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Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings

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December 6, 2013

Congressional Research Service
7-5700
www.crs.gov
R43331

CRS REPORT
Prepared for Members and
Committees of Congress

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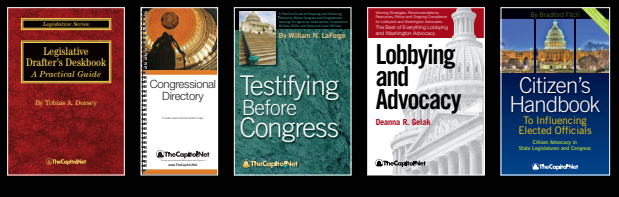

Summary

On November 21, 2013, by overturning a ruling of the chair on appeal, the Senate set a precedent that lowered the vote threshold required by Senate Standing Rule XXII for invoking cloture on most presidential nominations. The precedent did not change the text of Rule XXII of the Standing Rules; rather, the Senate established a precedent reinterpreting the provisions of Rule XXII to require only a simple majority of those voting, rather than three-fifths of the full Senate, to invoke cloture on all presidential nominations except those to the U.S. Supreme Court.

The precedent does not eliminate the potential need for a cloture process for the Senate to reach a vote on a contested nomination. The time required to invoke cloture on a pending nomination remains as it was before the precedent. Specifically, nominations are still subject to Rule XXII's requirement that (1) a cloture motion filed on a pending nomination lie over for two days of Senate session prior to the cloture vote, and (2) the nomination be subject to an additional 30 hours of post-cloture consideration prior to a vote on confirmation. For the 113th Congress only (pursuant to S.Res. 15), this post-cloture time limit is eight hours for most nominations and two hours for U.S. District Court judges; the limit is still 30 hours for high level executive nominations and the top judicial positions (see **Table 1**).

The only direct effect of the new precedent is to change the vote threshold by which the Senate can invoke cloture (and thereby eventually reach a vote) on these nominations from three-fifths of the Senate to a numerical majority of Senators voting (with a quorum present). However, to the extent that the change may effectively limit the floor leverage of Senators opposing a nomination, there may be implications for the pre-floor stages during which nominations are vetted.

In addition, the parliamentary circumstances under which the November 21 precedent was set will likely be examined for their implications for future attempts to change Senate procedures. A key element of the feasibility of such action is whether a Senate majority in favor of change can reach a vote to establish new procedures in the face of opposition. Reaching a vote to reinterpret existing rules, in a contested situation, might rely on steps that are novel or potentially are in contravention of existing rules and precedents; in addition, the effects of such actions could also undermine the existing procedural prerogatives available to Senators. Such proceedings have sometimes been called the "nuclear option." In this context, an important feature of the proceedings of November 21 was the inability of opponents to extend debate on the appeal of the chair's ruling.

This report explains the procedural context within which the precedent was set and addresses the precedent's effects on floor consideration of nominations (as well as noting other potential effects on the nominations process). In addition, since the parliamentary circumstances under which the precedent was set fall within proceedings often called the "nuclear option," the report concludes by briefly noting the precedent's relevance for future proposals to alter or reinterpret Senate rules through the establishment of new precedent. An **Appendix** details the key procedural steps by which the precedent was set. This report will be updated if events warrant, or to add citations to additional CRS reports that address related issues.

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Introduction

In recent Congresses, renewed attention has been paid to the rules and practices of the Senate that allow committed Senate minorities (or individuals) to delay or prevent a vote on pending business unless a supermajority can successfully use the cloture process to reach a vote. Various proposals to change Senate rules in relation to extended debate and the use of cloture, among other issues, have been discussed; some of these proposals have been debated on the Senate floor, and some changes to the Standing Rules (as well as new temporary orders) have been adopted by the Senate.[1] However, since reaching a vote on a contested proposal to amend the Senate Standing Rules likely would require, under Rule XXII, invoking cloture with the support of two-thirds of Senators voting, some supporters of change have advocated making changes to Senate procedure instead by establishing a new precedent (basically, a reinterpretation of the rules). Some Senators and outside observers have used the term "nuclear" to describe such proceedings, in part because they might rely on steps that are novel (potentially in contravention of existing rules and precedents), or because they could undermine the prerogatives exercised heretofore by Senate minorities or individual Senators.[2]

