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Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations

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Abstract: On November 21, 2013, U.S. Senate Democrats utilized the long threatened “nuclear option,” thereby allowing a simple-majority of the chamber to end debate on lower federal court judicial nominations. Formal theory predicts that this change should permit the president to nominate more ideologically extreme nominees. By comparing President Obama’s nominees before and after the Senate’s change to the confirmation process, we are able to provide the first comprehensive examination of how the nuclear option is likely to impact the ideological makeup of the lower federal courts. We additionally examine the impact of the nuclear option on time to confirmation and nominee success. Our results indicate, while post-nuclear option nominees are not significantly more liberal, they are being confirmed more often and more quickly, allowing Obama and Senate Democrats to more efficiently fill the federal judiciary with Democratic-leaning judges.

In the long term, the [filibuster] rule change represents a substantial power shift in a chamber that for more than two centuries has prided itself on affording more rights to the minority party than any other legislative body in the world. Now, a president whose party holds the majority in the Senate is virtually assured of having his nominees approved, with far less opportunity for political obstruction.

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On November 21, 2013, under the leadership of Senate Majority Leader Harry Reid (D-NV), US Senate Democrats utilized the long threatened “nuclear option,” thereby allowing a simple-majority of the chamber to end debate on

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lower federal court judicial nominations (along with executive nominations). The controversial maneuver followed over a decade of threats from majority leaders in both parties to end the minority obstruction on nominations. In 2003, under the leadership of then-Senate Majority Leader Bill Frist (R-TN), Republicans threatened to use the nuclear option to stop Democratic obstruction of several of George W. Bush’s judicial nominees. The Senate averted a showdown over the nuclear option when a coalition of seven Democrats and seven Republicans signed on to a compromise agreement.

Scholars and journalists alike touched on the magnitude of the Senate’s action. Writing for the *Washington Post*, Jonathan Bernstein (2013) argued that it “changes how the nation is governed in a significant way.” The *New York Times* dubbed it “the most fundamental alteration of its rules in more than a generation” (Peters 2013). Political scientist Steven Smith (2014, p. 265) listed it as “among the three or four most important events in the procedural history of the Senate.”

With specific regard to lower federal court judicial nominations, Democrats justified the decision to alter chamber debate rules on the grounds that minority-party Republicans were engaging in what Reid described as “unbelievable, unprecedented obstruction” (Peters 2013). In his remarks on the

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1. Rather than formally amending its rules, an action that would have been subject to unlimited debate, the Senate established a new precedent by overturning, on appeal, a decision of the Chair. The new precedent lowered the threshold needed to invoke cloture on nominations from 60 votes down to a majority of the chamber. Supreme Court nominees were not included in the new precedent; future Court nominees will still require 60 votes to invoke cloture. The new precedent did not eliminate the potential need to invoke cloture on those nominees or alter the time required to invoke cloture, meaning that confirming nominees is still a time consuming process (Heitshusen 2013).

2. The seven Democrats agreed to support cloture motions on several of the obstructed nominations. In exchange, the Republicans agreed to withhold their support for any nuclear option attempt (Binder, Madonna and Smith 2007). Under Reid, Democrats threatened to use the procedure on several occasions. In 2011, Senate Democrats established a precedent that it was not in order to offer motions to suspend the rules after cloture had been invoked (Binder 2011; Sonmez 2011). Reid then threatened to use the procedure at the start of the 113th Congress, but eventually settled on agreeing to several minor revisions to the rules governing post-cloture debate during the 113th Congress. A 2013 ruling by the US Court of Appeals for the District of Columbia limiting the president’s ability to make recess appointments led to another bout of nuclear option threats in early July. This also ended in a compromise where several Republican senators agreed to vote for cloture on several nominees to the National Labor Relations Board, as well as for Richard Cordray to lead the Consumer Financial Protection Bureau (Lesniewski and Sanchez 2013).

3. Not all Democrats agreed. Senator Carl Levin (D-MI) – one of three Democrats to oppose the maneuver – argued the majority has “sacrificed a professed vital principle for the sake of momentary convenience” (*Congressional Record Daily*, 113th Congress, November 21, 2013, S8422).
Senate floor, Reid pointed to flagging confirmation rates and argued that “half of the Nation’s population lives in parts of the country that have been declared a judicial emergency” (Congressional Record Daily, 113th Congress, November 21, 2013, S8414). Similarly, Senate Judiciary Chairman Patrick Leahy (D-VT) argued the confirmation rate for judges under Obama was far lower than it had been under President Bush (Leahy 2013). Citing confirmation delay, President Obama had called for the Senate to reform its rules in his 2012 State of the Union address (Sanchez and Shiner 2012).

