

Judicial Selection, Appointments Gridlock, and the Nuclear Option*

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I. INTRODUCTION

The recent history of the selection process for federal judges has revealed a rich set of problems for theoretical and normative analysis. In recent presidential administrations, a number of judicial vacancies have remained unfilled for extended periods of time, as judicial nominations have been bottled up in committee, “blue slipped,”¹ or filibustered. We call this phenomenon “appointments gridlock”. Not only has appointments gridlock resulted in heated political rhetoric and substantial academic commentary; it has also resulted in a very interesting and potentially important set of moves and countermoves, including the Senate Majority Leader’s threat to deploy what has become known as the “nuclear option” and the resulting emergence of the so-called Gang of Fourteen, a group of senators—seven Republicans and seven Democrats—who reached an agreement that committed the Democrats to allow floor votes on specified nominees who had been filibustered, and not to filibuster future nominees except in “extraordinary circumstances,” in exchange for an agreement not to pursue the nuclear option—namely, the abolition of the judicial filibuster by simple majority vote.²

1. See *infra* Part II.B.2 (discussing the “blue slip”).

2. See *infra* Part II.B.4 (discussing the “nuclear option”).

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In this Article, we employ approaches developed by political scientists in the context of legislative studies to identify the causes of appointments gridlock and the consequences of the nuclear option. Formal studies of the federal legislative process have emphasized the extent to which the distribution of veto and veto override power shapes legislative outcomes and determines the incidence of gridlock. It is our premise that the judicial appointments process, no less than the legislative process, is characterized by various forms of veto and veto override power that drive the possibility of appointments gridlock in analogous fashion. In the context of federal judicial selection, a simple majority of senators can veto the President's proposal for a judicial vacancy by voting down the nominee. A minority can also exercise veto power over judicial nominees by use of the filibuster. A filibuster can be overt, as in the form of extended debate on the floor of the Senate that prevents a confirmation vote, or it can merely be implied, as when the tradition of senatorial courtesy is invoked with the unspoken but real backing of a filibuster threat. These forms of minority veto power are, in turn, subject to enduring override in the form of the nuclear option.

Although some have professed shock and dismay at overt exercises of the filibuster veto,³ the obstruction of judicial nominees by a legislative minority or, indeed, individual senators is historically commonplace, to the point that it has been institutionalized in Senate practice for some time now.⁴ To political scientists in particular, it is wholly unsurprising that political actors use whatever means are at their disposal to advance

3. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 188 (2003) [hereinafter Cornyn, *Our Broken Judicial Confirmation Process*] (arguing that "the filibusters of judicial nominations have never been a part of Senate tradition before," and that "current usage" of the filibuster against judicial nominees is "an abomination"); John Cornyn, *Obstruction and Destruction Plague Judicial Nominees*, L.A. TIMES, Nov. 12, 2003, at B11 (asserting, inter alia, that "[n]o judicial nominee who has enjoyed the support of a majority of senators has ever been denied an up-or-down vote—until now"); C. Boyden Gray, *End Abuse of Filibuster*, USA TODAY, Apr. 26, 2005, at 10A (objecting that "[j]udicial filibusters of majority-supported nominees have never been part of the Senate's tradition").

4. See, e.g., David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 491-500 (2005) (describing, inter alia, the ability of the Senate Judiciary Committee to kill judicial nominations, the institutionalization of senatorial courtesy in the form of the "blue slip," and the regularity with which federal judicial nominations have historically been blocked or defeated).

their policy goals: use of the filibuster by contrary-minded legislators to block judicial nominees is nothing more than rational goal-oriented behavior. Earlier work by political scientists on the legislative process has established that the greater the number of political actors with veto power, the greater the tendency toward legislative gridlock.⁵ Building upon this work, we argue that the judicial selection process is, like the legislative process, highly prone to gridlock owing to the number of veto players with the ability to block movement of the status quo, even in times of unified government. We then test our theory by using it to explain historical variations in the level of judicial appointments gridlock, from the presidency of Gerald Ford through the current administration of George W. Bush. Finally, we extend our analysis to address the consequences of the nuclear option. We conclude that the threat of abolishing judicial filibusters reduces, but does not eliminate, the overall propensity of the selection process toward gridlock. Moreover, a senator who can credibly threaten to cast the last vote needed to invoke the nuclear option is likely to enjoy disproportionate influence. Moderate senators have reason to compete for this influential role and may find it in their best interest to bargain as a group with the minority. The full extent of their influence will, however, depend upon their ability to deceive their opposition.

This Article unfolds in six parts, of which this introduction is Part I. In Part II, *The Legal Framework for Judicial Selection*, we explore both the constitutional provisions and the Senate rules and customs that bound the judicial selection process. Part III, *The Premises of the Model*, discusses the analytical assumptions underlying our depiction of the judicial selection process in the form of a simple spatial model that can be easily understood and manipulated. The heart of the Article is found in Parts IV and V. In Part IV, *A Pivotal Politics Model of the Judicial Selection Process*, we set forth our model, apply it to the actual history of federal judicial selection over the last thirty years, then adapt it to the prospect of the nuclear option. Part V, *Presidential Nomination Strategy in the Shadow of the Nuclear Option*, evaluates the President's strategic alternatives in the aftermath of the truce that has for now forestalled the

5. See, e.g., GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 19-37 (2002) (explaining why "policy stability," or the difficulty of significant change in the status quo, "increases in general with the number of veto players"); Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in PRESIDENTS, PARLIAMENTS, AND POLICY 61-63 (Stephen Haggard & Mathew D. McCubbins eds., 2001). Where one veto player's preferences are wholly subsumed within those of another, however, the preferences of the subsumed player should in practice be inconsequential to the outcome. See TSEBELIS, *supra*, at 26-29 (discussing the "absorption rule").

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exercise of the nuclear option. Finally, in Part VI, *Conclusion: Debunking the Conventional Wisdom*, we recapitulate our various challenges to the folk wisdom surrounding judicial selection and offer some thoughts on what lies ahead.

II. THE LEGAL FRAMEWORK FOR JUDICIAL SELECTION

The process by which federal judges are selected is bounded by a legal framework that defines the various options available to political actors. Here we outline that framework, beginning with the Constitution and then moving to a consideration of the internal procedures of the Senate.

A. *The Constitutional Structure*

The Constitution establishes the basic framework for the selection of federal judges. The judiciary itself is established by Article III, which provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁶

Importantly, the “good behaviour” clause of Article III has been interpreted to confer life tenure on justices and judges who are nominated by the President and confirmed by the Senate.⁷ Within this constitutional framework, federal statutes set forth the contours of a complex set of judicial institutions, such as the number of seats on the Supreme Court, the existence of the lower federal courts, and the jurisdictions of these courts with respect to one another and to state courts.

Nomination and confirmation of judges and other federal officials are governed by Article II, which gives the President the power to propose and the Senate the power to confirm (or veto) the President’s nominees:

6. U.S. CONST. art. III, § 1.

7. See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1, 65-69 (1989); Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 135-39 (2003); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 692, 696-701 (1999).

He . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁸

Although the Constitution uses the words “nominate,” “Advice and Consent,” and “appoint,” the substance of the clause gives the President the power to propose (or “nominate”) and the Senate the power to veto (by withholding “Consent”). This scheme is the obverse of the legislative process, wherein Congress proposes and the President may veto.

The President enjoys another option under Article II, in the form of the Recess Appointments Clause.⁹ That clause provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.¹⁰

The historical meaning of the Recess Appointments Clause is contested, but contemporary presidential practice has embraced the use of the clause to fill any judicial vacancy that happens to exist during a Senate recess, regardless of whether the Senate was in session when the vacancy first arose.¹¹

B. The Rules and Norms of the Senate

The constitutional framework for the judicial selection process is fleshed out by the rules and norms of the Senate. In particular, the process is shaped by the committee system, the tradition of senatorial “courtesy” as manifested in the form of the “blue slip,” the filibuster, and the nuclear option.

8. U.S. CONST. art. II, § 2, cl. 2.

9. See generally Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 *passim* (2005); see also Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 423-24 (2005).

10. U.S. CONST. art. II, § 2, cl. 3.

11. A good case can be made that the Recess Appointment Clause was intended originally to apply only to vacancies that arise when the Senate is in intersession recess. See Rappaport, *supra* note 9, at 1547-58.

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1. *The Senate Judiciary Committee*

Upon their receipt from the White House, judicial nominations are referred to the Senate Committee on the Judiciary.¹² In practice, the chair of the committee enjoys the power to delay or kill a judicial nomination—by refusing to convene a hearing, for example, or to schedule a committee vote¹³—but this power has never been exercised with respect to a Supreme Court nominee. In theory, a nomination that is “bottled up in committee”¹⁴ can be forced out by a vote of the whole Senate, but in practice this is rare. When a nomination remains in committee, the Senate itself has not “advised” the President, but functionally, when a nomination remains in committee until the end of a Session, the effect is a “veto” of the nomination.

2. *The Blue Slip*

The practice of “blue slipping” is a form of senatorial courtesy, which is in turn a multifarious concept that defies neat definition.¹⁵ The “blue slip” procedure gives the senators from the home state of a judicial nominee the opportunity to express their approval or disapproval of the nominee. The consequences of a senator’s failure to return a “blue slip” or to report favorably upon a nominee have varied over time, a fact that has provoked considerable partisan acrimony in the recent past.¹⁶ Nevertheless, it can safely be said—as the Department of Justice puts it—that “[b]lue slips are generally given substantial weight by the Judiciary Committee in its consideration of a judicial nominee.”¹⁷

12. See United States Senate Committee on the Judiciary, <http://judiciary.senate.gov> (last visited July 30, 2005).

13. See Sarah A. Binder & Forrest Maltzman, *Congress and the Politics of Judicial Appointments*, in CONGRESS RECONSIDERED 297, 303 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005).

14. See, e.g., MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 65 (2000) (describing “bottling up” incident); Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233, 248 n. 48 (2000) (describing “bottling up” incident).

15. See GERHARDT, *supra* note 14, at 143 (identifying the various facets of senatorial courtesy); Law, *supra* note 4, at 493-96 (discussing senatorial courtesy and the “blue slip”).

16. See Law, *supra* note 4, at 494-96 (describing Democratic anger at what were perceived as efforts by Orrin Hatch, then chair of the Senate Judiciary Committee, to rewrite the blue slip rules to Republican advantage).

17. United States Department of Justice, Judicial Nominations, 109th Congress,

3. *The Filibuster*

Confirmation of a judicial nominee requires only a majority vote—fifty-one senators if all are voting. But action on a judicial nomination may effectively be blocked by a filibuster.¹⁸ Senate Rule XXII governs cloture—that is, a vote to end debate. In relevant part, the Rule reads:

Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a ye-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?”

And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.¹⁹

<http://www.usdoj.gov/olp/judicialnominations.htm> (last visited July 30, 2005); *see also*, e.g., WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 245-51, 263 (6th ed. 2004); Brandon Denning, *The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RIGHTS J. 75, 76-78 (2001); Law, *supra* note 4, at 494.

18. There is a large and varied law review literature on use of the filibuster to block judicial nominations. *See, e.g.*, Cornyn, *Our Broken Judicial Confirmation Process*, *supra* note 3, at 211; E. Martín Enriquez, *Tyranny of the Minority: The Unconstitutional Filibuster and the Superimposed Supermajority On The Advice And Consent Clause Of The Constitution*, 21 T.M. COOLEY L. REV. 215, 219-20 (2004); Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 350-51 (2005); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239-45 (1997) (defending the constitutionality of judicial filibusters); Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting The Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1437 (2004); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 546-47 (2005) (discussing the Senate practice of filibustering judicial nominees); Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847, 857, 882 (2005).

19. SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. XXII, at 21 (2d Sess. 2000), *available at* <http://rules.senate.gov/senaterules/rule22.htm>.

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That is, if all senators are voting, sixty votes are required to close debate on a judicial nomination and sixty-six votes are required to close debate on a rule change that would alter the sixty-vote rule. Thus, on its face, Rule XXII has the practical effect of conferring upon any group of forty-one or more senators the power to veto a judicial nomination.

The historical practices of the Senate with respect to judicial filibusters have been the subject of debate. The most prominent episode to date has been the filibuster of Abe Fortas's proposed elevation to the position of Chief Justice in 1968. This filibuster lasted for four days and forced President Johnson to withdraw the nomination after only forty-five senators voted to close debate, with the consequence that the vacancy created by the resignation of Earl Warren was ultimately filled by Nixon's choice of Warren Burger.²⁰ Between the close of the Johnson administration and the midpoint of George W. Bush's first term in office, the Senate would proceed to hold no fewer than fourteen cloture votes on district and circuit court nominations.²¹ A conspicuous recent example involved President Clinton's efforts to appoint then-District Judge Richard Paez to the Ninth Circuit: the Paez nomination languished for over four years before efforts to block the appointment culminated in an actual filibuster attempt on March 8, 2000, which failed when only fourteen Republicans voted against cloture.²²

The current controversy over the filibuster of judicial nominees arose in George W. Bush's first term as President. During that time, Democrats filibustered ten of President Bush's fifty-two circuit court nominees.²³ Three of the nominees targeted by the Democrats—Miguel Estrada, Carolyn Kuhl, and Charles Pickering—chose to withdraw or declined to have their names resubmitted.²⁴ Another six nominees—Priscilla Owen, Janice

20. See Binder & Maltzman, *supra* note 13, at 311; John Massaro, *LBJ and the Fortas Nomination for Chief Justice*, 97 POL. SCI. Q. 603, 604 & n.3, 620 (1982); see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 297-98 (3d ed. 1992); Rizer, *supra* note 18, at 857-58.

21. See Binder & Maltzman, *supra* note 13, at 311.

22. See Cornyn, *Our Broken Judicial Confirmation Process*, *supra* note 33, at 224-25; Jennifer A. Dlouhy, *Parties Use Judicial Standoff to Play to Core Constituents*, 60 CONG. Q. WKLY. 2722, 2727 (2002).

23. See Helen Dewar & Mike Allen, *GOP May Target Use of Filibuster*, WASH. POST, Dec. 13, 2004, at A1.

24. See Bill Frist, *Restoring Fairness and Dignity to the Judicial Confirmation Process*, Speech at Heritage Foundation, June 28, 2005, available at http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech_id=239&Month=6&Year=2005&IsTextOnly=1.