Some discussion of possible proceedings of this kind has focused chiefly on Senate consideration of presidential nominations to the executive branch and/or the federal judiciary.[3] So-called "nuclear" floor proceedings were publicly contemplated in 2005 in relation to judicial nominations;[4] in July 2013 similar actions were discussed in relation to presidential nominations to executive branch positions.[5]

On November 21, 2013, the Senate took actions to address concerns about both executive branch and judicial appointments (with the exception of nominations to the Supreme Court). Specifically, the Senate reinterpreted the application of Senate Rule XXII to floor consideration of presidential nominations by overturning a ruling of the chair on appeal. For nominations other than to the Supreme Court, the new precedent lowered the vote threshold by which cloture can be invoked—

[1] For discussion of selected proposals introduced, and in some cases, considered in recent Congresses, see CRS Congressional Distribution Memorandum, *Proposals to Change Senate Rules Submitted on January 3, 2013*, by Valerie Heitshusen and Elizabeth Rybicki (available from either author), CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by Christopher M. Davis and Valerie Heitshusen, and CRS Report R42928, *"First Day" Proceedings and Procedural Change in the Senate*, by Valerie Heitshusen. For an analysis of changes adopted at the outset of the 113th Congress, see CRS Report R42996, *Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki. In addition, in the 112th Congress, changes in the scope and process of Senate confirmation were enacted in law, as well as implemented via a Senate standing order. See P.L. 112-166 and S.Res. 116 (112th Congress). For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

[2] For extensive analysis of the issues raised by potential "nuclear" proceedings, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth.

[3] Indeed, in the 112th Congress, changes in the scope and process of Senate confirmation were enacted in law, as well as implemented via a Senate standing order. See P.L. 112-166 and S.Res. 116 (112th Congress). For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey. Some implications of the new precedent in relation to procedures established by S.Res. 116 are discussed under "Other Potential Effects on Presidential Nominations," below.

[4] For an analysis of immediate effects of the 2005 discussions, see archived CRS Report RS22208, *The "Memorandum of Understanding": A Senate Compromise on Judicial Filibusters*, by Walter J. Oleszek.

[5] For related floor debate, see, for example, *Congressional Record*, July 11, 2013, daily edition, pp.S5628-5637 and S5653-S5659.

from three-fifths of the Senate to a simple majority of those voting, thereby enabling a supportive majority to reach an "up-or-down" vote on confirming a nomination. Reaching a confirmation vote, however, still requires either unanimous consent or a successful cloture process, as detailed further below.

Senate Floor Consideration of Nominations: Rule XXII and Temporary Modifications

The vote threshold by which the Senate can confirm a presidential nomination is, and has always been, a numerical majority of those voting (provided a quorum is present). However, floor consideration of any nomination is subject to no general time limits under Senate rules, and those rules provided no mechanism by which a simple majority could end or even limit consideration and bring the Senate to a vote. While the Senate frequently agrees by unanimous consent to vote on a pending nomination, Senators opposing a particular nomination often have been able to delay or prevent a numerical majority from reaching such a vote.

History and Operation of Rule XXII in Relation to Nominations

Paragraph 2 of Senate Rule XXII (also known as the "cloture rule") provides a process by which a supermajority of the Senate can vote to limit further consideration of a pending question. When the rule was adopted in 1917, the cloture process applied only to legislation. However, in 1949, the Rule was amended so that cloture could also be filed in relation to nominations, thereby making it possible for a supermajority to limit further consideration of a nomination and proceed to a vote.[6] However, not until 1968 was a cloture motion filed in relation to a nomination.[7] Since 1975, the Rule's supermajority threshold by which cloture could be invoked on a pending nomination (or any other question other than in relation to a proposed change to the Senate standing rules) has been three-fifths of the Senate (60, unless there is more than one vacancy in the chamber). As on legislation, a cloture motion filed on a nomination under Rule XXII receives a vote after two days of Senate session. The text of the Rule provides that, if on that vote the requisite supermajority supports cloture, the Senate will—after no more than 30 hours of consideration—vote on the pending question, with final approval subject to only a simple majority vote.

