# “GOING NUCLEAR”: THE EFFECT OF FILIBUSTER REFORM ON SE NATORIAL TREATMENT OF FEDERAL APPEALS AND DISTRICT COURT NOMINATIONS

by

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(Under the Direction of Michael Lynch)

## ABSTRACT

In 2013, Senate Majority Leader Harry Reid resorted to the procedural “nuclear option” to thwart Republican obstruction of judicial nominations. This reform-by-ruling of the presiding officer effectively lowers the vote-threshold on certain executive nominations from 60 to 51. This paper elucidates the impact of this procedural reform on the nominations of federal appeals and district court judges. Utilizing survival analysis and logistic regression, I show that nominations made during the use of the nuclear option were more likely to be confirmed as well as confirmed at a quicker rate. The effect of the nuclear option on the likelihood of success and length of the process is statistically significant for both appeals and district court nominations. This indicates that while President Obama and Senator Reid were interested in filling three vacancies on the powerful D.C. Circuit Court, filibuster reform improved the treatment of lower-court judicial nominations across the board.

Index Words: Filibuster, Nuclear option, Judicial nominations, Survival analysis, Legislative process

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## Introduction

Previously, both Senate Republicans and Democrats have threatened use of the procedural "nuclear option". In 2013, what was once a threat became a reality. Senate Republicans were accused of being obstructionists for filibustering Obama-appointed nominees at a supposedly unprecedented rate. Obama commented, "This isn't obstruction on substance, on qualifications. It is just to gum up the works".[1] The nuclear option was the solution to this accused obstruction.

In his statement, Obama connected the filibustering of his nominees to a broader trend of gridlock in Washington:

> It's no secret that the American people have probably never been more frustrated with Washington, and one of the reasons why that is, is that over the past five years, we've seen an unprecedented pattern of obstruction in Congress that's prevented too much of the American people's business from getting done…Today's pattern of obstruction just isn't normal. We can't allow it to become normal.

This paper focuses specifically on nominations to federal district and appeals courts. It sets out to answer the following question: did the use of the nuclear option improve the confirmation process for Obama's lower-court nominees? More specifically, were Obama's nominees confirmed at a faster rate, and did they have a greater likelihood of being successfully confirmed?

A handful of events in the history of U.S. House and Senate procedure have enabled scholars to assess the impact of procedural reforms on policy outcomes, roll-call vote patterns, length of processes, and coalition sizes (Carson, Lynch, and Madonna 2011). Reed's rules (1890) and cloture reform (1917) are two notable examples. The use of the nuclear option will be

[1] "Senate Goes for 'nuclear Option'" POLITICO. Accessed December 2, 2015. http://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199.

counted among the major procedural reforms in the Senate. It effectively removes the 60-vote threshold for cloture on the confirmation of many executive appointments (including but not limited to lower-court nominations) and replaces it with a simple majority threshold. 60 votes would still be required to invoke cloture for Supreme Court nominees (Heitshusen 2013). While less generalizable outside of nomination-related matters, the nuclear option in the Senate gives scholars the opportunity to assess the impact of filibuster reform. I predict that when the nuclear option is utilized, lower-court nominees are more likely to be confirmed and are confirmed at a faster rate.

The fact that the nuclear option is such a recent development is a double-edged sword. On one hand, this paper can take one of the first cuts at elucidating the impact of a significant procedural change. On the other hand, the lack of scholarly literature on the subject poses some difficulties. In "Nuclear Fallout: Investigating the Effect of Senate Procedural Reform on Judicial Nominations", Boyd, Lynch, and Madonna (2015) assess the impact of the nuclear option on both nominee ideology and the length of the confirmation process. Counter to their prediction, they find that Obama nominees are no more liberal during the use of the nuclear option than before. They also find that the confirmation process is significantly shorter post-nuclear option. This is determined through a difference of means test. Their predictions are intuitive, but a multivariate, statistical analysis that controls for institutional factors, political factors, and nominee-specific differences is necessary to crafting a better understanding of the nuclear option's impact. This paper sets out to do just that. I will proceed as follows: first, I will examine the current literature on nomination politics, procedural and obstruction tactics, and the lead up to the deployment of the nuclear option. Next I will detail the methods and findings of the Boyd et al. (2015) piece, followed by an exploration of relevant scholarship pertaining to

lower-court judicial nominations. Most important among these is a piece by Martinek et al. (2002), which presents a widely acclaimed model of the duration of the lower-court judicial confirmation process. Their model is an integral component of my empirical analysis. Next, I will discuss my theory and two hypotheses, followed by an estimation of a Weibull hazard model and a logistic regression to estimate the duration of the confirmation process and the likelihood of a successful confirmation, respectively. I will conclude with a discussion of my findings.

