

THE BROOKINGS INSTITUTION

5 on 45:
On the nuclear option

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PITA: You're listening to 5 on 45 from the Brookings Podcast Network: analysis and commentary from Brookings experts on today's news regarding the Trump administration.

(Music)

BINDER: Hi, I'm Sarah Binder. I'm a senior fellow here in Governance Studies at the Brookings Institution. Today was quite the day on the Senate floor. The Senate went what we call—went nuclear. It banned filibusters for today and going forward of Supreme Court nominations. I thought I'd talk a little bit about, a little more precisely, what it means to go nuclear, how did we get to this spot, why did the Senate go nuclear today, why did Republicans in particular take the Senate nuclear, and what does it mean going forward? How momentous or how important is today's event, and what should we expect in the years ahead?

So first, what do we mean when we went nuclear? Well, the rules of the Senate actually require something called cloture to cut off debate. Cloture entails 60 votes for Supreme Court nominations, meaning if you want—Democrats, today the minority, if they want to filibuster and they got more than 41 votes, it means they prevent cloture. That's a filibuster. Republicans wanted to get confirmed Neil Gorsuch, the president's nomination to the Supreme Court, and so they went nuclear. They didn't actually have enough votes to technically change the rules of the Senate, and so they set a new interpretation of the rules, what we call a new precedent. From now on, the precedent says when Supreme Court nominations come up, it only takes 51 votes, not 60, not a supermajority but a simple majority, to cut off debate and move forward to an up-or-down vote to confirm the Supreme Court nomination. Democrats had done this, they'd

gone nuclear for lower-court nominees as well as for Cabinet officials and other executive branch nominees back in 2013, when it was Obama in the White House and the Democrats controlling the Senate. So this really was the Senate Republicans' turn to kill the rest of the filibuster for nominations. Now, keep in mind the rules still say 60, but the Senate has the authority—the majority of the Senate can interpret its rules the way they want, and so they've set a new precedent. From now on, 51 votes to cut off debate. No more filibustering of Supreme Court nominees.

All right, why did this happen, how did we get here? Well, there's certainly a lot of—Democrats and Republicans will tell the story different, and certainly from the Democrats' perspective, why did they filibuster it? Well, certainly the Republicans taking hostage the empty seat of Justice Scalia after he passed away and refusing to consider Obama's nominee, Merrick Garland—that's certainly stuck in the craw of Democrats and pushed them in part, in addition to Gorsuch's views, to filibuster. Republicans, they have their own list of complaints about how the Democrats treated Bush nominees in the past, and so it's hard to say who's to blame here. So I think it's helpful if we step back and we think of today's change as part of a decades-long, intensely partisan parliamentary arms race, a procedural warfare that actually has been increasingly pitched over the judicial branch.

So what is this partisan warfare? Why do we get here? So first of all, partisanship is just clearly boiling over. At least since the 1980s, partisanship has been on the rise in the Senate, as basically ideological positions and the politicians in each party have been sorted into the Democratic Party on the left and the Republican Party on the right. And of course, elections have gotten more competitive, and so who controls the majority

really matters. As partisanship has heated up, the courts have also become far more important policymakers. Contested nominations were the name of the game until Democrats killed filibusters for judicial nominations. It matters to the parties more and more who sits on the courts, and certainly who sits on the Supreme Court, right? Obviously as Congress has deadlocked, the more stalemate there has been in Congress, it's made the Supreme Court even more pivotal. And so, no surprise Republicans are eager to put their own party's nominee onto the bench.

So we have this long parliamentary arms race. The minority finds a way to block the majority, the majority clamps down. The minority looks for a new way to obstruct the majority, and the majority goes to greater length to find a new way. And so the combination of partisanship, aggressive majorities, and these really byzantine rules of the Senate, it really added up and brought us to this momentous nuclear move today.

How important is it? I think it's careful to keep in mind that today will not be the high-water mark of partisanship in the U.S. Senate. I think it makes more sense to think of today's change to the rules of the game, or interpretation of the rules of the game, as one more very slow, incremental step towards majority rule in the Senate. It is still possible to filibuster legislative measures. It's just nominations that now won't be—can't be filibusters. It may well be that a future majority—perhaps this majority, though I'm not so sure—it may well be that a future majority decides that what they want to achieve is so important that they will reinterpret the rest of the cloture rule to create majority cloture—in other words, to ban filibusters all together in the Senate. I think there are a lot of reasons why majorities actually like the filibuster. It advantages them as individuals who might want to challenge or step out and distinguish themselves from

their own party, and it's nice to blame the minority, for sure, when things don't go your way. But the longer term evolution of the Senate, I think, has followed a very slow path towards majority rule. Senators rarely reverse course. They rarely re-give—they rarely give back rights to the minority, suggesting that a future, cohesive, ambitious Senate majority could one day actually be tempted, kind of, to finish the job.

(Music)

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