Notably, unlike the process by which the Senate agrees to bring legislation to the floor for initial consideration,[8] the procedures by which the Senate can bring up a nomination (that is, make it

[6] The amendment to Rule XXII in 1949 appears to have turned on issues unrelated to nominations. Extending the cloture process to "any measure, motion, or other matter pending before the Senate" was proposed chiefly to allow a debate limit on motions to proceed to the consideration of a bill or other measure, as well as on other pending questions (e.g., a motion to amend the *Journal*). See U.S. Senate, Committee on Rules and Administration, *Senate Cloture Rule*, committee print, 112th Cong., 1st sess., S.Prt. 112-31 (Washington: GPO, 2011), pp. 20-21 and 189-192 for additional detail.

[7] See CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development*, by Richard S. Beth, for the historical use of cloture on nominations.

[8] Except in limited circumstances under ruling-making statutes (e.g., bringing up a budget resolution or reconciliation bill under the terms of the Congressional Budget Act), proceeding to initial consideration of legislation requires either unanimous consent, or agreement to a debatable motion to proceed. That is, absent unanimous consent, the Senate may need to successfully use a cloture process to reach a vote not only on the measure itself, but also on the motion to (continued...)

pending for floor consideration) do not, in current practice, rely on the provisions of Rule XXII. Specifically, by precedent, the motion to go into executive session and proceed to consider a specific item of business on the Executive Calendar (i.e., a nomination or treaty) is not subject to debate.[9] As a result, reaching a vote on the motion does not require a cloture process, so a simple majority of those voting can agree to bring up the nomination without requiring a supermajority to invoke cloture in order to limit debate on the question of bringing up the nomination.[10]

Note, however, that the Senate (except by unanimous consent) cannot consider multiple nominations *en bloc*; in addition, paragraph 2 of Rule XXII provides that once cloture has been invoked on any pending question, the question "shall be the unfinished business to the exclusion of all other business until disposed of." This means that the Senate can consider nominations only sequentially, absent unanimous consent to do otherwise. Cloture motions can be filed on multiple nominations, effectively allowing the two-day layover period before a vote on cloture to lapse concurrently on each nomination.[11] However, once the Senate invokes cloture on one nomination, it cannot vote on cloture on any other nomination until the expiration of the post-cloture time (and a final vote) on the first nomination; in other words, processing multiple contested nominations requires the use of any *post-cloture* time in sequence, not concurrently.

Temporary Modification to Cloture on Nominations for 113th Congress

In January 2013, after extended deliberations about proposed changes to its Standing Rules and procedural practices, the Senate adopted S.Res. 15—a standing order that governs certain floor proceedings, but that expires at the end of the 113th Congress. The standing order did not change the process of invoking cloture provided by Rule XXII; rather, for certain nominations, Section 2 of S.Res. 15 provides only for different *post-cloture* limits on consideration from those provided in Rule XXII. Specifically, for the remainder of the 113th Congress, all but the very highest of executive nominations are subject to a maximum of eight hours of post-cloture consideration, and district judge nominations are subject to only two hours, post-cloture. (See **Table 1** below.) All other federal judicial positions, as well as high level executive nominations (effectively cabinet

(...continued)

proceed to the measure. Unless the measure proposes a change to the Senate's Standing Rules, the vote threshold for invoking cloture on a motion to proceed is three-fifths of the Senate.

