



THE WHITE HOUSE TRANSITION PROJECT
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Kinder Institute on
Constitutional Democracy
University of Missouri

Smoothing the Peaceful Transfer of Democratic Power

Report 2021—55

THE “NUCLEAR OPTION” HAS FIZZLED, AGAIN
Here’s Why and What to Do About It

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WHO WE ARE & WHAT WE DO

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EXECUTIVE SUMMARY*

Senate majorities of both parties have altered the rules of debate to speed up deliberations on presidential nominees, particularly on judicial nominations. These deployments of the Senate’s “nuclear option,” however, have had no demonstrable effect with respect to judicial nominations. We suggest the evidence highlights the role of “opportunism” rather than of partisan obstruction in delaying nominations. We also document how thwarting opportunism by changing the Senate’s focus — removing substantive legislation in favor of exclusively considering judgeships can lead speeding up deliberations. And we recommend seven reforms to improve the appointments process.

DEPLOYING THE “NUCLEAR OPTION”

In April 2019, the Senate majority deployed what many have called “the nuclear option,” using Senate Rule 20 to create precedents for how to apply other Senate rules, in this case altering Rule 22 (defining the cloture motion) thereby reshaping the filibuster’s application to presidential nominations (cf. Ba *et al* 2020).¹ While many observers conflate the “nuclear option” with changing the filibuster rule itself, the two differ technically. And while many of these changes have affected the filibuster, the precedents set with the nuclear option have altered other rules as well. The April 2019 change, for example, also altered the time allowed for debate after successfully invoking cloture, applying different limitations to different kinds of appointments. Interestingly, while many observers saw McConnell’s 2019 use of nuclear option as an apocalyptic alteration of the Senate’s rules, these changes represent just part of a broader alteration begun in the 113th Congress. During

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¹ Burgess Everett, “Republicans Trigger ‘nuclear option’ to Speed Trump Nominees,” *Politico*, April 3, 2019.

the Obama administration, a bipartisan coalition temporarily restructured post-cloture debate for nominations and legislative matters by passing SRes. 15 (January 24, 2013).² For appointments, the resolution temporarily revised downward post-cloture debate from 30 to 8 hours for all “sub-cabinet” nominations and to 2 hours for district courts.

The conflation of the nuclear option with the filibuster understandably derives from how the Senate leaderships have justified deploying their nuclear options in the past. They have regularly characterized lengthening Senate deliberations on judicial nominations as resulting from partisan obstructionism, abetted by the cloture rule’s supermajority requirements and by the prolonged post-cloture debate rules, both defined by Senate Rule 22.³ Proponents of these rules changes have claimed the 60-vote threshold to close a filibuster and the subsequent 30 hours of post-cloture debate allow the president’s opposition to obstruct nominations that would otherwise receive simple majority support.⁴ This argument — that the standing precedents and rules, *in the moment*, unnecessarily prolong deliberations — has continued to justify further use of the nuclear option to alter those deliberations. For example, even after attaining a reduction of post-cloture debate on district court and executive nominations through SRes. 15 in January 2013, Majority Leader Reid used minority obstructionism to justify deploying the nuclear option just 10 months later to exempt most Article III judicial nominations and most executive positions from the standard rules on the filibuster.⁵ The change reduced the votes needed for cloture (and, eventually, for confirmation) to a simple majority.⁶ The new majorities in the 114th and then the 115th Senates allowed that precedent on cloture votes to stand, but reverted to the standing rule on post-cloture debate time. Then, on April 6, 2017, the Senate majority revived the nuclear option to extend the precedent on cloture to cover all nominations (including to SCOTUS)⁷ and, on April 3, 2019, to reduce the amount of post-cloture debate for all nominations except those for circuit judgeships or for SCOTUS from 30 hours to 2.⁸ Significantly, while they have switched their positions in the majority, both parties have argued these precedents would accomplish the same objective in the face of the same obstruction.⁹

Table 1 summarizes all these changes governing judicial appointments. The changes, generated by using the nuclear option or by applying normal parliamentary processes, have created five separate “regimes” in deliberations (A-E). Each regime constitutes a different set of rules for cloture and post-cloture debate time for judicial nominees. Another alteration (F), involved deploying the nuclear option to change Senate deliberations over executive agency appointments and legislation.¹⁰ The initial, baseline regime for judicial appointments (A) ended on January 24, 2013 with the adoption of SRes. 15, which initiates regime (B).

² SRes. 15 (113th Congress, Senate vote 1, January 24, 2013) also placed limits on post-cloture amendments to substantive bills thereby limiting “filibuster by amendment.” Because the amending process does not apply to nominations, the discussion here does not consider these restrictions.

³ Paul Kane, “Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees,” *The Washington Post*, November 21, 2013. See also Jeremy Peters, “In Landmark Vote, Senate Limits Use of the Filibuster,” *The New York Times*, November 21, 2013; Walter Oleszek, 2008, *Cloture: Its Effect on Senate Proceedings*, Washington: Congressional Research Service, 98-780.

⁴ Under Rule 22, the proportion required to end debate encompasses a 3/5ths *Yea* vote from all “Senators duly chosen and sworn.” The deployment of the nuclear options creates precedents establishing the more lax requirement of a “simple majority” within a quorum, that the number voting *Yea* only exceeds the number voting *Nay*.

⁵ To date, the written language of Rule 22 remains unchanged.

⁶ Senate vote 242, November 21, 2013, to sustain the presiding officer’s ruling which denied Majority Leader Reid’s point of order that a majority vote could invoke cloture on nominations to Article III courts (excluding SCOTUS) and sub-cabinet executive appointments (exclusive of EX I). The new precedent also kept temporary, post-cloture debate to 8 hours for executive appointments and 2 hours for judicial nominations excepting circuit and SCOTUS nominations which remained at 30 hours.