Not surprisingly, Republicans disagreed and suggested the move was an unnecessary power grab. Senator Jeff Sessions (R-AL) argued that the caseloads of federal courts do justify the addition of new judges and that approving each new judgeship was “akin to every year burning 1 million on the Mall” (Congressional Record Daily, 113th Congress, November 21, 2013, S8424). Senator Bob Corker (R-TN) likened Reid’s actions to that of Russian President Vladimir Putin (Lesnieowski 2014a), and Senate Minority Leader Mitch McConnell suggested Reid was demanding the Senate “sit down, shut up, and rubber stamp everything, everyone the president sends up” (Saenz 2013). Numerous senators expressed concern that the maneuver was going to remove any incentive to compromise on nominees and lead to more ideologically extreme judges.

As the debate suggests, the stakes for the federal judiciary from this rule change and its assumed influence on nominations are unquestionably high. Previous research on judicial nominations and confirmations demonstrates that who gets nominated (Goldman 1997), how long it takes to fill vacancies (Massie, Hansford and Songer 2004), how long it takes to confirm judges (Binder and Maltzman 2002; Martinek, Kemper and Van Winkle 2002; Hartley and Holmes 2002), and the outcome of confirmation proceedings (Martinek, Kemper and Van Winkle 2002; Hartley and Holmes 2002) are all politically charged and have important implications for the composition for the federal judiciary. Additionally, this scholarship indicates that the threat of obstruction in judicial nominations can constrain who the president selects to nominate and the likelihood of

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4 Reid further justified the nuclear option on the grounds that “the Senate has changed its rules 18 times, by sustaining or overturning the ruling of the Presiding Officer, in the last 36 years – during the tenures of both Republican and Democratic majorities” (Congressional Record Daily, 113th Congress, November 21, 2013, S8415).

5 Criticism regarding the pace of judicial confirmations was not limited to Democrats. Chief Justice John Roberts (2012) called for more bipartisan cooperation to fill long-standing vacancies. And in June 2012, the President of the American Bar Association wrote a letter to Senate Majority Leader Harry Reid (D-NV) and Senate Minority Leader Mitch McConnell expressing “grave concern for the longstanding number of judicial vacancies on Article III courts” (Robinson 2012).
nomination success (Johnson and Roberts 2005; Wawro and Schickler 2006). With the removal of the filibuster for judicial nominations, many questions emerge. Has the ideology of nominees changed after the nuclear option? Is the president more successful in his attempts to appoint judges, now that his nominees require fewer senators’ support for success? Can the president appoint judges more quickly than he could before the nuclear option was invoked? In other words, what is the net impact of the Senate’s rules change on the confirmation process, and how does this influence the makeup of the federal courts? We seek to provide an initial answer to each of these questions.

In an effort to assess the impact of the nuclear option on judicial nominations, we examine data for all district and circuit court nominations made by President Obama from 2009 through the end of 2014. We identify the ideology of nominees using a new measure of political ideology – the campaign finance score (CF score) (Bonica 2013, 2014). Based on the assumption donors give money to candidates that share their ideological preferences, these CF scores make use of federal and state campaign finance data to place campaign donors and recipients on a common ideological scale. Among their many advantages, these scores permit the examination of successful and unsuccessful lower federal court nominees’ ideologies in a way that other known measures cannot, which we discuss in detail below. We also collect data on whether nominees were eventually confirmed and how long it took successful nominees to be confirmed. By comparing each of these measures before and after the Senate’s change to the confirmation process, we are able to provide a first look at how the nuclear option is likely to impact the ideological makeup of the federal courts. Our results indicate that, while post-nuclear option nominees are not significantly more liberal, they are being confirmed more frequently and more quickly, thereby allowing President Obama and Senate Democrats to more efficiently fill the federal judiciary with Democratic-leaning judges.