Rogers Brown, William Pryor, David McKeague, Richard Griffin, and Thomas Griffith—were eventually confirmed in a deal to avert the so-called “nuclear option,” to which we shall now turn.

4. *The Nuclear Option*

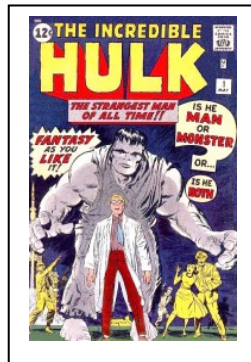
The term “nuclear option” is not well defined, but it usually refers to the use of procedure—in particular, a ruling of the chair sustained by a simple majority—to achieve cloture without the sixty or sixty-six vote supermajority specified by Rule XXII. Though the nuclear option may be executed in a number of ways,

[t]he underlying strategy is that a Republican senator would raise a point of order that the consideration of judicial nominees may not be filibustered, and the chair—most likely Vice President Cheney, in his capacity as President of the Senate—would sustain the point of order. A simple majority vote would then suffice to win any appeal of the chair’s ruling, or to table any objections to the ruling.²⁵

An early version of the nuclear option—then dubbed “Hulk,” after the angry green superhero of comic book fame²⁶—was proposed by Senator

25. David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve than an End to Partisan Conflict over Judicial Appointments*, 39 U. RICH. L. REV. 923, 944 n.57 (2005) (internal citations omitted); see, e.g., Mike Allen & Jeffrey H. Birnbaum, *A Likely Script for the ‘Nuclear Option’*, WASH. POST, May 18, 2005, at A1; Alexander Bolton, *Frist Finger on ‘Nuclear’ Button*, THE HILL (Washington, D.C.), May 13, 2004, at 1, available at <http://www.hillnews.com/news/051304/frist.aspx> (last visited Jan. 22, 2005); Dewar & Allen, *supra* note 23, at A1; Robert Novak, *Byrd’s nuclear option*, TOWNHALL.COM, Dec. 20, 2004, <http://www.townhall.com/columnists/robertnovak/rn20041220.shtml>.

26. See STAN LEE, THE INCREDIBLE HULK, No. 1 (May 1962) (introducing the “Hulk” character):



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Ted Stevens in February 2003.²⁷ The “Hulk” was soon rechristened the “Nuclear Option,” reportedly by fellow Senate Republican Trent Lott.²⁸ The idea of circumventing a filibuster through the use of a ruling from the chair has sometimes been associated with Democratic Senator Robert Byrd’s tenure as majority leader.²⁹ However, such filibuster-busting tactics were first perfected over a century ago by Republican leaders in their efforts to consolidate control over the House of Representatives.³⁰

27. The *Washington Post* offered this account of the origins of the “Hulk”:

Six-term Sen. Ted Stevens is among the Senate’s gruffest members on his best days, but on Feb. 26, 2003, he was downright angry. As Democrats blocked yet another one of President Bush’s judicial nominees, he sat in a wooden chair in the Republican cloakroom and told a group of colleagues and aides, “We can put an end to this now!”

He could march into the chamber, the Alaska Republican told them, assume the presiding officer’s seat and rule that the minority party could not filibuster this or any future judicial nominee. The audacious idea sparked so much excitement that GOP aides dubbed it “the Hulk,” after the fictional green muscleman featured on Stevens’s necktie that night, Stevens confirmed in an interview. For months, “Hulk” was the Republicans’ code word for a dramatic plan they wanted to hide from Democrats.

Jim VandeHei & Charles Babington, *From Senator’s 2003 Outburst, GOP Hatched ‘Nuclear Option’*, WASH. POST, May 19, 2005, at A15.

28. See Bruce Moyer, *Beneath the Filibuster Fracas*, FED. LAW., July 2005, at 14, 14; *Revenge of the Lott*, DAILY KOS, May 25, 2005, <http://www.dailykos.com/story/2005/5/25/11461/1816>.

29. See, e.g., Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 207-08 (2004); The Byrd Option, *The Opinion Journal*, WALL ST. J., Mar. 7, 2005, <http://www.opinionjournal.com/editorial/feature.html?id=110006383>; Novak, *supra* note 25 (claiming that, “during six years as majority leader, Democrat Robert C. Byrd four times detonated the nuclear option to rewrite Senate rules”).

30. See, e.g., GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 55-59* (2005) (describing the iron rule of Republican House Speaker Thomas Reed); DOUGLAS DION, *TURNING THE LEGISLATIVE THUMBSCREW: MINORITY RIGHTS AND PROCEDURAL CHANGE IN LEGISLATIVE POLITICS 125-33* (1997) (chronicling Reed’s abolition of the “disappearing quorum”); Randall Strahan, *Leadership and Institutional Change in the Nineteenth-Century House*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS 237, 255-62* (David W. Brady & Mathew D. McCubbins eds., 2002) (recounting the adoption and impact of the “Reed Rules”); Walter J. Oleszek, *A Pre-Twentieth Century Look at the House Committee on Rules*, Congressional Research Service (Dec. 1998), available at http://www.house.gov/rules/pre_20th_rules.htm (last visited Jan. 22, 2005) (discussing the successful

Although the use of the nuclear option in the context of the Democratic filibuster of George W. Bush's judicial nominations was discussed as early as February 2003, the Senate majority leadership did not take concrete steps to deploy the option until the spring of 2005. Majority Leader Bill Frist reportedly decided to use the option in early May of 2005 in connection with the nomination of Priscilla Owen to the Fifth Circuit.³¹ In reaction to Frist's plan, a group of Senate "moderates," including Senator John McCain and Senator Ben Nelson, began to discuss a compromise. The so-called "Gang of Fourteen"³² agreed upon a "Memorandum of Understanding on Judicial Nominations," which is set out in full in the notes.³³ In substance, the Republican

campaigns waged by Reed, first as a member of the Rules Committee then as House Speaker, to defeat a variety of Democratic filibusters).

31. See Charles Hurt, *Frist plans to use 'option' on nomination of Owen*, WASH. TIMES, May 10, 2005, at A1.

32. In addition to McCain (a Republican) and Nelson (a Democrat), the group also included, on the Republican side, Senators Lindsey Graham, John Warner, Olympia Snowe, Susan Collins, Mike DeWine and Lincoln Chafee; and, on the Democratic side, Senators Joe Lieberman, Robert Byrd, Mary Landrieu, Daniel Inouye, Mark Pryor and Ken Salazar. See Carolyn Lochhead, *Senate Filibuster Showdown Averted*, S.F. CHRON., May 20, 2005, at A1; Charles Hurt, *Nomination Will Test Senate Anti-Filibuster 'Gang,'* WASH. TIMES, July 20, 2005, at A20.

33. The full memorandum reads as follows:

We respect the diligent, conscientious efforts, to date, rendered to the Senate by Majority Leader Frist and Democratic Leader Reid. This memorandum confirms an understanding among the signatories, based upon mutual trust and confidence, related to pending and future judicial nominations in the 109th Congress.

This memorandum is in two parts. Part I relates to the currently pending judicial nominees; Part II relates to subsequent individual nominations to be made by the President and to be acted upon by the Senate's Judiciary Committee.

We have agreed to the following:

Part I: Commitments on Pending Judicial Nominations

- A. Votes for Certain Nominees. We will vote to invoke cloture on the following judicial nominees: Janice Rogers Brown (D.C. Circuit), William Pryor (11th Circuit), and Priscilla Owen (5th Circuit).
- B. Status of Other Nominees. Signatories make no commitment to vote for or against cloture on the following judicial nominees: William Myers (9th Circuit) and Henry Saad (6th Circuit).

Part II: Commitments for Future Nominations

- A. Future Nominations. Signatories will exercise their responsibilities under the Advice and Consent Clause of the United States Constitution in good faith. Nominees should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist.
- B. Rules Changes. In light of the spirit and continuing commitments made in this agreement, we commit to oppose the rules changes in the 109th Congress, which we understand to be any amendment to or interpretation of

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members of the group agreed not to vote for the nuclear option, while the Democrats agreed that three nominees—Janice Rogers Brown, William Pryor, and Priscilla Owen—would receive an up-or-down vote from the full Senate, and pledged that future filibusters of judicial nominees would be reserved for extraordinary circumstances.

III. THE PREMISES OF THE MODEL

Formal modeling resembles algebra or geometry in at least one crucial respect: they are all forms of notation that help us to extrapolate the logical consequences of what we already know or assume to be true.³⁴ The use of such notation requires us to specify our beliefs about the real world in simple spatial or mathematical terms that can be readily manipulated. This is no easy task when the phenomenon to be depicted in formal terms is as complex as the appointment of federal judges. A verbal account may embrace complexity and nuance but, at the same time, can also be ambiguous or imprecise. The process of reducing reality to numbers and diagrams encourages us to articulate, in explicit and unambiguous terms, our beliefs as to how the world works. No theory, verbal or formal, is free of underlying beliefs that operate as assumptions. What a formal model aspires to do is to lay these assumptions

the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII.

We believe that, under Article II, Section 2, of the United States Constitution, the word “Advice” speaks to consultation between the Senate and the President with regard to the use of the President’s power to make nominations. We encourage the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.

Such a return to the early practices of our government may well serve to reduce the rancor that unfortunately accompanies the advice and consent process in the Senate.

We firmly believe this agreement is consistent with the traditions of the United States Senate that we as Senators seek to uphold.

Memorandum of Understanding on Judicial Nominations, reprinted in NAT’L REV. ONLINE, Apr. 23, 2005, <http://www.nationalreview.com/benchmemos/064035.asp>.

34. See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049 (2006) (observing that the purpose of formal modeling is “to make explicit a set of assumptions that seem plausible as a stylized representation of a real-world situation, and to derive their logical implications to see what empirical regularities the assumptions predict and how these predictions change as other variables of interest change”).

bare, and to state their logical implications in the form of predictions that can be tested against reality. The fundamental assumptions underlying the model that we present in this Article concern the identity of the relevant players, and the criteria that they use to evaluate the costs and benefits of the possible outcomes over which they are asked to choose.

A. Who Are the Players: Parties or Legislators?

We identify four crucial players in the judicial appointments game—crucial, in the sense that each has the power either to veto a nominee, or to overcome the veto exercised by another player. First, there is the President, who decides whether someone will be nominated in the first place. Second, there is the median senator, who provides the last vote needed to confirm or defeat a nominee in the case of a simple majority vote on the Senate floor.³⁵ Third, there is the filibuster pivot, or the senator who provides the forty-first vote needed to defeat a cloture vote. As previously discussed, however, filibusters are vulnerable not only to cloture, but also to the nuclear option. The possibility of the nuclear option implies the existence of a fourth crucial player whom we shall call the *nuclear pivot*. As will be explained below,³⁶ the nuclear pivot is the senator who provides the last, or fifty-first, vote needed to invoke the nuclear option. It is possible, but not necessarily the case, that the median senator and nuclear pivot will be the same person: for example, a senator might have ideologically extreme taste in judicial nominees yet also fear the long-term consequences of the nuclear option, in which case he might be the nuclear pivot but not the median senator.

Our model thus assumes that the relevant players in the appointments process are not the Republican and Democratic Parties, but rather individual legislators with preferences that may diverge from those of their respective party leaderships. This assumption is not a trivial one. There is an ongoing debate among political scientists as to whether, and to what extent, political parties actually matter.³⁷ At one extreme, one might treat parties as monolithic political actors endowed with a sense of

35. The median senator may be either the fiftieth or fifty-first senator in support of (or in opposition to) a nominee, depending upon which side the Vice-President takes.

36. See *infra* Part IV.D.1 (discussing the characteristics of the “nuclear pivot”).

37. See, e.g., Simon Jackman et al., *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355, 361-66 (2004) (testing the hypothesis that parties actually influence how individual legislators vote); Barbara Sinclair, *Do Parties Matter?*, in PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS, *supra* note 30, at 36, 36-63 (offering an overview of the debate, and taking the position that “the majority party in the House, through its elected party leaders, uses procedural strategies to affect legislative outcomes”).

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purpose and unity of action. On this view, parties determine the content of legislation (or the composition of the federal bench): a successful roll call or confirmation vote thus reflects the ability of a dominant party to set goals and control outcomes, not the happenstance agreement of fifty-one or more individual senators as to a particular bill or nominee. At the opposite extreme, parties might be viewed merely as collections of individuals who pursue their own self-interest and act in concert only to the extent that they happen to be like-minded.³⁸

The analytical models that we draw upon and apply in this Article fall squarely within this latter school of thought. To be sure, a party's leadership can and does manipulate the agenda and modify the incentives of individual legislators via a combination of carrot and stick. It is a premise of our model, however, that the preferences of individual actors matter more, and parties matter less, than popular discussion of politics tends to imply. In our view, the alignment of the crucial players may track party lines but need not necessarily do so. Even if Republicans are nominally the majority party in the Senate, there is no guarantee that the median senator, the filibuster pivot, and the nuclear pivot will all be Republicans. The extent of their alignment along party lines will depend upon the extent to which parties already consist of likeminded legislators or are capable of exerting discipline over their members. The drama of politics as warfare between clashing armies may better capture the popular imagination—and is certainly easier for journalists to depict, and for voters to follow—than a political world in which loosely aligned individuals exploit obscure procedural rules in pursuit of sometimes disparate aims. But the reality of American politics is not so binary or Manichean. Witness, for example, the power wielded by the Gang of Fourteen, a collection of senators acting independently of—if not in defiance of—their respective party leaderships. The conspicuous inability of the Republican leadership to muster a simple majority in favor of the nuclear option—not to mention the fact that most roll call votes in Congress divide one or

38. See, e.g., KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 4-6 (1997) (noting that roll call votes in Congress “typically split one or both of the parties,” that the effects of “party loyalty” can be difficult to isolate from a legislator’s personal ideological preferences, and that parties reflect “clusters” of ideological preferences “rather than permanently jelled voting blocs”); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 185 (1998) (finding “precious little systematic evidence . . . that the majority party in the Congress is disproportionately powerful at winning pivotal votes, much less noncentrist outcomes”).

both parties³⁹—belies the notion that political conflict is fought and resolved along reliable party lines.

