambassador to El Salvador." Gold and Gupta (2005, 267) conclude by arguing "Due to Byrd's new precedent, motion to proceed to nominations are no longer debatable." See also Merkley (2013) and Arenberg and Dove (2012, 173).

Civil War between the left and the right had broken out in El Salvador in late 1979, and the current ambassador, Frank DeVine, asked to be relieved on January 21, 1980. In a speech supporting the nomination, Senator Claiborne Pell (D-RI) noted that Devine "departed in country on February 15 (Congressional Record, 96th Congress, March 5, 1980, 4733)." Carter nominated White, the former ambassador to Paraguay, in fill the vacancy. On February 22, the Senate Foreign Relations Committee voted 8 to 2 to favorably report White's nomination to the Senate floor. Only Senators Jesse Helms (R-NC) and Richard Lugar (R-IN) voted no. Press accounts suggest that Helms then held up the nomination (see "Senate OK's Career Diplomat as Ambassador to El Salvador," Los Angeles Times, March 6, 1980.)

The Senate has always considered executive business (treaties and nominations) in executive session, and its Rules have long provided that a motion to go into executive session is not debatable. Once the Senate entered executive session, its practice was to take up the treaty which stood first on the Executive Calendar, unless it adopted a motion (or gave unanimous consent) to proceed instead to some other treaty or to a nomination.[47] Such a motion to proceed, like one to consider a bill or resolution in legislative session, is debatable. On March 5, 1980, nevertheless, Majority Leader Byrd moved that "the Senate go into executive session to consider the first nomination on the Executive Calendar" (*Congressional Record*, vol. 126, March 5, 1980, 4729-4732).A Senator from the minority party raised the point of order that "It is not in order to determine the order of executive business while in legislative session." The chair immediately upheld this point of order, and Senator Byrd appealed the ruling. Opponents at once inquired whether the appeal was debatable, and after some uncertainty the chair ruled that since the "main motion to go into executive session is not debatable ... a subsidiary motion involving it would not be. Therefore, the appeal is not debatable." The Senate permitted brief debate by unanimous consent, after which it sustained the appeal, 54-38, reversing the ruling of the chair and establishing a precedent that a compound motion to go into executive session and to take up a specified nomination was in order.

Proceedings on the appeal reflected a presumption that this compound motion would not be debatable. Initially, the Majority Leader made clear that his intent was to establish that "the Senate should be able to reach a nomination ... without having to ... deal with a filibuster on the motion to proceed to the first nomination on the calendar." The chair then based its ruling that the appeal was not debatable on the premise that Senator Byrd's underlying motion, which was the subject of the ruling appealed, was not debatable. As a result, the precedent the Senate set by upholding the appeal introduced into Senate procedure a new limit on consideration by providing a means for the Senate to take up a nomination on a non-debatable motion (though the nomination itself remained subject to filibuster).

Retroactive Consideration Limits and Coupled Motions

In its basic elements, these proceedings conformed to established Senate practice on points of order. The initial ruling of the chair was consistent with previously existing procedure, and the appeal of the ruling and the Senate's decision on the appeal reflected established practice. Potentially crucial to the outcome, however, was the chair's ruling that the appeal was not debatable, for by this action the chair put in place a limit on its consideration which ensured the ultimate occurrence of the vote that established the precedent sought. This holding could be viewed as involving a form of bootstrapping, for it rested on a premise that the compound motion was both in order and non-debatable, and this premise was used to govern proceedings that took place before the vote on the appeal by which that premise itself would be established. To this extent it is not clear that these proceedings demonstrated any path, consistent with existing Senate procedure, by which a majority could achieve procedural change.

[47] In this case, the item on the Senate Executive Calendar was the U.S.-Soviet Strategic Arms Limitation Treaty (SALT II). Broadly speaking, the treaty placed limitations of the strategic arsenals of the United States and the Soviet Union. It was controversial and the centerpiece of the Carter administration foreign policy, which had begun negotiations on it in 1977. The *Washington Post* argued that Byrd asked the Senate to set the precedent because he was "not wishing to risk a vote on Salt II and diplomatic nominations for the foreseeable future" (Lyons 1980).

When the chair supported its ruling against debate on the appeal by observing that the motion for executive session was not debatable, it implicitly appealed to a principle that debate is not in order on a question raised while a non-debatable question is pending. Such a principle seems requisite in order to preserve the purpose of prohibiting debate on the underlying question. Yet the underlying question in this case was not the established motion for executive session, but rather Senator Byrd's proposed compound motion both to go to executive session and to take up a specified nomination. By itself, the motion to proceed to consider a nomination would have been debatable. Under the ruling of the chair, as a result, the non-debatable character of one component of Senator Byrd's compound motion (namely, the motion for executive session) rendered non-debatable the appeal of the initial ruling against the compound motion as a whole.

The ruling, in other words, appears to depend on a presumption that the compound motion inherited the non-debatability of the established motion for executive session. Yet only by voting to uphold the appeal would the Senate establish that the compound motion was even in order to begin with. In this sense, it might be considered that holding the appeal non-debatable would require assuming already valid, prior to the decision on the appeal, a point that could have been be established only by that decision itself --- namely, the non-debatability of the compound motion. In this respect, the proceedings might be considered to be at variance with Senate rules and precedents as they stood prior to the Senate's decision.

Debate on the appeal addressed these issues, but only obliquely. The initial point of order asserted that the motion for executive session could not be combined with the motion to proceed to consider a specific nomination. No Senator supported this point of order by appealing directly to the principle that, in general, separate motions may not be "coupled" in a single proposition, (Riddick and Frumin 1992, 135-137, 802-803, 934, 999), which might have supported a claim that Senator Byrd's compound motion should not be taken as regulating proceedings at a point when the Senate had not yet decided that such a motion was in order. One Senator, nevertheless, did develop an argument against coupling the specific motions in question by asking the chair to confirm that "it has been the custom of the Senate to take the items on the Executive Calendar in the order in which they appear --- except by unanimous consent," which the chair elaborated with "Or by motion to proceed to a specific matter on the Calendar after the Senate was in executive session." The Senator went on to argue that this established practice constituted precedent, also quoting *Riddick's Senate Procedure* to show that "Deciding which calendar item on the Executive Calendar to consider is clearly the transaction of executive business," and therefore must be conducted in executive session (*Congressional Record*, vol. 126, March 5, 1980, 4729-4731).