The Senate in the Nomination Process

Article II, Section 2 of the US Constitution requires that the president appoint officers of the US, including federal judges, “by and with the Advice and Consent of the Senate.” Scholarly work has long suggested that the Senate’s advise and consent role creates a substantial constraint on who presidents can successfully appoint to the federal bench. Specifically, while few nominations are ever officially voted down on the floor, many suffer substantial delays or fail to be approved and are

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6 See O’Connell (2015) for another perspective on this question.
sent back to the president at the end of a congressional session (Kruzb, Fleisher and Bond 1998). Because of this, the executive branch rarely makes decisions over nominations unilaterally (Segal, Cameron and Cover 1992). In order to minimize delay and improve his odds of success, presidents frequently reach out to fellow partisans in the Senate and, on occasion, members of the opposite party. We should expect that changes in the Senate’s internal procedural rules can and should affect these interactions with the president regarding nominees, with the November 2013 utilization of the long threatened “nuclear option” serving as a primary example. As noted above, this rule change moves the Senate from requiring a supermajority of the chamber to just a simple-majority of the chamber to end debate on lower federal court judicial nominations. This rules change could lead to president to alter the ideology of his nominees and also affect the efficiency and outcome in the processing of these nominees.

The Filibuster Pivot and Nominee Ideology

Within the nomination process, the executive branch rationally anticipates the legislative response to any potential nominations and constrains presidential choices accordingly (Calvert, McCubins and Weingast 1989; Hammond and Hill 1993; Moraski and Shipp 1999; Nokken and Sala 2000; Snyder and Weingast 2000; Nixon 2004; Nemacheck 2007). The president and individual senators are assumed to consider not only the ideology of the underlying nominee, but also how that individual would influence the ideology and partisanship composition

7 Newspaper coverage highlighted how President Obama met with Republican and Democratic senators in order to win approval for several nominees to the US Court of Appeals for the District of Columbia circuit in the Spring of 2013 (Ellperin 2013). This need for a president to reach out to the Senate on judicial nominations has been institutionalized through the norm of “senatorial courtesy” – i.e. the practice of asking senators from the state where an appointment will be made if they object to a nominee. Historically, if a home-state senator opposed a nominee, the Senate would often decline to proceed with the nominee’s confirmation.

8 The minority is not powerless in the post-nuclear Senate. Nominations still have to proceed through the traditional cloture procedure, and while now only a majority is needed to invoke cloture, the procedural process required to gain cloture can be time consuming. Objecting to a request to yield back post-cloture debate time, Senator Charles Grassley (R-Iowa) noted that “we have not yielded back post-cloture time on judicial nominations since the so-called nuclear option was triggered last November” (Congressional Record Daily, 113th Congress, April 10, 2014, S2356). In response, Reid noted the difficulties in proceeding through the nominations, citing the “inordinate amount of time” Republicans are causing the Senate to consume (Lesniewski 2014b).
of the underlying court when evaluating nominees. Presidents are therefore assumed to choose nominees that move policy output in a way that maximizes the president’s ideological preferences while still gaining the support of enough senators to achieve confirmation. This work suggests that the political ideologies of successful nominees are heavily influenced by the dynamics of the nominating process and the political ideologies of those participating in it.

Scholars adopting a formal theory approach to the study of the Senate argue that both legislation and nominations must be approved by numerous veto players before enactment or confirmation. The pivotal player is determined by ordering legislators ideologically in a unidimensional, spatial model and applying the relevant decision-rule (Krehbiel 1998). For nominations made in the modern Senate, a liberal (conservative) president’s nominee must have the approval of the sixtieth most liberal (conservative) senator to ensure confirmation. Scholars utilizing this formal theory approach conclude that the primary effect of the filibuster has been the expansion of the “gridlock interval,” leading to more moderate public policy (Wawro and Schickler 2006). To pick up the support of the pivotal sixtieth senator, presidents must also choose judicial nominees such that their political ideologies are more moderate than the ideology of the president.

Of course, with the elimination of the filibuster via the nuclear option, this scenario changes. In the post-nuclear option Senate, presidents should be able to nominate more ideologically-extreme judicial nominees and still gain the support of the Senate’s median voter. This would, theoretically, lead presidents to make fewer concessions on nominee ideology since a liberal (conservative) president

9 The same logic applies to nominees to various boards and agencies, where a single nominee can alter the ideological makeup of a voting body.