⁷ The precedent on SCOTUS derives from Senate vote 109 to sustain the ruling of the presiding officer denying Majority Leader McConnell’s point of order that the Reid precedent of 2013 applied to SCOTUS nominations. See Valerie Heitshusen, 2017, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, Washington: Congressional Research Service, R44819.

⁸ The precedent on post-cloture debate derives from Senate vote 61 to sustain the ruling of the presiding officer denying Majority Leader McConnell’s point of order that precedents set post-cloture debate for most nominations at 2 hours.

⁹ Another issue involves the intermittent recognition of Senate “blue slips,” one further tactic (that few senators condemn) which allows Senators from the “home-state” of a district court nominee to register their support, opposition, or non-commitment to a particular nominee for that judicial position. See the discussion in the conclusion and see Salvador Rizzo, “Are Senate Republicans Killing ‘blue slips’ for Court Nominees?” *The Washington Post*, February 21, 2018 or Carl Tobias, “Senate Blue Slips and Senate Regular Order,” *Yale Law & Policy Review*, November 20, 2018.

¹⁰ Senate vote to sustain the ruling of the chair, April 4, 2019, against a motion by Leader McConnell proposing to alter post-cloture debate rules with respect to executive appointments.

Heretofore, judicial nominations received the same treatment that legislative issues received: 30 hours of debate after a 3/5^{ths} majority invoked cloture. SRes. 15 reduces the post-cloture debate time for district court judges from 30 to 2. The third regime (C) began with Reid’s deployment of the nuclear option on 11/21/2013, altering cloture for most nominations, including for most Article III judgeships. This alteration creates a major regime change, drastically reducing the filibuster’s effect on the number necessary to reach a confirmation. The fourth regime (D) forms when SRes. 15 expired on 12/14/2014 with the Senate’s *sine die* adjournment, resetting post-cloture debate. Although, the precedent that altered cloture remained in effect. The fifth regime (E) began when Mitch McConnell and Senate Republicans deployed another nuclear option on April 6, 2017 setting cloture for SCOTUS to a simple majority and restoring post-cloture debate to 2 hours for Article III district judgeships.¹¹

Table 1. Senate Deliberation Controls on Judicial Appointments & Using the Nuclear Option

		Regimes in Senate Floor Deliberations					
Controls (under Rule 22)	Article III Court	A.	B.	C.	D.	E.	F.
		<i>Before</i> SRes. 15 1/24/13	<i>After</i> SRes. 15 1/24/13	Nuclear Option set Precedent 11/21/13	Return to Rule 22 1/3/2015	Nuclear Option set Precedent 4/6/2017	Nuclear Option set Precedent 4/3/2019
Required <i>Yea</i> vote on Cloture	District	$\frac{3}{5}$	$\frac{3}{5}$	$Y > N^{12}$	$Y > N$	$Y > N$	$Y > N$
	Circuit	$\frac{3}{5}$	$\frac{3}{5}$	$Y > N$	$Y > N$	$Y > N$	$Y > N$
	SCOTUS	$\frac{3}{5}$	$\frac{3}{5}$	$\frac{3}{5}$	$\frac{3}{5}$	$Y > N$	$Y > N$
Post Cloture Debate	District	30	2	2	30	2	2
	Circuit	30	30	30	30	30	30
	SCOTUS	30	30	30	30	30	30

Source: *Standing Rules of the Senate, Congressional Record* (various days).

Because the appointments process represents a bridge between the general election and the policy agenda, understanding these appointment reforms affords an insight into whether or how partisan strategies can effect governance. What is more, because Article III judicial appointments have lifetime tenure, these appointments create a longer shadow into public policy than can executive appointments. Nominations to the judiciary thus constitute a significant microcosm of the broader appointments process, and evaluating the effect of Senate rule changes on judicial nominations provides a window into whether partisan tactics resolve or exacerbate the problems with Senate deliberations.

So, how has deploying the nuclear option on judicial nominations worked out? We gathered and analyzed data on judicial appointments during these distinct Senate regimes to find out.

¹¹ While we focus on the effect of deploying the nuclear option to rules governing floor deliberations, some may wonder whether altering the “blue slip” norm, allowing Senators from a nominee’s home state to prevent consideration of that judicial nominee, might contribute to the problem and therefore create a separate set of regimes. We explore this question in the online supplementary appendix. Briefly, we find no consistent effect of the blue slip process on Senate processing times.

¹² See footnote 4. The “simple majority rule” requires only that to invoke cloture, the number voting *Yea* exceeds those voting *Nay*.

EVALUATING THE EFFECTIVENESS OF THE NUCLEAR OPTION

If deploying the nuclear option blunts minority obstruction on appointments and, hence, undermines the “tribalism” that pundits regularly assail as the source and consequence of this obstruction, then applying these precedents in practice should shorten deliberations. Both majority leaderships that have deployed these modifications, have insisted they strike at the heart of the problem. As it turns out, political scientists largely endorse this logic.¹³ Much theoretical work¹⁴ in the field has concentrated on the growing divide between the parties, arguing that this growing partisanship foments the obstructionism that senators complain about.

The typical explanation for appointments politics emphasizes the role of partisan polarization, abetted by super-majoritarian Senate procedures: the greater the policy differences between the parties, the more determined that obstruction, and taking advantage of the Senate’s rules, the longer its deliberations. McCarty and Razaghan explain the lengthening Senate deliberations as resulting from “the super-majoritarianism of the Senate ...[which] gives partisan and ideological minorities a strategic opportunity to have an impact on public policy by delaying nominations that would pass on a simple majority vote....”(1999:1125). This explanation also informs Eric Ostrander’s (2015) recent analysis of contemporary appointments and Hollibaugh and Rothenberg’s 2017 model of presidential nominations. In all these theoretical models, senators in the minority oppose the president’s nominees on policy grounds — the more polarized the parties, the stronger their opposition. That opposition motivates the senators to obstruct the nomination for as long as they can to delay the delivery of those policy options nominees would carry out and, as the opposition party, they oppose. The degree of polarization, then, becomes a meter of potential obstruction intensity and its amplification by the Senate’s rules the method for stretching deliberations. In this analysis, the easiest way to moderate the obstructionism involves striking at its procedural amplification — the rules that govern floor deliberations.