## Previous Scholarship

### *Politicizing "Advice and Consent"*

The federal government is comprised of three branches with separate but overlapping powers.[2] One of the president's enumerated powers in Article II of the Constitution is to make nominations to the federal bureaucracy and bench. These nominations must be done with the "advice and consent" of the Senate. Because of this clause, the process of staffing the bureaucracy and courts engages both the executive and the Senate. While the two players may not be even-handed in the game, the president must either work with Congress or at least account for congressional preferences in choosing nominees (Rottinghaus and Bergan, 2011; Sollenberger 2008).

In an era of increased polarization, the confirmation process is yet another arena for the party of the president and the opposition in the Senate to engage in a political duel. This is not a recent development. For over a decade, scholars have identified that partisan squabbling and delays have increasingly surrounded the confirmation process (Bond, Fleisher, and Krutz, 2009; Mackenzie, 2001; McCarty and Razaghian, 1999; O'Connell, 2015). Nonetheless, in our case, President Obama and Majority Leader Harry Reid Harry Reid were accusing Senate Republicans of obstructing nominees at an unprecedentedly high level. While this level of obstruction may be

[2] "Separate institutions sharing powers" (Neustadt 1990, 29).

expected based on the trends of increasingly partisan confirmation processes, Obama nominees *were,* in fact, being delayed two times as long as Reagan nominees (O'Connell 2015). Later, I will discuss the implications of senatorial delay over the confirmation of judicial nominees. Here, it is important to note that obstructing a nomination for as long as possible, as opposed to voting down a nominee on the floor of the Senate, is the primary weapon of the opposition. Martinek et al. (2002) point out that while a president's nominee is almost always confirmed (Barrow, Zuk, and Gryski 1996; Goldman 1997), they may not be getting what they want "*when* they want it."

***Remedies for Increased Obstruction and Gridlock***

When the minority party is thwarting the president's ability to staff the bench and bureaucracy, the majority party may call for reforms. In the years leading up to the 2013 nuclear option, Senate leaders and President Obama sought to break Republican obstruction in the Senate. I will leave a normative assessment of each party's legitimacy in accusing the other side of not fulfilling their constitutional duties to the pundits. Scholars have demonstrated that senatorial opposition to nominations is partisan in nature (Carter, 1994; Mackenzie, 2001; McCarty and Razaghian, 1999). Ostrander (2016) points out that the desire to reform the nomination process may also flow from the same partisan and ideological sources. This desire is checked by the possibility of the Senate changing hands in the near future. In this scenario, the procedural reforms would be strengthening the hand of the opposing party (Ostrander 2016).

The nuclear option reform was preceded by less extreme measures that sought to decrease the delay of nominations. These reforms were largely unsuccessful as " the nominations facing intense strategic delay tended to remain targets" (Ostrander 2016). Senatorial reticence to nomination reform is completely logical, as the decision to engage in procedural reforms can

have important implications in the balance of power between the Senate and executive. Ostrander (2016) has argued that for the sake of increasing the efficiency of the nomination process, Senate reforms may ultimately be "advantaging the executive" in a significant way. He writes, "without the credible threat of long-term delay, senators may no longer be able to use nominations as a mechanism for thwarting presidential policy ambitions or for extracting information from the executive." Thus, the implications of removing obstruction as a tool go beyond constraining the president in the nomination arena. Obstruction of nominations can be used as leverage in other conflicts where the president and the Senate are at odds with one another.

The attempts at reform failed to prevent the escalation that ended in utilization of the nuclear option. In 2011, the Senate passed a resolution that expedited some nominations to the bureaucracy by allowing them to bypass the committee stage of the process. Instead of going through a committee, the nomination would proceed straight to a floor vote (Ostrander 2016). Oddly, the nominations that bypassed the committee stage proceeded at a slower rate than regular nominations (Ostrander 2016). Then, in 2012, PAESA ("Presidential Appointment Efficiency and Streamlining Act") became law. This reform exempted some appointed positions from Senate confirmation. It did nothing to tackle the issue of strategic delay because the most controversial nominations (including judicial nominations) were not exempted (Ostrander 2016). The failure of these reforms to meaningfully bypass Republican obstruction led to the deployment of the nuclear option.

***Reform-by-Ruling and the "Nuclear Option"***

The "nuclear option"[3] is a procedural maneuver that allows cloture to be reached with a majority vote (as opposed to 60 votes). A member of the majority party makes a point of order. Next, the presiding officer accepts his fellow party member's point of order. If the minority appeals this decision, a member of the majority can submit a "motion to table," allowing a simple majority vote with no debate (preventing the minority from filibustering their party's appeal) (Binder et al., 2007). If the majority party has always had the option of reforming procedure through a ruling of the presiding officer (Wawro and Schickler 2006), why then is there such stability in the rules of the Senate?

One reason for such procedural stability is the deterrence from both sides to changing the status quo. Wawro and Schickler (2006) argue that the reform-by-ruling option is enough of a deterrent to keep the minority at bay. This enables the majority to keep the Senate's rules the way they want them. The other view is that the majority party is prevented from significantly weakening the procedural rights of the minority because of the threat of minority obstruction (Binder and Smith, 1997; Binder, Madonna, and Smith, 2007).