10 There is some scholarly disagreement over how deterministic a role is played by the Senate minority party’s ability to filibuster nominees and, in response, the need for supermajority support to end such filibusters (see, e.g. Johnson and Roberts 2005). This uncertainty is somewhat predictable, as legislative scholars have reached differing conclusions regarding the influence of the filibuster on policy output in the Senate (Binder and Smith 1997; Wawro and Schickler 2004, 2006, 2010; Binder, Madonna, and Smith 2007; Koger 2010). This conflicting work on the filibuster also presents different predictions for how the appointment process will be impacted in a post-nuclear Senate.

11 This assumes, of course, that the president wants to make more ideologically extreme nominations. As Goldman (1997) argues, some presidents hold strong non-ideological motivations for their judicial appointment agenda. For President Obama, empirical evidence confirms such a non-ideological commitment in the form of diversifying the courts (e.g. Kimel and Randazzo 2012). During his first 6 years in office, 35 percent of Obama’s lower federal court nominees have been racial minorities and 42 percent have been women. Whether Obama holds ideological concerns in his nominations strategy in addition to his diversity ones, however, can and should be empirically tested.
now only needs to gain the approval of the fifth most liberal (conservative) senator to gain confirmation for his nominees. This is exactly the objection that Senate Republicans frequently raised in the days leading up to November 21, 2013. For example, Senate Minority Whip John Cornyn (R-TX) suggested Reid’s maneuver would help the president “stack the courts with radically liberal judges when his political initiatives fail legislatively” (Congressional Record Daily, 113th Congress, October 31, 2013, S7710). And Senator Charles Grassley (R-IA) argued that “if the Democrats are bent on changing the rules. Go ahead. There are a lot more Scalias and Thomases out there whom we would love to put on the bench” (Congressional Record Daily, 113th Congress, November 12, 2013, S7940).

Influencing Confirmation Rate and Time

Additional empirical work has also looked at overall confirmation success and delays in the nomination process. Scholars generally argue confirmation delay and failed confirmations are important for four reasons. First, time taken confirming a nominee is time that nominee is not on the bench representing the president (Shipan and Shannon 2003). Second, vacancies limit the ability of the courts to manage their caseloads (Roberts 2012). Third, lengthy battles over nominations can delay the enactment of presidential initiatives (McCarty and Razaghian 1999; Binder and Maltzman 2009). Finally, the timing of a nomination can influence its success (Kruyt, Fleisher and Bond 1998; Groseclose and McCarty 2001; Binder and Maltzman 2009).

As with nominee ideology, confirmation success and delays in confirming nominees are both influenced by the nomination process and the ideological position of the president and Senate. Looking specifically at the length of time it takes for a nomination to be confirmed, scholars have determined that Senate ideology, relative to the president, is associated with confirmation delay for Supreme Court nominees (Shipan and Shannon 2003), lower level judicial nominees (Nixon and Goss 2001; Binder and Maltzman 2002, 2009; Martin, Kemper and Van Winkle 2002), and other executive branch nominations (McCarty and Razzghian 1999; Nixon 2001; Bond, Fleisher and Kruyt 2009; Dull et al. 2012). Scholars note that time is a precious commodity in the Senate and majority party concerns about time certainly influence the way they approach their legislative agenda, including pending judicial nominations (Binder and Smith 1997; Wawro and Schickler 2006). Similarly, examinations of both confirmation success and total votes received by Supreme Court nominees, lower level judicial nominees, and other executive nominations suggest that the congruence of ideology between the president and Senate play a causal role in determining nominee success and the level
of nominee support (Cameron, Cover and Segal 1990; Krutz, Fleisher and Bond 1998; Epstein and Segal 2005; Cameron, Kastellec and Park 2013).

Just as with the above discussion regarding nominee ideology, there is a strong chance that the reduction of the “gridlock interval” in the Senate should affect confirmation rate and time. With the shrinking interval following the nuclear option, there should be less opportunity for minority party obstruction through “the killing or delaying the enactment of a considerable body of legislation otherwise headed for enactment or law” (Binder and Smith 1997, p. 203) or nominees headed toward confirmation. A recent post-nuclear option example illustrates this point. In May of 2014, Senator Rand Paul (R-KY) sent a letter to Senate leadership announcing his intentions to object to the nomination of Harvard Law Professor David Barron to the US Court of Appeals for the First Circuit. Prior to the nuclear option, this threat likely would have derailed or at least greatly postponed consideration of the nomination. In the post-nuclear Senate, however, Barron was confirmed 52–43, and Senator Paul was not granted extensive floor time (Lesniewski and Chacko 2014; Valencia 2014).

