Filibustering and Majority Rule in the Senate: the Contest over Judicial Nominations, 2003-2005

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On January 31, 2006, Samuel Alito was confirmed as an associate justice of the U.S. Supreme Court by a vote of 58 to 42. Like most legislation, judicial nominations are vulnerable to filibusters, and sixty votes are required to override a filibuster and force an up-or-down vote on the nomination.¹ Recent research on Senate obstruction highlights the role of filibustering as an everyday tactic in the modern Senate (Koger n.d.; Krehbiel 1998; Sinclair 2002b), and the forty-two senators opposed to Alito could have blocked his confirmation if they had all voted against cloture.² Instead, sixteen Democrats voted for cloture on Alito and then voted against his nomination. This chapter explores the secret of Alito’s success: the endogeneity of filibustering rights in the Senate.

Alito’s confirmation ended—at least temporarily—a five-year feud over the use of filibusters to block judicial nominations. The feud began as a serious disagreement about what kind(s) of judges ought to sit on the federal bench and grew into a dispute over the rules of the Senate. It led to drastic threats: the leaders of the majority party threatened to revoke the minority’s right to obstruct judicial nominations, and the leader of the minority party threatened a complete shutdown of the Senate. This debate nicely demonstrated three general points about legislative parties in the Senate. First, the Senate can severely reduce minority rights if a bare majority of its members are sufficiently devious and determined. Second, the political and legislative costs of such majoritarian tactics can be prohibitively steep, making it difficult to form a majority coalition that is willing to incur these costs. Third, this case illustrates the limits of party power in the Senate. In the end, critical blocs of senators who had little to gain from a confrontation over minority rights combined to defuse the conflict. Thus, senators
have the ability but (so far) not the desire to impose majority-party rule on the Senate.

This chapter begins by explaining how simple majorities can reduce minority rights in the Senate even if a minority attempts to obstruct reform. As we shall see, senators can use unconventional tactics to circumvent a filibuster against a formal change in the standing rules of the Senate. Second, I assess the frequency and partisanship of parliamentary rulings in the modern Senate. Finally, I turn to the fight over judicial nominations from 2003 to 2005, which culminated in a bipartisan agreement to preserve the right to filibuster while limiting the use of that right.

Rules, Precedents, and Filibustering

To a naïve reader of Senate rules, it is obvious that a simple majority can change the rules of the Senate. Senate rules are changed by resolutions; these resolutions require a simple majority to pass; thus, Senate rules can be changed by a majority. However, resolutions can also be debated, and the Senate has no formal rule for limiting debate by a simple majority vote. Therefore, unless the Senate votes to impose cloture, a minority of the Senate can drag out debate on a rules change indefinitely. To make matters worse for reformers, Rule 22 of the Senate imposes an especially high threshold for cloture on rules changes: two-thirds of all senators voting must support cloture before the Senate can limit debate on a resolution to change the Senate’s rules.1

What recourse is left to senators seeking to empower the majority party by restricting filibustering? Even if it is difficult for a slender majority of senators to formally alter their chamber’s rules, it can be relatively easy to change the meaning of their rules. Like most legislatures, the Senate has a regular process for any member to challenge the manner in which the legislature is functioning by raising a point of order stating his or her objection. Ordinarily, these points of order are used to enforce current rules, such as Senate Rule 19’s prohibition on speaking ill of the motives of another senator. In such cases a transgression occurs, a point of order is lodged, the chair sustains the complaint, the transgressor is admonished, and debate goes on.

Occasionally, a senator disagrees with the presiding officer’s decision. Any senator can appeal the chair’s decision. Appeals are debatable and are decided by a simple majority vote. Any senator can cut off debate on an appeal and force a vote by moving to table the appeal. While the vocabulary of this process is drawn from legal settings, legislators are under no obligation to adopt the “right” or “best” interpretation of a rule when they vote on appeals, nor are procedural interpretations subject to judicial review.4

In extraordinary cases, these procedural objections can be used to alter the interpretation of current rules or to boldly assert new prerogatives. Consider some historical precedents that empowered the Senate majority party:5

June 1879: The president pro tempore counts nonvoting members toward a quorum for the purpose of transacting business, but not voting. This makes it more difficult for the Republican minority to continue a filibuster against an appropriations bill (Burdette 1940).