[9] See *Riddick's Senate Procedure,* Floyd M. Riddick and Alan. S. Frumin, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992) (hereafter *Riddick's*), pp. 941-943, for more detail on these precedents, established in floor proceedings in 1980. For additional information, see "Executive Business" in CRS Report RS20668, *How Measures Are Brought to the Senate Floor: A Brief Introduction*, by Christopher M. Davis; for a longer discussion, see "Floor Procedures" in CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

[10] In practice, the Senate agrees to unanimous consent requests (typically propounded by the majority leader or his designee) to proceed to executive session to take up a nomination on the Calendar; this practice is common since any Senator opposing the nomination knows that a majority could prevail on the motion to proceed if unanimous consent to proceed could not be secured. Absent unanimous consent, however, the Senate would have to vote on the motion, as well as on the subsequent motion to return to legislative session (an action that is also typically taken pursuant to a unanimous consent request).

[11] Absent unanimous consent to combine the required procedural steps, the Senate would instead agree to enter executive session and proceed to a specific nomination; the leader would file cloture on this nomination. Then the Senate would agree to return to legislative session and the leader would repeat the steps for the next nomination, and so on.

level), remain subject to up to a 30 hours of post-cloture debate, as provided for under Rule XXII.[12]

Table 1.Maximum Number of Hours of Post-Cloture Consideration of Nominations in the 113th Congress

Pursuant to S.Res. 15 and Senate Rule XXII

Nomination	Maximum Consideration
U.S. district courts	2 hours
Courts with fixed terms, such as the court of claims, the tax court, and presumably the territorial courts	8 hours
All executive branch positions except 21 high level positions	8 hours
21 high level executive branch positions, including the head of each executive department[a]	30 hours
The Supreme Court, the U.S. Circuit Courts of Appeals, and the U.S. Court of International Trade	30 hours

Source: CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

Notes:

a. The standing order excludes positions "at level I of the Executive Schedule under section 5312 of title 5, United States Code," which, in addition to the 15 heads of departments (14 Secretaries and the Attorney General), includes the United States Trade Representative, the Director of the Office of Management and Budget, the Commissioner of Social Security, Social Security Administration, the Director of National Drug Control Policy, the Chairman of the Board of Governors of the Federal Reserve System, and the Director of National Intelligence.

The November 21 Precedent: Some Effects and Implications

Reinterpretation of Rule XXII

The precedent set on November 21, 2013, did not change the text of Rule XXII of the Standing Rules.[13] The Senate applies its rules to specific situations in accordance with its precedents, most recently compiled as *Riddick's Senate Procedure*, cited earlier. Senate precedents are effectively an identification of instances in which the Senate established or applied a particular understanding of the actions that its rules preclude or allow in specific circumstances. The non-partisan Parliamentarian relies on these precedents to advise the presiding officer on how to

[12] See CRS Report R42996, *Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki, for more information.

[13] For the Senate to invoke cloture on a proposal to amend the text of the standing rules (Rule XXII or any other standing rule) requires—under paragraph 2 of Rule XXII—the support of two-thirds of those voting on cloture; this remains the case, as the Senate did not consider a proposal to amend the text of Rule XXII or any other standing rule.

enforce and apply the rules, as well as how to respond to points of order from Senators seeking to enforce the rules (or in response to parliamentary inquiries seeking to elucidate the rules' effects). Through action on any appeals of rulings of the chair or submitted points of order, however, the Senate itself is the final authority on the interpretation and application of its rules.[14] In summary, in floor proceedings on November 21, the Senate established a new *precedent* by which it has reinterpreted the provisions of Rule XXII to require only a simple majority to invoke cloture on most nominations.

Effect on Senate Floor Consideration of Nominations

The effect of the Senate's new precedent is to lower the vote threshold by which cloture can be invoked on a nomination other than to the U.S. Supreme Court from three-fifths of the Senate to a simple majority of those voting, thereby enabling a supportive simple majority to reach an "up-or-down" vote on confirming the nomination. The new precedent, however, does not expedite the cloture process. Absent unanimous consent to arrive at a vote, once the Senate proceeds to a nomination, a cloture motion can be filed on the nomination, but the Senate still will not vote on the cloture motion until the second day of Senate session after the cloture motion is filed (unless the Senate unanimously consents to schedule the vote earlier). The Senate can, however, turn to other business during the two days of session that elapse prior to the cloture vote.