This potential for an increase in the raw quantity of judicial nominees confirmed and a decrease in the time needed to get there through the reduction in minority obstruction opens up the potential for a net ideological and partisan gain for the president in judicial nominations even if there is not appreciable shift in nominee ideology following the nuclear option. In other words, even if individual nominees forwarded to the Senate from the White House are not more liberal than those pre-November 2013, by successfully confirming Obama judicial nominees more often and more quickly, the rule change could well have a huge impact on the composition of the federal courts, leading some individual circuit and district courts to be Democratic-leaning for the first time in many years.

Data and Measurement

To examine how the nuclear option has affected the judicial nomination process, we develop a database of all lower federal court nominations made during the Obama administration. Following the scheme developed by Martinek, Kemper and Van Winkle (2002), we collect all judicial nominations to federal district and appeals courts from the beginning of 2009 through the end of 2014.\textsuperscript{12} Obama has

\textsuperscript{12} We used an existing nominee database generously provided to us by Adam Bonica and an additional database provided by James Monogan and Richard Vining. After merging the databases, we updated them to include nominees through the end of 2014.
made 456 judicial nominations during this time.¹³ For each nomination, we collect
data on each nominee’s political ideology, whether the nominees were success-
fully confirmed, and how long the confirmation process lasted.

To assess the political ideology of Obama’s judicial nominees, we use common
space campaign finance scores or CF scores (Bonica 2013, 2014). This emerging
method of measuring ideology is based on the basic assumption that donors give
money to candidates that best share their ideological preferences. Bonica (2014)
makes use of over 100 million donor contribution records from both state and
federal elections made between 1979 and 2012. These data contain over 13 million
donors, 500,000 organizations, and 50,000 candidates. Using these data, ideological
scores are estimated that place all of these individuals and groups on a
common ideological scale. Since judicial nominees are frequently donors to
political campaigns, a majority of Obama’s nominees have CF scores that can be
identified and used to assess the ideological impact of the nuclear option.

CF scores differ from other methods previously used to assess the political
ideology of judicial nominees. Epstein, Landes and Posner (2013) delineate
between “ex ante” and “ex post” measures of judge ideology. Ex ante approaches
measure judges’ ideologies using data from before they began serving on the
bench, while ex post measures typically use judges’ voting records to assess their
ideologies. Ex post measures are not feasible here. Since Senate reforms occurred
very recently, there has simply not been time for judges to amass a voting record.
Additionally, not all judicial nominees are confirmed or have previous judicial
experience, so voting records are unavailable for these judges.

Previously used ex ante measures also pose difficulties for examining the impact
of the nuclear option. A common method of assessing nominee ideology is to use
either the party of president or a measure of the political ideology of the president
as a proxy for the ideology of nominees or judges. While numerous previous studies
have shown the ideology of the president is linked to the decision-making of judges,
this does not contribute very much to our understanding of how the Senate’s role
in selection process helps determine the ideological makeup of district and appeals
courts (Giles, Hettinger and Peppers 2001). Additionally, since Obama has been the
president for the time period both before and after Senate reforms, there is no way
to use presidential scores to assess the effect of changes to the confirmation process.

¹³ It is not uncommon for Obama to renominate someone who was not successfully confirmed in
an initial nomination attempt. Of the 456 nominations made by Obama there are 330 unique indi-
viduals nominated for judicial positions. Renominations of previous nominees make up the other
126 nominations. Because we view each nomination as an opportunity to select a candidate of a
certain ideological type, we consider the nomination as our unit of analysis and do not remove
renominated nominees from the analyses (see also Martinik, Kemper and Van Winkle 2002).
Scholars have long recognized the influential role the Senate plays in the confirmation process and have developed ideological measures that account for the role of the Senate. Giles, Hettinger and Peppers (2001) develop the commonly used GHP scores that account for senatorial courtesy. Because district courts are located within a certain state and appeals courts' seats are often associated with a particular state, senators in the president's party "have a claim to influence if not control of the appointment" (Giles, Hettinger and Peppers 2001, p. 628). This fact has been incorporated into ideology measures by assuming that a nominee shares the ideology of the home state senator, if there is a home state senator from the president's party. If both senators are from the president's party, the average of the two is used. If there is no senator from the president's party, the ideology of the president is used.14

