# Nuclear option

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## Nuclear option

- *The term "nuclear option" is an analogy to nuclear weapons being the most extreme option in warfare.*
- *In November 2013, Senate Democrats led by Harry Reid used the nuclear option to eliminate the 60-vote rule on executive branch nominations and federal judicial appointments, but not for the Supreme Court.*

The nuclear option  is a parliamentary procedure that allows the United States Senate to override the 60-vote rule to close debate, by a simple majority of 51 votes, rather than the two-thirds supermajority normally required to amend the rules. The option is invoked when the majority leader raises a point of order that only a simple majority is needed to close debate on certain matters. The presiding officer denies the point of order based on Senate rules, but the ruling of the chair is then appealed and overturned by majority vote, establishing new precedent.

This procedure effectively allows the Senate to decide any issue by simple majority vote, regardless of existing procedural rules such as Rule XXII which requires the consent of 60 senators (out of 100) to end a filibuster for legislation, and 67 for amending a Senate rule. The term "nuclear option" is an analogy to nuclear weapons being the most extreme option in warfare.

In November 2013, Senate Democrats led by Harry Reid used the nuclear option to eliminate the 60-vote rule on executive branch nominations and federal judicial appointments, but not for the Supreme Court. In April 2017, Senate Republicans led by Mitch McConnell extended the nuclear option to Supreme Court nominations in order to end debate on the nomination of Neil Gorsuch.

As of March 2019, a three-fifths majority vote is still required to end debates on legislation.

## Background

## The 60-vote rule

- *Since the 1970s, the Senate has also used a "two-track" procedure whereby Senate business may continue on other topics while one item is filibustered.*
- *Beginning with a rules change in 1806, the Senate did not restrict the total time allowed for debate.*
- *2 states that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."*

Beginning with a rules change in 1806, the Senate did not restrict the total time allowed for debate. In 1917, Rule XXII was amended to allow for ending debate (invoking "cloture") with a two-thirds majority, later reduced in 1975 to three-fifths of all senators "duly chosen and sworn" (usually 60). Thus, although a bill might have majority support, a minority of 41 or more senators can still prevent a final vote through endless debate, effectively defeating the bill. This tactic is known as a filibuster.

Since the 1970s, the Senate has also used a "two-track" procedure whereby Senate business may continue on other topics while one item is filibustered. Since filibusters no longer required the minority to actually hold the floor and bring all other business to a halt, the mere threat of a filibuster has gradually become normalized. In the modern Senate, this means that any controversial item now typically requires 60 votes to advance, unless a specific exception limiting the time for debate applies.

Changing Rule XXII to eliminate the 60-vote rule is made difficult by the rules themselves. Rule XXII sec. 2 states that to end debate on any proposal "to amend the Senate rules...the necessary affirmative vote shall be two-thirds of the Senators present and voting." This is typically 67 senators assuming all are voting. Meanwhile, Rule V sec. 2 states that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Effectively, these provisions mean that the general 60-vote cloture rule in Rule XXII can never be modified without the approval of 67 senators.

## Procedure to invoke the option

- *The "nuclear option" is invoked when a simple majority of the Senate overrides the normal consequences of the rules above.*
- *(Riddick's Senate Procedure is a compilation by Senate parliamentarians of precedents established throughout the entire history of the Senate by direct rulings of the chair, actions relating to rulings of the chair, or direct Senate action.)*

The "nuclear option" is invoked when a simple majority of the Senate overrides the normal consequences of the rules above. Following a failed cloture vote, the majority leader raises a point of order that Rule XXII should be interpreted – or disregarded on constitutional

grounds – to require only a simple majority to invoke cloture on a certain type of business, such as nominations. The presiding officer, relying on the advice of the Senate Parliamentarian, then denies the point of order based upon rules and precedent. But the ruling of the chair is then appealed, and is overturned by simple majority vote. For example, the option was invoked on November 21, 2013, as follows:

A new precedent is thus established allowing for cloture to be invoked by a simple majority on certain types of actions. These and other Senate precedents will then be relied upon by future Parliamentarians in advising the chair, effectively eliminating the 60-vote barrier going forward. (Riddick's Senate Procedure is a compilation by Senate parliamentarians of precedents established throughout the entire history of the Senate by direct rulings of the chair, actions relating to rulings of the chair, or direct Senate action.)