B. The Dimensionality of Conflict Over Judicial Appointments

In assessing judicial candidates, political actors face a range of potentially relevant considerations that include the nominee's intellectual ability, the degree of party loyalty that the nominee has exhibited, the nominee's personal relationship (or lack thereof) with the actor in question, and the nominee's contribution to the demographic diversity of the bench, to name but a few.⁴⁰ Perhaps the most important of these considerations, from the perspective of the typical political actor, is the ideology of the nominee. Yet even ideology, in turn, can be assessed along a number of dimensions, such as abstraction versus particularity or simplicity versus complexity. A nominee might possess a set of positions on specific legislative proposals or judicial decisions, for example, without also holding an overarching view as to the proper balance between national versus local power, or between capital and labor. In the case of judicial nominees, disagreement over policy—of the kind that we assume motivates the relevant actors in the judicial selection process—can further be distinguished from disagreement over judicial philosophy. As the “New Institutionalists” have emphasized,⁴¹ judges can vary not only along a left-right policy dimension, but also along what might be called a realism-formalism dimension.⁴² At one extreme, perfect realists decide cases solely on the basis of political ideology; at the other extreme, perfect formalists decide cases solely on the basis of formal legal materials. On this two-dimensional view of judicial ideology, individual judicial nominees occupy a point on a plane, with formalist-liberals, realist-liberals, formalist-conservatives, and realist-conservatives occupying the points most distant from the center.⁴³

39. See *supra* note 38.

40. See, e.g., GERHARDT, *supra* note 14, at 129 (identifying various criteria that presidents may consider in selecting judicial nominees); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 200-09* (2002) (concluding that a Supreme Court nominee's prospects for Senate confirmation rest upon the interaction of the nominee's qualifications and his or her ideological position); Law, *supra* note 4, at 484 (listing criteria relevant to the selection of judicial nominees).

41. See generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Howard Gillman & Cornell W. Clayton eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell W. Clayton eds., 1999).

42. See Lawrence B. Solum, *Judicial Selection: Ideology versus Character*, 26 CARDOZO L. REV. 659, 666-68 (2005).

43. See *id.* at 668-71 figs.3, 4, 5 & 6, 688 fig.7 (offering graphical illustrations of

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It should not be assumed, however, that political actors actually make multidimensional choices with respect to judicial nominees. Indeed, in a literal sense, it is impossible for them to do so. A senator confronted with a judicial nomination has only two choices: to support or to oppose the nominee. Even in a n -dimensional space defined by a multitude of potentially relevant considerations, there are only two points between which the senator can choose—yes or no—and there is only one geometric structure, in turn, that connects two points—namely, a straight line.⁴⁴ It is a brute fact that, if there are only two choices available, “the effective space in which political choice occurs has only one dimension.”⁴⁵ Unlike a piece of legislation, a judicial nominee cannot be amended to incorporate multiple dimensions of choice: senators cannot give themselves a choice between formalist and realist versions of a liberal candidate, for example, as much as they might prefer to do so.

How, then, do political actors reduce n -dimensional choices to a single dimension in the manner that binary decisions require? The answer to this question lies well beyond the scope of this Article. It is a core insight of cognitive psychology and behavioral economics, however, that people simplify complex choices. The decision to support or oppose a judicial nominee is no exception. A somewhat generous view of human cognitive capacity is required to think that political actors are capable of collapsing all dimensions they consider relevant into a single dimension, or of making binary choices in a way that actually maximizes their aggregate utility over all relevant dimensions. It would not be surprising if even sophisticated actors were instead to focus upon one particularly salient dimension to the exclusion of others, for example, or to resort to some composite dimension that resists precise definition yet is reasonably well understood in practice—the most obvious candidate being the familiar left-right ideological continuum.⁴⁶

Our approach in this Article is to model the behavior of the relevant actors as motivated exclusively by policy preferences that range along a single dimension, from left to right. Political scientists have divided over whether political conflict in the United States can be accurately

the two-dimensional model).

44. See MELVIN J. HINICH & MICHAEL C. MUNGER, *ANALYTICAL POLITICS* 196 fig.9.3 (1997) (illustrating how two choices yield an “effective space for choice” that is a line, whereas three choices yield a choice space that is a plane).

45. *Id.* at 195.

46. See *id.* at 199 (observing that “liberal” and “conservative” ideology have shifting intellectual content but are nevertheless the product of widely shared understandings).

represented as unidimensionally ideological, or whether a multidimensional model is necessary to do justice to reality. The debate is not one that can be resolved here. Suffice it to say, however, that we are in good company in treating conflict over judicial nominations as conflict along a single left-right dimension: the assumption of exclusively policy-driven conflict along a left-right ideological continuum is typical of the relevant political science literature.⁴⁷ This assumption underlies the unidimensional spatial models set forth below in Part IV.

Our premise of a unidimensional policy space is supported by both methodological and substantive considerations. As a matter of methodology, unidimensional models are popular among political scientists for good reason—namely, because they tend to purchase a great deal of analytical clarity at relatively little cost in descriptive accuracy. Multidimensional models of political conflict, by comparison, can suffer from a number of drawbacks. First, they are challenging to use and difficult to understand.⁴⁸ Second, they sometimes lack unique mathematical solutions and produce indeterminate results.⁴⁹ Third, even when they can be solved, they do not necessarily expand upon what can be learned from much simpler models: sophisticated multidimensional models often produce results analogous to those produced by unidimensional models, “but with much more technical complexity.”⁵⁰

As a matter of substance, a unidimensional ideological model of how political actors evaluate federal judicial candidates is justified on several grounds. First, as explained above, binary choices—of the sort that senators face when voting on judicial nominees—are literally unidimensional in nature. Second, we believe that ideology is among the most salient of the criteria that political actors bring to bear on judicial nominees and,

47. See, e.g., POOLE & ROSENTHAL, *supra* note 38, at 5-6, 17-21 (observing that, “[f]or most of American history,” the ideological structure of domestic political conflict “is indeed one-dimensional”); KREHBIEL, *supra* note 38, at 21-22 (assuming, without fanfare, a unidimensional policy space); DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* 14-20 (1998) (applying and extending Krehbiel’s unidimensional “pivotal politics” model of legislative gridlock); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1072-75 (1999) (assuming that conflict over Supreme Court nominations occurs exclusively along a unidimensional policy space).

48. See, e.g., Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 473 (1998) (discussing why unidimensional models are “so much more tractable, both analytically and expositionally, than multidimensional models”).

49. See *id.* (observing that “simple multidimensional models” are prone to produce “unstable” outcomes).

50. *Id.*

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indeed, that its relative importance has only increased over time.⁵¹ To the extent that any considerations are dominant in the minds of senators asked to vote on candidates who already meet some threshold level of professional qualification, those considerations are likely to be ideological in nature. Third, even when other considerations come into play, they do not necessarily operate to the detriment of ideology: neither the elder Bush's selection of Clarence Thomas for the Supreme Court nor the younger Bush's appointment of Janice Rogers Brown to the D.C. Circuit, for example, sacrificed conservative principle for the sake of diversity.⁵² Fourth, the left-right continuum is itself a composite dimension with the potential to subsume other considerations, such as judicial philosophy.⁵³ Whatever combination of preferences happens to be possible in theory, it is currently the case that those who prefer ideologically conservative judges tend also in practice to express a preference for judges who exhibit judicial restraint, and to identify ideologically liberal judges with a lack of restraint, over a wide range of politically salient issues.⁵⁴

51. See, e.g., Law, *supra* note 4, at 486 (describing increasing presidential emphasis on the policy views of judicial nominees, from Truman to Reagan); Binder & Maltzman, *supra* note 13, at 304 (attributing the use of "extreme tactics" in the judicial nomination wars to "the increased polarization between the two parties and the rising salience of the federal courts across the interest group community").

52. See Rorie Spill Solberg, *Diversity and George W. Bush's Judicial Appointments: Serving Two Masters*, 88 JUDICATURE 276, 276 (2005) (observing that the younger Bush has "pursued his conservative agenda" while "simultaneously" increasing the diversity of the federal bench); *Fueling the Fight*, WASH. POST, Oct. 30, 2003, at A22 (characterizing Brown as so radically conservative that Bush could not "reasonably expect Democratic senators to support" her appointment).

53. See *supra* text accompanying note 46 (discussing how cognitive limitations may lead decisionmakers to collapse a range of considerations into a single composite dimension such as ideology, even at the cost of oversimplification).

54. See Judicial Activism Archive, <http://www.popularsovereignty.org/online.resources.html> (last visited Apr. 8, 2006) (compiling numerous attacks on "judicial activism" by a lengthy roster of well-known conservatives). Of course, the association between political ideologies and critiques of "judicial activism" can shift dramatically over time: today's battle lines do not correspond to those of the New Deal era, for example, when attacks upon "judicial legislation" tended to originate not from the right, but from the left. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 18 (1996) (observing that, to supporters of the New Deal, "judicial activism" was synonymous with "laissez-faire constitutionalism"); Daniel Smilov, *The Character and Legitimacy of Constitutional Review: Eastern European Perspectives*, 2 INT'L J. CONST. L. 177, 179 (2004) (contrasting the criticisms leveled by New Deal Democrats against the pre-1937 jurisprudence of the Supreme Court with the criticisms

C. Evaluating the Costs and Benefits of the Nuclear Option

As Senate Republicans are well aware, the nuclear option has not proven terribly popular with the public—a fact that no doubt exerts a significant restraining influence upon its use.⁵⁵ Successful use of the nuclear option is also likely, however, to have significant repercussions for the procedures and customs of the Senate, some of which might prove quite undesirable to Democrats and Republicans alike. By abolishing the judicial filibuster, Republican senators will achieve certain short-term ends, but this accomplishment may well come at the expense of their own long-term interests. In deciding whether to support the nuclear option, the players in the appointments game must weigh short-term against long-term consequences. The manner in which they strike the balance between today and tomorrow will depend not only upon their perception of the future risks associated with the nuclear option, but also with the extent to which they discount future costs relative to present benefits.⁵⁶

Let us assume that exercise of the nuclear option results in a rule change over the objections of thirty-four or more senators,⁵⁷ and that the new procedural regime provides that a simple majority of senators could close debate on a judicial nomination, but leaves the remainder of Rule XXII intact.⁵⁸ The obvious short term effect of this change would be to ensure the confirmation of all nominees favored by a bare majority of senators. At the same time, however, adoption of a rule change that abolishes the judicial filibuster diminishes the power of each individual

leveled in more recent decades by conservative constitutional lawyers against the Warren Court).

55. See Richard Morin & Dan Balz, *Filibuster Rule Change Opposed*, WASH. POST, Apr. 26, 2005, at A1 (reporting that two-thirds of the public opposes the nuclear option, according to one poll); Jesse J. Holland & David Espo, *Survey: Few in GOP Back Plan to Stop Dems*, YAHOO! NEWS, Apr. 21, 2005, http://story.news.yahoo.com/news?tmpl=story&cid=536&e=1&u=/ap/20050422/ap_on_go_co/filibuster_fight (reporting that private polling commissioned by Senate Republicans revealed majority opposition among the public to the nuclear option).

56. See, e.g., Law, *supra* note 4, at 515 (discussing discount factors in the context of judicial appointments); *id.* at 517-18 (arguing that, because presidents are not repeat players to the same extent as senators, they tend to have steeper discount factors and tend as a result to approach judicial selection more aggressively and ideologically than senators).

57. Recall that Rule XXII requires a two-thirds vote (or the support of sixty-six senators) to close debate on a rule change.

58. The resulting rule could be structured in various ways. For example, it might retain the sixty-vote requirement on the first vote for cloture but provide that the lower threshold would obtain on subsequent votes (perhaps after the passage of specified periods of time). For purposes of our analysis here, it is not relevant which particular rule variant takes hold.

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senator: a senator who needs only forty allies to block action is more powerful than a senator who needs fifty allies to do the same.⁵⁹ Moreover, in the longer term, the nuclear option may backfire on the very senators responsible for invoking it. As some Republicans have observed, their party is unlikely to control the White House and Senate forever, and should the fortunes of the parties reverse, those on the right may find themselves longing for the days of the judicial filibuster.⁶⁰ The filibuster option that prevents a Republican president and Senate majority from trampling a Democratic minority today, may also prevent a Democratic president and Senate majority from trampling a Republican minority tomorrow. In short, what goes around, comes around. Another potential consequence of the nuclear option is the risk that the filibuster will be limited or abolished in other contexts as well. Once Pandora's box has been opened and the nuclear option has been used to halt judicial filibusters, what is to stop a similar rule change with respect to other executive offices or even ordinary legislation? Whether such slippery-slope⁶¹ effects would obtain is itself uncertain, as are the consequences that would attend further erosion of the filibuster.

Yet another possible external cost of the nuclear option for individual Senators could result if the nuclear option were to trigger the senatorial equivalent of "mutually assured destruction." Senate Minority Leader Reid

has already vowed to make the GOP "rue the day" that it tampers with the filibuster, and to "screw things up" throughout the Senate in retaliation. If Senator Reid makes good on his word, Republican senators may find themselves in a Never-Never Land of unending quorum calls, refusal to consent to limits upon debate or amendment, extended debate on whether bills should be debated at all, inexhaustible streams of non-germane amendments, committee paralysis, and

59. See, e.g., SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE passim* (1997) (arguing that the Senate has retained the filibuster not for reasons of principle, but because it enhances the power and furthers the self-interest of individual senators); Helen Dewar, *Harkin Targets a Senate Tradition*, WASH. POST, Nov. 20, 1004, at A10 (observing that "the ability to threaten a filibuster—and bring the Senate to a halt—enhances the power of every senator, regardless of party, seniority or stature").

60. See, e.g., Law & Levinson, *supra* note 25, at 947 n.67 (quoting Republican Senators John McCain and Chuck Hegel); Tom Raum, *GOP's Filibuster Strategy Could Backfire*, YAHOO! NEWS, Apr. 16, 2005, at http://story.news.yahoo.com/news?tmpl=story&cid=536&e=4&u=/ap/20050416/ap_on_go_co/filibuster_politics (quoting former Senate Majority Leader Bob Dole).

61. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 *passim* (2003).

whatever other parliamentary mayhem the party of Robert Byrd can muster. In policy terms, Democratic retaliation would likely jeopardize major components of the President's legislative agenda, including Social Security and tax reform.⁶²

Such retaliation might, in turn, trigger even harsher procedural countermeasures by the majority, which could employ the nuclear option to pass rules that would eliminate the need for unanimous consent⁶³ and centralize power in the Senate leadership, along the present lines of the House of Representatives.⁶⁴ But such structural changes might curtail the rewards associated with non-leadership positions in the Senate—including, for example, various powers of patronage currently associated with membership in the Senate. Republican and Democratic senators alike may balk at the erosion of the prized prerogatives that render individual members of the Senate so much more powerful than their counterparts in the House.⁶⁵

Ultimately, it is impossible to know in advance what the precise consequences of the nuclear option would in fact be. This very uncertainty, however, ought to give senators cause for hesitation before supporting a nuclear strike against the opposition. Rational actors can and do discount future costs and benefits: the players in the appointments game must decide for themselves whether, for example, the assurance of a confirmation victory today is worth a heightened risk of defeat in future years. To be more specific, rational evaluation of costs and benefits presupposes that the players are capable of calculating the expected payoffs from different courses of action: that is, they must discount future gains (and losses) by the probability that the gains (or losses) will actually occur.⁶⁶ Yet all that politicians can know with any certainty about the future, however, is the inevitability of change in the political world. It can be difficult for senators to project whether they will remain in office, much less whether they will find themselves in the majority, some years from now. The greater the uncertainty surrounding the future impact of the nuclear option, the riskier the nuclear option becomes. To embrace the nuclear option in the face of such uncertainty may demonstrate an appetite for risk.

62. Law & Levinson, *supra* note 25, at 945 (internal citations omitted).

63. Because the standing rules of the Senate do not limit the time that may be spent on debate, *see* SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, R. XIX, at 13–14 (2d Sess. 2000), the timely completion of Senate business is heavily reliant in practice upon the use of so-called unanimous consent agreements that contain time restrictions.

64. *See supra* note 30 and accompanying text (discussing the consolidation of control that occurred in the House of Representatives in the late nineteenth century).

65. *See supra* note 59.

66. *See* Law, *supra* note 4, at 515 & n.169, 517-18 (defining discount factors and discounted payoffs, and discussing how steep discount factors can lead political actors to behave uncooperatively in the judicial appointments context).

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To summarize, the formal analysis that we present in the next part of this Article assumes that left-right ideological disagreement among individual political actors over the ideal composition of the bench drives the outcome of the federal judicial selection process. We further assume that these actors hold divergent views as to the net cost or benefit of abolishing judicial filibusters via the nuclear option, and that this divergence of views means that senators who support the confirmation of a particular nominee may not necessarily agree on whether to support the nuclear option as well. Although these assumptions can be questioned, we believe that they are vindicated to a substantial degree by the accuracy of the results that they produce. If it is indeed gross error for us to omit non-ideological motivations from our model, for example, then the predictions that we obtain should fall far from the mark. As will be explored below, however, our model yields results that are quite consistent with the recent history of the federal judicial selection process.⁶⁷

IV. A PIVOTAL POLITICS MODEL OF THE JUDICIAL SELECTION PROCESS

The same models of strategic interaction that political scientists have developed to explain legislative outcomes and policy gridlock can also be applied to the appointment of federal judges. Models of this variety have proven useful for exploring strategic interactions, for at least two important reasons. First, formal modeling demands simplification. The use of a simple spatial model forces us to narrow our analytical focus from the countless factors that may be relevant in any complex political interaction, to the few factors that we suspect are truly decisive in determining the ultimate outcome. The goal, one might say, is to capture the shape of the forest rather than the details of any particular tree. To that end, “[m]odels purposefully ignore certain aspects of reality . . . and highlight instead variables that explain a high percentage of the behavior in question.”⁶⁸ Simplification is thus considered a defining virtue, not an unintended weakness, of game theory. Second, game-theoretic notation escapes the vagueness inherent in purely verbal analysis. To model a strategic interaction as a game requires us to

67. See *infra* Part IV.C (applying the model to Supreme Court appointments from the Ford administration onward).

68. SEGAL & SPAETH, *supra* note 40, at 45-46.

articulate our assumptions in unambiguous fashion and, in return, enables us to identify the logical implications of those assumptions.

Our aim here is to apply approaches developed by political scientists in the context of legislative studies to explore a pair of questions about the appointment of federal judges—namely, the conditions under which appointments gridlock occurs, and what effect the threat of the filibuster (and the counter-threat of the nuclear option) have upon the outcome.

A. *The Pivotal Politics Model of Legislative Gridlock*

In the context of legislation, gridlock can be defined simply as the inability of a legislative majority to enact policies that it prefers over the status quo.⁶⁹ From time to time, observers have spoken colloquially of the conflict over judicial appointments as a form of gridlock. We believe the label is fundamentally apt: the same conditions that give rise to legislative gridlock also cause appointments gridlock. Conversely, the factors that *fail* to explain legislative gridlock cannot account for appointments gridlock either. Various political scientists have shown, in particular, that divided government is neither a necessary nor a sufficient condition for legislative gridlock to occur.⁷⁰ Recent history demonstrates that the same is true of judicial appointments: faced with a Republican Congress, the current Bush administration has nevertheless encountered great difficulty in securing the confirmation of a number of its judicial nominees.⁷¹

Keith Krehbiel's "pivotal politics" theory of lawmaking⁷² suggests that legislative gridlock—or, in less negative terms, policy stability—is a function of two variables. The first is the extent to which all of the key players in the legislative process have relatively homogenous policy preferences. The president is obviously a key player, due to his veto power; so too is the median legislator, insofar as his support also signifies the support of a bare legislative majority. They are not, however, the

69. See, e.g., KREHBIEL, *supra* note 38, at 26; BRADY & VOLDEN, *supra* note 47, at 14-20 (employing Krehbiel's "pivotal politics" model of gridlock).

70. See, e.g., SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 61-63 & tbl.4-1, 96 (2003) (finding that divided party control of Congress and the White House has "little effect" on the frequency of legislative gridlock, particularly with respect to issues that have received public attention); KREHBIEL, *supra* note 38, at 51-75; DAVID MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002*, at 51-199 (2d ed. 2002); David R. Jones, *Party Polarization and Legislative Gridlock*, 54 *POL. RESEARCH Q.* 125, 137 (2001) (finding that "unified government is just as prone to gridlock as divided government when parties are highly polarized and neither party has a large majority").

71. See *supra* text accompanying notes 23-24.

72. See KREHBIEL, *supra* note 38, at 20-48.

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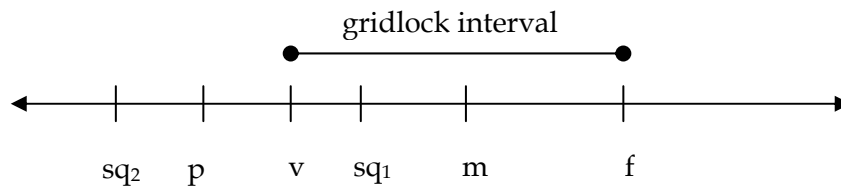
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only key players: changes to the status quo may also depend, for example, upon the acquiescence of a legislative minority capable of sustaining a filibuster, or a legislative supermajority capable of overriding a presidential veto. The fact that the president and a bare majority of legislators belong nominally to the same party is no guarantee that the status quo can be modified: not all the relevant players may belong to the party, and even if they do, their preferences may not be especially homogenous.

The second determinant of gridlock is the location of the status quo relative to the key players. If the status quo is extreme relative to what all of the key players would like, significant policy change can be expected. Conversely, however, even if the key players share relatively homogenous preferences, no legislative change is predicted if existing policy happens to fall *between* what different players would prefer. The theory predicts that policy change will not occur so long as any player happens to prefer the status quo to the old policy.

Together, the relative homogeneity of player preferences and position of the status quo determine the width of the *gridlock interval*,⁷³ as illustrated in Figure 1. The available policy choices and the preferences of the players are modeled as falling along a single left-right dimension. The key players in this model are the president, the median legislator, the veto pivot, and the filibuster pivot, whose preferred policies, or ideal points, are indicated by p , m , v , and f , respectively.⁷⁴

FIGURE 1: THE GRIDLOCK INTERVAL



In this particular example, a liberal president faces a relatively conservative unicameral legislature. By definition, any policy proposal that enjoys the support of the median legislator also has the support of at

73. See *id.* at 35 fig.2.7 (depicting the gridlock interval graphically).

74. To see how statistical analysis of roll call voting data can ascertain the identities of actual median legislators, filibuster pivots, and veto pivots in the Senate, see Jackman, Clinton & Rivers, *supra* note 37, at 359-61.

least a majority of legislators. However, the median legislator cannot necessarily secure passage of her ideal policy. On her left, she must contend with the president, who will attempt to veto any legislation that would move the status quo further from p . A presidential veto can be overridden, but only by a legislative supermajority. The possibility of a veto override is captured by the existence of v , the veto pivot: for all policies to the left of v , there exists a legislative supermajority large enough to override a presidential veto. For example, if the legislature consists of one hundred members and a two-thirds vote is required to override a presidential veto, then the veto pivot will be the sixty-sixth most conservative legislator, who supplies the last vote necessary for a successful override. Efforts by the president to veto policies to the left of v will be successfully overridden, but a presidential veto of a policy to the right of v cannot be overridden. Meanwhile, on her right, the median legislator faces another kind of veto in the form of a filibuster: any movement to the left of the filibuster pivot, f , encounters fatal opposition from a right-wing legislative minority sufficiently large to sustain a filibuster. If sixty votes are required to defeat a filibuster, the filibuster pivot will be the forty-first most conservative legislator, who supplies the last vote necessary to sustain a filibuster.

The gridlock interval in this case is the entire policy space between v and f : any effort to move an initial status quo policy that falls between these two points will be successfully blocked by one of the players. Assume, for example, that the initial status quo happens to be sq_1 , a relatively moderate policy that falls between the ideal points of the veto pivot and the median legislator. There exists a legislative majority that would prefer m over v . However, if the median legislator introduces a bill that moves policy to m , the president will veto the bill, and the veto pivot will vote to sustain the veto because he prefers sq_1 over m . Any movement to the right of v will face a presidential veto that cannot be overridden, and by the same token, any movement to the left of f will succumb to a successful filibuster. Only if the initial status quo policy falls outside the gridlock interval will legislative change occur.

If, however, the initial status quo policy is relatively extreme, then whoever sets the legislative agenda will be able to obtain an even better policy outcome than if the status quo had been relatively moderate in the first place. To see why, assume now that the initial status quo policy is sq_2 , a more liberal policy than any of the key players would prefer. The median legislator can now propose and obtain passage of a more conservative policy up to the point at which the veto pivot is indifferent between the old and new policies. The only potential sources of opposition to such a rightward shift are the president and the veto pivot, both of

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whom are more liberal than the median legislator. But even if the president attempts to veto the new policy, the veto pivot will vote to override the veto as long as the veto pivot is at least as happy with the new policy as with the status quo. Indeed, if the initial status quo is sufficiently extreme—as in the case of sq_2 —the median legislator may in fact be able to secure passage of her ideal policy, m . To adopt m is to surmount gridlock because there is no policy that enjoys majority support over m .

B. Application of the Model to Federal Judicial Selection

With a few modifications, Professor Krehbiel's "pivotal politics" explanation of legislative gridlock can be generalized to the appointment of federal judges. First, in the appointments context, it is the president, not the legislature, who sets the agenda by selecting nominees. Other players may enjoy the power to veto—or to override the vetoes of others—but they do not enjoy the strategic advantages that come with the power of defining the available options. In Figure 1, for example, the median legislator is able to move policy from sq_2 to her ideal point, m , because she has the power to propose m as an alternative to sq_2 . If, however, the president enjoyed the sole power to propose new policies, he would offer his own ideal policy, p , which would defeat sq_2 and would therefore become law, yet is not nearly as desirable to the majority of legislators as m .

Second, the president's power of initiative in the judicial appointments context is not as extensive as that of Congress in the context of lawmaking. Whereas legislators may seek to modify the status quo by proposing new policies if and when they please, presidents must await judicial vacancies in order to affect the balance of the bench. Vacancies may arise naturally through attrition or via the legislative creation of new judgeships, and neither occurrence is wholly within the president's control. Indeed, Congress may even eliminate vacancies against the president's wishes.⁷⁵ On the whole, however, judicial vacancies occur

75. See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 86 (1988) (describing how the Judiciary Act of 1801 reduced the size of the Supreme Court from six to five, in order to prevent Jefferson from filling a vacancy); John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681, 684-85 (2002) (discussing both the Judiciary Act of 1801 and similar legislation enacted in 1866 that reduced the size of the Court from ten to seven, in order to prevent Andrew Johnson from filling any vacancies).

with sufficient frequency that every president has the opportunity to transform the composition of the federal bench: President Carter, for example, managed in the space of a single term to appoint 41.3% of the entire federal bench by the time he left office, while his two-term Republican successor surpassed even that figure with a whopping 48.9%.⁷⁶ To be sure, if a court is sufficiently small, a president may have to wait some time for an opening. Even Supreme Court vacancies, however, have historically occurred with some regularity: Carter is the only president in history to leave office after serving at least one full term without having appointed a single justice.⁷⁷

Third, we make a pair of simplifying assumptions regarding the propensity of legislators to filibuster and the ability of senators to assess the ideology of judicial nominees. We assume that filibusters are costless, and that all of the players possess perfect information as to the impact of a particular nominee (or slate of nominees) on the status quo. These assumptions are likely to be somewhat counterfactual. If, for example, a senator can trade his vote on a judicial nomination in exchange for White House support of a home-state military base, his willingness to support a filibuster against the nominee carries a substantial opportunity cost. In the language of Professors Rohde and Shepsle, presidents control an *inducements budget*, which includes goods ranging from fundraising assistance to pork-barrel projects that can be deployed to sway senatorial votes on judicial nominations.⁷⁸ Similarly, an incumbent senator facing a close reelection may be reluctant to filibuster judicial nominees—or to support the nuclear option⁷⁹—if his opposition can turn the issue into an electoral liability. Nor is it necessarily the case that the

76. See DEBORAH J. BARROW, GARY ZUK & GERARD S. GRYSKI, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* 84 tbl.5.7 (1996).