The 2013 nuclear option is not the first time that precedents were established through the ruling of a presiding officer. In the 19th century, there are several examples of Senate precedents being established through this reform-by-ruling tactic (Wawro and Schickler 2006, 36). Still, these rulings did less to strengthen the hand of the majority party than the nuclear option. In fact, threatening such a drastic empowerment of the majority "has long tamed the minority" (Binder, Madonna, and Smith, 2007). This highlights how momentous the nuclear option was in the history of Senate procedure.

[3] Referred to as the "Constitutional Option" by Senate Republicans in 2005.

In 2005, Republicans threatened the nuclear option to facilitate the confirmation of Bush nominees to the federal bench. Writing about the episode in 2007, Binder, Madonna, and Smith summed up the significance of "going nuclear" the following way:

> The history of the Senate is one of procedural opportunism with both parties' leadership guilty of flip-flops on parliamentary rules and practices…majorities should be careful what they wish for. Republicans claimed that they could launch a surgical strike against Democrats by banning only judicial filibusters. But the move would likely have been nuclear—with harmful consequences for both political parties and for the Senate as a deliberative body—and in the future could be replicated on other procedural matters, including the filibuster generally.

Six years after writing these lines, the Democrats "went nuclear". Reid's decision was significant for many reasons. It could prove to be harmful to the Democrats in future years if the Republicans hold the Senate and White House. Plus, its impact could go from purely blocking the filibuster of nominations to threatening the overall viability of the filibuster on all legislative matters (Binder et al., 2007).

It makes sense that the filibuster was specifically targeted by Democrats to thwart Republican obstruction. Howard and Roberts (2015) argue that the threat of a filibuster ("holds") is the most commonly used obstruction tactic. This reform effectively removes "the largest procedural obstacle leading to the delay or failure of many executive nominations" (Ostrander 2016). Different from the previously attempted reforms, the 2013 nuclear option was primarily directed at ensuring the confirmation of high profile, lower-court judicial nominees (Lesniewski, 2013). More specifically, Reid and Obama were concerned with filling vacancies on the D.C. Circuit Court of Appeals (Lesniewski, 2013; Ostrander 2016). As Ostrander points out, "this court is particularly salient as, by virtue of its D.C. jurisdiction, it rules on actions of government agencies". Thus, these nominations were among the most important in terms of increasing Obama's influence over policy as well as cementing his presidential legacy.

***Literature on the 2013 Nuclear Option***

Not enough time has elapsed since the initiation of the nuclear option for a substantial literature that assesses its impact to develop. As a first cut at understanding what effect this procedural change had on the timing and outcome of lower-court judicial nominations, Boyd et al. (2015) provide an excellent analysis. Through a difference of means test, they conclude that there is a statistically significant decrease in the length of the days it takes to confirm a judicial nominee.[4] I hypothesize the same effect of the nuclear option as Boyd et al. (2015). Their results are highly suggestive of an effect, but to be more certain, a multivariate statistical analysis must be done to control for changing political and institutional factors as well as nominee characteristics (Martinek et al. 2002). Another major difference between my study and Boyd et al. is a larger sample size. Because the nuclear option began being used for cloture votes in 2014, my study includes almost an entire additional year of judicial nominations. Likely, the effect of the nuclear option on the confirmation process will become clearer in years to come if it is used again in the Senate.[5] Along with a shorter confirmation process, Boyd et al. (2015) conclude that there is a statistically significant increase in the proportion of confirmations that are successful.

Similar to these scholars, O'Connell (2015) argues that the length of the nomination process for both appeals and district courts decreased post-nuclear option. She compares the mean duration of confirmations as well as failure rates in the year before and after the filibuster reform. She finds that both the duration and the rate of failure decreased for both appeals and district courts. In fact, the average confirmation time saw a greater decrease for district courts

[4] Using Adam Bonica's CF-scores, Boyd et al. also conclude that Obama's post-nuclear option nominees have been no more liberal than his pre-nuclear option nominees.

[5] It is important to consider that the GOP holds a majority in the Senate for the 114th Congress. The majority leader is equipped with tools to block the president's nominees other than the filibuster. I control for a Senate controlled by the opposition party.

than for appeals courts. These comparisons lack any confidence intervals and fail to control for the myriad of variables that influence confirmation timing and likelihood of success.

It is clear why the likelihood of a nominee being successfully confirmed is important to presidential influence over the federal judiciary. What, though, are the implications of a longer or shorter confirmation process? First and foremost, a longer confirmation process means that the president's nominee will have less time on the bench representing the president (Shipan and Shannon 2003). Since the Carter presidency, there has been an increasing understanding from all players in the game that these nominations are an important part of cementing a president's legacy (Hartley and Holmes 1997, 277). Along with inhibiting the president's ability to influence policy, delay dissuades qualified candidates from accepting a nomination (Mackenzie, 2001). It also takes time away from other legislative activities (Ostrander 2016; Senate, 2011).

