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R SHEET ON POST-CLOTURE DEBATE TIME FOR PRESIDENTIAL NOMINATIONS

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BACKGROUND

Republicans in the Senate are threatening to blow up the chamber's rules if their Democratic colleagues do not support a proposal authored by Roy Blunt (R-Mo.) and James Lankford (R-Okla.) to shorten the amount of debate time senators have after cloture has been invoked on presidential nominations for some executive-branch and judicial positions. On Feb. 13, the Rules and Administration Committee approved the Blunt-Lankford proposal on a party-line vote and the measure currently awaits consideration by the full Senate.

By going nuclear to shorten post-cloture debate time, Republicans risk undermining the broader regime represented by the Senate's Standing Rules. It would be the third time in six years that a majority of senators has acted unilaterally in violation of the rules. Each successful use of the nuclear option signals a growing ambivalence among rank-and-file senators regarding the importance of adhering to written rules to regulate the legislative process. As the tactic becomes routinized, the normative barriers surrounding important minority rights like the legislative filibuster are weakened.

Fortunately, the Senate's current Standing Rules already empower a majority of the institution's members to overcome most dilatory tactics after cloture has been invoked on a presidential nominee. Specifically, Senate majorities may shorten the amount of post-cloture time required for most nominees without using the destructive nuclear option by strictly enforcing Rule XXII (i.e., the cloture rule).

CURRENT DEBATE

Thanks to Democrats use of the nuclear option in 2013 to lower the threshold to invoke cloture on all nominations (other than for the Supreme Court) from three-fifths of senators to a "majority-vote," technically, Senate minorities are no longer able to single-handedly block a confirmation vote for a presidential nomination. The 2013 nuclear option eliminated the supermajority filibuster

SUMMARY

- Republicans can speed up the confirmation process by enforcing the Senate's current rules and practices.
- Strictly enforcing the provisions of Rule XXII limits the amount of time senators can filibuster to delay a confirmation vote on a nominee after cloture has been invoked.
- Unlike the nuclear option, a rules-based strategy to overcome obstruction does not undermine the Senate's Standing Rules more broadly.

for most nominations. In 2017, Republicans followed suit, using the maneuver to eliminate the minority's ability to filibuster Supreme Court nominees.

Yet despite these changes, Rule XXII still allows senators to delay the confirmation process after cloture has been invoked. Republicans accuse Democrats of abusing this provision by forcing the maximum amount of time to pass before relenting and allowing the Senate to vote up or down on whether to confirm a nominee.

Notwithstanding this, Democrats are not solely responsible for the recent delay in the confirmation process. Republicans have been unwilling to strictly enforce all of Rule XXII's provisions, choosing instead to work with Democrats to make the slow-down palatable to all senators. However, strict enforcement would make it harder for the Democrats to obstruct by making dilatory tactics more costly. Consequently, delays would be reduced on all but the most controversial nominees.

ACTION ITEMS

The provisions of Rule XXII that govern post-cloture time are as follows: Once the Senate votes to end debate on a nomination, that nominee remains before the Senate "to the exclusion of all other business until disposed of." Rule XXII also limits post-cloture time to no more than thirty

hours and stipulates that “no senator shall be entitled to speak in all more than one hour on [...] the matter pending before the Senate” during that period. Notably, Rule XXII does not require post-cloture time to last for thirty hours; a confirmation vote can occur earlier if no senator wants to speak and is allowed to do so under the rule.

Republicans can speed up the confirmation process for presidential nominees by strictly enforcing these provisions instead of waiving them as they currently do in most circumstances.

Keep the Debate Going

The Senate currently suspends debate after cloture has been invoked on most nominees. Specifically, Republicans ask unanimous consent that the Senate “proceed to legislative session for a period of morning business with senators permitted to speak therein for up to 10 minutes each” (or otherwise move to legislative session to consider other matters) instead of beginning post-cloture debate time on the nominee in question. In other words, instead of keeping the nomination in question pending before the Senate to speed up the confirmation process, Republicans have been seeking Democrats’ permission to suspend consideration. For example, this happened on thirty-one of the forty-eight judicial nominees on which a cloture vote was necessary in 2017 and 2018. Of those, Republicans asked unanimous consent to suspend debate on thirteen nominees *immediately* after the Senate voted to invoke cloture on them. Stopping this practice would force individual Democrats to use their one hour of debate time to speak on the Senate floor in order to delay a confirmation vote.

Stop Setting Votes at the Outset

For most nominees, Senate Republicans set confirmation votes by unanimous consent, usually for the following day and sometimes even several days later, despite the fact that Rule XXII does not require thirty hours to transpire after cloture has been invoked. In doing so, they effectively made thirty hours the minimum, rather than the maximum, time that must elapse before a nominee can be confirmed on an up-or-down vote. When it came to judicial nominees, Republicans locked-in votes on forty-three of the forty-eight nominees on which a cloture vote was necessary in 2017 and 2018.

Force Senators to Speak

Republicans also waive Rule XXII when they ask unanimous consent that all time during recess, adjournment, morning business and leader remarks count post-cloture for the nominee in question. Under the Senate’s rules,

post-cloture time is only required if a senator wants to speak. By letting such time run when the Senate is not in session, Republicans make it possible for Democrats to delay nominees without speaking. For example, Republicans did so on forty-two of the forty-eight nominees on which a cloture vote was necessary in 2017 and 2018.

Allow the Presiding Officer to Call a Vote

Republicans also delay the confirmation process by preventing the Senate’s presiding officer from calling a vote whenever a member is not speaking. According to the Senate’s current practices, the presiding officer must request a vote whenever a senator finishes speaking and no other senator seeks recognition. Yet Republicans routinely prevent the presiding officer from doing so when they suggest the absence of a quorum at the end of their speeches. This effectively suspends the Senate’s business until another senator comes to the floor to speak. While the Senate is in a quorum call, the presiding officer cannot call a vote on the nominee under consideration. For example, Republican senators ended their speeches by suggesting the absence of a quorum during post-cloture time on judicial nominations on 46 different occasions over the past two years.

If Republicans want to speed up the confirmation process for presidential nominees, they can do so by strictly enforcing these provisions instead of waiving them as they currently do in most circumstances.

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