The complaints about partisanship and the rules changes justified by those complaints suggest changing the rules should have a wholistic effect, first reducing the length of the Senate’s floor deliberations and, then, having a similar effect on those stages that lead up to those floor deliberations. The theoretical explanation for how floor deliberations affect the previous stages in general implies that presidents and committee leaders anticipate the results of the final stage and adjust their behavior in earlier stages accordingly so as not to unnecessarily prolong the appointments process. Thus, as Eric Ostrander has argued, presidents and committee leaders adopt a “[role] in which [they]...anticipate and adapt to the wishes of the Senate” majority (Ostrander 2015:1163). By this logic, reducing partisan obstructionism in the final stage would then reduce obstruction throughout the process, as well.

Of course, other political science research on appointments suggests that changing the Senate rules on appointments could produce a different set of effects altogether. Political scientists know a good bit about appointment politics. We have mapped the segments of the appointments process linking each to the next in the sequence and assessing the contribution of each to the overall process. We have theoretical models of what affects deliberations in each stage of the overall process. We have delineated between the motivations of politicians that might affect their deliberations and we have identified processes, like bargaining, which might shape those deliberations as well. We have identified other variables such as the size of the Senate workload, the popularity of the president, or the pace of nominations that might also affect the efficiency of the Senate confirmation process. These alternative explanations and variables suggest that the rule changes to the floor

¹³ See Heather Ba, Brandon Schneider, and Terry Sullivan, 2019, *The Longer You Wait, the Longer It Takes: Presidential Transition Planning and Appointment Politics*, Washington: The White House Transition Project.

¹⁴ As prominent examples, see Gary E. Hollibaugh and Lawrence S. Rothenberg, 2018, “The Who, When, and Where of Executive Nominations: Integrating Agency Independence and Appointee Ideology,” *American Journal of Political Science*, 62,2(April):296-311; Ian Ostrander, 2015, “The Logic of Collective Inaction: Senatorial Delay in Executive Nominations,” *American Journal of Political Science*, 60,4(October):1063-76; David M. Primo, Sarah A. Binder, and Forrest Maltzman, 2008, “Who Consents? Competing Pivots in Federal Judicial Selection,” *American Journal of Political Science*, 52,3(July):471-89; Nolan M. McCarty, 2000. “Proposal Rights, Veto Rights, and Political Bargaining,” *American Journal of Political Science*, 44,3(July): 506-22; Nolan M. McCarty and Rose Razaghan, 1999, “Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996,” *American Journal of Political Science*, 43,4(October):1122-43.

procedures in the Senate could fail in their purported goal or even have unintended consequences. For one, the rule changes might exacerbate partisan tensions, forcing Senators inclined to obstruct appointments to redouble their efforts and find new methods of obstruction, or simply to concentrate their efforts on the committee process, thereby prolonging that stage. Alternatively, the myriad other variables that affect the appointments process could interact with the dynamics of party polarization in complex ways, preventing the rule changes from having any consistent effect at all on Senate processing times.

We can map the general expectation set out here onto the five regimes identified in Table 1. As a regime change undermines the super-majoritarian rules, in cloture and in debate, each change should produce shorter and shorter Senate deliberations. And this effect should occur in both Senate stages, reflecting anticipated reactions. Hence,

- E1. *A Strong “Nuclear” Effect.* The length of deliberations in both the floor and then committee stages should shorten during regimes that reduce the votes necessary for cloture or post-cloture debate time.

While this expectation suggests that deliberations in regime A. would exceed lengths of deliberations in regime B. and so on, we will pay special attention to comparisons between the two changes involving the nuclear option on judicial appointments: between regimes B. and C., on the one hand, and between D. and E., on the other. Because Presidents Obama and Trump specifically encouraged their party’s majorities to deploy the nuclear option in these two situations, the resulting changes should pose a significant test of this expectation and the logic behind it.

The comparison between regime C. and D. provides something of a special test. With the arrival of a new Senate majority in the 114th Senate, some of Rule 22’s normal standards returned suggesting that deliberations in this period would lengthen by comparison with regime C. Because that regime-change also coincided with a party change in the Senate majority, though, President Obama’s nominees faced a new kind of situation, one in which the *majority party* opposed the administration’s nominees. The effect of the rules regime change, therefore, would also coincide with a stronger, partisan change effect.

Of course, since all of the rules changes target the floor stage of the appointments process, the nuclear effect could be substantially weaker and affect just this final stage. Hence:

- E2. *A Weak “Nuclear” Effect.* The length of deliberations in the floor stage should shorten during regimes that reduce the votes necessary for cloture or the time for post-cloture debate, but committee processing times remain unaffected.

Alternatively, rules changes could have the unintended consequence of increasing the determination of Senators inclined to obstruct the president’s nominees. In this way, rules change simply fuel the fires of partisanship rather than contain them. So we must also allow for a third expectation:

- E3. *An Unintended “Nuclear” Effect.* The length of deliberations in either or both the committee and floor stages lengthen after rule changes as the minority redoubles its efforts at obstruction in reaction to the rule change.

