

Comments on Nuclear Devastation

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I would like to make a few observations about Sarah Binder's post, "Is nuclear winter coming to the Senate this summer?"

1. Sarah frames the possibilities (short of the Democrats triggering the nuclear option) as two. The majority will tame the minority by threatening the nuclear option or alternatively the nuclear threat by the minority will effectively back the majority down. This misses the possibility of a very Senate-like outcome—further bipartisan compromise. Of course, that was the outcome in 2005. The nuclear option was avoided through a compromise negotiated and imposed by the "Gang of Fourteen." President Bush got several of the judges he wanted and a rough agreement was forged to avoid filibusters on judicial nominations.
2. Sarah concludes that if either "the majority tames the minority or the minority scares the bejeezus out of the majority—the same outcome ensues: Nothing." Reaching this conclusion implies that the only acceptable outcome is further reform, not resolving the current impasse or avoiding a "nuclear winter." It seems in that view that anything short of eliminating the possibility of filibuster on nominations is labeled "nothing."
3. Sarah's otherwise excellent summary of the "nuclear option" characterizes its effect as the Senate "set[ting] a new precedent by simple majority vote to exempt nominations from the reach of Rule 22." While this is correct as far as it goes, it fails to illuminate the fact that this is only possible if the presiding officer (presumably the vice president) ignores Senate precedent and declares in some fashion that the debate can be ended by a simple majority. It is the tabling of the appeal of the ruling which then creates the new precedent. This is critical because the tabling motion is not debateable and therefore cannot itself be filibustered.
4. The observation is made that "Republicans (at least when they are in the minority) call this "changing the rules by breaking the rules..." It sheds more light on the potential use of and the potential reaction to the nuclear option to note that many Democrats during the 2005 battle when they were in the minority, also referred to it as "breaking the rules to change the rules." Then-Senator Joe Biden said about the nuclear option, "it is the ultimate act of unfairness to alter the unique responsibility of the Senate and to do so by breaking the very rules of the Senate..."
5. I have long argued ([here](#) and [here](#)) that going outside of the Senate's ("formal" rules as Sarah calls them) in order to set the precedent that a simple majority (potentially as few as 26 senators) can eliminate the filibuster-- even if targeted against filibusters on nominations at first-- would empower any Senate majority to rewrite the rules at any time, and that a majority would inevitably construct rules that give it near absolute control over amendments and debate like in the House.