The probability of a nomination being confirmed is closely related to the length of the confirmation process (Binder and Maltzman 2009; Groseclose and McCarty 2001; Krutz, Fleisher and Bond 1998). The timing of the process also impacts the workload of the federal judiciary. The longer a court has a vacancy, the harder it is for the court to handle their caseload (Roberts 2012). Because of this, in the case of the nuclear option, a shorter nomination process would mean that the procedural move was serving its purpose. In terms of ideology, obstruction constrains the president's choice of nominee. Lack of that threat could have important ideological consequences on the makeup of the federal judiciary (Wawro and Schickler 2006; Johnson and Roberts 2005).

A number of factors can influence the amount of time it takes for a lower-court nominee to be confirmed. How do we go about modeling this? Martinek, Kemper, and Winkle (2002) use duration analysis to elucidate what influences the duration of the confirmation process. In order

to assess the impact of the nuclear option on the duration of lower-court nominations, it is necessary to control for these factors. The Martinek et al. (2002) model is widely accepted as a superb model of the process of lower-court nominations. They categorize the factors that influence timing into three groups: political factors, institutional factors, and nominee characteristics. While not all of these variables were statistically significant in their hazard model or logistic regression, I discuss all of them below. Furthermore, I control for all of them in my logistic regression and duration analysis.

Martinek et al. (2002) identify five political factors that influence the timing of judicial confirmations.[6] First, is the party composition of the Judiciary Committee. The greater the number of members from the president's party, the shorter the duration of the process and the more likely a nominee is to be confirmed. Another political factor they identify is the potential loss of a majority in a midterm election. In midterm years, the length of time for nominations should be shorter, and nominees should be more likely to be confirmed. The president's approval rating also plays an important role. A higher presidential approval rating correlates with a quicker nomination process and a greater likelihood of successful nomination (Martinek et al. 2002). Finally, they find that the earlier a nomination is made in the congressional session, the longer the duration of the confirmation and the lower the probability of a successful outcome for the president.

Martinek et al. (2002) identify three institutional factors that must be accounted for in a study of the duration of lower-court confirmation processes. First, as a president's term progresses, the process takes more time, and the likelihood of confirming a nominee decreases. Furthermore, nominations made in a president's second term are subject to the same negative

[6] I will only discuss four of the five factors. The omitted factor is that nominations that occur after the nomination of Robert Bork are less likely to receive favorable treatment in the Senate.

treatment. Finally, as pending lower-court nominations accumulate, a nominated judge will be less likely to be confirmed, and the process will take longer.

Along with institutional and political considerations, certain characteristics of the nominee can influence how lower-court nominations are handled in the Senate. One characteristic is the quality of the nominee. As their ABA score increases, nominees are more likely to be confirmed, and the length of their confirmation process is shorter. Another factor is the race of the nominee. They find that minorities were treated less favorably (in terms of duration and likelihood of confirmation). They also predict that female nominees will receive less favorable treatment than males.

Finally, because appeals courts can have a greater impact on policy than district courts, it is possible that they receive "different senatorial treatment" (Martinek et al. 2002). Thus, models should be estimated separately for appeals and district courts.

## Theory and Hypotheses

When a president nominates a candidate to fill a lower-court vacancy, several outcomes can occur. Ideally for the president, the nomination will exit the Senate Judiciary Committee and be confirmed quickly. Once a nomination is brought to a floor vote, it is rare that it is voted down. Another potential outcome is that a nominee will request that the president withdraw his or her nomination. More commonly, though, a nominee will face a significantly lengthy process (because of obstruction, either in the committee or during the cloture vote) (Krutz, Fleisher, and Bond 1998). Most of these obstructed nominations are then returned to the president on *sine die.*

From 2009 through 2013, if the Republicans were successful in preventing a floor vote for long enough, the nomination would be returned to the president, often to be nominated again at the next beginning of the next Congress. The nuclear option effectively removes this tool of

obstruction. I predict that nominations processed with the nuclear option (both for appeals and district courts) will be confirmed at a quicker rate than non-nuclear option nominations.

$H_1$: *Ceteris paribus*, the duration of the nomination process for both district and appeals courts will be shorter for those nominations made during the use of the nuclear option than for non-nuclear option nominations.

I also predict that the nuclear option will influence the likelihood of a nominee being successfully confirmed. As discussed above, lower-court nominees are almost always confirmed when they reach a floor vote. The main tool of killing a judicial nomination is obstruction until the end of the session. Because the nuclear option makes it significantly more difficult to prevent a floor vote on a nominee, the likelihood that someone nominated is successfully confirmed should be higher for nominations made during the use of the nuclear option.

$H_2$: *Ceteris paribus*, nominations made during the use of the nuclear option will be more likely to be successfully confirmed than non-nuclear option nominations.