Finally, our research and that of others, suggests an alternative understanding of appointments politics, one that emphasizes a range of other influences, some of which suggest a different underlying process at work in affecting the length of deliberations. For example, if other factors, such as Senate legislative priorities and logistics, have a similar influence on deliberations, changing the rules that govern the final floor vote may have no consistent effect whatsoever on either stage of Senate deliberation. Consistent throughout appointments politics and consistent with the motivational assumptions in the standard literature on appointments, we could assume that Senators pursue policy-making first and foremost. They pursue that objective through a variety of mechanisms or levers in the bargaining process might strengthen their demands for policy changes. Sometimes the policy changes that they pursue have nothing to do with to the purview of the judicial appointment under consideration. Nonetheless, they hold the nominee hostage to pursue this wholly unrelated policy advantage.

Simply put, appointment politics constitutes a process that analysis cannot easily decompose into a series of independent effects governed by specific Senate rules. Rule changes may therefore have no clear, consistent effect on the length of floor or committee deliberations because the variables that affect these processes interact in ways the predominant theories of political polarization cannot capture. Hence:

- E4. *No “Nuclear” Effect.* There is no clear, consistent effect of the rule changes across the stages of Senate confirmation.

Data and Analysis

The analysis of appointment politics over the past half century has focused on the duration of the entire Senate confirmation process because, as it turns out, the Senate has confirmed virtually all judicial nominees brought to a floor vote. Krutz *et al* have called this pattern, a “presumption of success.”¹⁵ “Failed” nominations do not occur on the floor but instead die with a whimper when nominees drop into one of three kinds of “limbo,” languishing in committee or on the Senate’s calendar or quietly withdrawing altogether.¹⁶ The Senate terminates the first two groups when it returns these languishing nominations to the President under its Rule 31(§5; §6), which bars the Senate from further considering nominations whenever the Senate has suspended its business for longer than 30 days. In some cases, these nominations will have languished for a long time, but the bulk of them involve nominees presented to the Senate within a couple of months of the Senate adjourning, most often at session’s end, affording those nominees little opportunity for regular consideration. Often, the administration offers up these late nominations as a symbolic act with no intent of reissuing them once a new session commences. For example, these nominations never get reported from committees of jurisdiction, presumably because senators of both parties realize the ambivalence administrations and leaders have towards these nominees.

We also examine the duration of Senate deliberations. However, we analyze separately the length of committee versus floor deliberations. In our data set, we also track nominations through each stage of appointments process, and make note of which nominations die in which stage: in limbo in the committee stage or in limbo on the Senate calendar. We exclude those nominations that die in limbo, which constitute 137 cases of the nearly 2,000 total nominations we track over the 40 years.¹⁷

Although some of the data used in past studies of appointments extend back to the early 1900s, complex research models have generally relied on data from the last six presidencies, when we can detail both the executive and Senate processes and when presidential appointments must factor in those major ethics and transparency reforms first applied to President Reagan. For our part, we rely on data derived from the White House Transition Project (WHTP), which draws its underlying data mainly from the Senate.gov database and the White House press briefings stored in the National Archives.

In our analysis, we compare the duration of judicial appointments in both the Senate committee and floor vote stages across the procedural “regimes” affecting judicial nominees that we outline in Table 1. In considering these regimes, we treat nominees caught on the cusp between regimes by applying their committee deliberations before the cusp to the prior regime and their floor deliberations after the cusp to the subsequent regime. This last treatment only involves 12 Obama nominations.

The Nuclear Option Fizzles, Twice

Evaluating the effects of the nuclear option on floor deliberations constitutes the strongest evaluation of the linkage between partisanship, changing routines, and deliberations. Table 2 presents our results about the average length of deliberations by regimes, along with the basic statistical comparisons on those means.¹⁸ E1

¹⁵ Glen S. Krutz, Richard Fleisher, and Jon R. Bond, 1998, “From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate.” *American Political Science Review*, 92(December): 871–82.

¹⁶ Jon Bond *et al*, call this kind of failure by limbo “malign neglect,” but many of these judicial nominations simply languish rather than fall victim to a strategy. Hence, the large percentages that get nominated and then languish near the end of a term when the Senate has little opportunity to vet these nominees. Jon R. Bond, Richard Fleisher, and Glen S. Krutz, 2009, “Malign Neglect: Evidence That Delay Has Become the Primary Method of Defeating Presidential Appointments,” *Congress and the Presidency*, 36,3(Autumn): 226–43.

¹⁷ Because most nominations in limbo seem to reflect the “symbolism” strategy described earlier, nominated too late in the Senate’s schedule, their inclusion in the data analysis would actually reduce the averages for floor and total deliberations, producing a misleading assessment of actual senate deliberations on more “serious” nominations.

¹⁸ The appendix repeats Table 2 using medians rather than means. Using medians responds to the possibility, not borne out in the data, that nominations later in an administration might draw on underlying population with a different variance than those introduced early on. As it turns out, using a median measure produces no significantly different results from the means, except in regime A.

and E2 suggest that moving from left to right across regimes should significantly shorten deliberations, especially from B. to C., the deployment during the Obama administration, and then from regime D. to E., the first deployment during the Trump administration. As indicated, the primary pattern suggested in the strong nuclear expectation does not occur. Of the nine comparisons allowed by available data between regimes over the three kinds of courts, eight did not follow the suggested pattern, either for floor deliberations or for total time in the Senate (not shown). For example, over the Obama administration, repeated attempts to alter the rules from A. to B. and B. to C. did not shorten deliberations, but significantly lengthened them for district and circuit judges, the very targets of the changes. The return to Rule 22, post-cloture debate rules with the 114th Senate did produce significantly longer deliberations consistent with the shift in Senate party control. More on this result below.