Another Senator raised a series of parliamentary inquiries addressing whether Senator Byrd's compound motion was divisible. If the motion had been divided, the component providing for consideration of a specified nomination would presumably have been held debatable, thereby defeating Senator Byrd's stated intent in establishing the compound motion, in much the same way that Senator Allen's demand for a division of the motion to proceed to consider the amendment to the cloture rule in 1975 defeated the attempt to ensure an immediate vote on that motion. In 1980, however, the chair held that inasmuch as "the basis for the point of order is ... the coupling of the two motions," the motion could not be divided while the appeal was pending, while if the Senate were to sustain the appeal, it "will have said that the [compound] motion is in order and therefore not divisible." Finally, if the Senate rejected the appeal, the motion as a

whole would be out of order, in which case its divisibility would be moot *Congressional Record*, vol. 126, March 5, 1980, 4731-4732.

The same Senator also raised an argument, similar to the one he had offered the previous December, against the general concept of altering procedure by precedential action. He objected that the Majority Leader's action represented an attempt "to modify the rules by an appeal," and that the Senate instead "ought to talk about amendments of the rules." Senator Byrd responded, "I do not see this as changing the rules of the Senate. I simply see it as determining what the proper precedent should be... ." Later, Senator Byrd also inquired of the Chair whether his motion "contravened any rule," and when the Chair responded that "it is not mentioned in any rule and there is no precedent for it," he drew the conclusion that "My motion does not contravene any rule; my motion does not contravene any precedent. It merely establishes a precedent." These remarks appear to acknowledge that the outcome sought would indeed constitute a change in Senate procedure (*Congressional Record*, vol. 126, March 5, 1980, pp. 4730-4731).

This objection to changing procedures by precedential action rested in part on the assertion that such a proceeding, in contrast to formal amendment of the rules, could be accomplished "by a majority vote on an appeal." This framing of the issue overlooked that amendment of the rules also requires only a simple majority vote; in both cases, it is only the potential need to overcome a filibuster that generates the possibility of forcing a super-majority vote for cloture. In this respect, the 1980 debate suggests that at that time, the Senate had not yet fully realized that what would enable a simple majority to act was not simply that a precedent was being established rather than a rule amended. Instead, the essential element of the proceedings that allowed a simple majority to establish the new restriction on debate was that the proposal was considered under time limits.

Subsequent Extension of Application

The series of proceedings through which the 1980 precedent was finally established also illustrates how the scope of a precedent set in a specific case may by ambiguous. During debate on the appeal in March 1980, a minority Senator inquired whether reversing the ruling of the chair would establish that a non-debatable motion was in order to go into executive session to consider not just the first nomination on the Executive Calendar, but any specified nomination on that Calendar." The Chair did not comment on this inquiry, and Senator Byrd "maintain[ed] that that is a question for another day" (*Congressional Record*, vol. 126, March 5, 1980, 4732). Later, however, in June of the same year, Senator Byrd announced his intent to offer just such a motion. Minority Senators raised parliamentary inquiries objecting that the March precedent had addressed only motions to go into executive session to take up the first nomination. At that point, Senator Byrd responded, "No, I think the Senator is incorrect ... We have established the precedent that the Senate may move to take up a particular nomination," and the Chair concurred that "The precedent has been established ... that the Senate can move to go into executive session to take up a particular nomination without it being a debatable motion" (*Congressional Record*, vol. 126, June 19, 1980, 15747-15748).[48]

[48] The colloquy is quoted at length in Riddick and Frumin 1992, 941-942.

No actual ruling occurred at that point on the admissibility of such a motion, because in the end, Senator Byrd called up the nomination in question by unanimous consent (*Congressional Record*, vol. 126, June 19, 1980, 15807. Still later, however, in October, Senator Byrd did offer a motion of this kind, and some of the same minority Senators renewed their questions about whether the actions made admissible by the March precedent included a non-debatable motion to go into executive session to take up any specified nomination (*Congressional Record*, vol. 126, October 1, 1980, 28769-28771). Although the justification Senator Byrd offered for his motion in March had explicitly referred only to enabling the Senate to reach the first nomination on the Executive Calendar, some of the arguments against it had referred to the general prospect of determining, in legislative session, which nomination to take up. The Chair responded that, "based on the colloquy leading up to the March 5 precedent," that action had made in order motions to proceed to any nomination, and the reference of Senator Byrd's motion on that occasion to the nomination standing first on the Calendar was only "happenstance." Senator Byrd concurred in this view and supported its consequences as reasonable and practicable.

The Senators who raised these objections in October did not proceed to raise a point of order against Senator Byrd's motion, but suggested that "at some future time we should ... try to clarify the issues I have suggested." In the following year, however, the minority party of 1980 gained the majority in the Senate and the Presidency, and one of the minority Senators involved in the 1980 proceedings became Majority Leader. However, with Senator Byrd as Minority Leader, no further procedural challenge was ever raised against the 1980 precedent.

Amendment Held Germane on Appeal, 1995

The Senate again acted to alter its precedents with respect to legislative amendments to appropriation bills in 1995, although this action differs from the others examined here in that it appears to have been an incidental effect of the proceedings rather than their deliberate purpose. Like the amendment in the 1979 proceedings, the one that occasioned these proceedings was considered under a time agreement, so that the point of order asserting its legislative character could be raised only after the agreed time had expired. In this instance, however, instead of raising the defense of germaneness, the sponsor allowed the chair to rule the amendment legislative, then appealed the ruling. The Senate overturned the ruling of the chair, 57-42. Pursuant to this vote, the amendment was held in order, and the Senate ultimately adopted it.

The Senate subsequently construed this vote as establishing a precedent (often called the "Hutchison precedent") under which no standard existed by which it could enforce its ban on "legislative" amendments to general appropriation bills. This situation persisted until 1999, when the Senate adopted a resolution restoring the pre-1995 interpretation of the rule (Bach 1997; Rundquist 1999; see S.Res. 160, 106th Congress).

The vote on the appeal in this instance occurred without intervening debate, presumably because the proceedings were occurring at a point when debate was no longer in order. In this case, the occurrence of the vote on the appeal, which enabled the Senate to establish the new precedent without requiring the support of more than a simple majority, was assured only because the Senate had previously given unanimous consent to limit consideration of the underlying amendment. If the proceedings had been deliberately constructed as a means for establishing alterations in Senate procedure, opponents of the change could have preserved their opportunity

to filibuster the change by preventing unanimous consent to impose any such time limits. To this extent, these proceedings once more failed to demonstrate a generally applicable method by which the Senate could be assured of being able to establish alterations in procedure without either diverging from with established rules or facing a potential need for super-majority support in the course of proceedings.