## Data and Methods

My sample includes all of Obama's nominations to appeals and district courts, through 2015.[7] This covers nominations made from 2009 through 2015.[8] While this analysis could have been conducted with data going farther back than the beginning of the Obama administration, beginning in 2009 is a conservative approach that potentially avoids statistical problems. My sample includes only one year of nominations made with the nuclear option in place. Because my primary focus is on the effect of my nuclear option variable, I want it to impact as much of

[7] Data on nominations were compiled from Wendy Martinek's publically accessible data as well as Dr. Lynch's data, which he generously shared. The data on the most recent nominations were collected by the author.

[8] Because there are 2015 nominations that have not been voted on, I remove all from the dataset that were not confirmed by February 11, 2016.

my sample as possible. Beginning with Obama's first term does a better job of achieving this goal than extending my study further into the past (the ratio is 5:2, pre:post nuclear option years).

The Martinek et al. (2002) model adequately controls for the various institutional, political, and nominee-specific factors that influence both the timing and likelihood of confirmation of lower-court nominees. I test both of my hypotheses through the estimation of models based on their model. This allows me to hone in on the effect of the nuclear option, which is included as a dichotomous independent variable.[9]

To test my first hypothesis about the duration of the confirmation process, I estimate a Weibull hazard model.[10] As explained by Martinek et al., duration analysis is useful in assessing confirmation timing because of the amount of censored observations in the sample. If every nomination received a floor vote, OLS could be used with the number of days from nomination to confirmation vote as the dependent variable. The problem with this approach is that nominations may or may not reach the final vote stage. For nominations that are not confirmed, more likely than not, a floor vote was prevented and the nomination was returned to the president at the end of the session. Any event other than a confirmation is censored.[11] Survival analysis allows me to study duration while preventing the complete loss of information from the non-voted on nominations (Martinek et al. 2002).

It is also important to note that I did not remove observations where nominations failed to be confirmed and were subsequently re-nominated in a later Congress. This decision was

[9] Their work also informs my decision to estimate separate models for district and appeals court nominees.

[10] Martinek et al. (2002) use the Weibull model instead of the Cox Proportional hazards model because they find that confirmations have positive duration dependence. The Weibull model allows them to incorporate this factor. Positive duration dependence indicates that as the duration increases, a successful confirmation is more likely. Because I am attempting to follow the Martinek et al. (2002) model as closely as possible, I utilize the Weibull model as well.

[11] As outlined in Box-Steffensmeier and Jones (1997), the hazard function for this model is $h(t) = hp(ht)^{p-1}$. Its parameters are estimated with $h(t) = \exp(-\beta' X + p \ln t)$

informed by the inclusion of a re-nomination variable by Martinek et al. (2002). Also, I add a control variable for re-nominations. They explain, "While at first blush it may appear preferable to combine these separate nominations into one observation, there are practical reasons that make this difficult, not the least of which is determining the appropriate way to measure the time between nomination and confirmation".

In the hazard model, my dependent variable is the number of days between when a nomination is made and some sort of final action is taken on it (usually either it comes to a floor vote or is returned to the president). Any observation that does not result in a confirmation is censored.

In order to test my second hypothesis, I estimate a logistic regression, based on the Martinek et al. (2002) model, to expose the effect of the nuclear option on the likelihood of a nominee being confirmed. I estimate two logistic regression models. One for district courts and one for appeals courts. The independent variables are reported below. The dependent variable is whether or not the confirmation was successful. Successful confirmations take a value of 1 and unsuccessful take a value of 0. The results are presented in the tables below.

The variable that captures nominations made during the utilization of the nuclear option is a dichotomous variable taking a value of 1 for nuclear option nominations and a value of 0 for non-nuclear option nominations. My independent control variables are as follows:

*Year of Presidential Term:* I include a dichotomous variable for the second, third, and fourth years of Obama's terms.

*Month of Congressional Term:* This is a continuous variable capturing how much of a Congressional term has elapsed. I measured this as the number of months into each Congress that had elapsed at the time of the nomination.

*ABA Rating:* This is a variable measuring nominee quality that takes a value between 1 and 6.

*Divided Government*: This variable is dichotomous and captures the time when the Republicans held a majority in either one of both house of Congress.

*Divided Government_Senate*: This variable is dichotomous and captures the time when Republicans held a majority in the Senate.[12]

*Sex:* This dichotomous variable takes a 1 for nominees that are female and a 0 for those who are male.

*Minority*: This variable takes a 1 for nominees that are a racial minority and a 0 for those who are white.

*Judicial Committee:* This is a continuous variable that is measured as the percentage of members of the Senate Judiciary Committee that are not from the president's party.

*Approval:* This is measured by the Gallup approval rating from the poll taken most closely to the date of the nomination.

*Number of Pending Nominations:* The number of nominations pending when a nomination is made.

