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The Constitutional Option

The Senate's Power to Make Procedural Rules by Majority Vote

Executive Summary

- The filibusters of judicial nominations that arose during the 108th Congress have created an institutional crisis for the Senate.
- Until 2003, Democrats and Republicans had worked together to guarantee that nominations considered on the Senate floor received up-or-down votes.
- The filibustering Senators are trying to create a new Senate precedent — a 60-vote requirement for the confirmation of judges — contrary to the simple-majority standard presumed in the Constitution.
- If the Senate allows these filibusters to continue, it will be acquiescing in Democrats' unilateral change to Senate practices and procedures.
- The Senate has the power to remedy this situation through the "constitutional option" — the exercise of a Senate majority's constitutional power to define Senate practices and procedures.
- The Senate has always had, *and repeatedly has exercised*, this constitutional option. The majority's authority is grounded in the Constitution, Supreme Court case law, and the Senate's past practices.
- For example, Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents that changed Senate procedures during the middle of a Congress.
- An exercise of the constitutional option under the current circumstances would be an act of restoration — a return to the historic and constitutional confirmation standard of simple-majority support for all judicial nominations.
- Employing the constitutional option here would not affect the legislative filibuster because virtually every Senator supports its preservation. In contrast, only a minority of Senators believes in blocking judicial nominations by filibuster.
- The Senate would, therefore, be well within its rights to exercise the constitutional option in order to restore up-or-down votes for judicial nominations on the Senate floor.

Introduction

In recent months, there has been growing public interest in the Senate's ability to change its internal procedures by majority vote. The impetus for this discussion is a Senate minority's use of the filibuster to block votes on 10 judicial nominations during the 108th Congress. Until then, a bipartisan majority of Senators had worked together to guarantee that filibusters were not to be used to permanently block up-or-down votes on judicial nominations. For example, as recently as March 2000, Majority Leader Trent Lott and Minority Leader Tom Daschle worked together to ensure that judicial nominees Richard Paez and Marsha Berzon received up-or-down votes, even though Majority Leader Lott and most of the Republican caucus ultimately voted against those nominations. But that shared understanding of Senate norms and practices — that judicial nominations shall not be blocked by filibuster — broke down in the 108th Congress.

This breakdown in Senate norms is profound. There is now a risk that the Senate is creating a new, 60-vote confirmation standard. The Constitution plainly requires no more than a majority vote to confirm any executive nomination, but some Senators have shown that they are determined to override this constitutional standard. Thus, if the Senate does not act during the 109th Congress to restore the Constitution's simple-majority standard, it could be plausibly argued that a precedent has been set by the Senate's acquiescence in a 60-vote threshold for nominations.

One way that Senators can restore the Senate's traditional understanding of its advice and consent responsibility is to employ the "constitutional option" — an exercise of a Senate majority's power under the Constitution to define Senate practices and procedures. The constitutional option can be exercised in different ways, such as amending Senate Standing Rules or by creating precedents, but regardless of the variant, the purpose would be the same — to restore previous Senate practices in the face of unforeseen abuses. Exercising the constitutional option in response to judicial nomination filibusters would restore the Senate to its longstanding norms and practices governing judicial nominations, and guarantee that a minority does not transform the fundamental nature of the Senate's advice and consent responsibility. The approach, therefore, would be both reactive and restorative.

This constitutional option is well grounded in the U.S. Constitution and in Senate history. The Senate has always had, *and repeatedly has exercised*, the constitutional power to change the Senate's procedures through a majority vote. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the first cloture rule in 1917. *Simply put, the constitutional option itself is a longstanding feature of Senate practice.*

This paper proceeds in four parts: (1) a discussion of the constitutional basis of the Senate's right to set rules for its proceedings; (2) an examination of past instances when Senate majorities acted to define Senate practices — even where the written rules and binding precedents of the Senate dictated otherwise; (3) an evaluation of how this history relates to the present impasse regarding judicial nomination filibusters; and (4) a clarification of common misunderstandings of the constitutional option. The purpose of this paper is *not* to resolve the political question of *whether* the Senate should exercise the constitutional option, but merely to demonstrate the constitutional and historical legitimacy of such an approach.

The Constitution: the Senate's Right to Set Procedural Rules

"Each House may determine the Rules of its Proceedings."
— U.S. Constitution, art. I, sec. 5., cl. 2.