May 1908: The presiding officer again counts a nonvoting member toward a quorum. Also, a new ruling, supported by a 35–3 vote, makes it more difficult for senators to obstruct by repeatedly demanding the counting of a quorum (Burdette 1940).

August 1937: The presiding officer formally recognizes the majority leader’s priority in recognition (Riddick and Frumin 1992).

February 1975: Senators vote 51–42 in favor of limiting debate on changing the Senate’s cloture rule by a simple majority vote. This test vote was subsequently reversed as part of a compromise (Binder and Smith 1997).

October 1977: Vice President Walter Mondale and Majority Leader Robert Byrd (D-WV) cooperate to limit the use of time-wasting amendments after a successful cloture vote.6

March 1995: The Republican majority suspends the prohibition against adding policy riders to appropriations bills (Rule 16) by a 57–42 vote (Koger 2002, chap. 9).

These examples suffice to show that Senate majorities can revise the meaning of its rules by raising points of order and then sustaining or overturning the presiding officer’s decision by simple majority vote.

It is possible to make drastic changes in Senate decision making by reinterpreting current rules. Over the years, senators have considered the following

Empowering the presiding officer of the Senate to determine when sufficient debate has occurred on an issue. Republican leaders contemplated this strategy in 1891 (Koger 2002; Wawro and Schickler 2006). Some scholars point out, correctly, that senators are unwilling to allow their presiding officer to exercise this much power (e.g., Haynes 1938; Gamm and Smith 2000), but it is nonetheless possible for senators to employ this strategy.

Moving the previous question. The rules of the Senate do not mention the “previous question” motion used to cut off debate in the House, but the rules do not ban such a motion either. During the 1915 filibuster of the ship purchase act, the Democratic majority seriously considered asserting the right to move the previous question, but they abandoned the venture because they lacked the votes to make it work (Koger 2007).
SUSPENDING THE RULES BY MAJORITY VOTE. Motions to suspend the rules can include all of the procedural detail (restrictions on amendments, time limits) included in unanimous consent agreements in the modern Senate or special rules in the modern House; the only restriction is that the motion cannot be introduced and considered on the same day (Beth 1993). When combined with the Senate majority leader’s right to be recognized before all others, this strategy would allow the majority-party leader to propose restrictive floor procedures for a simple majority vote. In order to adopt this process, a Senate majority would have to overturn a 1915 precedent requiring a two-thirds majority to suspend a rule of the Senate and, most likely, adopt a new precedent making these motions nondebatable.

REQUIRING THE SENATE TO READOPT RULES BY MAJORITY VOTE AT THE BEGINNING OF EACH CONGRESS. Although this may be the most complicated strategy, it has also been the most attempted (see Binder and Smith 1997; and Wolfin- ger 1971). First, a majority must overturn a precedent that the Senate is a “standing body”—that is, that its rules automatically continue from Congress to Congress. Next, the Senate, like the House, would consider amendments to its rules by simple majority vote. Once freed of the current rules, a simple majority could assert its right to limit debate on rules proposals. In 1963, 1967, 1969, 1971, and 1975 (see above), senators voted on whether the Senate is a standing body.

It may be easier to implement a “reinterpretation” strategy when the presiding officer supports the reform effort. In order to win, the reform faction usually must force a vote on its appeal, but appeals are traditionally subject to debate (and hence endless discussion) in the Senate. There are three ways out of this conundrum. First, if the presiding officer makes a ruling that favors reform, then it is the defenders of the status quo who must appeal the chair’s decision. These appeals can be tabled by a simple majority without debate. Second, a chair may, of his or her own authority, simply announce after some debate on an appeal that there has been adequate discussion for senators to make up their minds, so voting will commence without further deliberation. Both of these scenarios rely on the assistance of the presiding officer. Obviously, vice presidents have the constitutional authority to preside over the Senate, and some vice presidents, such as Hubert Humphrey in 1969 and Nelson Rockefeller in 1975, have been willing to intervene on behalf of reformers. Furthermore, it has often been possible for senators to place an ally in the presiding officer’s chair regardless of the vice president’s preferences. Prior to 1967, there was no constitutional provision for replacing a vice president, so if the vice president died, resigned, or succeeded to the presidency, the office was sim-

ply vacant and the president pro tempore presided without interruption. These gaps in vice-presidential services provided long stretches of time during which senators could carry out majoritarian schemes if they wished to do so. Furthermore, contemporary vice presidents rarely preside over the Senate, preferring to allow senators to perform this deadly dull task unless their presence is necessary to break a tie vote.