As demonstrated in Martinek et al. (2002), statistical models of the duration of the confirmation process should be estimated twice to account for different senatorial treatment of appeals court nominees; estimated once for district court nominees and once for appeals court nominees (Allison 1996). O'Connell (2015) found that from 1981-2014 the failure rates for appeals court nominations were nearly twice as high as the failure rates for district court nominations (40.8% and 23.7%, respectively). This further highlights the higher stakes of

[12] Because of colinearity issues, the divided-Senate variable and the proportion of the president's party on the Judiciary committee are removed from the logistic regression of appeals court nominations.

confirming an appeals court nominee. Because of the potential for biased results, I estimate my hazard model and logistic regression separately for appeals and district court nominees.

## Results

Table 1 presents the coefficients and hazard ratios for the Weibull model. Positive coefficients indicate that the independent variable shortens the duration. The results indicate that the use of the nuclear option correlates to a statistically significant (at the 95% confidence level) decrease in the length of the confirmation process. This result holds for both appeals and district court nominations. Thus, my first hypothesis is confirmed. The prediction that lowering the threshold for cloture will speed up the nomination process is quite intuitive. Nonetheless, these results are interesting because they reveal that although Majority Leader Reid and President Obama worked together to prioritize certain nominees over others, there was still an across the board decrease in the length of the process.

As previously stated, even after cloture is voted on, 30 hours of debate are permitted. Put another way: while the votes were there for cloture on all nominations, the time was not (Ostrander 2016). If every nominee was filibustered, and all 30 hours of post-cloture debate used, the time it took to confirm all nominees would be longer than the total time in a congressional session (Millhiser 2010).

Thus, even nuclear option confirmations take time, forcing the leadership to make strategic choices about voting on the nominations. Appeals court nominees have a greater potential to influence policy (Allison 1996), which would suggest that Reid and Obama prioritized filling the appeals court vacancies over the district court ones. This is even more expected when considering that a major motivation for utilizing the nuclear option was filling the three vacancies on the D.C. Circuit Appeals Court. The stakes were extremely high for both

sides. As long as the Republicans could hinder Obama's replacements, there were four active, Republican-appointed judges and four active, Democratic-appointed judges. Once the nuclear option was engaged, the Senate quickly filled all three vacancies. With the confirmation of Patricia A. Millett, Cornelia T.L. Pillard, and Robert L. Wilkins, Obama now has a 7-4 majority amongst active judges on the court (O'Connell 2015). Nonetheless, the results do not suggest that the nuclear option sped up the process for appeals court nominations at the expense of district court nominations. These results are in line with Boyd et al. (2015) and O'Connell (2015), who identified speedier confirmations for both appeals and district court nominees. Thus, the intuitive prediction of my first hypothesis holds up when the various dynamic factors that influence the process are accounted for.

Even with the across the board shortening of the process, the successful re-nomination of the three D.C. Circuit nominees is reflected in the results. For appeals courts, re-nominated judges are confirmed at a quicker rate. The coefficient estimate is statistically significant. This is not the case for re-nominated judges to district court vacancies. The coefficient for district courts suggests that a district court nominee that is re-nominated will have a lengthier process. This effect is not statistically significant.

The hazard ratio is useful in understanding the influence of a dichotomous variable taking a value of 1 on the hazard rate. A hazard ratio that is greater than 1 indicates that the variable has a positive impact on the hazard rate, all else equal. In my results, a hazard ratio of greater than 1 corresponds to a positive effect on the hazard rate of confirmation. A decreased hazard rate corresponds to a longer confirmation process. The hazard ratio for the effect of the nuclear option for both appeals and district courts is greater than 5. This further indicates that utilization

of the nuclear option (when the variable takes a value of 1) led to a more favorable treatment of nominees.[13]

The Weibull model is particularly useful in my study because it allows for an assessment of duration dependence (i.e. how the timing of the process impacts the likelihood of a successful confirmation). The overall-p value measures duration dependence. A value less than 1 indicates negative duration dependence, and a value greater than 1 indicates positive duration dependence. For appeals and district courts, the overall-p value is less than 1, indicating negative duration dependence. This suggests that the longer a nomination is "live", the less likely it is to be successfully confirmed.

This is a surprising finding because Martinek et al. (2002) find positive duration dependence in nominations, for appeals and district courts, from 1977-1998. This means that the longer a nomination was in the Senate, the greater the likelihood of it being successfully confirmed. The contrasting results may shed light on how common the tool of obstruction has become as a form of blocking nominations. Increased gridlock seems to characterize the modern political climate. The contrasting duration dependence between a study of nominations during Obama's presidency and nominations from Carter through Clinton shows not only that obstruction has become more common, but also that it is being used as a tool of Congress against the president. From Carter to Clinton, a longer process meant an increased chance of success, whereas under Obama, the opposite seems to be the case.

Very few of my control variables have a statistically significant effect on the duration of the confirmation process. Martinek et al. (2002) find a statistically significant relationship

[13] In attempting to conceptualize the hazard rate of the confirmation process, it may be useful to understand the parallels to an epidemiological study of death rates. In my model, a nomination "dies" when it is successfully confirmed. Observations that are still "alive" (censored observations) are the ones not voted on and returned to the president. Thus, anything that influences the hazard rate in a positive direction leads to better senatorial treatment of the nominee.

between many of these variables and the duration of the process. The differing results may be driven by the greater sample size in the 2002 study. My limited sample size likely bias my results away from statistical significance. Nonetheless, there are some interesting contrasts between my results and those of Martinek et al. (2002).