The Senate's constitutional power to make rules is straightforward, but two issues do warrant brief elaboration — the number of Senators that are constitutionally necessary to establish procedures and whether there are any time limitations as to when the rulemaking power can be exercised.

The Supreme Court addressed both of these questions in *United States v. Ballin*, an 1892 case interpreting Congress's rulemaking powers.[1] ***First***, the Court held that the powers delegated to each body are held by a simple majority of the quorum, unless the Constitution expressly creates a supermajority requirement.[2] The Constitution itself sets the quorum for doing business — a majority of the Senate.[3] ***Second***, the Supreme Court held that the "power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house."[4] Thus, the Supreme Court has held that the power of a majority of Senators to define the Senate's procedures exists at all times — whether at the beginning, middle, or end of a Congress.

The Senate majority exercises this constitutional rulemaking power in several ways:

- ***First***, it has adopted Standing Rules to govern some Senate practices and procedures. Those rules formally can be changed by a majority vote. Any motion to formally amend the Standing Rules is subject to debate, and Senate Rule XXII creates a special two-thirds cloture threshold to end that debate.
- ***Second***, the Senate operates according to Senate precedents, i.e., rulings by the Chair or the Senate itself regarding questions of Senate procedure. A precedent is created whenever the Chair rules on a point of order, when the Senate sustains or rejects an appeal of the Chair's ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Chair.[5] As former parliamentarian and Senate procedural expert Floyd M. Riddick has said, "The precedents of the Senate are just as significant as the rules of the Senate."[6]
- ***Third***, the Senate binds itself through rule-making statutes that constrain and channel the consideration of particular matters and guarantee that the Senate can take action on certain matters by majority vote. At least 26 such rule-making statutes govern Senate procedure *and*

[1] 144 U.S. 1 (1892).

[2] *Ballin*, 144 U.S. at 6. There is no serious disagreement with the Supreme Court's conclusion in *Ballin*. Indeed, Senator Edward Kennedy has said that only a majority is necessary to change Senate procedures. *Congressional Record*, Feb. 20, 1975, S3848. Senator Charles Schumer conceded during a Judiciary subcommittee hearing on the constitutionality of the filibuster that Senate rules "could be changed by a majority vote." S. Hrg. 108-227 (May 6, 2003), at 60.

[3] U.S. Const., art. I, § 5, cl. 1.

[4] *Ballin*, 144 U.S. at 5.

[5] Floyd M. Riddick, Senate Parliamentarian, Oral History Interviews (November 21, 1978), Senate Historical Office, Washington, D.C., at 429.

[6] Riddick interview at 426.

limit the right to debate, dating back to the 1939 Reorganization Act and including, most prominently, the 1974 Budget Act.[7]

- ***Finally***, the Senate can modify the above procedures through Standing Orders, which can be entered via formal legislation, Senate resolutions, and unanimous consent agreements.

It is important to emphasize, however, that these rules are the mere background for day-to-day Senate procedure. As any Senate observer knows, the institution functions primarily through cooperation and tacit or express agreements about appropriate behavior. Most business is conducted by unanimous consent, and collective norms have emerged that assist in the protection of minority rights without unduly hindering the Senate's business.

Consider, for example, the Senate's contrasting norms regarding the exercise of individual Senators' procedural rights. Under the rules and precedents of the Senate, each Senator has the right to object to consent requests and, with a sufficient second, to demand roll call votes on customarily routine motions. If Senators routinely *exercised* those rights, however, the Senate would come to a standstill. Such wholesale obstruction is rare, but *not* because the Senate's standing rules, precedents, and rulemaking statutes prohibit a Senator from engaging in that kind of delay. Rather, Senators rarely employ such dilatory tactics because of the potential reaction of other Senators or the possibility of retaliation. As a result, informed self enforcement of reasonable behavior is the norm.

At the same time, some "obstructionist" tactics have long been accepted by the Senate as features of a body that respects minority rights. Most prominent is the broadly accepted right of a single Senator to speak for as long as he or she wants on pending legislation, subject only to the right of the majority to invoke cloture and shut off debate. Indeed, an overwhelming and bipartisan consensus in support of the current legislative filibuster system has existed for 30 years.[8] Thus, the norms of the Senate tolerate some, *but not all*, kinds or degrees of obstruction.

Thus, while written rules, precedents, and orders are important, common understandings of self-restraint, discretion, and institutional propriety have primarily governed acceptable Senatorial conduct. It is the departures from these norms of conduct that have precipitated institutional crises that require the Senate to respond.