Even if there is a vice president (or some other antireform figure) acting as the presiding officer, devious majorities can circumvent this officer. First, even vice presidents are human—they must sleep, eat, and take breaks—and majorities can try to wait them out.” A second option is to raise a second point of order that debate on an appeal has dragged on too long. Under Senate Rule 20, the presiding officer must decide on a secondary point of order immediately, and any appeal goes to a vote without debate. Though extreme, this is the majority’s trump card. A majority of the House used this strategy in February 1811 in its effort to convert the previous question motion into a limit on debate (Koger 2002).

PARTIES AND RULE INTERPRETATION, 1961–2000

Now that we have established the possibility of majoritarian reform, this section describes basic patterns in Senate voting on procedural rulings and tests whether the overall pattern suggests that rules are being revised for partisan advantage. I identified all the votes analyzed in this section by using codebooks for congressional roll-call votes (ICPSR 1998) and searching for the words “ruling,” “chair,” and “appeal.” I exclude votes on whether to waive the Budget Act. For simplicity, I focus on the years 1961–2000.

First, I note that votes to interpret rules occur frequently. Figure 9.1 shows the raw number of votes on rule interpretation, including both appeals and motions to table appeals. The average number of votes on parliamentary rulings is 9.75 per Congress, with a peak in the mid-1970s, when points of order were frequently raised as a delaying tactic. The frequency of votes has decreased from a mean of 12.1 in the 1980s to 3.0 in the 1990s.

To what extent do parties enhance their procedural power by reinterpreting rules? I employ two measures of partisanship and majority control of the rules. First, I compare the mean Rice difference scores for votes to interpret rules with the mean Rice score for all other votes by Congress. A Rice difference score is the absolute value of the percentage of one party voting aye minus the percentage of the other party voting aye. A score of 0 means that equal proportions of the two parties voted aye, while a score of 100 means that each party unanimously opposed the other. If institutional
choices are less partisan than other decisions, the average Rice difference score should be lower for parliamentary decisions than for all other votes. Conversely, if parties often disagree over the proper interpretation of a rule, Rice difference scores should be higher than average on parliamentary appeals. Second, I compare the size of winning coalitions on interpretation votes versus all others. In addition to partisanship, we are also interested in whether cross-party majorities are manipulating rules for their own (presumably short-term) goals. If parliamentary votes are, on average, decided by smaller majorities than other votes, that is evidence that this form of institutional change is not based on consensus.

Voting on Senate rule interpretation is generally more partisan than other votes. Figure 9.2 shows the mean Rice difference score for interpretation votes and other votes for each two-year Congress from 1961 to 2000.

To the extent that we are curious about the possibility of partisan change, the disaggregated data are sufficient to resolve the question. Seventy-two votes have Rice difference scores above 50 percent; for twenty votes, the difference is in the 90–100 percent range. Parties can and do oppose each other on parliamentary votes. Furthermore, there is a pattern of elevated partisanship on interpretation votes. For the entire time series, the mean Rice cohesion score (counting each Congress as an observation) was 42.9 for parliamentary votes and 34.4 for all other votes. For the years 1979 to 2000, the mean scores increase to 52.2 for interpretation votes and 39.3 for all others—a 12.9 percent gap. Thus, these votes show an elevated level of partisanship on parliamentary votes, especially in recent years.

Of course, Rice difference scores do not necessarily indicate the size of the winning majority. A “high” Rice score of 50, for example, is possible when more than 70 percent of the chamber supports a rule interpretation. A second measure of majority control of the decision-making process is the margin of victory on key interpretation votes. If interpretation votes are more contested than other votes, we may infer that the majority of the Senate (including cross-party ideological factions) is interpreting the rules over the objections of a sizable minority. Figure 9.3 illustrates the winning-coalition size for parliamentary votes from 1961 to 2000. For comparison, the mean coalition size for all other votes is also shown.

The potential for majoritarian change is clear. Of the 210 votes, 125 are below the 66.7 percent threshold for cloture on a rule change. Any reforms achieved by these votes, we may suspect, could have been blocked by a filibuster if the majority had attempted a formal rule change. Furthermore,
if we take the mean of Congress-by-Congress averages, the winning side on parliamentary questions averages 65 percent of the chamber, while 73 percent is the average margin for all other votes. While 65 percent is not exactly a minimal winning-coalition size, it is significantly more adversarial than other Senate votes.

