

6 questions answered about ‘the nuclear option,’ the filibuster, and Supreme Court nominations

By [Louis Jacobson](#) on Friday, February 3rd, 2017 at 10:00 a.m.

So what is the ‘nuclear option’ in the Senate? We run through the details.

Now that President Donald Trump has tapped Neil Gorsuch to fill an open seat on the Supreme Court, the Senate is once again careening toward a showdown over “the nuclear option,” an obscure but important rule that governs how the chamber conducts its business.



The U.S. Senate chamber in 1868

Under current Senate rules, a minority of senators — indeed, as few as one — can filibuster, or hold up, a Supreme Court nomination, effectively requiring 60 votes for a motion to end debate and move on to the nomination itself.

Since the Republicans currently hold [52 Senate seats](#), it means the GOP needs eight Democrats simply to schedule a final vote. (After the 60-vote threshold is reached, the nomination itself needs only 51 votes to pass.)

Given the degree of partisan polarization in the Capitol and in the country today, most observers expect it will be hard for Republicans to secure the backing of eight Democrats. So a procedural shortcut known as the “nuclear option” stands as an alluring alternative, since it would allow Senate Republicans to sidestep the 60-vote threshold for Supreme Court nominations.

With this concept all over the news these days, let’s take a look at what the “nuclear option” is. (And just to be clear, the use of “nuclear” here is only metaphorical. No actual nuclear weapons are involved.)

How does the Senate work?

There is a [legend of uncertain veracity](#) that says George Washington and Thomas Jefferson came to agree that the Senate should serve as a “saucer” to the House’s “tea cup” — a vessel for cooling the hottest passions emanating from the House.

Whether the specifics of the tale hold up, the idea that the Senate is the slower, more cautious half Congress has been the chamber’s reputation throughout its history. The Constitution delegates internal rule-setting to the Senate itself, and for much of its history, the chamber — unlike the House — did not implement a mechanism to maneuver around a member determined enough to block action by mounting a filibuster.

In 1917, the Senate voted to empower a supermajority of 67 to cut off a filibuster and move on to other business, using a motion known as “cloture.” Then, in 1975, the Senate voted to lower the supermajority to its current number, 60.

Still, 60 votes is a significant hurdle for a chamber that has not often had one party win that many seats. In recent years, the two parties have become more polarized, and more willing to filibuster, even on matters that had previously been treated as routine. That has put pressure on Senate leaders to get rid of the longstanding supermajority hurdle or else face gridlock — especially for such high-stakes topics as nominations.

Detractors have warned that such important matters were better dealt with using the higher degree of consensus conveyed through a 60-vote supermajority. But there is one tool available to a Senate leader willing to buck the chamber’s longstanding tradition: the nuclear option.

How would senators deploy the nuclear option?

The mechanics of the nuclear option are complex even by the standards of parliamentary maneuvers, requiring a precise series of carefully choreographed steps. (Readers brave enough to tackle the details can refer to multi-page explanations in these [two reports](#) by the nonpartisan Congressional Research Service.) The gist, though, is that the majority party would move to change the supermajority rule through a series of votes that require only a simple majority.

At various points in recent years, one Senate leader or another has threatened to pull the nuclear trigger, but a bipartisan coalition managed to unite to defuse the situation — until matters came to a head on Nov. 21, 2013.

What happened on Nov. 21, 2013?

In 2013, Democrats, led by then-Majority Leader Harry Reid of Nevada, finally gave in to frustration over the refusal by the chamber’s Republican minority to approve President Barack Obama’s appointees, notably appeals-court judges. With the support of 52 Democrats, Reid succeeded in deploying the nuclear option, easing passage of several of Obama’s executive-branch and judicial nominees.

Reid limited the scope of his maneuver to appointments below the level of Supreme Court justice; for the Supreme Court, traditional filibuster and cloture rules would still apply. The fact that Reid left that exception is what brought us to the current faceoff.

Now, some Republicans in and out of the Senate — not to mention Trump — are saying that if Democrats filibuster Gorsuch, Senate Majority Leader Mitch McConnell, R-Ky., should follow Reid’s lead and deploy the nuclear option.

How big a deal would it be if McConnell implements the nuclear option?

Senate experts we checked with agreed that it would be a landmark moment if McConnell pulls the trigger, but they also urged some caution on using superlatives.

For starters, they agreed that if McConnell acts, he would essentially be extending the scope of Reid’s move incrementally.

Indeed, it was Reid’s move that was akin to “crossing the Rubicon” by laying down a precedent that McConnell can now use, said Lawrence Solum a Georgetown University law professor.

Also, a move by McConnell to change the rules on Supreme Court nominations would presumably leave untouched the 60-vote threshold for most other important Senate business, such as passing tax and spending bills. This would help keep the Senate more of a consensus-seeking body.

“This is another major step, but not as significant as would be going nuclear on ordinary legislation,” Solum said. Further assaults on the 60-vote supermajority are “unlikely in short term,” said University of Kansas political scientist Burdett Loomis, though he added, “Once the door opens, who knows?”

By itself, the public relations impact of detonating the nuclear option could be significant, said Gregory Koger, a University of Miami political scientist. “It would be a landmark political event, highlighting to the country that the court has become a wholly political body staffed by ideologues,” he said.

Haven’t Senate leaders been all over the map on whether to use the nuclear option?

Yes, they have. In November 2013, we gave [McConnell](#), [Reid](#) and [Obama](#) full-flops for changing their positions on whether the nuclear option was desirable. Reid and Obama favored the change in 2013 even though they had opposed it in 2005 when they were members of a Senate minority. And McConnell was willing to use the maneuver when he was in the majority in 2005 but opposed it in 2013 when he was leading the minority.

“It is fair to say that people speaking on behalf of each party have taken both sides of the argument over filibustering,” Koger said. “I was at a Senate Rules Committee hearing in July 2010 when the senators joked about this very point, suggesting that they should just swap talking points when there is a change in the majority.”

Most observers assign a measure of blame to both parties for ratcheting up the partisanship and relying increasingly on the filibuster over the course of many years. But some say that the current situation was exacerbated by the Republicans’ refusal, for nearly a year, to even grant a hearing to Merrick Garland, Obama’s pick for the Supreme Court seat that Gorsuch has now been tapped to fill.

“It’s fair to say that the parties have argued both sides of the filibuster issue,” said Steven Smith, a political scientist at Washington University in St. Louis. “But the Republicans have set new records for obstructionism in recent Congresses, including the record-setting delay in acting on the Garland nomination.”

What could keep the nuclear option from being used soon in the Senate?

With several Democrats promising a filibuster, and the apparent willingness of Senate Republicans to use the maneuver, the nuclear option seems likely to be deployed in the coming weeks, experts said.

The one wild card is whether enough senators will realize that curbing the reach of the filibuster ultimately hampers their own power as lawmakers. In the Senate, the filibuster hands a powerful legislative weapon to every single member of the body. So when the filibuster is weakened, every lawmaker’s power is weakened as well.

“Many senators — liberal, conservative, and moderate — like the individual power created for them by the Senate’s reliance on” supermajority cloture, Smith said.