## Validity

- *For example, former Senate Parliamentarian Alan Frumin expressed opposition to the nuclear option in 2005.*
- *The legality of the nuclear option has been challenged.*
- *[citation needed] It's been reported that a Congressional Research Service report "leaves little doubt" that the nuclear option would not be based on previous precedents of the Senate.*

The legality of the nuclear option has been challenged. For example, former Senate Parliamentarian Alan Frumin expressed opposition to the nuclear option in 2005.[citation needed] It's been reported that a Congressional Research Service report "leaves little doubt" that the nuclear option would not be based on previous precedents of the Senate. However, its validity has not been seriously challenged since being invoked by both parties in 2013 and 2017, at least with regard to invoking cloture on judicial nominations by simple majority vote.

## Terminology

- *The alternative term "constitutional option" is often used with particular regard to confirmation of executive and judicial nominations, on the rationale that the United States Constitution requires these nominations to receive the "advice and consent" of the Senate.*
- *By effectively requiring a supermajority of the Senate to fulfill this function, proponents believe that the current Senate practice prevents the body from exercising its constitutional mandate, and that the remedy is therefore the "constitutional option".*

Republican Party Senator Ted Stevens suggested using a ruling of the chair to defeat a filibuster of judicial nominees in February 2003. The code word for the plan was "Hulk". Weeks later, Senator Trent Lott coined the term nuclear option in March 2003 because the maneuver was seen as a last resort with possibly major consequences for both sides. The

metaphor of a nuclear strike refers to the majority party unilaterally imposing a change to the filibuster rule, which might provoke retaliation by the minority party.

The alternative term "constitutional option" is often used with particular regard to confirmation of executive and judicial nominations, on the rationale that the United States Constitution requires these nominations to receive the "advice and consent" of the Senate. Proponents of this term argue that the Constitution implies that the Senate can act by a majority vote unless the Constitution itself requires a supermajority, as it does for certain measures such as the ratification of treaties. By effectively requiring a supermajority of the Senate to fulfill this function, proponents believe that the current Senate practice prevents the body from exercising its constitutional mandate, and that the remedy is therefore the "constitutional option".

## History

### Senate rules before 1917

- *Aldrich's plan was procedurally similar to the modern option, but it stayed within the formal rules of the Senate and did not invoke the Constitution.*
- *If, as expected, the presiding officer overrules the point, Aldrich would then appeal the ruling and the appeal would be decided by a majority vote of the Senate.*

The first set of Senate rules included a procedure to limit debate called "moving the previous question." This rule was dropped in 1806 in the misunderstanding that it was redundant. Starting in 1837, senators began taking advantage of this gap in the rules by giving lengthy speeches so as to prevent specific measures they opposed from being voted on, a procedure called filibustering.

In 1890, Republican Senator Nelson Aldrich threatened to break a Democratic filibuster of a Federal Election Bill (which would ban any prohibitions on the black vote) by invoking a procedure called "appeal from the chair." At this time, there was no cloture rule or other regular method to force an immediate vote. Aldrich's plan was to demand an immediate vote by making a point of order. If, as expected, the presiding officer overrules the point, Aldrich would then appeal the ruling and the appeal would be decided by a majority vote of the Senate. (This plan would not work today because appeals from the chair are debatable under modern rules.)[citation needed] If a majority voted to limit debate, a precedent would have been established to allow debate to be limited by majority vote. Aldrich's plan was procedurally similar to the modern option, but it stayed within the formal rules of the Senate and did not invoke the Constitution. In the end, the Democrats were able to muster a majority to table the bill, so neither Aldrich's proposed point of order nor his proposed appeal was ever actually moved.

In 1892, the U.S. Supreme Court ruled in United States v. Ballin that both houses of Congress are parliamentary bodies, implying that they may make procedural rules by majority vote.