The partisan potential of parliamentary decisions extends to the outcomes of these votes. Figure 9.4 illustrates party wins and losses parsed by vote type, outcome, and winning party for 1961 to 2000. The left-most cluster, “appeal wins,” shows the distribution of party winners on votes to uphold an appeal from the ruling of the chair. Since we can fairly assume that the presiding officer typically affirms the procedural status quo when making rulings, these votes represent successful deviations from the status quo. More than half (39 of 73) of these successful appeals are supported by bipartisan majorities. The parties divided on the remaining thirty-four votes, and the majority party won 82 percent of them. Similarly, when direct votes on appeals are defeated by partisan majorities, the majority party wins twice as often as the minority party. When a motion to table an appeal succeeds, 49 percent of the time it is the majority party that successfully suppresses the appeal (37 of 75 cases), 47 percent of the time a bipartisan majority wins, and just 4 percent of such victories are won by the minority party. Finally, on the rare occasion that a motion to table an appeal fails in a partisan vote, the majority party wins 46.7 percent of the time. It is possible (but not guaranteed) that when a motion to table fails, the losing side will graciously accept the appeal from the point of order, so this category may also represent successful cases of procedural change. Taken together, these patterns suggest that the majority party has often been successful at preventing unfavorable new interpretations of chamber rules and has often imposed new interpretations of old rules by majority vote.

The next section documents a debate over whether the Senate majority party should impose a new precedent restraining obstruction against judicial nominations. This “nuclear-option” debate highlights both the fragility of Senate rules and the complex politics of institutional change.

**Mutually Assured Destruction in the Senate, 2003–2005**

For years, Republicans and Democrats have jostled over the partisan and ideological composition of the federal judiciary (Scherer 2005). The judicial branch is now the primary forum for a number of issues of prime importance to the members and organizations associated with each party: abortion, gay rights, civil rights, the environment, and many more. After
the 2000 election, Republicans had narrow control of the White House and Senate, raising Democrats' fears that they would be able to stack the judiciary with conservative judges. For the first four years of the Bush presidency, senators fought over district- and appeals-court nominations on the basis of the notion that these positions are important in their own right (after all, the Supreme Court decides only a few dozen cases a year, so the lower courts render the final decision on all others) and are a prelude to the Supreme Court nominations to come (Dlouhy 2003).

It is noteworthy that this dispute was not simply a Senate affair. Each party acted in concert with allied interest groups. The significant role of interest groups allied with the Senate Democrats, such as People for the American Way, came to light when Republican staffers on the Judiciary Committee publicized memos written by their Democratic counterparts that detailed the coordination between Senate Democrats and interested organizations (Hurt 2003). Senate Democrats used the judicial-nomination fight as a fundraising pitch (Kane 2002; Earle 2005a). On the other side, a large coalition of conservative organizations urged the nomination and approval of conservative judges, and as events unfolded, many supported drastic tactics to achieve this goal. Furthermore, President George W. Bush was a vocal critic of the Democrats' obstruction and urged the Senate to revise its rules so that every presidential nomination would be guaranteed a timely vote on approval (Allen and Goldstein 2002).

The first sign of the conflict was a low-visibility dispute over whether Democrats would be able to veto judicial nominations to posts within their own states (Eisele 2001). This question became moot in 2001 after Senator Jim Jeffords of Vermont switched from the Republican Party to being allied with the Democrats, so that control of the chamber switched, Patrick Leahy became chair of the Judiciary Committee, and Democrats could block any controversial nominee.

The conflict escalated after Republicans regained majority status in 2003 and President Bush renominated several judges who had languished in committee during the 107th Congress. For the next two years, the Democrats pursued a policy of selectively blocking appellate-court nominees whom they considered too extreme; ten of thirty-four appellate nominees were defeated after cloture votes revealed that they were supported by the Republican majority but less than three-fifths of the Senate. Despite their nearly unanimous voting against cloture, some moderate Democrats were uncertain about the wisdom of confronting Bush and the Republicans on judges. As late as April 2003, a Democratic memo listed fifteen senators who were opposed to the party strategy or waiving; some Democrats' support for the strategy was contingent on whether they were fighting over process (how much information should nominees have to divulge?) or substance (is this person qualified for the federal bench?) (Bolton 2003b).