The History: the Senate's Repeated Use of the Constitutional Option

The Senate is a relatively stable institution, but its norms of conduct have sometimes been violated. In some instances, a minority of Senators has rejected past practices and bipartisan understandings and exploited heretofore "off limits" opportunities to obstruct the Senate's business. At other times, a minority of Senators has abused the rules and precedents in a manner that violates Senators' reasonable expectations of proper procedural parameters. These are efforts to change Senate norms and practices, but they do not necessarily have the support of a majority.

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[7] Martin B. Gold, *Senate Procedure and Practice* (2004), at 5. For a complete list of the 26 statutes that limit Senate debate, see John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J. L. Pub. Pol'y 181, 213-214 (2003).

[8] Standing Rule XXII's standard for cloture — three-fifths of Senators "duly chosen and sworn" — has been in effect since 1975.

Such situations create institutional conundrums: what should be done when a mere minority of Senators changes accepted institutional norms? One option is to acquiesce and allow "rule by the minority" so that the minority's norm becomes the Senate's new norm. But another option has been for the majority of Senators to deny the legitimacy of the minority Senators' effort to shift the norms of the entire body. And to do that, it has been necessary for the majority to act independently to restore the previous Senate norms of conduct.

This section examines those illustrative instances — examples of when the Senate refused to permit a minority of Senators to change norms of conduct or to otherwise exploit the rules in ways destructive to the Senate, and, instead, exercised the constitutional option.

Then-Majority Leader Byrd's Repeated Exercise of the Constitutional Option

When Senator Robert C. Byrd was Majority Leader, he faced several circumstances in which a minority of Senators (from both parties) began to exploit Senate rules and precedents in generally unprecedented ways. The result was obstruction of Senate business that was wholly unrelated to the institution's great respect for the right to debate and amend. Majority Leader Byrd's response was to implement procedural changes through majoritarian votes in order to restore Senate practices to the previously accepted norms of the body.

1977 — Majority Leader Byrd Exercised the Constitutional Option to Alter Operation of Rule XXII and Prevent Post-Cloture Filibusters

In 1977, two Senators attempted to block a natural gas deregulation bill *after cloture had already been invoked*.[9] A "post-cloture filibuster" should seem counterintuitive for anyone with a casual acquaintance with Senate rules, but these obstructing Senators had found a loophole. Although further debate was foreclosed by Rule XXII once post-cloture debate was exhausted, the Senators were able to delay a final vote by offering a series of amendments and then forcing quorum calls and roll call votes for each one. Even if the amendments were "dilatory" or "not germane" (which Rule XXII expressly prohibits), Senate procedure provided no mechanism to get an automatic ruling from the Chair that the amendments were defective. A Senator could raise a point of order, but any favorable ruling could be appealed, and a roll call vote could be demanded on the appeal. Moreover, in 1975, before a point of order could even be made, an amendment first must have been read by the clerk. While the reading of amendments is commonly waived by unanimous consent, anyone could object and require a reading that could further tie up Senate business. Thus, the finality that cloture is supposed to produce could be frustrated.

These practices were proper under Senate rules and precedents, but Majority Leader Byrd concluded in this context that these tactics were an abuse of Senate Rule XXII. His response was to make a point of order that "when the Senate is operating under cloture the Chair is required to take the initiative under rule XXII to rule out of order all amendments which are dilatory or which on their face are out of order."[10] The Presiding Officer, Vice President Walter Mondale, sustained the point of order, another Senator appealed, and Majority Leader Byrd immediately moved to table. The Senate then voted to sustain the motion to table the appeal. In so doing, the Senate set a new

[9] See Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: a Majoritarian Means to Overcome the Filibuster*, 28 Harv. J. L. Pub. Pol'y 206, 262-264 (2004).

[10] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263.

precedent that ran directly contrary to the Senate's longstanding procedures which required Senators to raise points of order to enforce Senate rules. Now, under this precedent, the Chair would be *empowered to take the initiative* to rule on questions of order in a post-cloture environment.