## Early cloture era, 1917–1974

- *:236,258-60 "When the Constitution says, 'Each House may determine its rules of proceedings,' it means that each House may, by a majority vote, a quorum present, determine its rules," Walsh told the Senate.*
- *In 1957, Vice President Richard Nixon (and thus President of the Senate) wrote an advisory opinion that no Senate may constitutionally enact a rule that deprives a future Senate of the right to approve its own rules by the vote of a simple majority.*

The history of the constitutional option can be traced to a 1917 opinion by Senator Thomas J. Walsh (Democrat of Montana). Walsh contended that the U.S. Constitution provided the basis by which a newly commenced Senate could disregard procedural rules established by previous Senates, and had the right to choose its own procedural rules based on a simple majority vote despite the two-thirds requirement in the rules.:236,258-60 "When the Constitution says, 'Each House may determine its rules of proceedings,' it means that each House may, by a majority vote, a quorum present, determine its rules," Walsh told the Senate. Opponents countered that Walsh's constitutional option would lead to procedural chaos, but his argument was a key factor in the adoption of the first cloture rule later that year.

In 1957, Vice President Richard Nixon (and thus President of the Senate) wrote an advisory opinion that no Senate may constitutionally enact a rule that deprives a future Senate of the right to approve its own rules by the vote of a simple majority.:236-39 (Nixon made clear that he was speaking for himself only, not making a formal ruling.) Nixon's opinion, along with similar opinions by Hubert Humphrey and Nelson Rockefeller, has been cited as precedent to support the view that the Senate may amend its rules at the beginning of the session with a simple majority vote.

The option was officially moved by Democratic Party Senators Clinton P. Anderson (1963), George McGovern (1967), and Frank Church (1969), but was defeated or tabled by the Senate each time.:249-251

## 60-vote rule takes hold, 1975–2004

- *However, none of these procedural changes affected the ultimate ability of a 41-vote minority to block final action on a matter before the Senate via filibuster.*
- *According to one account, the option was arguably endorsed by the Senate three times in 1975 during a debate concerning the cloture requirement.*
- *(This was an effort to reverse the precedent that had been set for cloture by majority vote).*

A series of votes in 1975 have been cited as a precedent for the nuclear option, although some of these were reconsidered shortly thereafter. According to one account, the option was arguably endorsed by the Senate three times in 1975 during a debate concerning the cloture requirement. A compromise was reached to reduce the cloture requirement from two-thirds of those voting (67 votes if 100 Senators were present) to three-fifths of the

current Senate (60 votes if there were no current vacancies) and also to approve a point of order revoking the earlier three votes in which the Constitutional option had been invoked. (This was an effort to reverse the precedent that had been set for cloture by majority vote).

Senator Robert Byrd was later able to effect changes in Senate procedures by majority vote four times when he was majority leader without the support of two-thirds of senators present and voting (which would have been necessary to invoke cloture on a motion for an amendment to the Rules): to ban post-cloture filibustering (1977), to adopt a rule to limit amendments to an appropriations bill (1979), to allow a senator to make a non-debatable motion to bring a nomination to the floor (1980), and to ban filibustering during a roll call vote (1987). However, none of these procedural changes affected the ultimate ability of a 41-vote minority to block final action on a matter before the Senate via filibuster.

## 2005 debate on judicial nominations

- *In response to this threat, Democrats threatened to shut down the Senate and prevent consideration of all routine and legislative Senate business.*

The maneuver was brought to prominence in 2005 when Majority Leader Bill Frist (Republican of Tennessee) threatened its use to end Democratic-led filibusters of judicial nominees submitted by President George W. Bush. In response to this threat, Democrats threatened to shut down the Senate and prevent consideration of all routine and legislative Senate business. The ultimate confrontation was prevented by the Gang of 14, a group of seven Democratic and seven Republican Senators, all of whom agreed to oppose the nuclear option and oppose filibusters of judicial nominees, except in extraordinary circumstances. Several of the blocked nominees were brought to the floor, voted upon and approved as specified in the agreement, and others were dropped and did not come up for a vote, as implied by the agreement.

## Minor rules reforms, 2011 & 2013

- *The nuclear option was raised again following the congressional elections of 2012, this time with Senate Democrats in the majority (but short of a supermajority).*
- *Changes to the permanent Senate rules were passed by a vote of 86 to 9.*
- *In July 2013, the nuclear option was raised as nominations were being blocked by Senate Republicans as Senate Democrats prepared to push through a change to the chamber's filibuster rule.*

In 2011, with a Democratic majority in the Senate (but not a supermajority), Senators Jeff Merkley and Tom Udall proposed "a sweeping filibuster reform package" to be implemented via the constitutional option but Majority Leader Harry Reid dissuaded them from pushing it forward. In October 2011, however, Reid triggered a more modest change in Senate precedents. In a 51-48 vote, the Senate prohibited any motion to waive the rules

after a filibuster is defeated, although this change did not affect the ultimate ability of a 41-vote minority to block final action via an initial filibuster.