This conclusion may also be applied to the proceedings in the 1979 case. In that instance, even if the Chair had ruled against the point of order, the Senate would presumably still have been assured of reaching the vote through which a simple majority could settle the issue (which in 1979 would have been a vote directly on an appeal of the unfavorable ruling), for the proceedings could have occurred only at a point when no time remained available for debate. Yet that situation existed in the first place only because the Senate had earlier given unanimous consent to limit consideration of the amendment.

Provision of Conference Report Held within Scope on Appeal, 1996

Late in the 1996 session, opponents of a conference report, proposing a resolution of differences between the House and Senate versions of a bill, were prepared to raise a point of order against the report on grounds that conferees had inserted new language unrelated to any of the provisions on which the two versions differed.[49] Proponents of the report did not contest the violation; both sides expected that the chair would sustain the point of order, which would render further consideration of the conference report out of order (see Gold and Gupta 2005, 269-270). They asserted, however, that the new language was a necessary means of correcting an error in earlier legislation before the session adjourned. They planned to appeal the ruling. Opponents of the new language argued that if the Senate reversed the chair, it would establish a precedent under which any conference committee could freely add entirely new provisions to the legislation before it. Proponents of the report responded that conferees had often engaged in similar actions without challenge and that the Senate would set no broad precedent by permitting the action in this case.

If the chair sustained such a point of order, the Senate would have been precluded from considering the conference report unless a simple majority voted to overturn the ruling on appeal. Even if a majority would have supported the appeal, opponents of the report could have been able to forestall the vote by filibustering. To foreclose such a possibility, supporters of the conference report first secured cloture on the conference report, 66-31. By this action, the Senate both imposed an overall limit on consideration of the conference report and also rendered non-debatable any appeal arising during that consideration. Either of these conditions would have sufficed to ensure that a vote on the appeal would ultimately occur. Once cloture was invoked, supporters of the conference report themselves immediately raised the point of order. After brief debate by unanimous consent, the chair, as expected, sustained the point of order, supporters of the conference report appealed, and the Senate reversed the chair on appeal, 56-39.

[49] In technical language, the conference report exceeded the "scope of the differences" committed to conference, in violation of Senate Rule XXVIII.

As in the previous case, this vote was subsequently construed as establishing a precedent (the "FedEx precedent") in accordance with which no criterion could be framed that would permit any provision of a conference report to be held outside the scope of the differences between the chambers committed to conference. In this case, the Senate ultimately restored the former interpretation of the Rule through a provision inserted in the consolidated appropriations act of 2001.[50]

In this case again, the Senate was able to reach the vote by which a simple majority could establish the altered precedent without any proceedings being required that involved departures from Senate procedures as they stood at the time of the ruling. This condition existed, however, only because the Senate had previously imposed limits on consideration through the support of a super-majority for cloture (and in this case, the super-majority required for cloture exceeded the level of support achieved by the appeal). For this reason, these proceedings once more failed to demonstrate a generally applicable means by which the Senate could achieve procedural change in a way consistent with established procedure and yet also without the prospect that super-majority support might come to be required at some point in the process.

Sense of Senate Amendments *Per Se* Nongermane, 2000

Early in 2000, the Senate altered its precedents governing amendments to appropriations bills in a third respect. Once again, the Majority Leader constructed proceedings with the specific intent of instituting alterations in procedure. The amendment under consideration on May 17, 2000, had been called up on the previous day by the Majority Leader, and as in the two cases discussed earlier, it was being considered under a time agreement. When the allotted time was exhausted, the Majority Leader raised a point of order contending that the amendment was non-germane because it did not provide appropriations, but only expressed the sense of the Senate, and that the chair should rule on the question. Consistent with the provisions of Senate Rule XVI, the chair overruled the point of order, and the Majority Leader appealed, after which he obtained unanimous consent for an immediate vote on the appeal. The Senate overturned the ruling of the chair, establishing as a precedent that sense of the Senate amendments were inherently non-germane to appropriation bills (*Senate Journal*, 2000, 427-428; *Congressional Record*, vol. 146, May 17, 2000, 8283-8287).[51]

Not only were the proceedings on this matter entirely consistent with existing Senate procedures, but in this instance the Senate might well have been able to establish the new precedent even in the absence of limits on consideration, for no Senators actively contested the effort. If the matter had been controversial, however, opponents might have been able to prevent the occurrence of

[50] H.R. 4577, P.L. 106-554, enacted Dec. 21, 2000. See Rybicki 2006. Still later, in 2007, the Senate amended its Rule XXVIII to institute a procedure through which it could address violations of scope without automatically killing the conference report (S. 1, 110th Congress, P.L. 110-81). Note that, although super-majorities of the Senate supported both initial passage of this measure (96-2) and final action thereon (83-14), its inclusion of provisions amending the Standing Rules did not render support by more than a simple majority requisite for passage.

[51] After the precedent was established, the Majority Leader withdrew the point of order and allowed the amendment to be adopted, which further indicates that the explicit purpose of the proceedings was the establishment of the general precedent.

the vote by which a simple majority could act by first denying unanimous consent for consideration limits and then filibustering. This case, accordingly, also fails to exhibit a generally applicable method for altering Senate procedures that both maintains conformance with established rules and also can ensure a successful outcome in the absence of support from more than a simple majority.

Motions to Suspend the Rules Dilatory Under Cloture, 2011

By 2011 it had become a frequent practice in the Senate for the majority leader to control the amendment process on a bill, and especially to prevent non-germane amendments, by "filling the amendment tree." Under this practice, the majority leader would first offer, in succession, all amendments permitted by Senate practice to be pending at one time, and prevent any of them from coming to a vote, thereby blocking any others from being offered, except in individual cases when the leader would accept a unanimous consent request to set aside the pending amendment tree for the purpose. Once the tree was filled, the leader would then seek cloture on the bill and, if cloture could be obtained, non-germane amendments would no longer be in order. The leader would then continue to prevent disposition of the amendments in the filled tree until the time allowed for consideration under cloture expired. At that point it was no longer in order to offer further amendments of any kind, so the Senate could vote on the amendments already pending without affording any opening for ones not accepted by the leader.