Republicans grew frustrated as the Democrats began filibustering Miguel Estrada's nomination to the D.C. Circuit Court of Appeals. On the evening of February 26, 2003, Ted Stevens (R-AK) commented that the Republicans could end the debate and approve the nomination right then if he took over as chair and ruled that filibustering nominations was out of order (VandeHei and Babington 2005). The idea gained momentum among Republicans, who considered Democrats' tactics unprecedented and unacceptable. Democrats and the press labeled Stevens's proposal the "nuclear option," since Democrats would retaliate against Republicans' assertion of the majority's ultimate power with full-scale obstruction that would bring the Senate to a halt. In May 2003, Judiciary chair Orrin Hatch (R-UT) acknowledged to the press that Republicans were considering extraordinary tactics to suppress judicial filibustering (Bolton and Earle 2003), while Majority Leader Bill Frist (R-TN) proposed a formal rules change that would lower the threshold for cloture on a nomination by three votes after every defeated cloture attempt (Dewar and Allen 2003).

It was doubtful, however, that Republicans could muster a bare majority from their own members for a majoritarian strategy (Bolton 2003a), although they continued to discuss it (Bolton 2004). Instead, the Republicans continued to attempt and lose ordinary cloture votes. Moreover, they seemed to believe that they could win the war over judges by losing battles. By forcing Democrats to vote on cloture on stalled nominations (and other legislation), the Republicans hoped to build a record of Democratic filibustering and then campaign against the "obstructionist" Democrats in the 2004 elections. Toward this end, they staged an anti-filibuster telethon in November 2003 to draw attention to the Democrats' obstruction (Dewar and Branigin 2003).

During the 2004 election cycle, a single incumbent senator was defeated for reelection: Thomas Daschle, the minority leader from South Dakota. In a hyper-intensive campaign, Republicans characterized Daschle as an obstructionist holding up Bush's agenda and nominations. Following the election, Republicans' interest in suppressing filibusters against judicial nominations increased dramatically. President Bush, after all, had four more years to make nominations, and that would probably include one or more seats on the Supreme Court. Senator Frist criticized the Democratic filibusters as "radical" and warned that "one way or another, the filibuster of judicial nominees must end."
Harry Reid of Nevada, the new leader of the Democrats, began to negotiate with Frist over the ground rules for judicial nominations. These negotiations, however, were hampered by two factors. First, neither leader had a unified team behind him, so it was unclear how credibly Frist could threaten reform and Reid could threaten filibusters. Senate Democrats had reason to worry about the consequences of a filibuster: “Democratic strategists said that some of the party’s senators from states Bush carried in the presidential election could be reluctant to support a filibuster for fear of being portrayed as obstructionist—a tactic the GOP used successfully in congressional elections this year and in 2002.”

On the other side, Democrats speculated (and Republican aides later admitted) that Frist lacked the votes to carry out his threat (Hurt 2005; Klein 2006). Senators’ reluctance to engage in a high-stakes struggle reflected public opinion. A March 2005 Newsweek poll suggested public skepticism about the nuclear option; a 57 percent majority opposed the imposition of majority cloture for judicial nominations with only 32 percent supporting it, although among Republicans, a 55 percent majority supported the nuclear option and 33 percent opposed it. Nor did public opinion support the Democrats’ threat to retaliate; in the same poll, respondents opposed a postreform shutdown by a margin of 46 to 40 percent, although a majority of Democrats supported retaliation, by a 65 to 29 percent margin. Republican-allied business interests were also fearful that they would suffer in the fallout from a struggle over the rules, as their legislative priorities might be dragged into a postreform cycle of retaliation (Bolton 2005d).

Despite this ambivalence on both sides of the party line, Reid and Frist were constrained by the keen interest of outside actors in the nomination battle. Conservative groups such as the Christian Coalition, the American Conservative Union, and Focus on the Family formed umbrella groups such as the National Coalition to End Judicial Filibusters to advocate a more conservative judiciary at any cost. Evangelical organizations held a televised “Justice Sunday” rally to urge the Senate to approve conservative judges (Babington 2005). They were joined, as before, by President Bush in advocating cloture reform if necessary. On the other side, liberal groups such as the Sierra Club, Service Employees International Union, Planned Parenthood, and People for the American Way mobilized to advocate a meaningful role for Democrats—including a right to filibuster—in the judicial-confirmation process. These outside actors made it difficult to compromise, since Frist and Reid were each reluctant to disappoint the organizational core of their own party. Frist, in particular, was contemplating a run for the presidency and needed to maintain his conservative bona fides (Bolton 2005c).