The nuclear option was raised again following the congressional elections of 2012, this time with Senate Democrats in the majority (but short of a supermajority). The Democrats had been the majority party in the Senate since 2007 but only briefly did they have the 60 votes necessary to halt a filibuster. The Hill reported that Democrats would "likely" use the nuclear option in January 2013 to effect filibuster reform, but the two parties managed to negotiate two packages of amendments to the Rules concerning filibusters that passed on January 24, 2013, by votes of 78 to 16 and 86 to 9, thus avoiding the need for the nuclear option.

In the end, negotiation between the two parties resulted in two packages of "modest" amendments to the rules on filibusters that were approved by the Senate on January 24, 2013, without triggering the nuclear option. Changes to the standing orders affecting just the 2013-14 Congress were passed by a vote of 78 to 16, eliminating the minority party's right to filibuster a bill as long as each party has been permitted to present at least two amendments to the bill. Changes to the permanent Senate rules were passed by a vote of 86 to 9.

In July 2013, the nuclear option was raised as nominations were being blocked by Senate Republicans as Senate Democrats prepared to push through a change to the chamber's filibuster rule. On July 16, the Senate Democratic majority came within hours of using the nuclear option to win confirmation of seven of President Obama's long-delayed executive branch appointments. The confrontation was avoided when the White House withdrew two of the nominations in exchange for the other five being brought to the floor for a vote, where they were confirmed.

## Use in 2013 & 2017

### 2013: nominations except Supreme Court

- *On November 21, 2013, the Senate voted 52–48, with all Republicans and three Democrats voting against, to rule 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," even though the text of the rule requires "three-fifths of the senators duly chosen and sworn" to end debate.*

On November 21, 2013, the Senate voted 52–48, with all Republicans and three Democrats voting against, to rule 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," even though the text of the rule requires "three-fifths of the senators duly chosen and sworn" to end debate. This ruling's precedent eliminated the 60-vote requirement to end a filibuster against all executive branch nominees and judicial

nominees other than to the Supreme Court. The text of Rule XXII was never changed. A 3/5 supermajority was still required to end filibusters unrelated to those nominees, such as for legislation and Supreme Court nominees.

## Rationale for change

- *Regarding Obama's federal district court nominations, the Senate approved 143 out of 173 as of November 2013[needs update], compared to George W. Bush's first term 170 of 179, Bill Clinton's first term 170 of 198, and George H.W.*
- *Filibusters were used on 20 Obama nominations to U.S. District Court positions, but Republicans had allowed confirmation of 19 out of the 20 before the nuclear option was invoked.*
- *Obama won Senate confirmation for 30 out of 42 federal appeals court nominations, compared with Bush's 35 out of 52.*

The Democrats' stated motivation for this change was expansion of filibustering by Republicans during the Obama administration, in particular blocking three nominations to the United States Court of Appeals for the District of Columbia Circuit. Republicans had asserted that the D.C. Circuit was underworked, and also cited the need for cost reduction by reducing the number of judges in that circuit. At the time of the vote, 59 executive branch nominees and 17 judicial nominees were awaiting confirmation.

Prior to November 21, 2013, in the entire history of the nation there had been only 168 cloture motions filed (or reconsidered) with regard to nominations. Nearly half of them (82) had been during the Obama Administration, but those cloture motions were often filed merely to speed things along, rather than in response to any filibuster. In contrast, there were just 38 cloture motions on nominations during the preceding eight years under President George W. Bush. Most of those cloture votes successfully ended debate, and therefore most of those nominees cleared the hurdle. Obama won Senate confirmation for 30 out of 42 federal appeals court nominations, compared with Bush's 35 out of 52.

Regarding Obama's federal district court nominations, the Senate approved 143 out of 173 as of November 2013[needs update], compared to George W. Bush's first term 170 of 179, Bill Clinton's first term 170 of 198, and George H.W. Bush's 150 of 195. Filibusters were used on 20 Obama nominations to U.S. District Court positions, but Republicans had allowed confirmation of 19 out of the 20 before the nuclear option was invoked.