Table 2. Pace of Senate Floor Deliberations and Procedural Regimes

Article III Courts	Average Floor Deliberations (in days) by Regime					
	A. Before SRes. 15 1/24/2013	B. After SRes. 15 1/24/2013	C. Nuclear Option set Precedent 11/21/2013	D. Return to Rule 22 1/3/2015	E. Nuclear Option set Precedent 4/6/2017	F. Nuclear Option set Precedent 4/3/2019
District	118.7* 1095	133.3* 29	192.2* 87	268.1* 20	250.8 53	162.5* 83
Circuit	138.4* 264	115.2 9	224.3* 16	275.0 2	121.4 37	94.0* 8
SCOTUS	74.1 15				76.5 2	

Source: Compiled by authors.

Notes: * Average number of days with statistically different means (*) based on the n of cases reported below.

During the Trump administration, the use of the nuclear option aimed at affecting judges produced no statistically significant reductions. Indeed, the only serious reduction in the length of floor deliberations coincided with the second deployment of the nuclear option by Majority Leader McConnell in April, 2019, creating a precedent directed at nominations to executive positions only. Coincident with that change, though, the deliberations times from E. to F. for judges declined significantly, even though they should not have seen any effect at all. More on this result below.

All in all, the deployment of rules changes, through regular procedures or through nuclear option precedent setting, all aimed at reducing the influence of partisanship on judicial nominations, had little or no significant effect. In both instances of deploying the nuclear option, the Senate majority failed to produce the effect they intended. Rather in some instances, they actually resulted in steep increases in floor deliberations, the very effect they aimed to reduce. Generally speaking, then, the “nuclear option” in all its forms fizzled.

Table 3 reports the data on whether changes in floor rules could have an effect on committee deliberations, through anticipated reactions, as suggested under E1. Of the nine comparisons supported by the data, in committee deliberations, the data revealed four (possibly 4½) patterns consistent with E1. SRes. 15, for example, did shorten committee deliberations (A>B) for both district and circuit judicial nominations. Furthermore, returning to the standard rule on post-cloture debate in the 114th Senate significantly lengthened committee processing times of district court deliberations (C≤D), though circuit court deliberations did not significantly change from the previous regime. In addition, the first Trump era deployment of the nuclear option resulted in reduced committee deliberations for district court nominations, though not for circuit judgeships. And the second Trump era deployment, aimed not at judicial appointments, coincides with a significant reduction of committee deliberations for circuit judgeships.

The Case of the Last Regime. At best, the patterns associated with deploying the various nuclear options, whether through precedents or Senate resolutions, suggest at most only a weak relationship between partisan

obstruction and the appointments politics generating the length of Senate deliberations. We propose, however, that the results seem far more consistent with our fourth expectation that changes to the Senate rules will produce no clear consistent effect. Only the deployment of the nuclear option on April 3, 2019, to set a precedent about executive nominations, produced a statistically significant reduction of committee and floor deliberation times over judicial nominees and this rule change did not target judicial appointments, but Executive appointments. Thus, we interpret this evidence as being consistent with the effect of the change in partisan control in the 114th Senate.¹⁹

Table 3. Pace of Senate Committee Deliberations and Procedural Regimes

Article III Courts	Average Committee Deliberations (in days) by Regime*					
	A. <i>Before</i> SRes. 15 1/24/2013	B. <i>After</i> SRes. 15 1/24/2013	C. Nuclear Option set Precedent 11/21/2013	D. Return to Rule 22 1/3/2015	E. Nuclear Option set Precedent 4/6/2017	F. Nuclear Option set Precedent 4/3/2019
District	92.7* 1137	82.1* 39	114.5* 77	149.4* 42	79.4* 127	76.8 43
Circuit	114.9* 298	78.2* 13	152.9* 13	163.2 5	91.8 40	64.8* 6
SCOTUS	56.2 15			61.0 1	80.0 1	

Source: Compiled by authors.

Notes: * Average number of days with statistically different means (*) based on the n of cases reported below.

The differences in n of cases from Table 2 reflect treatment of nominations caught on the cusp between committee deliberations in one regime and floor deliberations in another.

In sum, the use of rules to limit obstruction does not seem to have worked: deliberations on the floor often lengthened following deployment of the nuclear options or the rules changes made no difference in deliberations. We think these results suggest a more complex appointments process that is influence by numerous other variables apart from polarization. In particular, here's what we think we can learn about the appointment process from these reforms and the outcomes that followed...

RETHINKING THE FIZZLE IN APPOINTMENTS

Following the second invocation by Republicans of the nuclear option (April 2019), we speculated in *The Washington Post* that the deployment would likely have little effect.²⁰ We reached that conclusion because ours and others' research has described an appointments politics affected by more than the partisan polarization that administrations and Senate leaderships had complained about so single-mindedly. That research has suggested that the tribalism they have highlighted doesn't just pose problems, it also reflects them. Targeting polarization, as these reforms have, then, would not produce the results they have hoped for: to truncate deliberations. The connection between controlling debate and senate deliberations on nominations appears more complicated than the pattern described by "obstructionism." Moreover, controlling the circumstances of debate also does not seem to influence the other stages of the appointments process as expected.

To understand the appointments quagmire, then, we suggest refocusing away from the concern with partisanship and toward the more complex relationships among senators that define the context of the

¹⁹ Other research has also found evidence for the effect of divided government over appointments in general (McCarty and Razaghi 1999) and judicial appointments in particular (Primo, Binder and Maltzman 2008).

²⁰ Heather Ba and Terry Sullivan, 2019, "Why Does it Take So Long to Confirm Trump's Appointments? The Senate 'went nuclear' — but that won't speed things up much," *The Washington Post — Analysis*, (April 24).

nominations process. The logistics of appointments creates opportunities for Senators to use non-support for a nominee as a bargaining chip to pursue other policy goals. Focusing on opportunism rather than partisan obstruction hold two advantages. First, focusing on opportunism highlights the myriad other forces that could affect deliberations. And second, it suggests a set of feasible strategies for ameliorating the appointments mess, strategies that emphasize what political leaders know how to do and that do not directly confront the seemingly intractable problem of partisanship.