In April 2005, Republican threats became more intense as Frist publicly committed the Republicans to imposing reform (Bolton 2005a, 2005d; Babington 2005a), despite internal Republican polls suggesting public opposition to the nuclear option (Bolton 2005e). The threats and negotiations came to a head on May 13, 2005, when Frist announced that he planned to bring the appellate-court nominations of Priscilla Owen and Janice Rogers Brown to the Senate floor. Frist’s press release stated that if Frist and Reid could not “find a way for the Senate to decide on fair up or down votes on judicial nominations, the Majority Leader will seek a ruling from the Presiding Officer regarding the appropriate length of time for debate on such nominees.” Negotiations between Frist and Reid ended on May 16, with Reid decrying Frist’s “all-or-nothing” approach (Hulse 2005), although a rump group of Republican and Democratic moderates continued to meet. The Senate debated Owen’s nomination on May 18 and 19, then Republicans filed a cloture petition on May 20; implicitly, this meant a showdown on May 23.

On that day, hours before the Senate began to vote on cloture and, perhaps, a nuclear option, a group of fourteen senators announced a deal to resolve the conflict. These fourteen agreed to vote for cloture on three of the five nominees facing a filibuster (including Owen and Brown), leaving another two nominees exposed to a filibuster. For all future nominations—including Supreme Court nominations—the agreement stated that “nominees should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist” (emphasized added; the agreement’s text is printed in the New York Times, May 24, 2005).

Who were the members of the “Cang of 14”? The Democrats were Ben Nelson (NE), Robert Byrd (WV), Joseph Lieberman (CT), Mark Pryor (AR), Mary Landrieu (LA), Ken Salazar (CO), and Daniel K. Inouye (HI). The Republicans were John Warner (VA), John McCain (AZ), Lindsey Graham (SC), Susan Collins (ME), Olympia Snowe (ME), Lincoln Chafee (RI), and Mike DeWine (OH). Press reports noted certain characteristics about members of the Gang of 14 that might account for why they joined this group. Some reports commented on their seniority; Byrd, Inouye, and Warner are senior senators, while Salazar, Pryor, and Graham were elected in 2002 and 2004. Other reports portrayed the members as moderates, despite members like McCain and Graham. Also, some among the Gang of 14 were up for reelection—Byrd, Lieberman, Nelson, DeWine, Chafee, and Snowe—so perhaps this was a ploy on their part to get attention as dealmakers right before the election.
I tested these claims with a probit analysis of whether a senator was a member of the Gang of 14, using seniority (number of terms), reelection, and moderation as predictors. Reelection is a trichotomous variable coded −1 for retiring senators, 1 for senators running for reelection in 2006, and 0 otherwise. Moderation is measured by senators' first-dimension DW-NOMINATE scores, which are conventionally used as a measure of ideology. In this case, I multiply Democrats' NOMINATE scores (which range from −.95 to −.021; low scores connote liberalism) by −1 so that the measure becomes an index of extremism: the higher a senator's NOMINATE score as adjusted, the more he or she is a liberal Democrat or conservative Republican. Moderates thus have low scores on this scale.

The results indicate that moderation is the best predictor of membership in the Gang of 14. There is no consistent relationship between membership and either reelection or seniority.22 Figure 9.5 illustrates the relationship between preferences and the probability that a senator will be a member of the Gang of 14. The figure presents the predicted relationship (with a confidence interval of one standard deviation) for extremism scores ranging from −.05 (the actual minimum was −.03) to .95. The results suggest an 83 percent chance that a very moderate senator with an extremism score of 0 will be in the Gang of 14; but on the basis of these data, it appears that senators with extremism scores of .5 had a 3 percent chance of being in the Gang of 14.23

What did the agreement mean? "Extraordinary circumstances" is an ambiguous standard, so the key to its meaning is that a filibuster is not "justified" if a majority of the Senate is willing to suppress it. This meant that if all non-Gang Republicans were willing to vote for a nuclear option and all Democrats (plus Jim Jeffords, I-VT) would oppose such an attempt, then a filibuster was "justified" if six out of the seven Gang Republicans agreed that it was. However, the members of the Gang of 14 also committed themselves to make up their own minds on whether to suppress a filibuster—a major commitment on an issue as politicized as judicial nominations. Afterward, senators and pundits wondered whether the agreement heralded a power shift toward the responsible moderates in the Senate. Indeed, the Gang of 14 reconvened after President Bush nominated John Roberts and Samuel Alito for the Supreme Court, and in both cases the group deemed any filibuster against these nominations unwarranted.