The reason for Majority Leader Byrd's tactic immediately became clear. He began to call up each of the dilatory amendments that had been filed post-cloture, and the Chair instantly ruled them out of order. There was no reading of the amendments (which would have been dilatory in itself) and there were no roll call votes. The Majority Leader then exercised his right of preferential recognition to call up numerous remaining amendments, and similarly disposed of them. No appeals could be taken because any appeal was mooted when Majority Leader Byrd secured his preferential recognition to call up additional amendments.[11]

This was the constitutional option in action. Majority Leader Byrd did not follow the regular order and attempt to amend the Senate Rules in order to block these tactics. Instead, he used a simple point of order that cut off the ability of a minority of Senators to add a new layer of obstruction to the legislative process. His method was consistent with the Senate's constitutional authority to establish procedure.

1979 — Majority Leader Byrd Exercised the Constitutional Option to Change Operation of Rule XVI (Limiting Amendments to Appropriations Bills)

Majority Leader Byrd used the constitutional option again in 1979 in order to block legislation on appropriations bills.[12] Standing Rule XVI barred Senate legislative amendments to appropriations bills. By precedent, however, such amendments were permissible when offered as germane modifications of *House* legislative provisions. Thus, when the House acted first and added legislative language to an appropriations measure, Senators could respond by offering legislative amendments to the House's legislative language. While another Senator might make a point of order, the Senator offering the authorizing language could respond with a defense of germaneness. And, by the express language of Rule XVI, that question of germaneness must be submitted to the Senate and decided without debate. By enabling the full Senate to vote on the germaneness defense without getting a ruling from the Presiding Officer first, the legislative amendment's sponsor avoided having to overturn the ruling of the Chair and create any formal precedents in doing so. The result was a breakdown in the appropriations process due to legislative amendments, and it was happening pursuant to Senate rules that plainly permitted these tactics.

Majority Leader Byrd resolved to override the plain text of Rule XVI and strip the Senate of its ability to decide questions of germaneness in this context. Senator Byrd's mechanism was similar to the motion he employed in 1977: he made a point of order that "this is a misuse of precedents of the Senate, since there is no House language to which this amendment could be germane, and that, therefore, the Chair is required to rule on the point of order as to its being legislation on an appropriation bill and *cannot submit the question of germaneness to the Senate*."[13] The Chair sustained the point of order, and the Senate rejected the ensuing appeal, 44-40.

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[11] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263-264.
[12] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 264-265.
[13] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265 (emphasis added).

The result of Majority Leader Byrd's exercise of the constitutional option was a binding precedent that caused the Senate to operate in a manner directly contrary to the plain language of Rule XVI.[14] Moreover, the method was contrary to past Senate practices regarding germaneness. But the process employed, as in 1977, was nonetheless constitutional because nothing in the Senate's rules, precedents, or practices can deny the Senate the constitutional power to set its procedural rules.

1980 — Majority Leader Byrd Changed Procedures Governing Executive Session and the Treatment of Judicial Nominations

The Senate's Executive Calendar has two sections — treaties and nominations. Prior to March 1980, a motion to enter Executive Session, if carried, would move the Senate automatically to the first item on the Calendar, often a treaty. Rule XXII provides (then and now) that such a motion to enter Executive Session is not debatable. However, unlike the non-debatable motion to enter Executive Session, any motion to proceed to a *particular* item on the Executive Calendar *was* then subject to debate. In practice, then, the Senate could not proceed to consider any business other than the first Executive Calendar item without a Senator offering a debatable motion, which then would be subject to a possible filibuster.[15]

Majority Leader Byrd announced his objection to this potential "double filibuster" (once on the motion to proceed to a particular Executive Calendar item, and again on the Executive Calendar item itself), and exercised another version of the constitutional option. This time he moved to proceed directly to a particular nomination on the Executive Calendar and sought to do so without debate. Senator Jesse Helms made the point of order that Majority Leader Byrd could only move by a non-debatable motion into Executive Session, not to a particular treaty or nomination.[16] The Presiding Officer upheld the point of order given that it was grounded in Rule XXII and longstanding understandings of Senate practices and procedures. But Majority Leader Byrd simply appealed the ruling of the Chair and prevailed, 38-54. Thus, even though there was no basis in the Senate Rules, and even though Senate practices had long preserved the right to debate any motion to proceed to a particular Executive Calendar item, the Senate exercised its constitutional power to "make rules for its proceedings" and created the procedure that the Senate continues to use today.

As an historical sidenote, Majority Leader Byrd used this new precedent to great effect in December 1980 when he bypassed several items (including several nominations) on the Executive Calendar to take up a single judicial nomination — that of Stephen Breyer, then Chief Counsel to the Senate Judiciary Committee, to be a judge on the U.S. Court of Appeals for the First Circuit. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court in 1994. Without Majority Leader Byrd's exercise of the constitutional option earlier that year, it is almost certain that Justice Breyer would not be on the Supreme Court today.