77. A greater number of presidents—including Franklin Roosevelt, Clinton, and George W. Bush—have managed to complete one full four-year term in office without filling any Supreme Court vacancies. Unlike Carter, however, these presidents did make appointments to the Court during their *overall* time in office—just as the younger Bush has now accomplished in his second term. See SEGAL & SPAETH, *supra* note 40, at 205 tbl.5.3 (listing, by year, all Supreme Court appointments since 1954); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, & the Confirmation Process*, 101 *YALE L.J.* 1491, 1503-04 (1992) (discussing Supreme Court appointments through the first Bush presidency).

78. See David Rohde & Kenneth Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court* 6, 17 (June 2005) (unpublished manuscript on file with the authors) (defining the “presidential inducements budget,” and suggesting that it offers a “promising line of attack” on the problem that formal models of the judicial selection process tend to predict “too much” gridlock).

79. See *supra* note 55 and accompanying text (noting the extent of public opposition to the nuclear option).

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players will all possess the same information as to the effect of particular nominations on the status quo. The White House may well possess better information on the views of its own judicial nominees than an opposition senator can muster, and it can be expected to use any such informational asymmetry to its advantage. Even if senators are on guard against “stealth nominees” whose ideological leanings cannot easily be discerned on the basis of public records, there may ultimately be little that they can do to reduce their uncertainty. To the extent that we relax these assumptions and allow instead that minority senators must pay a price to filibuster judicial nominees whose future impact is shrouded in uncertainty, we would expect minority senators to be more reluctant to filibuster, and appointments gridlock to be less prevalent, than the simple model presented here would predict.

Finally, the status quo is somewhat harder to define in the appointments context than in the legislative context. What the players seek to modify is not a static policy but rather the prevailing ideological balance of a particular court, or of the federal bench as a whole. This balance, in turn, presents a moving target. Legislative policy is inherently inertial and stable: because the choice of policy embodied in a statute remains in force if left undisturbed, doing nothing results in maintenance of the status quo. By contrast, the ideological balance of the bench can shift on its own if vacancies arise and remain unfilled, particularly if the court’s membership is small and closely divided. Moreover, vacancies may not occur at random: though this finding has been questioned, some studies have concluded that federal judges display a tendency to time their retirements strategically so as to facilitate their replacement by presidents of their own party.⁸⁰ As a result, voluntary departures may not be neutral in their overall impact on the balance of the bench.

80. See James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RESEARCH Q. 573, 573-97 (1995); Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987*, 52 J. POL. 457, 464, 466-72 (1990). The findings of these studies have been strongly disputed. See Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. 143, 154-57, 171 tbl.7, 172 (2006) (finding that federal judges are slightly *less* likely to leave office when they share the same party identification as both the President and the Senate majority, and concluding that “political considerations do not meaningfully explain when [federal] judges vacate their seats”). We are grateful to Stephen Burbank for bringing this counter-evidence to our attention.

There are thus two ways in which the status quo might be defined. One way is to define the status quo as the ideological balance of a court before a vacancy arises. The other way is to define the status quo as the ideological balance that the players confront after a judge has left the bench, and which will persist if the vacancy remains unfilled.⁸¹ Although the second definition is intuitively appealing, the first definition can in fact be more appropriate.

Imagine, for example, a vacancy created by the departure of the median judge from a closely divided, odd-sized appellate court that sits in plenary session, exactly akin to the current Supreme Court. There are two ways in which such a vacancy can arise. First, the median judge might decide to retire effective upon the confirmation of his or her replacement. In this situation, the players would presumably treat the *pre-vacancy* balance as the status quo for bargaining purposes, for the straightforward reason that the composition of the court remains intact in the meantime.

Second, the swing-vote judge might die in office or resign as of some fixed date, leaving behind an evenly divided court. Even in this situation, however, the status quo may still reflect the *pre-vacancy* balance of the court. As Professor Krehbiel observes, an evenly divided court cannot change course; as long as a majority is needed to overrule earlier precedent, the policies previously chosen by the court will remain in effect.⁸² The departure of the median judge disrupts the court's composition but leaves the court's existing policy choices intact. A player can therefore prevent policy change by blocking appointment of any nominee who does not match the ideological bent of the departing judge.

In still other cases, it may make little practical difference whether one adopts a *pre-vacancy* or *post-vacancy* definition of the status quo. On a highly lopsided court, for example, the departure of a particular judge may have no obvious effect on the prevailing ideological balance. Similarly, the departure of the median judge from a large court that ordinarily sits in panels may not modify the status quo in a way that the players deem relevant, insofar as the vacancy leaves an evenly divided court that generates much the same ratio of liberal to conservative panels as before.

81. See, e.g., Moraski & Shipan, *supra* note 47, at 1072-73 (taking the approach that presidents, when faced with a Supreme Court vacancy, seek to shift the median of the remaining eight-member Court); Rohde & Shepsle, *supra* note 78, at 2-3, 6-7 (defining the status quo, or "reversion policy," created by a Supreme Court vacancy as the ideological median of the post-vacancy Court).

82. See Keith Krehbiel, *Supreme Court Appointments as a Move-the Median Game* 6-7 (Feb. 15, 2006) (unpublished manuscript on file with the authors).

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However one chooses to define the ideological status quo, the notion that the selection process only gridlocks over efforts to shift the status quo has a crucial implication: not all judicial nominations should encounter conflict. The absence of conflict over many—indeed, most—judicial nominations does not disprove the pivotal politics model of judicial selection. The fact that the model often predicts *gridlock of the status quo* does not mean that it also predicts *conflict over every judicial nomination*. Rather, the model predicts that conflict should occur only over those nominations that have the potential to upset the status quo, whereas nominations that replicate the status quo, or fail to alter the status quo in a meaningful way, should not encounter conflict at all. In this regard, we merely echo what a small body of theoretical and empirical literature has already concluded—namely, that so-called “critical nominations” with the potential to shift the ideological median of a court will encounter greater resistance than other judicial nominations.⁸³

*C. Historical Application of the Model:
From Ford to Bush . . . to Bush*

Application of Krehbiel’s model, modified as above, enables us to see how the occurrence (or absence) of judicial appointments gridlock under recent administrations is not simply the product of divided (or unified) government but rather depends upon both the location of the status quo

83. P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793 *passim* (1993) (concluding that “critical nominations”—namely, those with the potential to shift the ideological median of the Court—are especially prone to conflict and failure); *see, e.g.*, Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190, 193-97 (2002) (finding that, under conditions of divided government, critical nominations to the lower federal courts are more prone to delay than noncritical nominations); Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 AM. J. POL. SCI. 654, 661-65 (2003) (finding that “critical nominations” to the Supreme Court encounter longer confirmation delays); Peter H. Lemieux & Charles H. Stewart, III, *A Theory of Supreme Court Nominations* 4-14 (Jan. 1991), *available at* <http://web.mit.edu/cstewart/www/papers/l&s2.pdf> (applying the median voter argument to the filling of Supreme Court vacancies, and predicting greater conflict over vacancies arising at the ideological median of the Court); Peter H. Lemieux & Charles H. Stewart, III, *Senate Confirmation of Supreme Court Nominations from Washington to Reagan*, Working Papers in Political Science P-90-3, Domestic Studies Program, Hoover Institution 4-10 (Apr. 1990), *available at* <http://web.mit.edu/cstewart/www/papers/l&s1.pdf> (same).

and the extent to which the preferences of the key players are homogenous. The more homogenous the preferences of the players and the more extreme the position of the status quo relative to those preferences, the greater the room for change, and vice versa.

The general contours of the model are as follows. The status quo is the ideological balance of the federal bench as a whole. The president (whose ideal point is once again depicted by p) makes judicial nominations, which can be rejected by either the median legislator (m) or vetoed by a minority capable of sustaining a filibuster (f). The original model in Figure 1 contained an additional player—the veto pivot, v —who determined whether a presidential veto would be overridden. In the appointments context, the equivalent of a presidential veto is a filibuster supported by more than forty senators. For now, we omit from our analysis the possibility that the filibuster itself can be abolished by a vote of fewer than sixty senators.

A threshold disclaimer is in order. In the historical discussion that follows, we make occasional reference to the electoral fortunes and membership ranks of the two parties. These references to party should not be taken as an abandonment of our premise that individual legislators, not parties, are the relevant players in the judicial selection process.⁸⁴ Under a pivotal politics approach, the party identification of the players is not of intrinsic interest: what matters is not whether the Democrats or Republicans control the Senate or White House, but rather the extent to which individual senators and presidents are liberal or conservative relative to one another. The party identification of the individual players is relevant, however, insofar as it conveys some rough information about their ideological leanings: while neither party may fit anyone perfectly, legislators can be expected to choose their party affiliation based on the extent to which they share the policy goals of other party members. Party membership therefore offers an imperfect, but convenient, means of situating individual political actors relative to one another on the ideological spectrum. Based on the partisan composition of the Senate as a whole, for example, we can make educated guesses as to the relative ideological location of the relevant individual players over time: a Senate consisting of sixty Democrats and forty Republicans is likely to have a more liberal median senator and filibuster pivot than a Senate consisting of forty Democrats and sixty Republicans.

84. See *supra* Part III.A (explaining our premise that the actions of individual legislators, not those of unitary parties, drive the outcomes of the judicial selection process).

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Party identification is admittedly a crude measure of the ideology of individual legislators and presidents. Fortunately, a vastly more sophisticated measure is freely available to the scholarly community in the form of the “DW-NOMINATE” scores devised by Professors Poole and Rosenthal, which political scientists have frequently employed as a standardized measure of the ideology of American political actors for purposes of empirical analysis.⁸⁵ For present purposes, we have drawn upon these scores to corroborate our descriptive assertions as to the ideological movement of the median senator over time.

1. The Ford Administration

Our story begins in the aftermath of Watergate with the Republican administration of Gerald Ford, who inherited a position that was notably weak in two respects. First, his Republican predecessor had failed to tip the partisan composition of the bench: Nixon was one of only two presidents since Reconstruction who failed to leave behind a bench on which his party’s appointees constituted a majority.⁸⁶ Second, the 1974 elections gave the Democrats a formidable sixty-seat majority in the Senate, albeit one prone to internal conflict between northern and southern factions. Shortly thereafter, the Senate revised its rules to require only a three-fifths vote to invoke cloture, thereby rendering the Republican

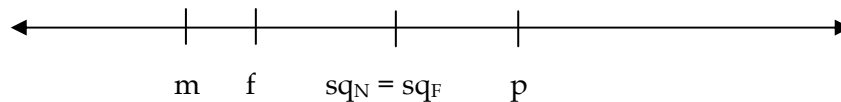
85. See POOLE & ROSENTHAL, *supra* note 38, at 23-26, 233-58; Keith T. Poole, *DW-NOMINATE Scores*, <http://voteview.com/dwnomin.htm> (last updated Dec. 10, 2004). The statistical mechanics underlying these scores are too complex to review here. Suffice it to say, for present purposes, that DW-NOMINATE scores measure the ideology of domestic political actors along two dimensions—a traditional left-right, or liberal-conservative, dimension that captures the bulk of contemporary political conflict, and a regional dimension that was of much greater salience when the country remained divided by the issue of slavery and its aftermath. *See id.* We have used the DW-NOMINATE scores to assess the ideological movement of the median senator along the left-right dimension, from the 94th through the 108th Congresses. This particular set of scores is available for download from Keith T. Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, <http://voteview.com/pmediant.htm> (last visited Sept. 4, 2005).

86. The other president in question is Grover Cleveland. *See Law, supra* note 4, at 498 n.103. More recently, President Clinton also failed, by a very narrow margin, to leave behind a bench having a majority of Democratic appointees, measured as of the precise moment that he left office. By dint of natural attrition and unfilled vacancies, however, his successor did in fact face a majority-Democratic bench shortly *after* taking office. *See* Sheldon Goldman et al., *Make-up of the Federal Bench*, 84 JUDICATURE 253, 253 & tbl.1 (2001).

minority incapable of waging a successful filibuster without the help of southern Democrats.⁸⁷

Because Ford took office following six years of judicial appointments by Nixon in the face of nominally Democratic Senate majorities, we depict the status quo that he inherited as a relatively moderate federal bench. With a right-leaning president and a left-leaning median legislator,⁸⁸ this moderate status quo fell squarely in the gridlock region between the two players. Thus, no meaningful ideological transformation of the bench was likely to occur: the status quo under Nixon (sq_N) ought to have remained the status quo under Ford (sq_F). Studies of judicial voting behavior suggest that Ford's appointees were indeed relatively moderate, at least as compared to those placed on the bench by Reagan and the elder Bush.⁸⁹

FIGURE 2: PRESIDENT FORD AND THE 94TH CONGRESS



2. The Carter Years

The prospects for change were considerably brighter under President Carter. Although the status quo remained relatively moderate, it was

87. Only three times over the last century has one party enjoyed a filibuster-proof Senate majority. See Law, *supra* note 4, at 512 n.163.

88. The DW-NOMINATE score of the median senator in the 94th Congress was -0.194, where negative numbers denote a leftward ideological position and positive numbers denote the opposite. From the 1st through the 108th Congresses, the scores for the median senator on the left-right policy dimension have ranged from the low of -0.426 reached in the 42d Congress, to the high of 0.533 reached in the 5th Congress. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

89. See Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision-Making Behavior of George W. Bush's Judicial Appointees: Far-Right, Conservative, or Moderate?*, 88 JUDICATURE 20, 26 tbl.1 (2004) (finding that Ford's district court appointees rendered a higher percentage of liberal decisions than those appointed by Reagan or Ford); Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19 tbls.1 & 2 (1996) (reporting that Ford's district court appointees were more liberal across a range of cases than those appointed by either Reagan or Bush Sr.); *id.* at 20 tbl.4 (finding that Ford's circuit court appointees were at least as liberal in the areas of civil rights and labor and economic regulation than those appointed by Reagan or Ford, but were more conservative in criminal justice cases).