How Context Affects Deliberations

While some Senators may obstruct a nomination simply on the basis of ideology or a nominee’s qualifications, Senators might also “oppose” a nominee to alter the circumstances of Senate policy-making, holding up a president’s nominee to create a bargaining advantage, completely unrelated to the potential policy purview of any particular nominee. Directors of Presidential Personnel often complain that their nominees find themselves trapped in the bargaining between the administration, the Senate leaders, and an individual Senator or a group of Senators over a completely unrelated issue.²¹ The broader the legislative agenda as a proportion of the Senate’s business, the more useful holding up a nominee would become. Of course, opportunism of this sort can be limited or exacerbated by the efforts of key Senate leaders who heavily influence the context of vetting of judicial appointments.

The effectiveness of such opportunism depends on the constantly fluctuating circumstances of the Senate’s agenda, something almost exclusively controlled by the Majority Leader. The more nominations become the Senate’s only business, again something controlled by the Majority Leader, the fewer reasons Senators might have for such delay, because the nominees become less valuable hostages in a policy agenda that has disappeared. This dynamic could easily explain why even though altering the rules on Senate deliberations for judicial nominations didn’t shorten those deliberations, as reported in Table 2, the deployment of the nuclear option in April of 2019 on executive appointments *also* shortened judicial nominations.

Table 4. Focus of Senate Activity as of 4/3/2019

Senate Floor Activity	<i>Before</i>				<i>After</i>				Altered Focus
	Nuclear Option set Precedent on Executive Nominations				Nuclear Option set Precedent on Executive Nominations				Change in % Votes
	Cloture Votes		All Votes		Cloture Votes		All Votes		
	n	%	n	%	n	%	n	%	
Substantive legislation	19	54.3	44	57.1	20	14.0	164	35.4	−38.0%
Judicial nominations	8	22.9	17	22.1	81	56.6	222	47.9	+117.2%
Executive nominations	8	22.9	16	20.8	42	29.4	77	16.6	−20.0%
<i>Total</i>	35		77		143		463		

Source: Compiled by authors from Senate.gov reports.

Table 4 reports some evidence of how Senate leadership and legislative priorities can affect appointment processing times. The table divides all Senate floor activity during 2019 into three classes: substantive legislative activity, consideration of judicial nominations, and consideration of nominations to executive posts. It reports two basic measures of activity: votes on cloture and all votes taken. Before the deployment of the nuclear option redefining floor deliberations on executive nominations, the senate’s business weighted heavily towards substantive legislation. More than half of all cloture votes involved legislative matters as did half of all votes. The daily rate of votes on substance more than doubled the daily rate for judicial nominations. Coincident with the deployment of the nuclear option on executive nominations, Senator McConnell seemed to adopt a new strategy with respect to Senate business. Instead of focusing on executive nominees freed up by this new

²¹ See for example, the White House Transition Project’s interview with Bush ’41’s Chase Untermeyer (1999), now found at:

<https://www.archives.gov/files/presidential-libraries/research/transition-interviews/pdf/untermeyer.pdf>.

deployment of the nuclear option, the senate shifted dramatically towards almost exclusive attention to judicial nominations.²² After the shift, more than half of all cloture votes involved judicial nominations while among all votes, again, almost half involved judicial nominations.

The last column in Table 4 summarizes the shift in focus. Both executive nominations and substantive legislation suffered significant declines in attention (–20% and –38%, respectively) while the Senate shifted its focus to judicial nominations which more than doubled (+117%). The daily rate of votes on judicial nominations after the shift amounted to an increase of 4½ times.

IF NOT A NUKE, THEN WHAT?

In both the deployment of the nuclear options to floor deliberations and to committee deliberations, to slow obstructionist partisans, no clear pattern emerged directly linking polarization to deliberations in the way that pundits, partisans, and scholars have suggested. While the empirical analysis presented here do not clearly distinguish between polarization as a variable and other potential explanatory variables, these results do suggest that other forces seem to play a role both in ameliorating the impact of rules changes and of polarization itself.

If a nuclear deployment does not address the underlying problems in appointments politics and maybe even exacerbates them, what route might leaders take to ameliorate these problems? As we noted earlier, judicial nominations present a window into appointments politics in general. Many of the problems associated with these nominations trouble nominations across the board. So, solutions to the problems presented by judicial appointments will also affect appointments in general.

For example, focusing the Senate’s daily agenda (whether on nominations exclusively or trading off between nominations and legislative matters) represents one element of the context for Senate deliberations that these results do seem to highlight. They also seem to suggest that leadership in the Senate and possibly anticipation and preparations in the Executive could dramatically affect opportunism and therefore drive appointments politics rather than merely react to them. Including these elements into understanding senate deliberations would underscore how various processes could shape opportunities for support or expressions of reluctance. It would also reorient attention towards how the appointments process begins, when choices shape the context for opportunism, and how and when contemporaneous political leadership that manipulates that context could affect deliberations on judicial nominees and nominees in general.

The Example of Transitions

The experiences of the last three presidential administrations illustrate just this effect that executive management and focus has on appointments politics. Before the presidential campaign began, Governor George W. Bush appointed a dedicated transition planning team. That team used its early start to learn in detail how they could organize the appointments process, going so far as to restructure and downsize the White House Personal Data Statement and to create a new electronic application system for appointments, which built a database of potential applicants and their qualifications. Consistent with this advanced planning and emphasis on coordination, the Bush transition team successfully named its critical White House staff a full eleven days earlier than the typical presidential transition putting it in a position to take advantage of its plans. In the end, the Bush White House took 199 days on average, from the date of the election, to identify and vet nominations, including those for the judiciary, a full 60 days less than his predecessors had or his successors would. Meanwhile, the Bush team proffered a straightforward, Republican policy agenda, setting only a modestly challenging number of issues before the Congress. Organization and advanced preparations in both areas, standing up the government and setting its course early, paid off.

