The Nuclear Option for Stopping Filibusters

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They did not seem to be in a position to help the other body. Yet, on October 10, 2002, members of the House Judiciary Committee listened to witnesses discuss how the Senate could be more efficient. In 2003, Senate committees heard similar testimony. During the hearings, eminent law professors suggested that the practice of allowing filibusters on judicial nominees could not be imposed by previous Senates on the current one. It, therefore, would be within the power of the 51 Republican Senators to uphold a point of order against the filibuster and proceed to govern by majority rule (Kmiec 2003). In Washington, this course of action is called the "nuclear option." Although the informal use of the nuclear option has several variations, each variation has a common underlying feature that can be formally defined. The nuclear option is a dramatic refusal to recognize delaying tactics permitted under the rules that facilitates the institutionalization of majoritarian procedures in a legislative body. Occurring in legislatures such as the 1881 British House of Commons, the use of the nuclear option can be a watershed event wherever the majority lacks an unassailable way to end debate.

This article sheds light on a compelling contemporary debate by placing the nuclear option for stopping filibusters in its historical and legal context. The key historical context is the 51st Congress (1889–1891) when the nuclear option loomed in both the House and the Senate. Empirical analysis suggests that leadership is the most compelling explanation for why it was used in the House but not in the Senate. The importance of leadership suggests that the opportunity still exists in the Senate to use the nuclear option to overturn filibusters. However, changes in the legal landscape since the 1890s have weakened the case for this option.

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Historical Context

During the 51st Congress, the U.S. House and Senate found themselves in similar positions. Both chambers had a narrow Republican majority and sharp partisan differences. Both chambers were in legislative standstills as determined minorities consistently employed various delaying tactics known as "filibustering." If these tactics could be overcome, legislation would go to President Benjamin Harrison, also a Republican. Ongoing tension in both chambers over delaying tactics reached a boiling point on an election-related matter with clear partisan implications. This tension prompted discussion that the presiding officers might simply refuse to recognize time-honored delaying tactics and bring the matter to a close. Under the rules, a majority could uphold a point of order against the presiding officer and proceed to govern. In short, members of the 51st Congress were aware of the "nuclear option" for stopping filibusters, although they most assuredly would not have called it that.

In the House of Representatives, inaction continued as 1890 began. The delaying technique of choice was the disappearing quorum. Although minority party members could be legally compelled to attend, longstanding rules prohibited counting them as part of the quorum if they didn't respond when their names were called. Unable to obtain a quorum on their own, Republicans were regularly frustrated when Democrats sat silently at their desks refusing to answer the quorum call. Tension in the chamber mounted as the Republicans wanted to seat the Republican in a West Virginia election dispute, but were frustrated by delaying tactics on the morning of January 29, 1890.

At this point, Speaker Thomas Brackett Reed asserted the majority right to govern over delaying tactics allowed under the rules. In contemporary language, he used the nuclear option. After taciturn Democrats again prevented a quorum, Reed directed the clerk to record the names of non-responders as part of the quorum. Enduring a sustained uproar, Reed's action was upheld on a party-line vote. The subsequent institutionalization of the Reed Rules prohibiting delaying tactics and strengthening the Rules Committee is the foundation for the majority rule that governs the House today.

While the House was taking action as 1890 progressed, Senate legislation was stalled by the delaying tactics of the Democratic minority. Tension escalated in the summer as the Senate took up legislation, already passed by the House, providing federal oversight of elections to ensure that blacks were allowed to vote in the South. Delaying tactics prompted a deal tabling the legislation until after the November election. The off-year election resulted in a Democratic majority in the House, giving the Republicans strong incentive to act before the session ended on March 4, 1891. Brought up again in December, the elections bill was filibustered for one month before being taken off the floor. A bad omen for the legislation's passage occurred on December 10, 1890, when Republicans could not persuade the presiding officer, Vice President Morton, to follow Reed's example by counting Democrats who remained silent during the quorum call (McElroy 1930). When the bill returned to the floor in January 1891, it was supported by a resolution to change the rules to allow the majority to end debate. The nuclear option, however, was not used to stop filibustering and an intense period on the floor ended on January 26, 1891. The opportunity was lost. The rules survived what scholars would see as the peak of tension in Senate history for establishing majority rule against delaying tactics (Rogers 1926), and so became further institutionalized. When cloture was finally adopted in 1917, it required a supermajority.