At first glance, this contest suggests that threats of reform can deter minorities from filibustering.24 We observe a sequence of obstruction, threat, and minority withdrawal that is consistent with deterred filibustering. Notably, all the major players in this fight—senators, staffers, reporters, interest groups—easily accepted the premise that the Republican majority could impose majoritarian reform if it was sufficiently committed and ruthless. At no point did Democratic senators or spokespersons simply deny that reform was impossible without a preexisting right to move the previous question. At the same time, this episode illustrates the difficulty majorities face when attempting to bully minorities into acquiescence. Between May 2003 and May 2005, several Senate Republicans announced that they would not vote for a nuclear-option strategy, and several news articles expressed doubt that Frist could muster a bare majority for his strategy. For several Republicans, using drastic tactics to impose majority cloture on judicial nominations represented a major break from the comity that is necessary for the day-to-day functioning of the Senate. It would also represent a de facto transfer of power from Senate moderates, who provide critical swing votes under the current system (as embodied in the Gang of 14), to the president and interest groups who select nominees and advocate for them.

On the other side, Reid and the Democrats had a difficult time making a credible threat to "go nuclear" in a postreform Senate. The reason is simple: Democrats were presumably already filibustering in every situation where the benefits of obstruction exceeded the costs. Any punitive filibustering by the Democrats would have required obstructing in situations where the
costs exceeded the benefits. Democrats could have tried to minimize the political repercussions by attributing their filibusters to the Republicans’ procedural revolution, but individual Democrats would still have found themselves voting against cloture on bills that were politically popular, urgently needed, or both. For this reason, Reid had to exempt a number of bills from his threat of a legislative shutdown, including appropriations bills and legislation related to “supporting our troops,” while other Democrats were reluctant to obstruct bills on highway funding or energy policy (Bolton 2005). In the end, the Senate moderates’ compromise spared both parties from trying to follow through on threats that would have been very costly to redeem and embarrassing to recant.

**Discussion**

This discussion of procedural tactics and disputes in the Senate is intended to demonstrate a simple fact: the Senate could be a much more majoritarian chamber than it is. Presumably, as in the House, the majority party would be the primary beneficiary of pro-majority reforms. But Senators have been reluctant to make major reforms, even when they are members of the majority party and their party’s agenda is being thwarted by Senate minorities. They have, however, imposed new interpretations on Senate rules that advantage the majority party (for examples, see Koger 2002, chap. 9).

Why doesn’t the majority party impose parliamentary “reinterpretations” that suppress filibustering? The nuclear-option showdown provides one answer to this question. It may be that Senate majorities rarely restrict obstruction because the minority refrains from pursuing filibusters that would provoke drastic reform. In the case of the Gang of 14, a bipartisan group of senators agreed to allow controversial judges to pass as long as the majority abandoned its reform plan.

This outcome ties into a second explanation for the persistence of Senate filibustering. In another work (Koger 2006), I find support for a classic argument that senators make against cloture reform, particularly cloture by majority vote. In a legislative setting, majority rule invites domination by party leaders, presidents, and interest groups who buy or coerce enough votes to win. Drastic reform would not necessarily benefit the members of the majority party because it would invite increased pressure to toe the party line and to ignore personal or constituent preferences. It seems that in 2005, moderates of both parties successfully averted a transformation of the Senate and preserved their own critical role in Senate politics.

**Notes**

1. “Filibuster” is defined as the use of delaying tactics to prevent a decision by a legislative chamber for strategic gain. For this chapter, I use the term “obstruction” as a synonym for filibustering.

2. Indeed, in 1968 the nomination of Abe Fortas for chief justice was blocked by a filibuster (Koger n.d.).

3. The Senate had no cloture rule before 1917; see Koger 2007 and Wawro and Schickler 2007 on the adoption of the Senate cloture rule. From 1949 to 1959, Rule 22 did not apply to resolutions to amend Senate rules.