Following Bush’s example, the Barrack Obama team had a largely successful transition effort, but its transition team focused almost exclusively on two *extraordinary* and simultaneous policy challenges (a general financial collapse and adoption of a universal health care system). They had little opportunity to develop an

²² See Allison Durkee, “Coronavirus Can’t Stop Mitch McConnell from Forcing Trump’s Judges Through the Senate,” *Vanity Fair*, 5/1/2020.

early appointments strategy.²³ Reflecting this lack of attention, President-elect Obama placed appointments in the hands of a staff who didn’t want the job, who came on board late, and who quit almost immediately. The Obama personnel operation stumbled through its early days, gave up, then refocused but having missed its opportunities would never really recover.

Donald Trump came to his personnel problems even more quickly than had Obama, firing the entire transition team three days after the election. After the “Saturday massacre,” the personnel team that Trump put in place had no experience with the government’s stand up or the campaign’s previous plans: of the seven early personnel staff, only one had any previous experience with appointments and she took on a limited, technical role. Subsequent to this poor beginning and probably because of it, several of Trump’s judicial nominations produced revealing flaws accompanied by considerable, negative press coverage.²⁴ While he has nominated roughly the same number of judicial nominees as his predecessors (e.g., submitting 229 in his first two years), President Trump withdrew four times as many judicial nominees during consideration as Obama and failed to resubmit another 28 nominations after the Senate used its rules to return them to him.

Faced with these disheveled executive operations, deploying a nuclear option may have seemed like the only strategy available to both sets of Senate leaders. But, because the nuclear option addressed none of the executive management issues that created the delays in the first place, no surprise that it has proven ineffective. We suggest that deploying the nuclear option has failed because it simply didn’t engage the responsibilities of effective leaders — planning, structuring agendas, making accommodations in those agendas, and scheduling — that would create the context in which Senators might avoid opportunism. Our initial skepticism about the effectiveness of the nuclear option was rooted in this understanding of appointments politics. So far, our hunch seems correct.

Projecting Leadership into Appointments Politics

We suggest seven changes, most of which rest on the notion of avoiding opportunism by early preparation, taking advantage of leadership that looks forward rather than merely anticipates and reacts. Four reforms focus on a fast start to appointments derived from expanding transition capacities in the campaigns and in the Senate. For example, campaigns normally learn about appointments from their “landing teams,” agency specific and typically policy driven groups looking to dominate on a policy outcome following the election. Or they learn about appointments from the *Plum Book*, the joint congressional-executive publication describing all PAS appointments but published four years earlier or available only after the election. Neither source provides timely information that would guide preparations for the operational necessities of the national government. The influence of these two conditions over the process either encourages policy commitment over administrative competence or offers a picture of the personnel challenges four years in the past. We suggest a more timely production of the *Plum Book* earlier in the campaign to apprise the transition planners of their immediate challenges. We suggest prioritizing operational responsibilities over ideological commitment, assuming that for many positions in governing getting the position secured early aids the administration more than achieving some ideological purity.

We also suggest a number of changes that increase resources to the early stages of the appointments process with the aim of standing-up earlier a national government’s critical personnel and taking advantage of the early *absence* of a demanding policy agenda. We propose that the executive set an objective of offering 400 nominations by the end of the first 100 days. To handle these nominations, we propose that the Senate increase temporary staffing levels on committees before the election so that they can process a larger number of these early nominations. We also propose creating a new apparatus in the Executive Office of the Presidency to manage presidential Personnel similar in stature and operation at the Office of Management and Budget, supported by a standing professional staff, and managed by the White House staff. We also suggest highlighting that the 400 initial nominations should include a significant number of positions that have in the past resulted

²³ See Chris Cioffi, “The GOP is Confirming Trump Judicial Nominees it Stalled Under Obama,” *Roll Call*, August 26, 2019.

²⁴ See Ed Kilgore, “Anti-Abortion Activist Is Trump’s Latest Unqualified Judicial Nominee,” *New York Magazine*, October 24, 2019 and Rebecca R. Ruiz, “Two Disputed Judicial Nominees Could Help Trump Reach Milestone,” *The New York Times*, October 30, 2019.

in confirmations by greater than 60 votes. Affording the Senate an opportunity to confirm nominees by extraordinary majorities will beat back nascent tribalism.

For the Senate, we suggest establishing in its standing rules a timetable for the Senate committees and party leaderships to coordinate appointment preparations with the national campaigns and their transition planners. Such a change would mirror steps taken in the executive agencies under the Kaufman-Leavitt Presidential Transition Act of 2015.²⁵ But in the Senate, such a procedure would require both parties to coordinate on appointments, without knowing the results of the election, again suppressing tribalism in much the same way that in 2012, the Senate leaders coordinated a reduction in the numbers of PAS positions, unilaterally transferring them to the president's exclusive control. The totality of these suggested changes would strengthen efforts in appointments by shifting some concentration to those bi-partisan positions critical to the national administration and restructuring some of the attention paid to those appointments most closely associated with the new administration's policy ambitions.

²⁵ See Martha Kumar's *Rules Governing Presidential Transitions: Laws Executive Orders, and Funding Provisions*, White House Transition Project Reports #2017-05, Washington: White House Transition Project. Also at <http://whitehousetransitionproject.org/transition-resources-2/transition-essays/>

APPENDIX

A. Analyzing the effects of blue slips

Judiciary Committee leaders determine the extent to which “blue slips” will affect its consideration of judicial nominees. Committee leaders that respect this norm allow home-state senators to act as gatekeepers on committee hearings for a specific nominee. For more than fifty years, the Judiciary committee has applied a norm that senators from a nominee’s home state could determine whether the committee held hearings on that nominee, a “courtesy” afforded senators of both parties reflecting the cooperative nature of their basic professional relationships.