## 2017: Supreme Court nominations

- *On April 6, 2017, Senate Republicans invoked the nuclear option to remove the Supreme Court exception created in 2013.*
- *This was after Senate Democrats filibustered the nomination of Neil Gorsuch to the Supreme Court of the United States, after the Senate Republicans had previously refused to take up Merrick Garland's nomination by President Obama in 2016.*

On April 6, 2017, Senate Republicans invoked the nuclear option to remove the Supreme Court exception created in 2013. This was after Senate Democrats filibustered the nomination of Neil Gorsuch to the Supreme Court of the United States, after the Senate Republicans had previously refused to take up Merrick Garland's nomination by President Obama in 2016.

## Proposed use for legislation

- *Following elimination of the 60-vote rule for nominations in 2017, senators expressed concerns that the 60-vote rule will eventually be eliminated for legislation via the nuclear option.*

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## Donald Trump

- *On January 21, 2018, President Trump said on Twitter that if the shutdown stalemate continued, Republicans should consider the "nuclear option" in the Senate.*

President Donald Trump has spoken out against the 60-vote requirement for legislation on several occasions. On January 21, 2018, President Trump said on Twitter that if the shutdown stalemate continued, Republicans should consider the "nuclear option" in the Senate. He repeated the call on December 21, 2018 with a fresh shutdown looming.

## Policy arguments

## Issues

- *whether a simple majority of the Senate should be able to confirm a judicial nominee or pass a bill;*
- *Policy debates surrounding the nuclear option – a tool to implement a rule change – are closely related to arguments regarding the 60-vote requirement imposed by Rule XXII.*
- *whether a three-fifths vote (60/100) should be required for cloture, as required by Rule XXII;*

Policy debates surrounding the nuclear option – a tool to implement a rule change – are closely related to arguments regarding the 60-vote requirement imposed by Rule XXII. Issues include:

whether a simple majority of the Senate should be able to confirm a judicial nominee or pass a bill;

whether a three-fifths vote (60/100) should be required for cloture, as required by Rule XXII;

whether the rule should differ for nominations vs. legislation; and

whether the Constitution mandates either threshold.

## Constitutional provisions

- *Regarding nominations, Article II, Section 2, of the U.S. Constitution says the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ...*
- *Judges...." The Constitution includes several explicit supermajority rules, including requiring a two-thirds majority in the Senate for impeachment, confirming treaties, expelling one of its members, and concurring in the proposal of Constitutional Amendments.*

The U.S. Constitution does not explicitly address how many votes are required for passage of a bill or confirmation of a nominee. Regarding nominations, Article II, Section 2, of the U.S. Constitution says the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges...." The Constitution includes several explicit supermajority rules, including requiring a two-thirds majority in the Senate for impeachment, confirming treaties, expelling one of its members, and concurring in the proposal of Constitutional Amendments.

## Arguments for simple majority

## Constitutional argument

- *From this, supporters argue that a simple-majority rule would bring current practices into line with the Framers' original intent – hence supporters' preferred nomenclature of the "constitutional option".*
- *Supporters of a simple majority standard argue that the Constitution's silence implies that a simple majority is sufficient; they contrast this with Article II's language for Senate confirmation of treaties.*

Supporters of a simple majority standard argue that the Constitution's silence implies that a simple majority is sufficient; they contrast this with Article II's language for Senate confirmation of treaties. Regarding nominations, they argue that the Appointments Clause's lack of a supermajority requirement is evidence that the Framers consciously rejected such a requirement. They also argue that the general rule of parliamentary systems "is that majorities govern in a legislative body, unless another rule is expressly provided."

From this, supporters argue that a simple-majority rule would bring current practices into line with the Framers' original intent – hence supporters' preferred nomenclature of the

"constitutional option". They argue that the filibuster of presidential nominees effectively establishes a 60-vote threshold for approval of judicial nominees instead of the 51-vote standard implied by the Constitution. A number of existing Judges and Justices were confirmed with fewer than 60 votes, including Supreme Court Justice Clarence Thomas (confirmed in a 52–48 vote in 1991).