[14] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265.
[15] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265-267.
[16] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 266.

1987 — Majority Leader Byrd Forced Change to Rule XII's Voting Procedures through Execution of the Constitutional Option

A fourth exercise of the constitutional option came in 1987 when Senator Byrd was once again Majority Leader. The controversy in question involved an effort by Majority Leader Byrd to proceed to consider a particular bill, an effort that had been frustrated because a minority of Senators objected each time he moved to proceed. To thwart his opponents, Majority Leader Byrd sought to use a special feature of the Senate Rules — the Morning Hour (the first two hours of the Legislative Day).

Under Rule VIII, a motion to proceed to an item on the Legislative Calendar that is made during the Morning Hour is non-debatable. This feature of the rules gives the Majority Leader significant power to set the Senate agenda due to his right to preferential recognition (which is, itself, a creature of mere custom and precedent). Such a motion cannot be made, however, until the Senate Journal is approved and Morning Business is thereafter concluded (or the first of the two hours has passed). Meanwhile, the clock runs on the Morning Hour while that preliminary business takes place. When the Morning Hour expires, a motion to proceed once again becomes debatable and subject to filibuster.[17] It was this feature of the Morning Hour that Senator Byrd believed would enable him to proceed to the bill in question.

Majority Leader Byrd's plan was complicated, however, when objecting Senators forced a roll call vote on the approval of the Journal, as was their right under the procedures and practices of the Senate. Rule XII provides that during a roll call vote, if a Senator declines to vote, he or she must state a reason for being excused. The Presiding Officer then must put a non-debatable question to the Senate as to whether the Senator should be excused from voting. When Majority Leader Byrd moved to approve the Journal, one Senator declined to vote and sought to be excused. Following Rule XII, the Presiding Officer put the question directly to the Senate — should the Senator be excused? — but during the roll call on whether the first Senator should be excused, *another* Senator announced that he wished to be excused from voting on whether the first Senator should be excused. The Chair was likewise obliged to put the question to the Senate. At that point, *yet another* Senator announced he wished to be excused from *that* vote. There were four roll call votes then underway — the original motion to approve the Journal and three votes on whether Senators could be excused. If Senators persisted in this tactic, the time it took for roll call votes would cause the Morning Hour to expire, and the Majority Leader would lose his ability to move to proceed to his bill without debate. All this maneuvering was *wholly consistent with the Standing Rules of the Senate*.

Majority Leader Byrd countered with a point of order, arguing that the requests to be excused were, in fact, little more than efforts to delay the actual vote on the approval of the Journal. His solution was to exercise the constitutional option: to use majority-supported Senate precedents to change Senate procedures, outside the operation of the Senate rules. In three subsequent party-line votes, three new precedents were established: ***first***, that a point of order could be made declaring repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) to be "dilatory;" ***second***, that repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) "when they are obviously done for the

[17] Gold, *Senate Procedure and Practice*, at 68-69.

purpose of delaying the announcement of the vote on the motion to approve the Journal, are out of order;" and ***third***, that a Senator has a "limited time" to explain his reason for not voting, i.e., he cannot filibuster by speaking indefinitely when recognized to state his reason for not voting.[18] Majority Leader Byrd had crafted these new procedures completely independently of the Senate Rules, and they were adopted by a partisan majority without following the procedures for rule changes provided in Rule XXII. Yet the tactics were wholly within the Senate's constitutional power to devise its own procedures.

This 1987 circumstance offers a very important precedent for the present difficulties. Majority Leader Byrd established that a majority could restrict the rights of individual Senators *outside the cloture process* if the majority concluded that the Senators were acting in a purely "dilatory" fashion. Previous to that day, dilatory tactics were only out of order *after* cloture had been invoked.

Additional Senate Endorsements of the Constitutional Option

The Senate also has endorsed (or acted in response to) some version of the constitutional option several other times over the past 90 years — in 1917, 1959, 1975, and 1979.

The original cloture rule, adopted in 1917, itself appears to be the result of a threat to exercise the constitutional option. Until 1917, the Senate had no cloture rule at all, although one had been discussed since the days of Henry Clay and Daniel Webster. The ability of Senators to filibuster any effort to create a cloture rule put the body in a quandary: debate on a possible cloture rule could not be foreclosed without some form of cloture device.