The intent of this course of action was to avoid providing an opportunity at any point for Senators to offer amendments not accepted by the majority leader. As it came into increasing use, however, Senators who wished to offer such amendments responded by developing a practice of giving notice that they would move to suspend the rules (specifically, the rules prohibiting the offering of non-germane amendments under cloture and of any amendments after the expiration of post-cloture time) in order to offer a specified amendment. They would then call up this motion at some point in the process of concluding consideration under cloture when an appropriate "branch" of the amendment tree became available. This practice markedly reduced the effectiveness of filling the amendment tree as a means of controlling amendments, and late in 2011, the majority leader used the process of changing procedures by instituting new precedents to disallow it.

Once the Senate invoked cloture on S. 1619, for currency exchange rate oversight, on which the majority leader had filled the amendment tree, he withdrew one of the amendments in the tree, thereby opening a branch on which another amendment could be offered. He then called up a motion to suspend the rules to permit offering a non-germane amendment that had previously been filed by another Senator. Third, he raised a point of order that the motion to suspend was dilatory under cloture; the chair, in conformance with previous practice, overruled the point of order; and the majority leader appealed the ruling. Appeals being non-debatable under cloture, the vote occurred at once, and the Senate overruled the chair (*Senate Journal*, 2011, 702-704; *Congressional Record* (daily ed.), vol. 157, Oct. 6, 2011, S6283, S6313-S6315. Inasmuch as the cloture rule explicitly prohibits any dilatory motion under cloture, the effect of the vote was to establish a precedent against entertaining any motion to suspend the rules while the Senate was proceeding under the terms of that rule.

The proceedings on this occasion seem to reflect considerations responding to the 1980 experience as well as to the 2004 discussions of the nuclear option. In this case, the element of the proceedings that limited consideration was that the point of order was raised under cloture, which meant that the appeal of the chair's ruling was not debatable. In these circumstances, no action at variance with established procedures was necessary in order to institute the intended change. On the other hand, the appeal was subject to no debate only because cloture had been invoked, which required the support of a super-majority. To this extent, these proceedings too fail to demonstrate a generally applicable means, by which a simple majority of the Senate could secure changes in procedure

Changing Procedure by Setting Precedent

Through each of the proceedings discussed in the previous section, the Senate effectively altered its operative procedures without formally amending its Rules, but instead by establishing a new precedent operating as an interpretation of its existing rules. Except in the 1995 proceedings that effectively vitiated the requirement that legislative amendments to appropriations bills be germane, the new precedent was the successful outcome of a deliberate attempt to institute the procedural alteration in question. In each of these instances, the Senate reached the result through proceedings that required the support of no more than a simple majority at any point in the process, and only one of these cases involves any suggestion that the proceedings could be said to involve any retroactive application of principles that would be established only through the outcome of those proceedings ("bootstrapping") or other departures from Senate procedure as it stood at the time of the action.

On only one of the seven occasions discussed (the 1980 establishment of a non-debatable motion to take up a nomination) did the new precedent institute additional means for the Senate to limit the consideration of any matter. Nevertheless, the approach of setting new precedents seems to have proven generally more feasible than that of actually amending the rules.

The avoidance of super-majority requirements and of bootstrapping in these proceedings contrasts with those examined earlier on proposals actually to amend the Rules. This contrast, however, did not arise from any requirement in established Senate procedure for super-majorities in proceedings on amendments to the rules that would be inapplicable to those by which the Senate may establish precedents. In the cases examined, what was crucial to the ability of a simple majority to institute new precedents was that the Senate considered the decisive question under some form of limits on the time for consideration. It was this circumstance that enabled a simple majority to reach the vote establishing the new precedent with no possibility that super-majority support would be required at some point in the process. In the earlier efforts to amend the Rules, conversely, it had often been a decisive contribution to the difficulties experienced that the means by which supporters attempted to bring consideration under time limits, without requiring super-majority support, involved actions at variance with the procedures recognized at the time the actions were taken.

It is not clear, that any of precedential actions examined here demonstrated a process by which a simple majority could establish new precedents that was not only consonant with established Senate rules, but also generally available for such purposes. All but one of the proceedings examined involved an appeal of a ruling of the chair on a point of order raised by advocates of

the new precedent, and in the seventh case, the chair submitted the point of order directly to the decision of the Senate. Generally, the Senate admits debate on both appeals and submitted points of order. In each of the situations examined, it was only the presence of specific conditions that created consideration limits that ensured the ability of a simple majority to act.

In the earliest of the seven cases, in 1979, the requisite limit on consideration was supplied by the non-debatable motion to table, applied against an appeal of a ruling favorable to the new precedent. In this respect, the proceedings resembled those later to be projected by the initial proposals for a nuclear option in 2004-2005. As the 1979 proceedings illustrated, such a proceeding could yield procedural change only if the initial ruling of the chair sustained the point of order. This, in turn, could occur without departure from existing procedures only when the point of order both presented a question of first impression and did not present a constitutional question. For if existing precedents ran contrary to the position asserted by the point of order, the chair was responsible to rule against the point of order. If a constitutional question was presented, the chair was responsible to submit the question rather than ruling at all. In either of these circumstances, the motion to table could be used only with the effect of overruling the point of order and thereby rejecting the procedural alteration it proposed.

By contrast, none of the other six occasions examined on which the Senate changed procedure by changing precedents made use either of a point of order based on the Constitution or of a motion to table. On these occasions, instead the requisite limit on consideration came about because the key question was raised under procedural conditions in which no debate was in order. In each of the most recent four cases, however, the appeal was not subject to debate either because it occurred under cloture or because it occurred after time available under a consent agreement was exhausted. In these cases, accordingly, the limit on consideration that ensured the ability of a simple majority to act would not have existed if not for the previous action of a super-majority to invoke cloture or accept a unanimous-consent agreement. To this extent, these episodes do not exemplify forms of proceeding that could be generally applied in order to ensure the capacity of a simple majority to achieve procedural change.

Only the two remaining cases may illustrate proceedings potentially generalizable to a broad range of efforts to establish new precedents, and one of these might be viewed as entailing a form of bootstrapping. In 1980, the Senate treated as non-debatable the appeal that would establish the admissibility of the motion to go into executive session to take up a nomination because the appeal was raised while the proposed motion itself was pending. This motion seems to have been treated as non-debatable, in effect, because the intent of establishing it was to provide a non-debatable means of taking up a nomination. This course of events might be cited to show that the Senate may apply a procedural principle that would be established by a decision of the Senate retroactively to the proceedings that could result in that decision. Such an interpretation would widen the scope of possible actions in which a similar proceeding could be used.