## Obstruction

- *Democrats responded that 63 of President Clinton's 248 nominees were blocked via procedural means at the committee level, denying them a confirmation vote and leaving the positions available for Bush to fill.*
- *In 2005, Republicans argued that Democrats obstructed the approval of the president's nominees in violation of the intent of the U.S. Constitution.*

Supporters have claimed that the minority party is engaged in obstruction. In 2005, Republicans argued that Democrats obstructed the approval of the president's nominees in violation of the intent of the U.S. Constitution. President Bush had nominated forty-six candidates to federal appeals courts. Thirty-six were confirmed. 10 were blocked and 7 were renominated in Spring 2005. Democrats responded that 63 of President Clinton's 248 nominees were blocked via procedural means at the committee level, denying them a confirmation vote and leaving the positions available for Bush to fill.

## Majority rule

- *In 2005, pro-nuclear option Republicans argued that they had won recent elections and in a democracy the winners rule, not the minority.*
- *They also argued that while the Constitution requires supermajorities for some purposes (such as 2/3 needed to ratify a treaty), the Founders did not require a supermajority for confirmations, and that the Constitution thus presupposes a majority vote for confirmations.*

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## Arguments for 60-vote rule

### Constitutional arguments

- *Regarding nominations, they contend that the word "Advice" in the Constitution refers to consultation between the Senate and the President with regard to the use of the President's power to make nominations.*

Proponents of the 60-vote rule point out that while the Constitution requires two-thirds majorities for actions such as treaty ratification and proposed constitutional amendments, it is silent on other matters. Instead, Article I, Section V of the Constitution permits and mandates that each house of Congress establish its own rules. Regarding nominations, they contend that the word "Advice" in the Constitution refers to consultation between the Senate and the President with regard to the use of the President's power to make nominations.

### Tradition

- *Starting with the first Senate in 1789, the rules left no room for a filibuster; a simple majority could move to bring the matter to a vote.*
- *A rule change in 1917 introduced cloture, permitting a two-thirds majority of those present to end debate, and a further change in 1975 reduced the cloture requirement to three-fifths of the entire Senate.*

Supporters of the right to filibuster argue that the Senate has a long tradition of requiring broad support to do business, due in part to the threat of the filibuster, and that this protects the minority. Starting with the first Senate in 1789, the rules left no room for a filibuster; a simple majority could move to bring the matter to a vote. However, in 1806, the rule allowing a majority to bring the previous question ceased to exist. The filibuster became possible, and since any Senator could now block a vote, 100% support was required to bring the matter to a vote. A rule change in 1917 introduced cloture, permitting a two-thirds majority of those present to end debate, and a further change in 1975 reduced the cloture requirement to three-fifths of the entire Senate.

### Majority rule

- *Proponents of the 60-vote rule have argued that the Senate is a less-than-democratic body that could conceivably allow a simple majority of senators, representing a minority of the national population, to enact legislation or confirm appointees lacking popular support.*

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## Ensuring broad support

- *Rather than require the President to nominate someone who will get broad support in the Senate, the nuclear option would allow Judges to not only be "nominated to the Court by a Republican president, but also be confirmed by only Republican Senators in party-line votes."*
- *In 2005, Democrats claimed the nuclear option was an attempt by Senate Republicans to hand confirmation power to themselves.*

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Of the 9 U.S. Supreme Court Justices seated as of May 2005, 6 were confirmed with the support of 90 or more Senators, 2 were confirmed with at least the support of 60 senators, and only 1 (Thomas) was confirmed with the support of fewer than 60 Senators, however, since John G. Roberts was confirmed, no candidate has gotten more than 68 votes. Conservative nominees for Appellate Courts that were given a vote through the "Gang of 14" were confirmed almost exclusively along party lines: Priscilla Owen was confirmed 55–43, Janice Rogers Brown was confirmed 56–43, and William Pryor was confirmed 53–45.