Explanation of the Outcome

An understanding of why the nuclear option was or was not used in 1890–1891 is the first step in understanding the possibility of its use today. Specifically, it is important to assess whether the outcome was determined by a path of institutional development or whether it was a result of leadership. A leadership explanation supports the idea that the nuclear option remains awaiting strong leadership, while a path-dependent explanation supports the idea that the option is precluded in the Senate.

https://doi.org/10.1017/S1049096504045251 Published online by Cambridge University Press

Political science explanations about the events of 1890–1891 have been fairly consistent in the Senate while mixed in the House. The Senate is generally perceived as having a rule structure that "locked into place a procedural arena" that precluded leadership: "The Senate's rules are the by-product of an early procedural decision [to eliminate the previous question motion] in 1806" (Binder and Smith 1997, 206). On the other hand, there is a vibrant debate about the House's use of the nuclear option that ranges from leadership to path-dependent explanations. Some scholars (e.g., Strahan 2002) emphasize the role of Reed's leadership. Dion's explanation (1997, 137) represents a middle ground in which the influence of leadership emerges as a shortcoming of an institutional model: "A final factor, though one shudders to bring it up, is the personality of Thomas Brackett Reed . . . [whose] action represented a level of political leadership and responsibility that is difficult to theorize about." Binder (1996, 18) derives a path-dependent perspective from her broader model of partisan advantage explaining procedural reform: "[T]his study suggests that Reed's actions were but part of a more gradual course of institutional change."

In this research, the empirical work is focused on discovering the perspective of the participants. Members of the 51st Congress are presumed to be the best judges of whether the path was set or whether leadership made the nuclear option possible. When the evidence is analyzed, leadership emerges as a more compelling explanation than path dependence for both the House and the Senate. The members themselves saw an opening for leadership.

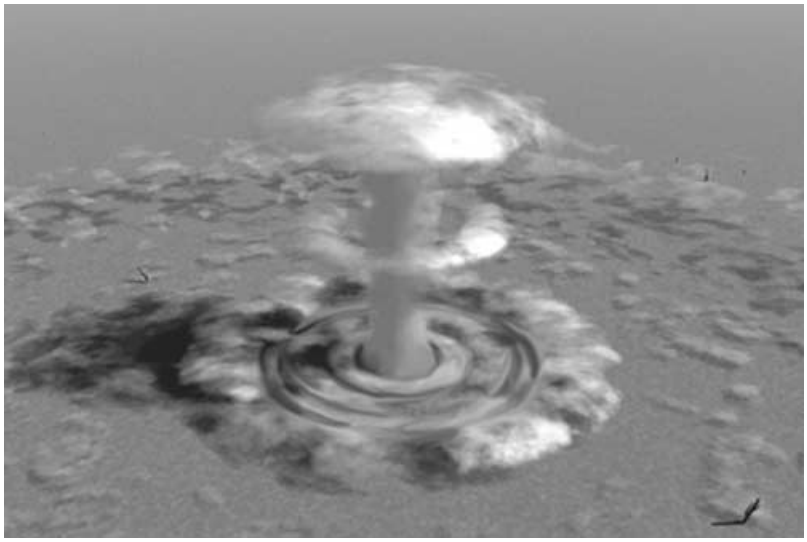
If the 51st House of Representatives had been on a path to establishing majoritarian rule, the members certainly were not aware of it. Both sides described Reed as revolutionary. Democrats immediately lamented, "Must the representatives of the people remain silent in their seats and see the Speaker of this House inaugurate revolution?" (*CR*, 29 January 1890, 950). Reed conceded that he had shattered precedent: "If we have broken the precedents of a hundred years, we have set the precedents of another hundred years nobler than the last" (Robinson 1930, 234). Given the revolutionary nature of Reed's action, it is not surprising that it placed tremendous stress on the system. Bedlam reigned as verbal invective turned into a physical revolt that saw Democrats hiding under desks and trying to force their way through locked doors by any means possible, including a technique immortalized as "Kilgore's Kick" (Tuchman 1966). Reed was widely denounced with "tyrant" and "czar" the epithets of choice. One respectful opponent carefully addressed Reed as "Tyrant, sir" (Busbey 1927, 181).