For example, my estimation of the Weibull model reveals no statistically significant relationship between minority nominees and the length of their confirmation process. Martinek et al. (2002) find that for district courts, nominees that are part of a minority group have lengthier nomination processes. In my model, the coefficient for minority nominations to district courts is positive, indicating that the duration for minorities may even be shorter than for white nominees. Still, it is not statistically significant. This fact makes it hard to determine whether or not Obama's minority nominees are receiving more favorable senatorial treatment than those of past presidents.

Table 2 presents the results of the logistic regression of the likelihood of a nominee being successfully confirmed. All else equal, appeals and district court nominations made while the nuclear option was in use are more likely to be confirmed. This result is statistically significant at the 95% confidence level. The sign of the coefficient and its statistical significance are suggestive of a positive effect of filibuster reform on the likelihood of a nomination being confirmed. To further elucidate this effect, I present the marginal effects of the nuclear option on the probability of a successful confirmation (Table 3). The numbers presented in this table confirm the positive impact of the nuclear option on the likelihood of a successful confirmation.

Table 1
Weibull Hazard Model for Lower-Court Judicial Nominations 2009-2015

| | **Appeals Courts** | | **District Courts** | |
|---|---|---|---|---|
| **Variable** | **Coefficient** | **Hazard Ratio** | **Coefficient** | **Hazard Ratio** |
| Nuclear Option | 1.731* | 5.649 | 1.628* | 5.095 |
| | (.840) | | (0.390) | |
| PendingNominations | .021 | 1.021 | -0.017 | 0.983 |
| | (.016) | | (0.009) | |
| Second Year | -.602 | .547 | -0.243 | 0.784 |
| | (.738) | | (.397) | |
| Third Year | -1.291* | .275 | .173 | 1.189 |
| | (.591) | | (0.252) | |
| Fourth Year | -1.250 | .287 | -0.007 | .993 |
| | (.818) | | (0.329) | |
| Month of Cong. Term | -.032 | .968 | -0.022 | 0.978 |
| | (.086) | | (0.029) | |
| ABA Rating | -.220 | .803 | 0.060 | 1.062 |
| | (.132) | | (0.046) | |
| Divided Gov. | 1.579* | 4.849 | -0.386 | 0.680 |
| | (1.286) | | (0.457) | |
| Divided_Senate | 13.143* | 510367.116 | 0.581 | 1.787 |
| | (5.311) | | (3.026) | |
| Sex | -0.269 | .764 | -0.126 | 0.882 |
| | (0.365) | | (0.131) | |
| Minority | 0.158 | 1.171 | -0.165 | 0.848 |
| | (0.382) | | (0.137) | |
| Proportion of Judicial Committee from non-presidential party | -.797* | .451 | -0.063 | 0.939 |
| | (.310) | | (0.175) | |
| Pres. Approval | 0.041 | 1.042 | 0.050 | 1.051 |
| | (0.092) | | (0.037) | |
| Re-nomination | 1.326* | 3.766 | -0.234 | 0.791 |
| | (.611) | | (.382) | |
| Log-Likelihood | -342.12 (df=14) | | -1584.1 (df=14) | |
| N | 91 | | 386 | |
| | | | | |
| Overall *p* | 1.835e-06 | | 1.487e-13 | |

Standard errors are in parentheses. *=p<.05

For appeals court nominees, utilization of the procedure corresponds with a .552 increase in the probability of successful confirmation. For district courts, the increase in probability is .491. Thus, my second hypothesis is confirmed. All else equal, lowering the threshold for cloture increased the likelihood of a nominee being successfully confirmed.

For district court nominations made under Obama, it appears that minority candidates are less likely to be confirmed. While the coefficient was not significant at the $p<.05$ level, it was significant at the $p<.1$ level. This is in-line with the theoretical predictions on nominee characteristics outlined in Martinek et al. (2002). The one variable in which my results contrast with Martinek et al. (2002) is ABA rating. This is a controversial measure of nominee quality made by the American Bar Association. Martinek et al. (2002) reveal a positive relationship between ABA rating and likelihood of a district or appeals court nominee being confirmed. For Obama nominees, there is no correlation between an increase in nominee quality and likelihood of being confirmed. In fact, though not statistically significant, the negative coefficient suggests the opposite could be true. Regardless of this fact, ABA score has no discernible impact on the probability of a successful confirmation.