## Public opinion

- *An Associated Press-Ipsos poll released May 20, 2005, found 78 percent of Americans believe the Senate should take an "assertive role" examining judicial nominees rather than just give the president the benefit of the doubt.*
- *In 2005, polling indicated public support for an active Senate role in its "advise and consent" capacity.*
- *The agreement to stave off the "nuclear option" reached by 14 moderate Senators supports a strong interpretation of "Advice and Consent" from the Constitution:*

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The agreement to stave off the "nuclear option" reached by 14 moderate Senators supports a strong interpretation of "Advice and Consent" from the Constitution:

## Court-packing

- *Elimination of the 60-vote rule is a significantly less drastic strategy, only allowing the majority to fill existing vacancies on the Court.*

- *However, if the two strategies are combined, a party that controls the Presidency and has a simple majority in the Senate, as FDR's Democrats did in 1937, could quickly gain control of the Court as well.*

Some fear that removing the 60-vote rule for judicial nominations would allow the courts to be "packed" by a party that controls the other two branches of the government. As of November 2013, Republican presidents have appointed five of the nine justices on the Supreme Court and all four of the chief justices since the Truman administration.

In 1937, Franklin Delano Roosevelt, a Democrat, sought to alter the court through the Judiciary Reorganization Bill of 1937 (a.k.a. "the court-packing plan"). Noting that the Constitution does not specify a number of Supreme Court justices, the bill would have added a seat for every justice over the age of 70½, creating a new majority on the Court. Roosevelt allowed the bill to be scuttled after Justice Owen Roberts began upholding the constitutionality of his New Deal programs.[citation needed]

Elimination of the 60-vote rule is a significantly less drastic strategy, only allowing the majority to fill existing vacancies on the Court. However, if the two strategies are combined, a party that controls the Presidency and has a simple majority in the Senate, as FDR's Democrats did in 1937, could quickly gain control of the Court as well.

## Opportunism

- *However, since a simple-majority rule for nominations was progressively adopted in 2013 and 2017, a significant bipartisan majority has remains opposed to eliminating the 60-vote rule for legislation.*
- *Senators in the majority often argue for simple majority rule, especially for nominations, while senators in the minority nearly always defend the 60-vote rule.*

In general, senators from both parties have been very opportunistic in making these policy arguments. Senators in the majority often argue for simple majority rule, especially for nominations, while senators in the minority nearly always defend the 60-vote rule. However, since a simple-majority rule for nominations was progressively adopted in 2013 and 2017, a significant bipartisan majority has remains opposed to eliminating the 60-vote rule for legislation.[citation needed]

Examples of opportunism abound. In 2005 Republicans pointed out that several Democrats once opposed the filibuster on judicial nominees, and only recently changed their views as they had no other means of stopping Bush's judicial appointees.

However, Republicans were staunch supporters of the filibuster when they were a minority party and frequently employed it to block legislation. Republicans continued to support the filibuster for general legislation – the Republican leadership insisted that the proposed rule change would only affect judicial nominations. According to the Democrats, arguments that a simple majority should prevail apply equally well to all votes where the Constitution does

not specify a three-fifths majority. Republicans stated that there is a difference between the filibustering of legislation – which affects only the Senate's own constitutional prerogative to consider new laws – and the filibustering of a President's judicial or executive nominees, which arguably impinges on the constitutional powers of the Executive branch.

## Other uses of "nuclear option"

- *The nuclear option is not to be confused with reconciliation, which allows issues related to the annual budget to be decided by a majority vote without the possibility of filibuster.*
- *(Nuclear weapons were not theorized until the 20th century, so the government's threat was not labeled as "nuclear" at the time.)*

Beyond the specific context of U.S. federal judicial appointments, the term "nuclear option" has come to be used generically for a procedural maneuver with potentially serious consequences, to be used as a last resort to overcome political opposition. In a recent legal ruling on the validity of the Hunting Act 2004 the UK House of Lords used "nuclear option" to describe the events of 1832, when the then-government threatened to create hundreds of new Whig peers to force the Tory-dominated Lords to accept the Reform Act 1832. (Nuclear weapons were not theorized until the 20th century, so the government's threat was not labeled as "nuclear" at the time.)

The term is also used in connection with procedural maneuvers in various state senates.

The nuclear option is not to be confused with reconciliation, which allows issues related to the annual budget to be decided by a majority vote without the possibility of filibuster.

## See also

- *United States federal judge*
- *Cloture*
- *Reconciliation (United States Congress)*
- *Up or down vote*

United States federal judge

Federal judicial appointment history

Cloture

George W. Bush judicial appointment controversies

George W. Bush Supreme Court candidates

Reconciliation (United States Congress)

Up or down vote

## Notes

## References

## External links

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