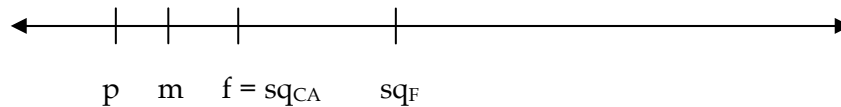
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now out of sync with the more homogenous preferences of the key players. In the 1976 elections, the Democrats captured not only the White House, but also another filibuster-proof Senate majority,⁹⁰ which meant that the filibuster pivot—the most right-leaning of the key players—was now likely to be a member of his own party, albeit a relatively conservative southern one. Though moderate, the status quo that Carter inherited fell outside the newly redefined gridlock region. The model therefore predicts that Carter should have been able to move the status quo as far left as the filibuster pivot would tolerate—that is, from sq_F to sq_{CA} .

FIGURE 3: PRESIDENT CARTER AND THE 95TH CONGRESS



The midterm elections of 1978, however, stripped the Democrats of three seats and thereby produced a rightward shift of both the median senator and filibuster pivot.⁹¹ The status quo was now, if anything, to the left of the new filibuster pivot. Perhaps not coincidentally, confirmation delays increased, and confirmation rates themselves took a slight downturn, during the Carter administration. For the first time in Carter's presidency, some nominees were denied a hearing outright.⁹² If the bare fact of divided government were to blame for conflict over judicial appointments, this increase would be difficult to explain. The pivotal politics model suggests instead that Carter's initial success in moving the status quo to the left during his first two years was partly to blame for the greater

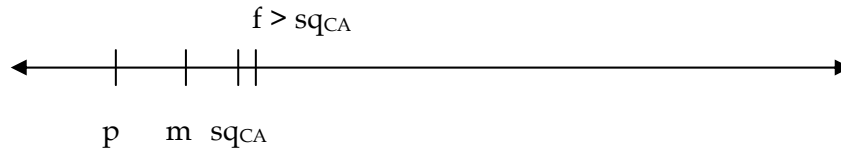
90. As measured by the DW-NOMINATE scores, the ideological position of the median senator changed very little from the 94th to the 95th Congress, from -0.194 to -0.190. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

91. Between the 95th and 96th Congresses, the DW-NOMINATE ideological score of the median senator increased from -0.190 to -0.143, indicating a rightward shift. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

92. See Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 253 tbl.1 (2003) (offering summary statistics of district court nominations); *id.* tbl.2 (offering the same statistics for circuit court nominations).

difficulty he encountered in his last two years. The slight rightward movement of key legislative players in the 96th Congress expanded the gridlock region to encompass the new status quo; thus, any further movement to the left would now face opposition from the filibuster pivot.

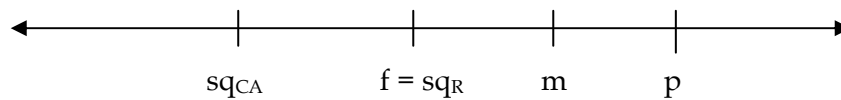
FIGURE 4: PRESIDENT CARTER AND THE 96TH CONGRESS



3. The Reagan Years

Like Carter, President Reagan faced a rare and valuable opportunity in his first term to remake the ideological balance of the bench. The 1980 election brought him to power with a Republican majority in the Senate that would not be surrendered for six years. Both of the conditions for change were therefore met. First, the results of the election shifted all of the key players—the president, the median senator, and the filibuster pivot—to the right.⁹³ Second, the status quo had previously been shifted to the left. Carter’s legacy was thus immediately ripe for change, the only check being the tolerance of the filibuster pivot—who, in turn, was probably a conservative southern Democrat whose constituents had backed Reagan. Thus, the status quo ought to have moved rightward, from sq_{CA} to sq_R .

FIGURE 5: PRESIDENT REAGAN AND THE 97TH CONGRESS



93. Between the 96th and 97th Congresses, the DW-NOMINATE ideological score of the median senator increased from -0.143 to -0.030, indicating another rightward shift. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

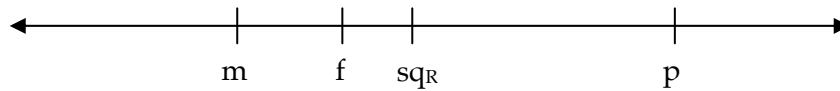
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On the heels of Reagan's first six years, the 1986 midterm elections that returned majority control of the Senate to the Democrats were a recipe for gridlock. Having already shifted the balance of the bench to the right, Reagan now faced a filibuster pivot, if not also a median legislator, to the left of the status quo.⁹⁴ Not surprisingly, the last two years of Reagan's time in office saw a precipitous drop in the percentage of judicial nominees who received a hearing, and a corresponding spike in the delays that nominees encountered.⁹⁵ From this perspective, the high-profile defeat of Robert Bork's nomination to the Supreme Court in 1987 was another wholly unsurprising symptom of appointments gridlock. In the language of Professor Ruckman, any nomination to fill Justice Powell's vacancy at the ideological center of the court would constitute a *critical nomination*—namely, one with the potential to shift the median of the court.⁹⁶ Efforts to shift the status quo are, of course, prone to gridlock. As the selection of Bork constituted precisely such an effort, his defeat by a Democratic Senate should have come as little surprise, notwithstanding the amount of attention that it attracted.⁹⁷

FIGURE 6: PRESIDENT REAGAN AND THE 100TH CONGRESS



94. The DW-NOMINATE ideological score of the median senator in the 100th Congress was -0.135, well to the left of the -0.030 score in the 97th Congress. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

95. See Goldman, *supra* note 92, at tbls.1 & 2; Binder & Maltzman, *supra* note 13, at 299 fig.13-1, 301 fig.13-2.

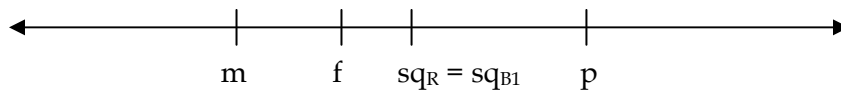
96. Ruckman, *supra* note 83, *passim*; see also *supra* note 83 (citing other theoretical and empirical work on the resistance that critical nominations encounter).

97. Indeed, the defeat of the Bork nomination was objectively predictable on the basis of historical data. See Lemieux & Stewart, *Senate Confirmation of Supreme Court Nominations from Washington to Reagan*, *supra* note 96, at 24-25 (employing a multivariate logit model to predict Bork's actual confirmation vote, and concluding that "[w]hat defeated Bork was partisanship and the lengthened process that resulted, but Bork was certainly not the first to fall victim to these two factors").

4. *The First Bush Presidency*

The first President Bush inherited roughly the same configuration as Reagan confronted in his last two years—namely, a status quo falling squarely in the gridlock region between a Republican president and a Democratic median legislator. Even assuming that Bush was ideologically more moderate in his judicial preferences than Reagan—a questionable assumption, in light of the actual voting record of his appointees⁹⁸—the model predicts no real change in the status quo. The elder Bush’s judicial nominees initially encountered slightly less resistance in the 101st Congress than did Reagan’s nominees in the 100th Congress,⁹⁹ even though the median senator had in the meantime moved further to the left.¹⁰⁰ By the third year of his presidency, however, any honeymoon that might arguably have existed was clearly over, and the percentage of circuit court nominees who received an actual confirmation hearing in the 102nd Congress fell to a new record low of 70%.¹⁰¹

FIGURE 7: PRESIDENT GEORGE H.W. BUSH AND THE 101ST CONGRESS



5. *The Clinton Years*

In his first two years in office, President Clinton faced a Democratic majority in the Senate—a rare opportunity to remake the judiciary of the kind enjoyed by Carter and Reagan immediately after taking office. The 1992 elections not only placed a Democrat in the White House, but also added a seat to the Democratic majority in the Senate.¹⁰² As under

98. See *supra* note 89 (citing empirical studies comparing the voting behavior of different judicial cohorts).

99. See Goldman, *supra* note 92, at tbls.1 & 2; Binder & Maltzman, *supra* note 13, at 299 fig.13-1, 301 fig.13-2.

100. The median senator’s DW-NOMINATE ideological score in the 101st Congress was -0.166. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

101. See Goldman, *supra* note 92, at tbl.2.

102. The median senator’s DW-NOMINATE ideological score in the 103rd Congress was -0.186, as compared to -0.176 in the 102nd Congress and -0.166 in the 101st Congress. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

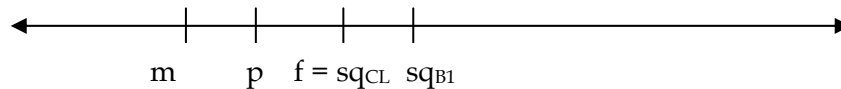
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Carter and the 96th Congress, the only brake on a leftward shift in the status quo was the Republican filibuster pivot. But the Republican minority proved willing and able to halt Clinton's progress: though Clinton's circuit court nominees were more likely to receive hearings than Bush Sr.'s nominees, the actual confirmation rate for such nominees reached only 85%, despite a 57-seat Democratic majority in the Senate.¹⁰³ Accordingly, the model depicts a leftward shift in the status quo from sq_{BI} to sq_{CL} , where sq_{CL} is the Republican filibuster pivot, or the point beyond which 41 Republican Senators would not tolerate further movement.

FIGURE 8: PRESIDENT CLINTON AND THE 103RD CONGRESS



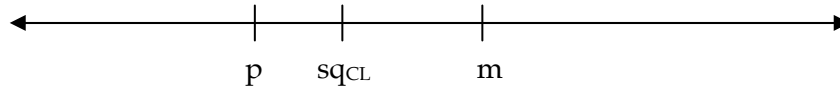
As Clinton's experience with the 103rd Congress demonstrated, unified government is no panacea for gridlock. By the same token, however, divided government can often make things worse. The 1994 midterm elections handed the Republicans a two-seat majority in the Senate, which only grew to five seats with Clinton's reelection in 1996. Correspondingly, on both occasions, the median senator moved to the right.¹⁰⁴ Meanwhile, the confirmation of judicial nominees plummeted to historic lows: in the last two years of his term, the Senate held confirmation hearings for only 47% of Clinton's circuit court nominees.¹⁰⁵ The occurrence of gridlock is, once again, consistent with the model. Indeed, because the status quo, sq_{CL} , is now between the president and the median senator, the location of the filibuster pivot becomes irrelevant: gridlock occurs regardless of whether forty-one senators are willing to wage a filibuster.

103. See Goldman, *supra* note 92, at tbl.2. By comparison, over the first two years of Bush Sr.'s presidency, the Democratic Senate confirmed nearly 95% of circuit court nominees. See *id.*

104. Between the 103rd and 104th Congresses, the DW-NOMINATE ideological score of the median senator increased from -0.186 to 0.00, only to increase again to 0.135 in the 105th Congress. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

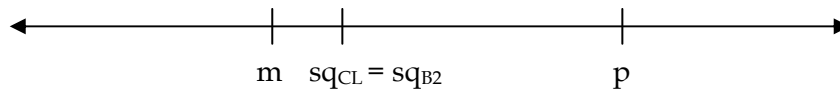
105. See Goldman, *supra* note 92, at tbl.2.

FIGURE 9: PRESIDENT CLINTON AND THE 104TH CONGRESS



6. *The Second Bush Presidency*

The 2000 elections inaugurated a tumultuous time in American politics. The hairbreadth election of George W. Bush to the White House contrasted with Republican losses at the congressional level that yielded a fifty-fifty split in the Senate. By virtue of the tie-breaking vote enjoyed by Vice President Cheney, the Republicans initially retained nominal control over the Senate. The departure of Senator Jeffords from the Republican Party six months into Bush's first term, however, delivered equally tenuous control to the Democrats by the same razor-thin margin. Notwithstanding these lurching changes in the leadership of the Senate, the substantive impact of the 2000 elections was fairly clear: the White House moved to the right, while the median of the Senate moved to the left.¹⁰⁶ Thus, in our spatial model, the arrangement of key players becomes the mirror image of what it was for most of the Clinton presidency: it is now the president who is to the right of the status quo, and the median senator who is to the left. The result, however, remains the same: the status quo, now labeled sq_{B2} , remains squarely gridlocked between the president and the median senator.

FIGURE 10: PRESIDENT GEORGE W. BUSH AND THE 107TH CONGRESS
(JUNE 2001-NOVEMBER 2002)

The midterm elections of 2002 returned bare control of the Senate to the Republicans, who extended their majority in 2004 to a more robust fifty-five seats. Yet even this expanded majority remained vulnerable to filibuster efforts, as the Democrats demonstrated repeatedly with their

106. The DW-NOMINATE ideological score of the median senator decreased from 0.122 in the 106th Congress—the tail end of Clinton's term—to -0.037. See Poole, *Party Medians From DW-NOMINATE, Congresses 1-108*, *supra* note 85.

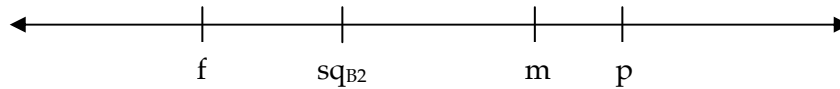
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obstruction of such high-profile circuit court nominees as Priscilla Owen and Janice Rogers Brown. Even with the White House and majority control of the Senate in Republican hands, the location of the Democratic filibuster pivot to the left of the status quo ensured continuing gridlock. The lesson of the simple spatial model remains the same: if the status quo falls between two veto players—in this case, a left-leaning filibuster pivot, on the one hand, and a right-leaning median senator or president, or the other—it is in the gridlock region and cannot be moved.