Under the new precedent, for the Senate then to limit debate on a nomination requires only a simple majority of those voting on cloture (unless the nomination is to the Supreme Court). Once cloture has been invoked, the nomination remains subject to post-cloture consideration, which, for the 113th Congress is a maximum of 2, 8, or 30 hours, depending on the nomination (see **Table 1**). In future Congresses, the post-cloture consideration limits will revert back to 30 hours for all nominations, unless the Senate provides otherwise. In addition, Rule XXII still prohibits consideration of other business (except by unanimous consent) during this post-cloture period; therefore, multiple nominations can still only be processed sequentially. In sum, the new precedent did not change existing requirements for floor time to complete a cloture process and reach a vote on a pending nomination.

Under previous practice, the Senate was already able to proceed to executive session and *proceed to consider* a nomination with the support of only a numerical majority. The new precedent now allows that same supportive majority to employ the cloture process to proceed to a vote on *confirming the nomination*. As a result, a simple numerical majority can now take actions to reach the final vote on a nomination, when before only three-fifths of the Senate could agree to limit consideration and reach a vote.[15]

Other Potential Effects on Presidential Nominations

Broader effects of the November 21 precedent cannot yet be fully assessed, but the precedent could have implications for elements of the nomination and confirmation process that occur prior to floor consideration. Under current Senate practices, the only nominations that the Senate can,

[14] See CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

[15] Time spent on a series of nominations on the Calendar could still effectively be reduced by filing cloture motions essentially "back-to-back," such that the two-day layover on the motions occurs concurrently. Absent unanimous consent, however, post-cloture time still cannot elapse concurrently on more than one nomination.

by majority vote, proceed to consider, invoke cloture on, and confirm, are those that appear on the Executive Calendar. For judicial and most executive branch nominations, only those reported by committee are placed on the Executive Calendar;[16] except by unanimous consent, the Senate has treated these nominations as eligible for floor consideration only after being favorably reported by committee.[17] Before the new precedent, opponents of these nominations might have focused their opposition on floor consideration, aware of the supermajority threshold for invoking cloture on the nomination. The new lower (majority) threshold for cloture now might induce opponents to oppose such nominees more frequently in committee, since those not reported out of committee effectively can be considered on the Senate floor only by unanimous consent.[18]

Pursuant to S.Res. 116, a Senate standing order adopted in the 112th Congress, the process is somewhat different for 272 positions in cabinet departments, certain advisory boards, and independent agencies.[19] S.Res. 116 provides a process by which these "privileged" nominations can be placed on the "Nominations" portion of the Executive Calendar, and thereby made eligible for floor consideration, without being first referred to and reported by committee—but only as long as no Senator requests that a nomination be referred. So while these nominations can potentially become eligible for floor consideration without committee action, any Senator can require that they be instead referred to committee—thereby effectively requiring the nomination to be reported by committee before floor consideration. In sum, the potential effects of the new precedent on pre-floor action are effectively the same for all nominations (whether "privileged" under S.Res. 116, or not), except for those to the Supreme Court.

In addition, while the lower threshold for cloture on nominations will remain in effect until the Senate takes further action to alter it, the reduction in the limits on post-cloture consideration for certain nominations (pursuant to S.Res. 15, 113th Congress) will revert back to 30 hours in the 114th Congress (2015-2016). At the time the standing order was agreed to, Senators understood

[16] Under Rule XXXI, proceeding to such a nomination is not in order until it has been on the Calendar for one calendar day. Bills and joint resolutions, under Rule XIV, can be placed directly on the legislative calendar without first being referred to and reported by committee. Rule XIV does not provide a process by which nominations can similarly reach the Executive Calendar without committee referral.

[17] Senate Rule XVII allows a Senator to submit a motion or resolution to discharge a committee from consideration of a nomination. Such a motion or resolution would itself be subject to debate and potentially to a cloture process. The Senate does not, in current practice, employ a discharge procedure in relation to nominations, except in agreeing to unanimous consent to discharge a committee from consideration of a noncontroversial nomination.