4. Article 1, section 5 of the U.S. Constitution states, “Each House may determine the Rules of its Proceedings.” In United States v. Ballin, 144 U.S. 1, 5, 12 S. Ct. 507, 509, the Court said: “Neither do the advantages or disadvantages, the wisdom or folly, of . . . a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.” Each chamber thus has great discretion to choose and interpret its own rules. The Supreme Court has rendered decisions, however, on the interpretation of congressional rules as they pertain to the legitimacy of executive appointments (United States v. Smith, 286 U.S. 6 [1932]) and the investigatory powers of standing committees (Chrissoffel v. United States, 338 U.S. 84 [1949], Yellen v. United States, 374 U.S. 109 [1963], Wheeldin v. Wheeler, 373 U.S. 647 [1963] 373 U.S. 647), but the Supreme Court clearly recognizes that internal legislative rules are not cognizable by the courts.

5. See Koger 2006 and Wawro and Schickler 2006 for more examples.


7. I describe such a case in the Rhode Island Senate in 1924, when a Republican majority attempted to oust a Democratic lieutenant governor (Koger n.d.).

8. This difference is significant at the .01 level using a paired t-test.

9. This difference is significant at the .00 level using a paired t-test.

10. Republican staffers on the Judiciary Committee accessed these memos from the computer system they shared with Democratic committee staffers. The Senate sergeant at arms and the Justice Department subsequently investigated this infiltration.

11. Specifically, Democrats wanted to maintain a policy whereby each senator is sent a “blue slip” for a nomination to a position in his or her state and the nomination is vetoed if a senator returns a negative blue slip. See Binder 2007 on the origins of this practice.
The Republicans refer to their threatened gambit as the "constitutional" option, ignoring a general rule of political rhetoric: the label with fewer syllables wins.


14. As discussed below, this "marathon" session did not constitute an effort to win by attrition.


18. The question was, "U.S. Senate rules allow 41 senators to mount a filibuster—refusing to end debate and agree to vote—to block judicial nominees. In the past, this tactic has been used by both Democrats and Republicans to prevent certain judicial nominees from being confirmed. Senate Republican leaders—whose party is now in the majority—want to take away this tactic by changing the rules to require only 51 votes, instead of 60, to break a filibuster. Would you approve or disapprove of changing Senate rules to take away the filibuster and allow all of George W. Bush's judicial nominees to get voted on by the Senate?" http://www.pollingreport.com/congress.htm, accessed April 12, 2005; N = 1,012; margin of error is plus or minus 3 percent.

19. The question was, "Senate Democratic leaders have threatened to slow down or stop almost all but the most essential legislative business if Republicans take away their ability to use the filibuster to stop judicial nominees they consider to be conservative extremists. Would you approve or disapprove of the Democrats responding in this way if the Republicans take away the filibuster?"

20. Outside groups also pressured senators to toe the line. After Senate Republican whip Mitch McConnell (R-KY) expressed reservations about "going nuclear," he was criticized by conservative radio host Rush Limbaugh, and the Family Research Council threatened to run television ads in Kentucky urging McConnell to change his position (Bolton 2005b).

21. On the broader network of links between interest groups and formal party organizations, see Koger, Masket, and Noel 2005.

22. Specifically, Pr(Gang of 14) = 1.008(568)β + .016(019)[Seniority] + -.111(332)[Reelection] + -2.194(1.404)[Extremism]; N = 100, pseudo-\(R^2 = .331\), and Wald \(\chi^2(3) = 31.47\)***. In alternate specifications, the results were unchanged when "retiring" and "running for reelection" were estimated as separate dichotomous variables. If we use "distance from own party median" as the ideological variable, it is statistically significant, but the relationship is weaker and substantively questionable—no ultraliberal Democrats or ultraconservative Republicans were in the Gang of 14.

23. I find (in Koger 2006) that from 1918 to 1925, support for majority cloture increased with proximity to the party median. The key difference between this chapter and Koger 2006 is that the latter utilizes data sets in which most senators expressed some preference on a question. In this case, senators self-selected (for the most part) into the Gang of 14. The implication of Koger 2006 is that in the event of a roll-call vote on the nuclear option, support for that option would have been low among moderates (as shown), liberal senators (no surprise), and staunch conservatives, who would fear the long-term consequences of centralizing power in the Senate, particularly if senators voted sincerely.