It took tremendous leadership to guide the House through this upheaval. No less a leader than Joseph Cannon believed that Thomas Brackett Reed was the only person who could have succeeded (Busbey 1927). As a leader, Reed was willing to take risks. Reed knew that he might lose and was prepared to resign if he were not upheld (Tuchman 1966). Reed's leadership also drew strength from being principle-centered. In writings over a decade, including when he was in the minority, Reed laid out the case for allowing the majority to govern. Finally, Reed's leadership took advantage of tremendous timing. Not informing his top deputies, Reed simply acted when the timing seemed optimal (Busbey 1927).

While it is tempting to envision the Senate as locked into a path of minority rights, the evidence suggests a failed opportunity to lead. Although it had a stronger tradition of minority rights than the House, the Senate was not on a path where the nuclear option was inconceivable. As tension grew, the nuclear option was considered possible, even likely. On January 20, 1891, George Vest (D-MO) sensed that the nuclear option was imminent: "There is a tension not only in this Chamber, but throughout the country, an extreme tension, brought about by the intimation that the time is rapidly approaching when the presiding officer of this body will, under some general and nebulous parliamentary law, declare that debate is ended and that freedom of speech has ceased to exist in the Senate of the United States" (*CR*, 20 January 1891, 1607).

The key underpinning of the path-dependent argument, the Senate's lack of a previous question motion, is dispelled by the experience of the British House of Commons. The lack of a previous question motion in Britain offered little barrier to a nuclear option already predicated on overturning precedent. In 1881, during an obstruction-dominated session, the presiding officer of the House of Commons simply walked in, sat down, and called for a final vote. Predictably, the use of the nuclear option prompted a prolonged uproar, but eventually the majority proceeded to govern and subsequently institutionalized closure procedures (Lowell 1908). Since senators saw both the U.S. House and the British House of Commons use the nuclear option, it becomes difficult to sustain the notion that the Senate was locked into a path of minority rights.

Instead, the evidence suggests that the Senate lacked the strong leadership necessary to guide the chamber through a shattering of precedent. The path was eased by the December 1890 message of President Harrison urging the Senate to have a "final vote" on the elections bill. Yet, Vice President Levi Morton, who presided over the intense period, did not act to secure a final vote. In fact, Morton, who did break one tie to proceed with the legislation, surprised his Republican colleagues by preventing a vote to appeal his ruling that debate should continue. In the aftermath,



Going Nuclear. "The nuclear option is a dramatic refusal to recognize delaying tactics permitted under the rules that facilitate the institutionalization of majoritarian procedures in a legislative body." Photo: istockphoto.com/Dane Wirtzfeld.

https://doi.org/10.1017/S1049096504045251 Published online by Cambridge University Press

Morton received much blame from Republicans who had mistakenly expressed confidence in him. Morton's failed leadership is more pronounced given his previous support for civil rights and his view of the vice president's role as presiding officer: "To a certain degree he is responsible for the progress of legislation, and any dilatory methods resorted to to embarrass the majority it is his duty to prevent, in such line of procedure as the majority may direct" (McElroy 1930, 184). Despite five successful procedural votes, Republicans failed to honor a caucus agreement to have the elections bill "pressed to a consideration, even if it becomes necessary to adopt a modified previous question" (Rothman 1966). In short, leadership failed in the Senate.