The conditions under which consideration of the key question was limited in the final instance examined, on the other hand, are simpler. In the 1979 case in which the chair submitted the point of order to the Senate for decision, consideration of the appeal was limited because the point of order was raised at the time when the chair had laid a pending cloture motion before the Senate for a vote, a proceeding which is to occur without debate. Inasmuch as this limitation on

consideration is established by Senate Rules, it would be applicable without further action by the Senate on any occasion when a cloture motion ripens.

The Proceedings of November 2013

The considerations summarized in the previous section describe the state of understanding of how Senate procedures might be changed by altering precedents before November 21, 2013, when the Majority Leader instituted proceedings to enable a simple majority to invoke cloture on most nominations. As prologue to these proceedings, the Senate had previously taken up a nomination to the U.S. Court of Appeals for the District of Columbia Circuit, and then rejected a motion for cloture on the nomination. Consistent with a practice that had become common in the Senate in recent years, the Majority Leader had entered a motion to reconsider the vote against cloture (*Congressional Record* (daily ed.), vol. 159, Oct 31, 2013, S7706-S7708). This practice enables the leader to obtain a second vote on cloture at a time, by calling up the motion to reconsider, without having to file a new cloture motion and wait two days for it to ripen.

The essential elements of the proceedings of November 21 were, first, that the Majority Leader moved that the Senate proceed to consider his motion to reconsider the cloture vote, and the Senate adopted this motion, 57-40 The Majority Leader then offered the motion to reconsider, and the Senate adopted this motion as well, 57-43. At that point, the Majority Leader 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." Pursuant to the explicit terms of the cloture rule, the President pro tempore overruled the point of order, and the Majority Leader appealed from the ruling. The Senate reversed the ruling of the chair, 52-48, and the President pro tempore ruled that this vote established a precedent under which "the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is not a majority." The Minority Leader appealed this ruling, and the Senate sustained the chair, 52-48. The President pro tempore then laid the cloture motion before the Senate, and the Senate invoked cloture, pursuant to the new precedent, by 55-43 *Congressional Record* (daily ed.), vol. 159, Nov. 21, 2013, S8416-S8418.[52]

Means by Which Consideration was Limited

During the Senate's proceedings on the Majority Leader's point of order, the Minority Leader raised several parliamentary inquiries reflecting what had become the accepted critique of attempts to alter procedures by instituting new precedents. One of these inquiries sought to establish that "a proposal to change the Senate rules would be fully debatable unless two-thirds of the Senators present and voting voted to invoke cloture." The next inquiry brought out that "prevailing on an appeal of the ruling of the Chair would change Senate precedent on how nominations are considered in the Senate and effectively change the procedures or application of the Senate's rules," and that this "overturning the ruling of the Chair requires a simple majority vote" (*Congressional Record* (daily ed.), vol. 159, Nov. 21, 2013, S8417-S8418). Together, the two inquiries evoked the widely accepted view of a simple majority process to set precedent,

[52] After invoking cloture, the Senate proceeded to enter executive session to consider the nomination under cloture, and later, on Dec. 10, confirmed it.

regarded as a means of circumventing a super-majority requirement for amendments to the Rules. The actual proceedings, by contrast, illustrated the principles outlined at the outset of this paper: that either amending the Rules or establishing precedent requires only a simple majority, but that either question is normally debatable, so that in either case a super-majority may be required in order to limit the time for consideration. Additionally, in either case, the capacity of a simple majority to act without facing the prospect of a super-majority hurdle depends on finding a means of bringing the question under consideration limits that does not depend on super-majority support.

On this occasion, the Senate treated proceedings on all the questions in this sequence as non-debatable, and the way in which it did so remained consistent with its established principles. The Senate holds that debate is not in order pending a cloture vote, inasmuch as the cloture rule specifies that when a cloture petition ripens, the cloture vote must occur at the time specified. The Senate has applied the same principle in the case of cloture motions coming before the Senate on reconsideration. It is also an established principle that a motion to reconsider is not debatable if the question to be reconsidered is not debatable (Riddick and Frumin 1992, 770-771). In this case, it was the pendency of a cloture motion, preceded by its prospective pendency, which began when the motion to reconsider was called up, that provided the limit on consideration necessary to ensure that a simple majority would be to institute the new precedent. In this respect, the proceedings by which the precedent for majority cloture was set remained consistent with established procedure.

These proceedings also incorporated a number of unusual features that occurred in passing, but these peculiarities do not seem to have introduced any inconsistencies with existing procedure. First, while the Majority Leader's motion to reconsider was pending, the Minority Leader moved to adjourn, which the Senate rejected, 54-46. In general, a motion to adjourn is in order at any point, even while a non-debatable question is pending. Also while this motion to reconsider was pending, and while the Majority Leader's appeal of the initial ruling of the chair was pending as well, the Minority Leader raised a number of questions in the form of parliamentary inquires, including the ones noted at the start of this section. Most of these, however, might be considered not to constitute parliamentary inquiries in a technical sense, for they addressed factual circumstances surrounding the consideration of nominations, rather than conditions of the pending procedural situation. Nevertheless, it was, within the normal discretion of the chair to entertain such inquiries, even at a point when debate was not in order, and the action of the President pro tempore in doing so had no tendency to vitiate the consideration limits that would enable a simple majority to act.

It might be thought more surprising that, after the Senate voted to proceed to consider the motion to reconsider, the Majority Leader offered a motion to reconsider. Presumably, a vote to proceed to the motion to reconsider would have the effect of bringing the motion to reconsider before the Senate, in which case the second action would seem superfluous. Its inclusion, nevertheless, did not affect the substantive effect of the proceedings nor, presumably, their propriety.

The import of the Minority Leader's appeal of the chair's ruling that a majority could now invoke cloture on most nominations appears similarly difficult to interpret. This action occurred immediately after the Senate's vote on the Majority Leader's appeal of the chair's initial ruling against Majority Leader's initial point of order. The President pro tempore announced that "the decision of the chair is not sustained," and ruled that this action of the Senate had established

majority cloture in the cases specified. In this context, the action of the Minority Leader seems to have constituted an appeal of the chair's statement of the effect of the previous appeal. Inasmuch as the outcome of this second appeal affirmed the outcome of the first, this sequence of events too apparently neither altered the effect of the proceedings nor introduced any departure from accepted procedure.