While these scores do account for the role of the Senate in the confirmation process, they cannot be used to assess the impact of the nuclear option. These scores presume senatorial norms of courtesy guide the confirmation process—in effect scholars are taking advantage of the historical consistency of Senate confirmation practices to account for its influence on nominee ideology. However, Reid's decision to go nuclear has clearly interrupted the historical consistency of Senate confirmation practices. If GHP scores were used to assess nominee ideology during the 113th Congress, they would not perceive any differences in nominee ideology because Senate practices changed while the chamber's membership did not. Additionally, the GHP scores are inappropriate for measuring the ideology of nominees who are not successfully confirmed.

By contrast, CF scores have the benefit of being ex ante scores of ideology that do not rely on consistency in Senate confirmation practices nor the successful confirmation of a nominee. Because of this, CF scores can be used to assess how nominee ideology changed before and after the nuclear option in a way that no other known measure permits. This key benefit does not come without a few problems. Because CF scores rely on campaign donation data, scores only exist for nominees that have contributed to political campaigns. While many of the nominees have contributed to campaigns, there is a good deal of missingness in the scores.15 Of Obama's 456

14 (Epstein et al. 2007) use this method to account for the ideological influence of the Senate in their Judicial Common Space (JCS) scores.
15 A related issue involves matching donor information in the (Bonica 2014) database with National Archive data on nominees. Since the FEC only requires that donors supply name, address, occupation, and employer name, it can sometimes be difficult to tell whether a donor is a judicial nominee or whether it is simply a person from the same state with the same name. Perhaps unsurprisingly, Andrew Carter, Obama's 2011 nominee to the District Court for the Southern District of New York, was not the only Andrew Carter to donate money to a political candidate in the state of New York in the last 30 years. Some nominees were kind enough to list their occupation as "pending circuit court nominee," but most had to be matched using personal information, such as work history, reported in White House press releases announcing their nominations.
Table 1: Nominee Ideology, Confirmation Rates, and Time to Confirmation, 2008–2014.

<table>
<thead>
<tr>
<th>All Obama Nominees (2008–2014)</th>
<th>Pre-Reform</th>
<th>Post-Reform</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average CF-Score</td>
<td>-0.637</td>
<td>-0.601</td>
<td>-0.036 (-0.437)</td>
</tr>
<tr>
<td>Confirmation Rate</td>
<td>61.781%</td>
<td>79.630%</td>
<td>-17.848% (-3.421)</td>
</tr>
<tr>
<td>Average Time to Confirmation</td>
<td>185.079</td>
<td>129.671</td>
<td>55.408 ^ (5.946)</td>
</tr>
</tbody>
</table>

T-scores for difference of means and z-scores for difference of proportions tests reported in parentheses. *Indicates significance at the 0.05 level.

judicial nominees, 319 (69.96%) can be matched to CF scores. Pre-nuclear option, 244 of 348 (70.11%) nominees can be matched and 75 of 108 (69.44%) post-nuclear option nominees can be matched. While this missingness may introduce some biases into our sample of matched nominees, any selection bias should affect the composition of pre-nuclear and post-nuclear samples similarly. This allows us to compare across these two groups with limited fear that potential selection biases are harming our ability to assess pre-reform and post-reform differences.

Results

With these data in hand, we turn now to the first comprehensive empirical examination of the effects of the nuclear option on judicial nominees’ ideology, confirmation rates, and confirmation times. First, to assess to impact of the nuclear option on the ideology of judicial nominees, we compare nominee ideology (measured using CF scores) before and after the Senate’s November 2013 reforms. The results of this comparison are provided in Table 1.16

As the table reveals, there is not statistical evidence that President Obama tried to place more liberal judges on courts in response to the Senate’s reduction of its confirmation vote threshold. Obama nominees had an average CF score of -0.637 prior to the nuclear option and an average of -0.601 after the nuclear option – a difference in means of -0.036 (t=-0.437).17 This may be because the rules change did not affect how Obama selected his judicial nominees. It could also be that there has not been enough time to see a change – the vetting process

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16 The Appendix provides the results for this examination for only those nominees from the 113th Congress (i.e., 2013 and 2014).