The logjam was broken when first term Senator Thomas Walsh announced his intention to exercise a version of the constitutional option so that the Senate could create a cloture rule. His method was to propose a cloture rule and forestall a filibuster by asserting that the Senate could operate under general parliamentary law while considering the proposed rule. Doing so would permit the Senate to avail itself of a motion for the previous question to terminate debate — a standard feature of general parliamentary law.[19] In this climate, Senate leaders quickly entered into negotiations to craft a cloture rule.[20] Negotiators produced a rule that was adopted, 76-3, with the opposing Senators choosing not to filibuster.[21] But it was only after Senator Walsh made clear that he intended to press the constitutional option that those negotiations bore fruit. As Senator Clinton Anderson would remark in 1953, "Senator Walsh won without firing a shot."[22]

The same pattern repeated in 1959, 1975, and 1979. In each case, the Senate faced a concerted effort by an apparent majority of Senators to exercise the constitutional option to make changes to Senate rules. In 1959, some Senators threatened to exercise the constitutional option in order to change the cloture requirements of Rule XXII. Then-Majority Leader Lyndon Johnson preempted its use by offering a modification to Rule XXII that was adopted through the regular order.[23] In 1975, the Senate three times formally endorsed the constitutional option by creating

[18] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 267-269.
[19] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 220-226.
[20] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.
[21] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.
[22] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 227.
[23] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 240-247.

precedents aimed at facilitating rule changes by majority vote, although the ultimate rule change (also to Rule XXII) was implemented through the regular order after off-the-Floor negotiations.[24] And in 1979, Majority Leader Byrd threatened to use the constitutional option unless the Senate consented to a time frame for consideration of changes to post-cloture procedures. The Senate acquiesced, and the Majority Leader did not need to use the constitutional option as he had in the other cases discussed above.[25]

The Senate, therefore, has long accepted the legitimacy of the constitutional option. Through precedent, the option has been exercised and Senate procedures have been changed. At other times it has been merely threatened, and Senators negotiated textual rules changes through the regular order. But regardless of the outcome, the constitutional option has played an ongoing and important role.

The Judicial Filibuster and the Constitutional Option

The filibusters of judicial nominations during the 108th Congress were unprecedented in Senate history.[26] While cloture votes had been necessary for a few nominees in previous years, leaders from both parties consistently worked together to ensure that nominees who reached the Senate floor received up-or-down votes. The result of this bipartisan cooperation was that, until 2003, no judicial nominee with clear majority support had ever been defeated due to a refusal by a Senate minority to permit an up-or-down floor vote, i.e., a filibuster.[27]

The best illustration of this traditional norm is the March 2000 treatment of President Bill Clinton's nominations of Richard Paez and Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. When those nominations reached the Senate floor, Majority Leader Trent Lott, working with Democrat Leader Tom Daschle, filed cloture before any filibuster could materialize. Republican Judiciary Chairman Orrin Hatch likewise fought to preserve Senate norms and traditions, arguing that it would be "a travesty if we establish a routine of filibustering judges."[28] Moreover, as a further testament to the bipartisan opposition to filibusters for judicial nominations, more than 20 Republicans *who opposed the nominations and who would vote against them* nonetheless supported cloture for Mr. Paez and Ms. Berzon, and cloture was easily reached.[29] Had every Senator who voted against Mr. Paez's nomination likewise voted against cloture, cloture would not have been invoked. Thus, as recently as March 2000, more than 80 Senators were on

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[24] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 252-260.

[25] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 260; *Congressional Record*, Jan. 15, 1979.

[26] This historical observation has been conceded by leading Senate Democrats. For example, the Democratic Senatorial Campaign Committee solicited campaign contributions in November 2003 with the claim that the filibusters were an "unprecedented" effort to "save our courts." See Senator John Cornyn, *Congressional Record*, Nov. 12, 2003, S14601, S14605. No Senator has disputed that until Miguel Estrada asked the President to withdraw his nomination in September 2003, no circuit court nominee had ever been withdrawn or defeated for confirmation due to the refusal of a minority to permit an up-or-down vote on the Senate floor.

[27] For a review of all past cloture votes on judicial nominations prior to the 108th Congress, see Senate Republican Policy Committee, "Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent" (Feb. 10, 2003), available at http://rpc.senate.gov/_files/JUDICIARYsd021003.pdf. See also Cornyn, 27 Harv. J. L. Pub. Pol'y at 218-227.