Under the regular procedure of the Senate, finally, the fundamental purpose of the motion to reconsider the cloture vote was presumably to bring the cloture motion back before the Senate, and accordingly, the Senate's vote to agree to this motion was presumably sufficient to achieve this purpose. Yet the chair did not actually lay the cloture motion before the Senate until after the Majority Leader raised the crucial point of order and proceedings thereon, including the subsequent appeals, were completed. During that time, nevertheless, the Senate apparently proceeded on the premise that the Senate was already in the non-debatable situation that the pendency of the cloture motion would bring about. In that sense, the proceedings remained consistent with the parliamentary situation as it might be assumed to have existed, even if not with that which was explicitly announced.

Point of Order Addressed a Proceeding Not Yet Pending

The timing of the point of order in this case suggests an additional concern. As discussed earlier, it is an accepted principle of Senate procedure that a point of order address a procedural situation before the Senate and not merely hypothetical. Normally, the chair will not entertain a point of order referring to a situation not then actually pending before the Senate. In the 2013 proceedings, as in 1963, the point of order advanced the claim that cloture would be invoked by a simple majority. In 2013, however, this point of order was raised before the cloture vote in question occurred. At that point, it was not actually known whether the vote for cloture would exceed a simple majority but fall short of three fifths. Moreover, if cloture were to be supported by more than the super-majority stated in the rule, there would be no doubt that cloture had been invoked, and if less than a simple majority were to support cloture, there would be no doubt that cloture had been rejected. Only if the vote were to fall in the range between these two alternatives would the claim raised by the point of order address an actually pending situation.

Yet in this instance the chair entertained the point of order at a point when the cloture vote had not yet occurred. This timing was potentially essential to the success of the proceedings, for only the pendency of the cloture vote created the non-debatable situation in which the point of order had to be considered. If the Majority Leader had waited until the motion for cloture had been decided, and if (as actually occurred) the motion was supported by a majority but not three fifths of the full Senate, he could then have raised the point of order claiming that the majority had invoked cloture. At that point, however, the Senate would no longer be in a non-debatable situation. The chair would presumably rule, consistently with Senate procedure as it existed up to that point, that cloture had not been invoked, in which case the Senate would be operating under its general rules with unlimited debate. Thus, opponents of the new precedent might have been able to block a decision on the point of order by filibustering.

In such a situation, advocates of establishing the new precedent might respond by appealing the ruling of the chair and arguing that, since their procedural claim was that cloture had been invoked, their appeal should be held non-debatable. Such an approach, however, would seemingly entail on a "bootstrap" form of argument. Alternatively, instead of overruling the point of order, the chair might sustain it, holding that cloture had been invoked by a majority. In that

case supporters of the new precedent could establish it by using the non-debatable motion to table an appeal raised by opponents, in the manner contemplated by advocates of the original "nuclear option" plan in 2004-2005. This course of action, however, would have required the chair either to diverge from established Senate procedure by ruling in a way inconsistent with applicable precedent, or else to presume already in effect the procedural principle that would be established by the vote on the appeal. Either of these forms of action would also appear to constitute a form of bootstrapping.

It appears to have been requisite, under the procedural conditions that existed, for advocates of the new precedent to raise their point of order under the non-debatable conditions of the pending cloture vote in order ensure a vote without engaging in bootstrapping or other violations of established procedure. Yet this course itself appears to have required departure from established procedure insofar as it violated the principle that points of order may be raised only against procedural actions actually pending, and not hypotheticals. In this respect, the proceedings of November 2013, like most of the efforts discussed earlier to alter procedure by instituting new precedents, still do not appear to open up a generally available course of action by which a simple majority can be assured of achieving procedural change while remaining within the bounds of existing rules.

Point of Order Stated to Minimize Ambiguity in Future Interpretation

To some extent, the form in which the November 2013 point of order was framed also represented a departure from the previous of the Senate. As observed earlier, in the section on "Subsequent Extension of Application," a point of order normally presents an argument about how some existing procedural standard should be applied to a specific situation. As a result, implications of a ruling in a particular case for any similar situations often remain to be clarified by interpretation on future occasions. By contrast, the 2013 point of order made no reference to any procedural grounds, and was framed instead only as an explicit statement of the principle to be established, even to the point of specifically excluding its application to Supreme Court nominations.

It appears possible that this framing was used, at least in part, with the intention of minimizing uncertainty about how the precedent set should be interpreted in future situations. Subsequent events, accordingly, have revealed only one respect in which the terms of the point of order proved to require any subsequent clarification. Although the point of order asserted that cloture could be invoked by a majority vote, it contained no specification of the form of majority intended. After the ruling, some question was raised whether the standard intended was a simple majority or, rather, a majority of the entire membership of the Senate, sometimes called a "constitutional majority." This second interpretation might have been viewed as justified because of its parallel to the stated requirement of the cloture rule for three fifths of the full Senate. Subsequent discussion and practice, however, seem to have made clear that the new precedent will be interpreted to require a simple majority (that is, a majority of Senators voting, with a quorum present).

Potential Implications of the 2013 Precedent

The substantive principle embodied in the Senate's precedent of November 2013 will clearly have a direct impact on the terms under which the Senate will consider nominations. The

proceedings by which the precedent was set, however, may independently turn out to have important effects on the terms under which the Senate will consider further changes in its procedures. In several respects, they included actions that were to some extent novel to Senate procedure. In particular, as the preceding discussion shows, the point of order raised in November 2013 differed from a typical point of order in two ways: it did not propose an interpretation of an existing procedural principle, but rather stated a procedural principle in general terms; and it proposed to apply its argument not to a specific pending situation, but to a procedural situation that the Senate was not actually facing at the time.

These features of the 2013 proceedings do not themselves constitute precedents, for they were not the subjects of any actual procedural decisions by the chair or the Senate. Yet inasmuch as the Senate in 2013 accepted these actions as admissible in its proceedings, advocates of further procedural change might be likely to employ them again. If the Senate were to continue to treat these actions as admissible, the effect could be to broaden substantially the extent to which of simple majorities might be able to achieve further procedural changes, potentially including additional more effective means of limiting the consideration of business.

In 2013, although the situation addressed by the point of order was not actually pending at the time the point was raised, Senators could reasonably expect that it would soon arise in practice. Inasmuch as the cloture motion then pending had failed of a three-fifths super-majority on the initial vote, a similar result might plausibly be anticipated on reconsideration. In future cases, however, advocates of procedural change might cite the 2013 proceedings as justification for raising a point of order having no direct relation at all to the procedural situation in which the Senate might then stand.