17 There is no evidence that Senate Democrats were prioritizing the confirmation of more liberal nominees over other nominees after the introduction of the procedural reforms. Confirmed nominees had an average CF score of -0.616 before the nuclear option and an average of -0.640 after the nuclear option. This difference of 0.024 is not statistically significant t=0.254.
for judicial nominees is extensive enough that the executive branch may not have been able to make effectively react to the reduced voting threshold.

The distributions of nominee ideology pre- and post-filibuster reform are also depicted in Figure 1. The differences between the two plots are subtle. And, indeed, the mean ideology of post-nuclear option nominees is actually slightly more moderate than pre-nuclear option nominees, although this difference is not statistically significant. The figure and table make clear two things. First, there is not empirical support for the expectation that President Obama has utilized the more favorable Senate gridlock interval to forward more extreme judicial nominees to the Senate. Second, Kimel and Randazzo (2012) observe that Obama has only prioritized the ideology of nominees for a small number of judicial nominees prior to 2013. This inconsistent focus on nominee ideology remains the case through the end of the 113th Congress, even after the November 2013 nuclear option. This is evident in both subfigures in Figure 1, with the nominee ideology widely distribution across liberal and moderate CF Scores. As detailed further above, it is quite possible that President Obama’s focus on nominating diverse judges has superseded any strict ideology considerations in his judicial nominations agenda. As we return to below, the lack

![Figure 1: Nominee Ideology, Before and After Filibuster Reform.](image)
of a significant ideology effect for individual nominees following the nuclear option does not preclude the possibility that there has been an overall ideological or partisan shift.

We turn next to confirmation rates and timing. Table 1 indicates that, as expected, the nuclear option has positively influenced confirmation success for lower federal judges. Prior to the nuclear option, 61.781% of President Obama nominees were eventually confirmed. After the nuclear option, this number grows to 79.630% of his nominees being confirmed. The difference in confirmation success rates is a statistically and substantively significant -178.48% (z=3.421). In addition to success rate, President Obama and the Senate Democrats have also seen an influence on the time to confirmation following the 2013 Senate rules change. Again looking first to Table 1, prior to the nuclear option, it took an average of 185.079 days for successful nominees to be confirmed. After the nuclear option this fell to 129.671. This means that nominees were confirmed an average of 55.408 \((t=5.946)\) days - nearly 2 months - faster after the nuclear option was invoked in the Senate. The distribution of these confirmation times, before and after the filibuster reform, are plotted in Figure 2. The visual differences are striking and attest to the highly decreased obstruction opportunities present in the Senate’s confirmation process following November 2013.

![Figure 2: Time to Confirmation, Before and After Filibuster Reform.](image-url)
While the nuclear option did not have a significant effect on the ideology of judicial nominees, that does not mean that the nuclear option did not give Obama and Senate Democrats an ideological advantage. By drastically reducing the time it takes to confirm a nominee, President Obama and Senate Majority Leader Reid were able to more efficiently fill the judiciary with Democratic-leaning judges. As an illustration of this, Figure 3 reports the average number of confirmations, per month, during the first 6 years of the Obama administration. After the November 2013 changes to the filibuster (shaded gray on Figure 1), there has been a stark increase in the number of nominees successfully added to the judiciary. Before Reid’s reforms, Obama averaged 3.51 successful confirmations a month. In the 14 months after the nuclear option, this average has increased to 6.57. This means that approximately 43 more nominees were confirmed after filibuster reform than in the same time period before filibuster reform.

Discussion and Conclusions

In the 13 months of its use, from the end of November 2013 through the end of 2014, the Senate Democrats’ nuclear option has had an impact on lower federal court nominations. In the above study of President Obama’s nominees’ ideology, confirmation success, and confirmation delays to federal district and circuit courts from 2009 through 2014, the results indicate that Obama has not, as formal theory predicts and some had feared, taken advantage of the altered gridlock interval to push forward increasingly liberal nominees. Despite this, however, through increased confirmation rates, decreased time to confirmation, and the overall efficient filling

![Figure 3: Successful Judicial Confirmations by Month, 2009–2014.](image-url)
of vacancies, Obama and Senator Reid have been able to overcome past hurdles regarding minority party confirmation obstruction tactics and quickly affect the overall ideological composition of the lower federal judiciary.