Beginning with Trump presidency, however, the Republican leadership began to modify this practice on the Judiciary ostensibly to speed up deliberations on nominations, including using the justifications about partisan obstruction. In July 2017, Chairman Chuck Grassley announced he would no longer permit the deployment of blue slips to determine committee hearings, beginning in August, thereby effectively deploying a “nuclear option” to his committee’s deliberations. At the beginning of his own chairmanship, in January of 2019, Senator Lindsey Graham modified this practice somewhat in contravention of the majority leadership’s guidance, restoring the application of blue slips to district court nominations. Following the standard obstructionist theory these changes should have affected deliberations.

Table 5 summarizes the alterations to the blue slip norm and their apparent effect on the average length of committee deliberations. The changes reported in the bottom half of the table created three regimes, closely (though not completely) mirroring the regimes created by the nuclear option in floor deliberations. Senator Grassley’s disregard of blue slips overlaps with regime E. after the initial deployment of the nuclear option by Leader McConnell with respect to deliberations on judicial nominations. Senator Graham’s restoration of blue slips for the bulk of the Judiciary’s nominations covers those nominations which eventually came to the floor under Leader McConnell’s new regime of restricted deliberations and focused Senate business.

Table 5. Judiciary Committee Use of Blue Slips and Deliberations

		Average Committee Deliberations (in days) by Regime		
		D. <i>Before</i> Grassley Reform (7/31/2017)	E. <i>After</i> Grassley Reform (7/31/2017)	F. <i>After</i> Graham Reform (1/29/2019)
Length of Deliberations on Article III Court nominees	District	95.4* 1299	103.8* 81	63.9* 88
	Circuit	115.2* 332	116.7 28	40.1* 15
	SCOTUS	-----	57.9 17	-----
Judiciary Committee Application of Blue Slips	District	Do apply	don’t	Do apply
	Circuit	Do apply	-----	don’t -----
	SCOTUS	-----	Never applied	-----

Source: Compiled by authors.

Notes: * indicates statistically significant comparisons between means.

Given the standard expectations, Senator Grassley’s reform should have drastically shortened deliberations, coinciding with drastically shortened floor deliberations under McConnell’s new precedents. Senator Graham’s backpedaling on blue slips should have slowed committee deliberations just as Senator McConnell intended to switch to an almost exclusive focus on judicial nominations. Neither effect transpired.

The Grassley deployment slowed deliberations dramatically (and statistically) for district judgeships while it had no effect for circuit judgeships. On the other hand, the Graham deployment while it should have lengthened district judgeship deliberations and had no effect on circuit judgeships, dramatically and statistically shortened both.

B. Robustness Results Using Medians

The analytics in the main body of this paper employs difference of means tests to assess the relevant expectations about the nuclear option. Those tests, of course rely on the assumption that means have a normal distribution. While nothing in the data suggests that the means do not have such a distribution as a population statistic, the mean responds more dramatically to extraordinary outliers in the data, more so than does the median, for example. So, as a precaution, Table 6 presents a Mood's median tests as an analysis of differences in medians, attempting to replicate the results from Table 2 and Table 3.²⁶ In the table we present test statistics on the null hypothesis that the two medians derive from the same population — that one regime does not differ from the next regime — using Mood's approach. In addition, we note with an asterisk (*) indicates which medians fall outside the confidence interval for the relevant mean reported in the main body of the paper.

Though smaller than the relevant means, the median length of deliberations rarely present results different from those summarized by the means. And the patterns reported as test of the expectations, using medians, replicate the results reported in Table 2 and Table 3 — the nuclear options generated no clear pattern of deliberations that would support the strong or weak expectations about reform effects on deliberations.

²⁶ The authors thank an anonymous referee for this analysis as a precaution.

Table 6. Pace of Senate Floor and Committee Deliberations within Procedural Regimes, using medians

Article III Courts	Median Floor Deliberations (in days) by Regime										
	A. Before SRes. 15 1/24/2013	<i>p</i> (B same as A)	B. After SRes. 15 1/24/2013	<i>p</i> (C same as B)	C. Nuclear Option set Precedent 11/21/2013	<i>p</i> (D same as C)	D. Return to Rule 22 1/3/2015	<i>p</i> (E same as D)	E. Nuclear Option set Precedent 4/6/2017	<i>p</i> (F same as E)	F. Nuclear Option set Precedent 4/3/2019
District	99.0* 1095	.008	139.0 29	.000	203.0 87	.075	282.5 20	.056	225.0 53	.000	147.5 83
Circuit	107.0* 264	.991	95.0 9	.019	202.5 16	.453	275.0 2	.445	112.0 37	.271	101.0 8
SCOTUS	82.0 15							.506	76.5 2		
Article III Courts	Median Committee Deliberations (in days) by Regime										
	A. Before SRes. 15 1/24/2013	<i>p</i> (B same as A)	B. After SRes. 15 1/24/2013	<i>p</i> (C same as B)	C. Nuclear Option set Precedent 11/21/2013	<i>p</i> (D same as C)	D. Return to Rule 22 1/3/2015	<i>p</i> (E same as D)	E. Nuclear Option set Precedent 4/6/2017	<i>p</i> (F same as E)	F. Nuclear Option set Precedent 4/3/2019
District	79.0* 1137	.052	62.0* 39	.026	98.0* 77	.000	148.0 42	.000	84.0 128	.033	65.0* 46
Circuit	85.0* 298	.612	58.0 13	.238	163.0 13	1.000	168.0 5	.039	84.5 40	.230	57.0 6
SCOTUS	57.0 15					1.000	61.0 1	1.000	80.0 1		

Source: Compiled by authors.

Notes: (*) signifies median outside the confidence interval around the mean.