[18] The general procedures and practices that apply to all committee meetings and actions (e.g., quorum rules, notice requirements) are, in some areas, prescribed in Senate Rule XXVI and other standing rules. (See CRS Report 98-311, *Senate Rules Affecting Committees*, by Valerie Heitshusen.) However, other relevant procedures vary by committee, based on the respective rules and practices of each. Several committees have specific committee rules and practices in regard to their consideration of nominations, in particular. For example, one prominent informal practice of the Senate Judiciary Committee on certain judicial nominations is in regard to "blue slips," by which Senators from a nominee's state weigh in on the nomination. (See CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Barry J. McMillion and Denis Steven Rutkus.) The section on "Committee Procedures" in CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki, provides an overview of the various procedures relevant to committee consideration of nominations. Additional information about specific committee procedural requirements is found in CRS Report 98-337, *Senate Committee Hearings: Scheduling and Notification*, by Valerie Heitshusen, CRS Report 98-775, *Quorum Requirements in the Senate: Committee and Chamber*, coordinated by Elizabeth Rybicki, CRS Report 98-711, *Senate Rules for Committee Markups*, by Walter J. Oleszek, and CRS Report RS22952, *Proxy Voting and Polling in Senate Committee*, by Christopher M. Davis.

[19] Appendix B of CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey, provides a list of these "privileged" nominations. The report also provides additional analysis of the expected effects of S.Res. 116 (112th Congress).

that the support of three-fifths of the Senate was potentially necessary to reach confirmation votes. Accordingly, the November 21 precedent could affect the likelihood that the standing order will be renewed. Particularly if the standing order is not renewed, Senators will need to continue to negotiate unanimous consent agreements to process routine nominations swiftly.

Finally, the process by which the President selects nominees may be now influenced by the understanding that nominees considered on the floor in the future can receive a vote with only the support of a numerical majority. In the past, many nominees may have been selected with an eye towards the possible need for supermajority support.[20]

Effect on Future Proposals to Change Senate Rules or Practices

The procedures by which the precedent was set also may have implications for future proposals to alter Senate rules or their application. A key procedural detail on which the November 21 proceedings turned was the inability of opponents of these proceedings to extend debate on the appeal of the chair's ruling. Under Senate practice, appeals are typically subject to no debate limit except in a post-cloture environment; therefore, overturning a chair's decision on appeal in the face of sustained opposition typically would require a successful cloture process (and therefore a supermajority vote) to reach a vote on the appeal.

The appeal of note in the events of November 21, however, was in relation to a non-debatable question (the cloture motion) and the appeal was therefore treated as itself being non-debatable;[21] this allowed the Senate to reach a vote on the appeal immediately. Since the practicability of proposed "nuclear" proceedings has often turned on the Senate being able to reach a vote to establish new procedures in a contested situation, the parliamentary circumstances under which the new precedent was set will likely be examined for their implications for future attempts to change Senate rules or the Senate's interpretation and application of them. CRS Report CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth, provides a detailed examination of the complications presented by certain procedural paths by which the Senate might consider changing its rules, with specific attention to the significance of debate limits (or lack thereof) on questions that may be raised during contested floor proceedings.

[20] Various CRS reports address the process and history of presidential appointments. Reports addressing executive branch appointments can be found on the CRS webpage; see the "Executive Branch Appointments" portion of the Federal Government section of *Issues Before Congress*. For CRS reports addressing judicial branch appointments, see the "Judicial Branch Appointments" portion of the Federal Government section of *Issues Before Congress*.

[21] *Riddick's*, p. 726 states that "appeals arising in connection with a non-debatable motion" are not debatable. The November 21 proceedings appear to be the first time an appeal was made between a reconsideration motion and a cloture vote.