Correspondingly, points of order have customarily been conceived as raising claims on the basis of an appeal to some existing procedural standard. It was no doubt in light of this conception that the change advocates of the 1950's sought to appeal to the Constitution as a basis for limiting consideration of proposals to amend the Rules. As earlier sections showed, this approach recurrently brought difficulties, because the constitutional interpretation to which they appealed was one not previously accepted by the Senate, and in consequence, it recurrently entangled the efforts in prospective or even actual bootstrapping. It may be in part for that reason that supporters of the 2013 the point of order framed it as a pure statement of a new procedural standard, with no reference to any grounds in previously existing authorities. The principle embodied in the 2013 point of order, nevertheless, addressed the subject with which the Senate was then dealing; this approach itself, however, represents a departure from the usual previous practice. If the Senate will now consider a citation of grounds unnecessary to the framing of a point of order, it is possible to conceive that future efforts may assert procedural principles bearing no relation to the business actually before the Senate at the time.

In combination, these considerations suggest the possibility of a point of order that would essentially amount to a statement of a new general procedural regulation that would not have to bear any relation to the specific procedural situation in which the Senate was operating at the time it was raised. As long as this point of order was raised at a point when that procedural situation reflected a non-debatable position, it could be possible for proceedings on the point of order to follow a course similar to that of 2013. Such a sequence of events could ensure that a vote would occur by which a simple majority could establish a new precedent on any subject as long as its advocates could present the issue at a point when debate was not in order. In that case

it might be said that the action of November 2013 had indeed demonstrated course of action, dependent neither on procedural circumstances adapted to the specific point at issue nor on prior Senate acceptance of any novel procedural principles, by which a simple majority could alter Senate procedures across a broad range.

If so, then the 2013 proceedings will have demonstrated a means by which, in principle, a simple majority might be able to establish any desired procedural standard at any time, as long as they can raise a point of order asserting that standard at some point in Senate proceedings at which debate is not in order, even if the substance of the standard being asserted bears no relation to the proceedings in which the non-debatable situation arises. To the extent the Senate may now come to consider such proceedings admissible, the "nuclear option" of 2013 may have established a broad capacity for a simple majority to change Senate procedures in any desired way at any point. To that extent the Senate could indeed end up as the purely majoritarian body that some critics have foreboded.

On the other hand, it may appear unlikely that the Senate would find a procedural regime admitting such unfettered majority discretion to be stable or sustainable in the long run. It seems unlikely that such a system could satisfy the principle enunciated by Jefferson that "It is much more material that there should be a rule to go by than what that rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the Speaker or the captiousness of the members" (Jefferson 2013, sec. 285). To avoid the prospect of unconstrained majoritarianism or perpetual procedural instability, the Senate might ultimately become willing to establish some procedural means of constraining the conditions under which a simple majority could exercise its constitutional authority over the procedures of the chamber.

References

Arenberg, Richard A. and Robert B. Dove. 2012. *Defending the Filibuster: The Soul of the Senate.* Bloomington, IN: Indiana University Press.

Amar, Vik D. 1988. "The Senate and the Constitution." *The Yale Law Journal*, 97 (6): 1111-1130.

Bach, Stanley. 1979. "Complexities of the Legislative Process: A Case Study of Congressional Consideration of the National Energy Legislation during the 95th Congress." *CRS Report 79-68.*

Bach, Stanley. 1982. "Germaneness Rules and Bicameral Relations in the U.S. Congress." *Legislative Studies Quarterly,* 7: 341-357.

Bach, Stanley. 1991. "The Senate's Compliance with its Legislative Rules: The Appeal of Order." *Congress & the Presidency,* 18:77-92.

Bach, Stanley. 1997. "Rules, Rulings and the rule of Law in Congress." Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL.

Bawn, Kathleen and Gregory Koger. 2008. "Effort, Intensity and Position Taking: Reconsidering Obstruction in the Pre-Cloture Senate." *Journal of Theoretical Politics*, 67-92.

Bell, Lauren C. 2011. *Filibustering in the Senate.* Amherst, NY: Cambria Press.

Bell, Lauren Cohen and L. Marvin Overby. 2007. "Extended Debate over Time: Patterns and Trends in the History of Filibusters in the U.S. Senate." Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL.

Beth, Richard. 1995. "What We Don't Know about Filibusters." Paper presented at the Annual Meeting of the Western Political Science Association, Portland, Oregon.

Beth, Richard S. 2005. "Entrenchment of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications." *CRS Report RL32843.*

Beth, Richard S. 2013. "Procedures for Considering Changes in Senate Rules." *CRS Report R42929.*

Bernstein, Jonathan. 2013. "The Senate has Gone Nuclear. Here's What's Next." *The Washington Post*, November 21. http://www.washingtonpost.com/blogs/plum-line/wp/2013/11/21/the-senate-has-gone-nuclear-heres-whats-next/

Binder, Sarah. 2013. "Boom! What the Senate will be Like When the Nuclear Dust Settles." *The Washington Post*, November 21. http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/21/boom-what-the-senate-will-be-like-when-the-nuclear-dust-settles/

Binder, Sarah A. 1997. *Minority Rights, Majority Rule.* New York, NY: Cambridge University Press.

Binder, Sarah A. and Steven S. Smith. 1997. *Politics or Principle? Filibustering in the United States Senate.* Washington, DC: Brookings Institution Press.

Binder, Sarah A. and Steven S. Smith. 1998. "Political Goals and Procedural Choice in the Senate." *Journal of Politics*, 60: 398-416.

Binder, Sarah A., Anthony J. Madonna, and Steven S. Smith. 2007. "Going Nuclear, Senate Style." *Perspectives on Politics*, 4: 729-40.

Buchanan, James M. and Gordon Tullock. 1962. *The Calculus of Consent.* Ann Arbor, MI: University of Michigan Press.

Burdette, Franklin. 1940. *Filibustering in the Senate.* Princeton, NJ: Princeton University Press.

Byrd, Robert C. 1988. *The Senate, 1789-1989.* Washington, DC: U.S. Government Printing Office.

Committee on Rules and Administration, U.S. Senate. 2011. *Senate Cloture Rule: Limitation of Debate in the Senate of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Congress (Cloture Rule)*, 112th Congress, 1st sess., committee print 112-31, prepared by the Congressional Research Service, Library of Congress. Washington, DC: U.S. Government Printing Office.

Cooper, Joseph. 1962. *The Previous Question: Its Standing as a Precedent for Cloture in the United States Senate.* Washington, DC: U.S. Government Printing Office.