Legal Context

The importance of leadership in establishing majoritarian rule raises the possibility that the opportunity remains in the Senate. Indeed, legal scholars have argued that forcing the filibuster on a new Senate is an unconstitutional "entrenchment" of the prior Senate, which violates majority rule and a power assumed to be possessed by all legislatures (McGinnis and Rappaport 1995). The legal argument has been echoed by political scientists: "Indeed, lacking any constitutional, historical, or theoretical reason to require supermajority requirements to cut off debate on controversial legislation, defenders of the filibuster are on weak ground" (Binder and Smith 1997, 210). To assess the claim, this research compares the legal context during the 51st Congress to the present.

In either era, the legal status of the nuclear option rests on the Article I, Section 5 provision that "each House may determine the rules of its proceedings." Since the Framers did not specifically discuss the provision, constitutional interpretation rests on identifying what minimal requirements are implied in the Framers' broader language. Beyond promoting deliberation, congressional procedures were expected to facilitate the disposal of pending matters and allow action over a single objector. Thomas Jefferson (1853, 65) describes disposal, including a vote to postpone, as essential: "Every Parliamentary assembly should have certain forms of question, so adapted as to enable them fitly to dispose of every proposition which can be made to them." In disposing of matters, the Framers above all maintained that unanimity should not be required. In *Federalist 43*, Madison suggests that a unanimity requirement "would have subjected the essential interests of the whole to the caprice or corruption of a single member" (Lodge 1900, 130).

While the Framers strongly opposed unanimity requirements, their insistence on majoritarian rule was less clear. Most significantly, they included seven supermajority requirements in the Constitution. Yet, it appears to be an irresolvable debate between advocates who believe that the Framers intended this list to be exhaustive (e.g., Delker 1996) and those who do not (e.g., McGinnis and Rappaport 1995). For its part, the Supreme Court cites the willingness of the Framers to selectively violate majoritarian supremacy in its *Gordon v. Lance* (1971) decision upholding a supermajority requirement for bond issues in West Virginia.

Strong in 1891, the legal case for the nuclear option is now tenuous. In 1891, although not used with the sureness or automaticity of today (Mayhew 2003), Senate filibusters were preventing either the disposal or non-unanimity envisioned by the Framers. Since 1891, the legal case has been weakened by two Supreme Court decisions. In *U.S. v. Ballin* (1892), the Supreme Court suggested that congressional rules were presumed valid unless the constitutional order was undermined. In *McGrain v. Daugherty* (1927), the Supreme Court considered whether the investigative authority of a Senate committee was moot because a new Congress had begun. The Supreme Court ruled that it was not moot because, unlike the House, the Senate was a "continuous" body. The combined message of the cases is that the Senate must follow rules that have been legitimately adopted.

The cloture rule, which allows 60 senators to close debate, seems to meet the Supreme Court standard and the Framers' minimal requirements of disposal and non-unanimity. After 87 years of cloture, the nuclear option seems to violate the presumption that the Senate is a continuous body following rules established through constitutional means. In practice, however, the courts may be reluctant to enter a dispute over Senate rules. Yet, the only time the nuclear option has been used, the Supreme Court settled the matter by upholding Reed in *Ballin* (1892).

Conclusion

Placing the nuclear option in its historical and legal context, this article offers a mixed conclusion. On one hand, history suggests that the nuclear option is possible with strong leadership. On the other hand, a changed legal context makes it less likely. Despite the weakened legal case, the nuclear option cannot be dismissed. Thomas Brackett Reed remains a revered leader among many politicians. One who has praised Reed is Vice President Richard Cheney (1983), who served in Congress for 16 years—all in the U.S. House of Representatives. Ironically, Vice President Cheney, who seldom exercises his constitutional power to preside over the Senate, is in position to mirror the action of Reed and exercise the nuclear option for stopping the filibuster in the Senate. It turns out that someone whose congressional service is exclusively within the House of Representatives might be in a position to change the other body after all.

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https://doi.org/10.1017/S1049096504045251 Published online by Cambridge University Press

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https://doi.org/10.1017/S1049096504045251 Published online by Cambridge University Press