FIGURE 11: PRESIDENT GEORGE W. BUSH AND THE 109TH CONGRESS



D. The Nuclear Option and the Nuclear Pivot

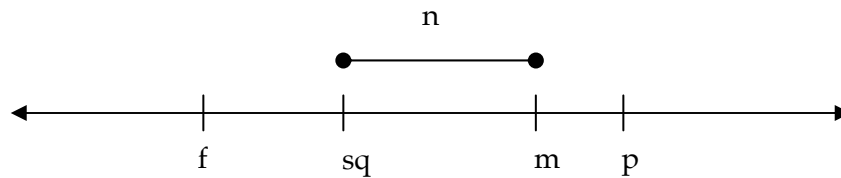
Against this backdrop of gridlock under unified government—which the pivotal politics model suggests is not at all surprising, but rather a predictable function of the location of the status quo and the extent to which key players share homogenous preferences—the Republican leadership began seriously to threaten the use of the so-called “nuclear option.” As we have already discussed, the effect of the nuclear option could be the permanent abolition of the judicial filibuster by a one-time simple majority vote. It is reasonable to assume that abolition of the judicial filibuster would be permanent because, once the rules of the Senate have been amended to preclude unlimited debate on judicial nominees, even those in the minority who oppose such an interpretation today can be expected to use it in the future when they are in the majority and it suits their ends to do so.¹⁰⁷ No Senate majority is likely to restore the judicial filibuster when doing so would thwart the majority’s own ability to confirm nominees.

The possibility that a simple majority may choose to abolish the judicial filibuster can be incorporated into our existing spatial model with the addition of a new player—the nuclear pivot, or n —as depicted in Figure 12. As in our earlier examples, m represents the ideal point of

107. See *supra* Part III.C.

the median senator with respect to the ideology of judicial nominees: all other things being equal, the median senator would prefer to see the ideological balance of the bench at m and will throw majority support behind changes that bring the status quo closer to m , while mustering majority opposition to changes that move the status quo away from m . There is also, however, a median senator on the question of whether the nuclear option ought to be exercised—namely, the senator who supplies the last vote needed to exercise the nuclear option. We designate this senator the *nuclear pivot*.

FIGURE 12: THE NUCLEAR PIVOT



Consider, for example, the configuration of power existing immediately prior to the 2006 midterm elections, under which the Republican Party controls the White House and Senate but remains vulnerable to filibusters, as in Figure 12. The party leadership wishes to exercise the nuclear option but needs at least fifty-one votes (including that of the vice president) to do so. The nuclear pivot will be the (most likely Republican) senator who provides the crucial fifty-first vote in favor of going nuclear. She¹⁰⁸ will tolerate a degree of Democratic filibustering before voting to abolish the judicial filibuster altogether, and the degree to which she is willing to tolerate Democratic filibusters is captured by the position of n . She will vote in favor of the nuclear option if, but only if, the Democrats attempt by filibuster to keep the status quo to the left of n . Once the status quo moves as far right as n (or even further), she will no longer be willing to vote in favor of the nuclear option. That is, any effort by Democrats to keep the status quo to the *left* of n will provoke a successful majority vote in favor of the nuclear option, whereas efforts to invoke the nuclear option against Democratic

108. Our use of the female pronoun to describe the nuclear pivot is not arbitrary or motivated purely by an interest in gender-neutral language. Cf. Jackman et al., *supra* note 37, at 361, 362 fig.2 (calculating, on the basis of roll call voting data, that only Senators Susan Collins and Olympia Snowe exhibit any meaningful probability of being the median senator).

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filibusters to the *right of n* will lack the support of the nuclear pivot and therefore fail.

1. Characteristics of the Nuclear Pivot

A number of important observations about the nuclear pivot must be made. First, as mentioned previously,¹⁰⁹ the median senator and the nuclear pivot may not be the same person: the fifty-first most conservative senator need not also be the fifty-first most willing to abolish the judicial filibuster. For any given nomination, a senator's willingness to support the nuclear option will depend not only upon her ideological preference for that particular nominee, but also upon her assessment of the nuclear option's unknown but potentially considerable future consequences, of the type discussed above in Part III.C. The outcome of that assessment, in turn, will be a function of such variables as each senator's time horizon, discount factor, and aversion to risk.¹¹⁰ Senators may also profess varying degrees of concern for the norms and institutional interests of the Senate that could, in theory, weigh differently upon their support for the nuclear option, though there is ample reason to suspect that talk of the Senate's institutional interests is a pleasant disguise for narrow calculations of individual self-interest.¹¹¹

109. See *supra* text accompanying note 36.

110. See Law & Levinson, *supra* note 25, at 947 (opining as to why some Republican senators, but not others, might balk at the nuclear option); Law, *supra* note 4, at 515, 517-18 (discussing discount factors in the context of judicial selection); *supra* text accompanying notes 56-66 (discussing discount factors and risk aversion in the context of the nuclear option).

Another reason why a senator might be willing to vote for a particular nominee, but against the nuclear option, may be that she has strategic reasons to vote insincerely. Suppose, for example, that the nuclear pivot is a moderate Republican who finds a particular nominee excessively conservative for her own tastes, but is under pressure from her constituents or party leaders to support the nomination. Assume, further, that it is easier for the senator to justify a vote against the nuclear option, than to justify a vote against the nominee—a plausible assumption, given the apparent public antipathy toward the nuclear option. See *supra* note 55. If so, her best strategy may be to cast an insincere vote in favor of the nominee, safe in the knowledge that the nominee will be successfully filibustered as long as she withholds her support for the nuclear option. Credit belongs to Laurie Claus for pointing out this possibility.

111. See BINDER & SMITH, *supra* note 65, at 4, 19-26, 205-09 (arguing on the basis of the historical evidence that the filibuster has endured, not because it furthers the institutional interests of the Senate, but rather because its continued existence aids

Second, the nuclear pivot can, and most likely does, prefer a status quo, sq , that is less moderate than n , the point at which she would actually support the nuclear option. At the moment, the nuclear pivot is most likely a Republican senator who is prepared to pay some price, but not an unlimited price, in order to preserve the judicial filibuster for future use. Though she belongs to the majority party, she can presumably foresee a time when her party finds itself in the minority, at which time the ability to filibuster judicial nominees may be more a source of relief than of frustration. The price that the nuclear pivot is willing to pay in order to keep the judicial filibuster is most clearly illustrated if we assume that the nuclear pivot is also the median senator, which is entirely possible: in that case, the price that she pays is simply the difference between her ideal point, m , and the more moderate point at which she is prepared to go nuclear, n .

Third, the precise location of n is unclear. Only the nuclear pivot knows what price she is willing to pay to preserve the option of future judicial filibusters. Indeed, the identity of the nuclear pivot may be unknown. As noted above, a floor vote on the nuclear option was averted by a last-minute agreement among fourteen relatively moderate senators from both parties—a group that likely included both the nuclear pivot and the median senator (assuming that the two are not one and the same).¹¹² It became clear in the prelude to this agreement, as party leaders on both sides attempted to muster the necessary votes for and against the nuclear option, that neither side knew whether it would prevail, much less which senator's vote would prove decisive.¹¹³ The identity of the nuclear pivot is, moreover, much less certain than that of the median senator. The players have less information about the former than about the latter. Whereas the likely identity of the median senator can be assessed—if not mathematically calculated¹¹⁴—from the voting records of individual senators on actual bills and nominations, there is no comparable history of roll call voting on the nuclear option that might similarly illuminate the nuclear pivot's identity.

individual senators in the pursuit of their own selfish interests, which may in fact be opposed to those of the Senate as an institution).

112. See *supra* notes 32-33 and accompanying text.

113. See, e.g., Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5 (noting that Senate Majority Leader Frist was “perilously close” to losing the votes needed to exercise the nuclear option, and quoting a former Senate aide’s assessment of the nuclear option’s viability as “too close to call”).

114. See Jackman et al., *supra* note 37, at 361, 362 fig.2 (concluding on the basis of roll call voting analysis that the median senator is most likely to be Susan Collins or Olympia Snowe).

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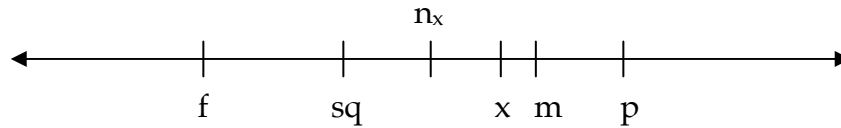
Following Charles Cameron's approach, we model our uncertainty as to both the identity and location of the nuclear pivot by employing the Harsanyi maneuver, a tactic used by game theorists to cope with troublesome situations of incomplete information.¹¹⁵ Even if we assume that the nuclear pivot must be one of the seven Republican senators who signed the agreement that averted a floor vote on the nuclear option, there is some probability that it might be any one of them. Moreover, these senators range in their willingness to tolerate filibusters. What might the outer limits of this range be? Presumably, the *most* tolerant of possible nuclear pivots would allow the Democrats to filibuster *any* rightward movement of the status quo, whereas the *least* tolerant of possible nuclear pivots would abolish the filibuster if the Democrats did not allow a bare Republican majority to move the status quo all the way to m . Accordingly, as shown in Figure 12, we model n as falling within a range bounded by sq and m , with its exact location to be determined by chance.

Fourth, the actual identity and position of the nuclear pivot may be difficult to ascertain in part because each of the possible nuclear pivots has strategic incentives to deceive the opposition and to represent that he or she is the true nuclear pivot. Figure 13 depicts the preferences of a moderate Republican senator who may or may not be the nuclear pivot. Her ideal point, x , lies slightly to the left of m : that is, she prefers a bench that is slightly more liberal than what her fifty-one most conservative colleagues would favor. The point at which she will vote in favor of the nuclear option—which we might call her *nuclear strike point*—is n_x : Democratic filibusters to the left of n_x will provoke her to vote for the nuclear option, but she will not join a nuclear strike against the filibuster if the Democrats merely attempt to prevent the status quo from moving to the right of n_x . The distance between x and n_x is, again, the ideological price that this senator is prepared to pay in order to preserve the judicial filibuster for future use. If, but only if, our hypothetical senator would in fact provide the last vote needed to abolish the judicial filibuster, then n_x is the true nuclear pivot in addition to being this particular senator's nuclear strike point. Even the senator

115. The Harsanyi maneuver is a way of making situations of radically incomplete information amenable to game-theoretic analysis by turning them into probabilistic events, as in the form of a lottery. See CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 100 (2000) (explaining the Harsanyi maneuver, and employing it to model the existence of a veto override player whose precise position is unknown).

herself, however, may not know if she is the actual nuclear pivot, particularly if her colleagues are also vying to be perceived as the nuclear pivot.

FIGURE 13: STRATEGIC DECEPTION BY A POSSIBLE NUCLEAR PIVOT



To be the nuclear pivot is to enjoy considerable influence. If our hypothetical senator can convince her colleagues on both sides of the aisle that she is in fact the nuclear pivot, she can cause the status quo to move exactly to her ideal point, x . In a world without filibusters, the status quo would simply shift to m , to the right of her ideal point. By contrast, in a world with filibusters but no nuclear option, the status quo remains gridlocked at sq , to the left of her ideal point. If, however, our senator's Republican colleagues believe that she is the nuclear pivot, and that she will allow the Democrats to filibuster any movement to the right of x , they will view attempts to move the status quo to the right of x as futile and will accept x as the best result that they can attain.

By the same token, our hypothetical senator will want to convince the Democrats not only that she is the nuclear pivot ($n = x$), but also that she is unwilling to pay a price to keep the filibuster ($n_x = n = x$). That is, her incentive will be to engage in strategic bluffing and appear less tolerant of filibusters, and more willing to exercise the nuclear option, than is actually the case. If she can accomplish this deception, the Democrats will allow the bench to shift as far to the right as x , her ideal point, but will (with her blessing) filibuster attempts to move the bench any further. In this case, not only will she have obtained her ideal outcome, but she will also have preserved the filibuster without paying any price.

2. *The Implications of a Nuclear Pivot*

What are the practical implications of adding a nuclear pivot to the model? First, the introduction of the nuclear option to the model narrows the gridlock region. In Figure 12, the addition of the nuclear pivot, n , means that the gridlock region is no longer the space between sq and m but is instead the space between n and m . That is, the ideological balance of the bench can now move from sq to n . Movement to the right of n can still be filibustered without triggering the nuclear

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option. Meanwhile, the median senator will continue to block leftward movement of the status quo away from m .

Second, this narrowing of the gridlock region occurs purely at the expense of those minority senators who have no means other than the filibuster to restrain movement of the status quo. Though some have characterized the agreement reached by the Gang of Fourteen as a victory of sorts for the Democrats,¹¹⁶ there is no plausible way for Democrats to put a pretty face on the actual effect of the nuclear option: the potential for abolition of the judicial filibuster by simple majority vote forces the filibustering minority to give up ground. In the absence of a nuclear pivot, the filibuster pivot can prevent the status quo from moving to the right of sq . The threat of the nuclear option, however, forces the filibuster pivot to settle at best for n . In agreeing not to filibuster candidates beyond a point of the nuclear pivot's own choosing, the opposition merely minimizes its losses.

Third, notwithstanding the existence of a nuclear pivot, the threat of a filibuster nevertheless enables minority senators to extract some degree of substantive concessions from the president, in the form of less extreme judicial nominees. Given a configuration of the type depicted in Figure 12—with the president at one end of the ideological spectrum, the filibuster pivot at the other, and the status quo between the two—the introduction of a nuclear pivot contracts, but does not eliminate, the gridlock region.

Fourth, there is a meaningful risk that the Democrats may accidentally trigger the nuclear option by attempting filibusters that the nuclear pivot will not in fact tolerate. To be sure, the nuclear pivot has every incentive to prevent the opposition from provoking a nuclear strike: as explained above, the continued existence of the filibuster enables the nuclear pivot to prevent the status quo from moving too far to the right for her taste. Because multiple senators can be expected to portray themselves as the nuclear pivot, however, the Democrats may experience confusion as to who is the actual nuclear pivot. Moreover, even if the Democrats can ascertain the identity of the nuclear pivot, they understand that the

116. See, e.g., David Espo, *Senate Clears Way for Approval of Judge*, RECORD (Hackensack, N.J.), May 25, 2005 at A11 (quoting an e-mail from Senator Majority Leader Reid's office that urged various groups to hail the agreement as a "victory over the radical right"); Bruce Smith, *Senator Faces a Storm at Home*, TULSA WORLD, June 5, 2005, at A13 (describing the criticism that Republican Senator Lindsey Graham has attracted from conservatives for his role in forestalling the nuclear option).

nuclear pivot faces incentives to bluff as to the true location of n . They may therefore mistake a true signal about the location of n for a bluff, resulting in a nuclear strike. There is no obvious way for the true nuclear pivot to send a distinctively credible signal about the true location of n , or for the Democrats to distinguish true information from self-interested cheap talk. Nor do the Democrats have the opportunity to learn over repeat play and employ the knowledge that they acquire in subsequent rounds: the only foolproof way for the filibuster pivot to discover where n lies is actually to provoke the nuclear option, which in turn ends the game for the filibuster pivot.