Davis, Christopher M. 2005. "Standing Order and Rulemaking Statute: Possible Alternatives to the "Nuclear Option"?" *CRS Report RL32874.*

Dewar, Helen. 1979. "Filibuster Stalls Senate Attempt to Toughen Tax on Oil Profits." *Washington Post*, December 13.

Dewar, Helen. 1979b. "Senate Ends Filibuster on Oil Tax with a $178 Billion Compromise." *Washington Post*, December 15.

Fisk, Catherine and Erwin Chemerinsky. 1997. "The Filibuster." *Stanford Law Review* 41: 181-254.

Gamm, Gerald and Steven S. Smith. 2000. "Last Among Equals: The Presiding Officer of the Senate." In *Esteemed Colleagues: Civility and Deliberation in the United States Senate,* Burdett A. Loomis, editor. Washington, DC: Brookings Institution.

Gold, Martin B. 2008. *Senate Procedure and Practice*. 2nd Edition. Lanham, MD: Rowman and Littlefield Publishers, Inc.

Gold, Martin, and Dimple Gupta. 2005. "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster." *Harvard Journal of Law and Public Policy* 28: 205-272.

Hatfield, Mark O. 1997. *Vice Presidents of the United States, 1789-1993*. Washington, DC: United States Government Printing Office.

Haynes, George H. 1938. *The Senate of the United States: Its History and Practice.* Boston, MA: Houghton Mifflin Company.

Heitshusen, Valerie. 2013. "Constitutional Points of Order in the Senate." *CRS Report R40948*.

Heitshusen, Valerie. 2014. "Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings." *CRS Report R43331*.

Jefferson, Thomas. 2013. *Manual of Parliamentary Practice*. In U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Thirteenth Congress* (H.Doc. 112-161, 112th Congress, 2d session), prepared by Thomas J,. Wickham, Parliamentarian Washington, DC: United States Government Printing Office.

Kammerman, David. 1953. *Senate Rules and the Senate as a Continuing Body.* Washington, DC: U.S. Government Printing Office.

Koger, Gregory. 2007. "Filibuster Reform in the Senate, 1913-17." In *Process, Party and Policy Making: Further New Perspectives on the History of Congress.* David Brady and Mat McCubbins, editors. Palo Alto, CA: Stanford University Press.

Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate*. Chicago, IL: University of Chicago Press.

Koger, Gregory. 2013. "Reid's Tactical Nuke and the Future of the Senate." *The Washington Post*, November 21. http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/21/reids-tactical-nuke-and-the-future-of-the-senate/

Koger, Gregory and Sergio J. Campos. 2014. "The Conventional Option." *Washington University Law Review* 91: 2012-2036.

Lesniewski, Niels. 2014. "Corker Compares Reid's Reign to Putin." *Roll Call*, February 27. http://blogs.rollcall.com/wgdb/corker-compares-reids-reign-to-putins/

Lynch, Michael S. and Anthony Madonna. 2010. "The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design." Paper presented at the University of Georgia American Political Development Working Group.

Lyons, Richard L. 1980. "First Bite of the Budget Shows it has Sharp Teeth." *Washington Post*, March 6.

Madonna, Anthony J. 2011. "Senate Rules and Procedure: Revisiting the Bank Bill of 1841 and the Development of Senate Obstruction." In *New Directions in Congressional Politics*. Jamie L. Carson, editor. New York: Routledge.

Merkley, Jeffrey. 2013. "Memo on Precedents for Simple Majority Rules Change." July 11. Available at http://t.co/1gv0AofGLn

Oppenheimer, Bruce I. 1985. "Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture." In *Congress Reconsidered*, 3rd Edition. Lawrence C. Dodd and Bruce I. Oppenheimer, editors. Washington, DC: Congressional Quarterly Press.

Perine, Keith. 2004. "Conservatives Defend 'Nuke' Option To Protect a High Court Nominee." *CQ Weekly*, September 4.

Peters, Jeremy W. 2013. "In Landmark Vote, Senate Limits Use of the Filibuster." *The New York Times*, November 21. http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?hp&_r=0&pagewanted=print

Pierson, Paul. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review*, 94 (2): 251-267.

Pierson, Paul. 2004. *Politics in Time: History, Institutions and Social Analysis.* Oxford: Princeton University Press.

Riddick, Floyd and Alan Frumin. 1992. *Riddick's Senate Procedure: Precedents and Practices*." Washington, DC: U.S. Government Printing Office.

Roberts, Jason M. and Steven S. Smith. 2007. "The Evolution of Agenda-Setting Institutions in Congress: Path Dependency in House and Senate Institutional Development." *In Process, Party and Policy Making: Further New Perspectives on the History of Congress.* David Brady and Mathew McCubbins, editors. Palo Alto, CA: Stanford University Press.

Rundquist, Paul S. 1999. "S. Res. 160: Rule XVI and Reversing the Hutchison and FedEx Precedents." *CRS Report RS20276.*

Rybicki, Elizabeth. 2006. “Senate Decisions Concerning the Authority of Conferees (Rule XXVIII,” CRS congressional distribution memorandum,

Senate [various years]. *Journal of the Proceedings*. Washington, DC: U.S. Government Printing Office.

Smith, Steven S. 2014. *The Senate Syndrome.* Norman, OK: University of Oklahoma Press.

Smith, Steven S. and Hong Min Park. 2013. “Americans Attitudes about the Senate Filibuster.” *American Politics Research* 41:735-760.

Smith, Steven S., Ian Ostrander and Christopher M. Pope. 2013. “Majority Party Power and Procedural Motions in the U.S. Senate.” *Legislative Studies Quarterly* 38(2): 205-236.

Story, Joseph. 1833. *Commentaries on the Constitution of the United States.* Boston, MA: Hilliard, Gray and Company.

Wawro, Gregory and Eric Schickler. 2004. “Where's the Pivot? Obstruction and Law-making in the Pre-cloture Senate.” *American Journal of Political Science* 48 (4): 758-774.

Wawro, Gregory and Eric Schickler. 2006. *Filibuster: Obstruction and Lawmaking in the U.S. Senate.* Princeton, NJ: Princeton University Press.

Wawro, Gregory and Eric Schickler. 2010. “Legislative Obstructionism.” *Annual Review of Political Science* 13: 297-319.

Weaver, Warren. 1979. “Oil Tax Compromise Reported in Senate.” *New York Times*, December 12.