Appendix. Procedures by Which the Senate Set New Precedent in Relation to Cloture on Nominations

On October 28, 2013, the Senate agreed to a motion by Majority Leader Harry Reid (NV) that the Senate proceed to Executive Session to consider the nomination of Patricia Ann Millett to be United States Circuit Judge for the District of Columbia Circuit; the majority leader immediately filed cloture on the nomination. On October 31, the Senate failed to invoke cloture on the Millett nomination, 55-38; immediately after the vote, the majority leader entered a motion to reconsider the vote by which cloture had not been invoked.[22]

On November 21, 2013,[23] the majority leader moved to proceed (that is, asked the Senate to take up) the motion to reconsider the failed October 31 cloture vote on the Millett nomination. Since the question on which reconsideration was proposed—that is, a cloture motion—is itself not subject to debate, the motion to proceed to the reconsideration motion was also not subject to debate; therefore, after the yeas and nays (i.e., a rollcall vote) were requested and ordered, the Senate voted immediately on the motion to proceed to the reconsideration motion; the motion to proceed was agreed to, 57-40.[24]

Having thus taken up the reconsideration motion, the majority leader moved to reconsider the failed cloture vote; this question of whether or not to reconsider the failed cloture vote was also not subject to debate. After rejecting an intervening motion to adjourn made by Minority Leader Mitch McConnell, the Senate voted to reconsider the cloture vote, 57-43 (thus agreeing to bring the cloture motion back before the Senate).[25]

The majority leader then raised a point of order that "the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote."[26] Consistent with the provisions of paragraph 2 of Rule XXII that provide for a three-fifths vote on cloture (in relation to all questions except a proposal to amend the text of the Senate standing rules), the chair ruled against the point of order. The majority leader appealed the ruling of the chair. Since this appeal was in relation to a non-debatable question (the cloture motion), the appeal itself was therefore treated as non-debatable. After the chair responded to a series of parliamentary inquiries from the minority leader, the Senate voted on the appeal; 52 Senators voted to overturn the ruling and 48 voted to sustain the chair.[27]

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[22] Supporters of cloture sometimes enter a motion to reconsider a failed cloture vote so as to allow for a second vote on cloture without having to file a new cloture motion and wait for it to lie over for two days. (A motion to reconsider a vote can only be entered by a Senator voting on the prevailing side or did not vote; this explains why the majority leader, even when he presumably supports cloture, may vote against the motion if he expects it to fail.) See additional explanation in CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Valerie Heitshusen, p. 10. See also Senate Rule XIII, and *Riddick's* pp. 1124-1149.

[23] The floor proceedings of November 21, 2013, summarized here are found on pages S8416-S8418 in the daily edition of the *Congressional Record*.

[24] Senate Roll Call Vote #239.

[25] Senate Roll Call Vote #241.

[26] *Congressional Record*, November 21, 2013, daily edition, p. S8417.

[27] Senate Roll Call Vote #242. The question the Senate votes on is "Shall the decision of the Chair stand as the judgment of the Senate?" so that this vote—in which the nays prevailed with 52 votes—was a vote to overturn the chair's ruling.

After the vote, the minority leader raised a point of order that the three-fifths threshold provided for in Rule XXII applies to invoking cloture on a nomination. The chair ruled against the point of order, based on the precedent just set via vote on the previous appeal. The minority leader appealed the ruling of the chair, but the Senate sustained the ruling, 52-48.[28]

Finally, the chair then laid the cloture motion before the Senate. No debate being in order on the cloture motion, the Senate then re-voted on the failed cloture motion, agreeing to it 55-43.[29] Based on the precedent just set by the Senate providing that a numerical majority was sufficient for invoking cloture on certain nominations (of which the Millett nomination was one), the presiding officer announced that the motion was agreed to. The Senate then continued proceedings on the nomination, but in post-cloture time (which, under Rule XXII, is limited to 30 hours of consideration).

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Acknowledgments

The author thanks her CRS colleagues, Richard S. Beth, Christopher M. Davis, Walter J. Oleszek, and Elizabeth Rybicki for helpful comments.

[28] Senate Roll Call Vote #243.

[29] Senate Roll Call Vote #244.

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