[28] *Congressional Record*, Mar. 8, 2000, S1297.

[29] For Berzon, compare Record Vote #36 (cloture invoked, 86-13) with #38 (confirmed, 64-34); for Paez, compare Record Vote #37 (cloture invoked, 85-14) with #40 (confirmed, 59-39). All votes on Mar. 8-9, 2000.

record opposing the filibuster of judicial nominations.[30] If the new judicial nomination filibusters are accepted as a norm, then the Senate will be rejecting this history and charting a new course.

It is not only the Senate norm regarding not filibustering judicial nominations that risks being transformed, but the effective constitutional standard for the confirmation of judicial nominations. There can be no serious dispute that the Constitution requires only a Senate majority for confirmation. Indeed, many judicial nominees have been confirmed by fewer than 60 votes in the past — including three Clinton nominees and two Carter nominees.[31] *Never* has the Senate claimed that a supermajority is necessary for confirmation.

Recently, however, some filibustering Senators have suggested that a failed cloture vote is tantamount to an up-or-down vote on a judicial nomination. The new Senate Minority Leader, Harry Reid, has stated that the 10 filibustered judges have been "turned down."[32] Senator Charles Schumer has repeatedly stated that a failed cloture vote is evidence that the Senate has "rejected" a nomination.[33] Senator Russell Feingold described the filibustered nominees from the 108th Congress as having "been duly considered by the Senate and rejected."[34] Judiciary Committee Ranking Member Patrick Leahy has referred to the filibustered nominees as having been "effectively rejected."[35] And in April 2005, Senator Joseph Lieberman claimed that 60 votes should be the "minimum" for confirmation.[36] These characterizations illustrate the extent to which the Senate has lost its moorings.

Without restoration of the majority-vote standard, judicial nominations will require an extra-constitutional supermajority to be confirmed, without any constitutional amendment — or even a Senate consensus — supporting that change. Any exercise of the constitutional option would, therefore, be aimed at restoring the Senate's procedures to conform to its traditional norms and practices in dealing with judicial nominations. It would return the Senate to the Constitution's majority-vote confirmation standard. And it would prevent the Senate from abusing procedural rules to create supermajority requirements. Instead, it would be restorative, and Democrats and Republicans alike would operate in the system that served the nation until the 108th Congress.

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[30] For a more detailed list of Senators' historic opposition to filibusters for judicial nominations, see Senate Republican Policy Committee, "Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent" (Feb. 10, 2003), available at http://rpc.senate.gov/_files/JUDICIARYsd021003.pdf. For an extended examination of filibustering Senators' previous opposition to judicial filibusters, see Cornyn, 27 Harv. J. L. Pub. Pol'y at 207-211.

[31] Examples of judicial nominations made prior to the 108th Congress that were confirmed with fewer than 60 votes include Abner Mikva (D.C. Cir., 1979); L.T. Senter (N.D. Miss., 1979); J. Harvie Wilkinson III (4th Cir., 1984); Alex Kozinski (9th Cir., 1985); Sidney Fitzwater (N.D. Tex., 1986); Daniel Manion (7th Cir., 1986); Clarence Thomas (Supreme Court, 1991); Susan Mollway (D. Haw., 1998); William Fletcher (9th Cir., 1998); Richard Paez (9th Cir., 2000); and Dennis Shedd (4th Cir., 2002).

[32] William C. Mann, *Senate leaders draw line on filibuster of judicial nominees*, Boston Globe, Jan. 17, 2005.

[33] Senator Charles Schumer, *Congressional Record*, July 22, 2004, S8585 ("I remind the American people that now 200 judges have been approved and 6 have been rejected"); see also Jeffrey McMurray, *Pryor Supporters Debate Timing of Vote*, Tuscaloosa News, Jan. 10, 2005 ("To nominate judges previously rejected by the Senate is wrong"); Anne Kornblut, *Bush Set to Try Again on Blocked Judicial Nominees*, Boston Globe, Dec. 24, 2004 (quoting official statement by Sen. Schumer).

[34] Keith Perine, *Fiercest Fight in Partisan War May Be Over Supreme Court*, CQ Weekly, Jan. 10, 2005, at 59.

[35] *Congressional Record*, Feb. 27, 2004, S1887.

[36] Senator Joseph Lieberman, Transcript of Press Conference, Apr. 21, 2005, on file with Senate Republican Policy Committee.