Fifth, any deal to forestall the nuclear option is likely to involve the participation of most or all Republican moderates. An obvious reason for the group nature of the deal is that even the nuclear pivot may not realize that he (or she) is in fact pivotal. The inherent uncertainty of the situation is likely to be aggravated, moreover, by strategic posturing on the part of moderate Republican senators, each of whom stands to benefit by masquerading as the nuclear pivot. The Democrats therefore have little choice but to deal simultaneously with a number of Republican senators if they wish to avert the nuclear option with any measure of confidence.

Sixth, potential nuclear pivots have good reason to negotiate with the Democrats as a group; they are likely to stake a more favorable position by bargaining collectively than by bargaining individually. As noted above in our discussion of Figure 13, each potential nuclear pivot may have an incentive to appear less tolerant of Democratic filibusters than is actually the case, in order to minimize the price that he or she must pay to preserve the judicial filibuster for future use. A senator who takes a harsher stance against the filibuster than do others, however, runs the risk of demonstrating to the Democrats that he or she is not in fact the nuclear pivot and can therefore be safely disregarded. That is, the potential nuclear pivots risk engaging in a race to the bottom (or, more accurately, a race to the left), as each seeks to avoid the appearance of being more conservative than the others. They are better off if they can coordinate instead upon a single, relatively harsh anti-filibuster stance—say, for example, that “[n]ominees should only be filibustered in extraordinary circumstances.”¹¹⁷

Finally, the written truce agreement reached by the Gang of Fourteen is best understood not as a binding agreement that will actually constrain the relevant players, but rather as an effort by a consortium of potential nuclear pivots to signal its relative intolerance of judicial filibusters.

117. Memorandum of Understanding on Judicial Nominations, *supra* note 33.

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The agreement amounts in substance to a statement that there exists some limited set of circumstances under which the filibustering of a judicial nominee will not trigger the nuclear option. Not only is that set of circumstances left undefined by the agreement, however, but there also exists no external authority capable of defining it in a binding way. Whether and under what circumstances the filibuster pivot will actually support a filibuster, or the nuclear pivot will actually launch a nuclear strike, must ultimately be determined not by interpretive argument over the meaning of the agreement, but rather by the ongoing strategic interaction of the filibuster and nuclear pivots. The existence of a vague and unenforceable agreement does not convert a game of strategy into a hermeneutic contest.

3. Conditions Governing the Likelihood of the Nuclear Option

Under what conditions does our model predict that a nuclear strike will occur? First, the nuclear option will only be triggered by an effort to shift the status quo to some point between the filibuster pivot's ideal point, f , and the nuclear pivot's strike point, n_x . To see why this is so, consider Figure 13: for movement to the left of f , there is no risk of a filibuster that might trigger the nuclear option, while for movement to the right of n_x , the nuclear pivot will be unwilling to exercise the nuclear option. Second, the filibuster pivot must lack accurate information as to the location of the nuclear strike point, n_x . The filibuster pivot will not knowingly support a filibuster that the nuclear pivot is unwilling to tolerate. In Figure 13, for example, the filibuster pivot will not attempt to block shifts that occur to the left of n_x . From the perspective of the filibuster pivot, n_x is not ideal, but it is still better than the median senator's ideal point, m , which will be the result if the nuclear option gives a simple majority the power to defeat filibusters. Thus, only if the filibuster pivot miscalculates the location of n_x should we expect to observe actual exercise of the nuclear option. The prospect of the nuclear option thrives on the filibuster pivot's uncertainty as to what the nuclear pivot will tolerate. And as we have argued above, there are many reasons to think that the true location of the nuclear strike point will be difficult for the filibuster pivot to discern.

Our predictions differ somewhat from those suggested by Douglas Dion, who has proposed a "partisan theory" of the circumstances under which a legislative majority is likely to take action against minority

obstructionism.¹¹⁸ On Professor Dion's view, smaller majorities are more likely than large majorities to take action against obstructionist tactics—by voting for cloture, for example, or by amending procedural rules—in part because smaller majorities are more ideologically cohesive, and in part because smaller majorities face larger *minorities* that are more prone to engage in obstruction.¹¹⁹ The empirical support for his theory is for the most part drawn from the antebellum House of Representatives, however, and he takes care to qualify his conclusions with respect to the Senate as tentative.¹²⁰

On its face, Dion's theory suggests that a small Senate majority should be more likely than a large Senate majority to exercise the nuclear option. We conclude differently. Even if Dion is correct that smaller majorities are more ideologically cohesive than larger majorities, ideological cohesion alone may not be enough to ensure that the nuclear pivot will side with fellow party members in backing a nuclear strike. Even a relatively conservative nuclear pivot might plausibly prefer to retain veto power over a future renegade liberal majority than to secure the confirmation of a particular conservative jurist today. As we have argued above, a standing precedent that judicial filibusters are out of order has consequences for the future that can be perceived and weighted in different ways.¹²¹ As a result, one's appetite for conservative (or liberal) judges may not exactly match one's willingness to employ the nuclear option in order to satisfy that appetite.¹²² Two senators of identical ideological timbre may assess the net cost or benefit of the nuclear option quite differently. Consequently, the ability of a bare majority to support the nuclear option demands sameness-of-view along both ideological and nonideological dimensions.

This need for agreement along nonideological dimensions, in turn, makes it harder for ideologically cohesive but small majorities to muster the necessary support for the nuclear option than Dion's argument might imply. Rather, the greater the number of senators who share a particular

118. See DION, *supra* note 30, at 21-37. We are grateful to Beth Garrett for bringing Professor Dion's work to our attention, and for encouraging us to articulate the differences between his views and ours.

119. See *id.* at 36, 47.

120. Compare *id.* at 41-162 (devoting four chapters to discussion of the House of Representatives from 1837 to 1895) with *id.* at 165-88 (devoting one chapter to discussion of the Senate, and concluding only that the results suggest that "the pattern of behavior witnessed in the House . . . does have at least surface plausibility in the Senate").

121. See *supra* Parts III.C.2, IV.D.1.

122. See *supra* Part IV.D.1 (explaining why the median senator and nuclear pivot may not be the same person).

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ideological bent, the greater the odds that fifty or more of those same senators will also concur in the view that the benefits of a nuclear strike outweigh its costs. Thus, whereas Dion contends that small majorities are more likely to abolish obstructionist tactics because they tend to be cohesive, we believe instead that the likelihood of the nuclear option will be positively correlated with both the ideological cohesion *and* the size of the majority faction. A bare legislative majority that exhibits ideological cohesiveness may nevertheless be hard-pressed to summon the votes needed for the nuclear option. At the same time, however, we do not believe that very large and ideologically cohesive majorities are especially likely to exercise the nuclear option, for the straightforward reason that such majorities can have their way by means of ordinary cloture votes, without resort to extraordinary measures. In our view, there exists some intermediate size of legislative majority—neither excessively large nor excessively small—that maximizes the likelihood of a nuclear strike.

V. PRESIDENTIAL NOMINATION STRATEGY IN THE SHADOW OF
THE NUCLEAR OPTION: A TIME FOR AGGRESSION, OR
A RACE AGAINST TIME?

Against the backdrop of the truce reached by the Senate's Gang of Fourteen, what strategy should the President now adopt with respect to the selection of judicial nominees? At root, he has two options, a hardline approach or a more compromising approach: either he can continue to select nominees at least as conservative as those who have previously been filibustered, or he can select more moderate nominees who are unlikely to encounter a filibuster. In any given case, the hardline strategy has three potential outcomes: (a) the nominee is confirmed without a filibuster; (b) the nomination provokes a filibuster that triggers the nuclear option; or (c) the nominee is filibustered, and the nuclear option fails.

At first glance, the President seems to have little to lose from pursuing the hardline approach. From his perspective, outcomes (a) and (b) are both desirable: either his desired nominee is confirmed, or the filibuster pivot is eliminated, in which case the status quo is freed to move as far to the right as the median senator will allow. However, (b) will not occur unless the filibuster pivot miscalculates. Nevertheless, the fact that the nuclear option has contracted the gridlock region and made possible some additional movement to the right might seem to imply that the time is ripe for aggressive action.

The case for strategic moderation, by contrast, rests upon an important consideration that we have so far neglected—namely, the relative discount factors of the President and the filibuster pivot. In any confrontation between the President and the Senate over judicial nominations, the President enjoys a number of advantages, but time is not one of them. There is no reason to think that the President can or will outlast his opposition in the Senate. If history is any indication, a Democratic minority numerically capable of sustaining a filibuster is a fact of life in the Senate. Not once in the last century has the Republican Party enjoyed a filibuster-proof Senate majority.¹²³ President Bush, by comparison, is certain to leave office in another couple of years,¹²⁴ and the likelihood that he will be replaced by a Democrat is hardly negligible. Indeed, as a general matter, the political lives of presidents are much shorter than those of senators:

At any given time over the last thirty years, between one-quarter and one-half of those in the Senate had already served longer than twelve years, while approximately one-fifth had more than eighteen years of service behind them. By comparison, only one-fifth of presidents—including, in recent times, just two of George W. Bush's eight immediate predecessors—have managed to serve a full eight years in office, while another fifth have served less than one term.¹²⁵

A president's political mortality—particularly that of a lame-duck president entering the second half of his last term—can be expected to influence his choice of nomination strategy. If presidents are to leave their mark upon the world—or the judiciary—they must do so quickly. Judicial vacancies left for Democratic successors represent missed opportunities for a Republican President and Senate leadership. Moreover, if the President can improve today upon the status quo with appointments that are only moderately conservative, there is no reason for him to wait until tomorrow to do so: a moderately conservative judge does nothing to affect the status quo until he is already seated on the bench. To paraphrase an old adage, as the end of his second term approaches, a bird in the hand may well prove to be worth two to President Bush.

With the support of a likeminded Senate majority willing to threaten the nuclear option, the President enjoys powerful advantages over his opposition in the Senate. He cannot make full and prompt use of these advantages, however, until he first knows just how extensive they

123. See Law, *supra* note 4, at 515 & n. 163.

124. See U.S. CONST. amend. XXII, § 1 (providing that no one may be elected president more than twice).

125. See Law, *supra* note 4, at 505.

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actually are, and it is questionable whether he now has the time to discover their true extent by trial and error. The sheer passage of time thus casts a different light upon the plight of his enfeebled opposition. By now, it should be clear that the existence of the nuclear option is not good for the Democrats. Moreover, the truce that has been styled a Democratic victory is, in substance, nothing of the sort. At best, it formalizes in loose language what was political reality all along—namely, that the filibuster may only be used to the extent that the nuclear pivot is in fact willing to tolerate filibusters. The real victory for the Senate's remaining Democrats lies in the fact that, for the better part of the current president's political lifespan, they have managed to filibuster judicial nominees and postpone the moment of nuclear reckoning—only to postpone it again with an uncertain truce, and thereby keep the true extent of their own power shrouded in mystery, through the critical juncture of the President's first two appointments to the Supreme Court.

VI. CONCLUSION: DEBUNKING THE CONVENTIONAL WISDOM

Conventional wisdom is a stubborn thing. If the current spectacle of appointments gridlock under unified government were not sufficient, we hope that our analysis helps lay to rest the widespread but inaccurate notion that appointments gridlock is simply the product of divided government. Using a pivotal politics model, we have sought to show that appointments gridlock, like legislative gridlock, is a function of three variables: the number of veto players, the ideological location of the veto players relative to one another, and the ideological location of the status quo relative to that of the veto players. Just as a celestial eclipse demands a precise alignment of sun, moon, and earth, gridlock is likely to be broken only when all of the relevant players and the status quo are aligned in a particular fashion. In our political system, bare legislative majorities do not suffice to accomplish change; rather, minorities possess qualified forms of veto power. The common tendency to describe the balance of power in terms of either unified or divided government obscures this basic fact.

Our approach also suggests that it may be naive to blame the so-called "Borking" of any number of earlier judicial nominees for the current state of the federal judicial selection process. Political actors with veto power can be expected to use that power to block changes in the status quo that they do not like. The unsurprising result is the defeat of judicial nominees who promise to transform the status quo in ways that the

relevant veto players find unacceptable. There is little to discourage veto players from exercising their power except, perhaps, the threat of retaliation, which may not be effective when the stakes are high and the prospect of retaliation seems distant.

By modifying the basic pivotal politics model to include a nuclear pivot, we have sought also to illuminate the consequences of the nuclear option. The possibility of a permanent filibuster override harms the Democrats by impairing their ability to block changes in the status quo. Moreover, contrary to conventional wisdom, the Democrats have gained nothing of substance from the truce agreement concluded by the Gang of Fourteen. The existence of a written agreement does nothing to change the underlying reality that the Democrats can filibuster judicial nominees only to the extent that the nuclear pivot will tolerate filibusters. The truce agreement amounts in substance to a statement by a consortium of all the likely nuclear pivots that they are relatively intolerant of judicial filibusters. It is highly doubtful, however, that any verbal agreement could convey, credibly and precisely, the actual limits of their tolerance. The likelihood of the nuclear option will ultimately depend not upon the meaning of the words adopted by the Gang of Fourteen, but rather upon the ability of minority senators to navigate the limits of what the nuclear pivot will tolerate, in the face of limited information and even deliberate misinformation.

The extent and outcome of future partisan strife over judicial selection cannot be forecast with certainty. We have sought, instead, to rule out certain interpretations of recent events, and to pinpoint what remains uncertain. Our model suggests that the mere existence of the nuclear option forces the Democrats to surrender some, but not all, of the ideological ground that they have sought to defend via the filibuster. At the same time, the Democrats have benefited by prolonging the struggle over various judicial vacancies well into the current President's second term, and by posing a continuing check of limited but uncertain magnitude upon the President's judicial choices. It remains to be seen the extent to which the President can capitalize upon the newfound leverage conferred by the threat of a nuclear strike, or must instead take a more moderate stance to obtain what he can in his remaining time.