The implications of this are already bearing themselves out in courts and judicial decision-making. As an example, on July 22, 2014, just about 8 months from the November 2013 rule change, a three-judge panel on the D.C. Circuit Court of Appeals ruled in Halbig v. Burwell that the IRS incorrectly interpreted the Obamacare legislation to allow subsidies to purchasers of health insurance through federal exchanges. Almost immediately following the decision, the Obama administration announced its intention to petition the full D.C. circuit, en banc, for a rehearing.

If the court accepts, the full eleven-judge bench will be tasked with deciding whether to endorse or to reject the panel’s decision. But the possibility of en banc endorsement is slim – thanks to Harry Reid (Tuttle 2014).

Of course, this important federal circuit court18 was at the center of the November 2013 firestorm, with the court’s then eight sitting judges evenly split between Democratic and Republican appointees. With the filibuster rule change, three Obama nominees to the court quickly sailed through the Senate, making the court’s composition 7 to 4 in favor of Democratic appointees. And, indeed, when asked whether these events vindicated the use of the nuclear option, Senate Majority Leader Reid responded that based on “simple math, you bet” (Sanchez 2014). The D.C. Circuit’s transformation is likely to be the first of many federal courts where the balance of ideological power is tipped in the liberal direction thanks to the Senate’s procedural reform. At the start of Obama’s presidency only one circuit court had a majority of Democratic-appointed justices – by the fall of 2014 that figure had risen to nine (O’Connell 2015).

The results here provide strong evidence that changes to the Senate’s filibuster have important empirical implications for how the president and Congress work together to appoint judges. The increased rate and speed of nominee confirmations has clear aggregate effects on the overall ideological makeup of the federal judiciary. The 13-month experiment of President Obama and Senate Democrats appointing judges with a lower vote threshold shows that the ideological composition of the federal judiciary is much easier to influence when fewer votes are required for nominee success.

18 “The D.C. Circuit Court of Appeals is universally considered the second most important court in America, both because of the nature of its docket that includes an unparalleled amount of litigation on the scope of federal governmental regulatory authority and because it’s a stepping stone to the High Court” (Goldman, Slotnick and Schiavoni 2013, p. 29).

<table>
<thead>
<tr>
<th>113th Congress Nominees (2013–2014)</th>
<th>Pre-Reform</th>
<th>Post-Reform</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average CF-Score</td>
<td>−0.724</td>
<td>−0.601</td>
<td>−0.123 (−0.984)</td>
</tr>
<tr>
<td>Confirmation Rate</td>
<td>48.889%</td>
<td>79.630%</td>
<td>−30.741% (−4.536)</td>
</tr>
<tr>
<td>Average Time to Confirmation</td>
<td>145.364</td>
<td>129.671</td>
<td>15.693 (1.483)</td>
</tr>
</tbody>
</table>

T-scores for difference of means and z-scores for difference of proportions tests reported in parentheses. *Indicates significance at the 0.05 level.

What is still unknown are the lasting impacts of filibuster reform on the nominating process. After Senate Republicans gained a majority during the current 114th Congress, they chose to maintain the reduced confirmation threshold introduced in 113th Congress. Because Majority Leader McConnell can slow the confirmation of Obama’s nominees by preventing the scheduling of votes on nominees, the advantage that filibuster reform gave to Obama has disappeared. In times of divided government, parties opposing the president will be able to use their control of the Senate to prevent the consideration of presidential nominees regardless of the voting threshold (Ostrander 2015). Only when the president’s party controls the Senate will reduced filibuster thresholds, should they remain in place, allow the president’s allies in the Senate to once again more efficiently place the president’s nominees on federal benches.

Appendix

To examine the robustness of our results reported in the text, Table 2 reports the results of the above for nominees made only within the 113th Congress. As the table indicates, the results are largely consistent with those reported in the text. Confirmation rate and time to confirmation are both sizably impacted following the nuclear option, with rate of confirmation going up and time to confirmation going down. Time to confirmation does not achieve statistical significance, something that is undoubtedly attributable to the small sample size.

19 Once the Senate established a simple majority precedent, it would be difficult for the Senate to return to the previous 60-vote threshold for cloture on presidential nominations (Ostrander 2015).
References


Lesniewski, Niels. 2014a. “Corker Compares Reid’s to Putin.” Roll Call, February 27.


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