Common Misunderstandings of the Constitutional Option

Senate procedures are sacrosanct and cannot be changed by the constitutional option. This misunderstanding does not square with history. As discussed, the constitutional option has been used multiple times to change the Senate's practices through the creation of new precedents. Also, the Senate has changed its Standing Rules several times under the threat of the constitutional option.

Exercising the constitutional option will destroy the filibuster for legislation. The history of the use of the constitutional option suggests that this concern is grossly overstated. Senators will only exercise the constitutional option when they are willing to live with the rule that is created, regardless of which party controls the body. For the very few Senators (if any) who today want to eliminate the legislative filibuster by majority vote, the roadmap has existed since as early as 1917. Moreover, an exercise of the constitutional option to restore the norms for judicial confirmations would be just that — an act of *restoration*. To eliminate the legislative filibuster would not be restorative of Senate norms and traditions; it would destroy the Senate's longstanding respect for the legislative filibuster as a vehicle to protect Senators' rights to amend and debate. It is also worth noting that the Senate is now entering its 30th year of bipartisan consensus as to the cloture threshold (three-fifths of those duly chosen and sworn) for legislative filibusters.[37]

All procedural changes must be made at the beginning of a Congress. Again, this claim does not square with history. In fact, there is nothing special about the beginning of a Congress vis-à-vis the Senate's right to establish its own practices and procedures, or even its formal Standing Rules. As discussed above, Majority Leader Byrd used the constitutional option to create a precedent that overrode Rule XVI's plain text — and not at the beginning of a Congress. Moreover, as the Supreme Court held in *Ballin*, each House of Congress's constitutional power to make procedural rules is of equal value at all times.[38]

The essential character of the Senate will be destroyed if the constitutional option is exercised. When Majority Leader Byrd repeatedly exercised the constitutional option to correct abuses of Senate rules and precedents, those illustrative exercises of the option did little to upset the basic character of the Senate. Indeed, many observers argue that the Senate minority is stronger today in a body that still allows for extensive debate, full consideration, and careful deliberation of all matters with which it is presented.

Exercising the constitutional option would turn the Senate into a "rubber stamp." Again, history proves otherwise. The Senate has repeatedly exercised its constitutional power to reject judicial nominations through straightforward denials of "consent" by up-or-down votes. For example, the Senate defeated the Supreme Court nominations of Robert Bork (1987), G. Harold Carswell (1970), and Clement Haynsworth (1969) on up-or-down votes.[39] Even in the 108th

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[37] In 1995, Senators Tom Harkin and Joe Lieberman proposed a major revision to the Senate filibuster rules *for legislation*, but the proposal failed 76-19, attracting the support of no Republicans and but a fraction of Democrats (who were in the minority). The only current Senators who sought to change the Senate's consensus position on legislative filibusters were Senators Jeff Bingaman, Barbara Boxer, Russell Feingold, Tom Harkin, Edward Kennedy, John Kerry, Frank Lautenberg, Joe Lieberman, and Paul Sarbanes. See Record Vote #1 (Jan. 5, 1995).

[38] *Ballin*, 144 U.S. at 5.

[39] See Record Vote #348 (Oct. 23, 1987) (defeated 42-58); Record Vote #112 (Apr. 8, 1970) (defeated 45-51); Record Vote #135 (Nov. 21, 1969) (defeated 45-55).

Congress, when the Senate voted on the nomination of J. Leon Holmes to a federal district court in Arkansas, five Republicans voted against President Bush's nominee. Had several Democrats not voted for Mr. Holmes, he would not have been confirmed.[40] In other words, the Senate still has the ability to work its will in a nonpartisan fashion as long as the minority permits the body to come to up-or-down votes. Members from both parties will ensure that the Senate does its constitutional duty by carefully evaluating all nominees.

Conclusion

Can the Senate restore order when a minority of its members chooses to upset tradition? Does the Constitution empower the Senate to act so that it need not acquiesce whenever a minority decides that the practices, procedures, and rules should be changed? Can the Senate majority — not necessarily a partisan majority, but simply a majority of Senators — act to return the Senate to its previously agreed-upon norms and practices? The answer to all these questions is a clear ***yes.*** The Senate would be acting well within its traditions if it were to restore the longstanding procedural norms so that the majority standard for confirmation is preserved and nominees who reach the Senate floor do not fall victim to filibusters.

[40] Record Vote #153 (July 6, 2004) (confirmed 51-46).