The results of the logit estimation (Table 2) also reveal that an increase in presidential approval corresponds to an increase in the likelihood of a successful confirmation for district court nominees. Furthermore, judges nominated to a district court for a second time are less likely to be confirmed. There is no statistically significant effect for appeals court nominations. Martinek et al. (2002) find the same results for re-nominated nominees. Another factor that decreases the likelihood of a successful district court nomination is the number of nominations pending before the full Senate or Senate Judiciary Committee. While the results are not

statistically significant for appeals court nominees, this may be caused by the smaller population size (n=91 for appeals courts and n=386 for district courts) and not a lack of an effect.

Table 2
Logistic Regression of Lower-Court Judicial Nominations 2009-2015

| | **Appeals Courts** | **District Courts** |
|---|---|---|
| **Variable** | **Coefficient** | **Coefficient** |
| Nuclear Option | 7.019* | 4.866* |
| | (2.253) | (1.423) |
| Pending Nominations | 0.077 | -0.067* |
| | (0.045) | (0.030) |
| Second Year | 5.620* | 8.068* |
| | (2.182) | (1.509) |
| Third Year | -0.102 | 1.362* |
| | (1.119) | (0.613) |
| Fourth Year | 5.511* | 8.950* |
| | (2.119) | (1.227) |
| Month of Cong. Term | -0.810* | -0.772* |
| | (.252) | (0.102) |
| ABA Rating | -0.436 | -0.037 |
| | (.330) | (0.131) |
| Divided Gov. | -1.556 | -1.211 |
| | (2.129) | (1.503) |
| Divided_Senate | NA | 15.665 |
| | | (907.450) |
| Sex | 0.047 | -0.347 |
| | (.758) | (0.376) |
| Minority | 1.244 | -0.687 |
| | (0.894) | (0.393) |
| Proportion of Judicial Committee from non-presidential party | NA | 0.032 |
| | | (.895) |
| Pres. Approval | 0.140 | 0.239* |
| | (0.171) | (0.096) |
| Re-nomination | -0.523 | -4.320* |
| | (1.604) | (1.268) |
| AIC | 84.862 | 243.35 |
| Log-Likelihood | -29.431 (df=13) | -106.677 (df=15) |
| PRE | 0.548 | 0.684 |
| N | 91 | 386 |

Standard errors are in parentheses. *=p<.05

Table 3
Marginal Effect of Nuclear Option on Likelihood of Successful Confirmation

| | Appeals Courts | District Courts |
|---|---|---|
| **Nuclear Option (=0)** | .447 | .484 |
| | (.211, .683) | (.269, .669) |
| **Nuclear Option (=1)** | .999 | .975 |
| | (.995, 1.003) | (.992, 1.008) |
| **95% Confidence Intervals in Parentheses** | | |

## Conclusion

The Senate and the president share the power of staffing the bureaucracy and the bench. It is very unlikely that a nomination will be voted down; instead, obstruction is the preferred tool of the opposition. An obstructionist Senate can successfully constrain the executive's ability to staff the judiciary with judges likely to share his ideological preferences. As described above, the duration of the nomination process is extremely important in a variety of ways, but most importantly in that a lengthier process inhibits the ability of the president to carry out his policy objectives.

The history of using Senate procedure as a political tactic is one of flip-flopping by both parties. In 2005, Senate Democrats were obstructing Bush nominees, and the Republicans were threatening use of the nuclear option. In 2013, Senate Majority Leader used this reform-by-ruling approach to reduce the number of votes needed for cloture from 60 to 51. My purpose has been to elucidate the impact of filibuster reform on the treatment of Obama's nominees to appeals and district courts. While several studies have sought to explain this, I gain more leverage by employing a multivariate analysis to control for the other factors that influence the timing. The results of my Weibull hazard model and logistic regression indicate that judicial nominations made during the use of the nuclear option were processed at a quicker rate. These nominations were also more likely to be successfully confirmed. Thus, my two hypotheses are confirmed.

Furthermore, past studies like Boyd et al. (2015) and O'Connell (2015) were correct in their assessment of the nuclear option's impact.

The question then remains, was it worth it for the Democrats to employ such a drastic and unprecedented measure? In the short term, the nuclear option allowed Obama to fill many vacancies on the federal bench. Among these successful nominations were three re-nominations to the D.C. Circuit Court of Appeals. By utilizing the nuclear option, the Democrats obtained a 7-4 majority on the court considered the second most powerful in the land. While unknown to Democrats at the time, upon Justice Scalia's death, the nuclear option enabled the president to make a nomination from the D.C. Circuit Court without fear of losing a majority on this important court. Obama's nominee to replace Scalia is Merrick Garland, the chief judge on the court.

The long-term impact of deploying the nuclear option is still unclear. Both parties will likely use extreme caution when resorting to this procedural maneuver in the future. Nonetheless, the filibuster has been diminished as a legitimate tool of the minority party to obstruct the president's ability to staff the federal bureaucracy and bench. In the most extreme scenario, filibuster reform could be used to pass controversial, salient legislation. As described in Binder et al. (2007), procedural politics is one of partisan flip-flopping. If the Republicans take the White House and maintain their non-filibuster proof Senate majority in 2016, it will become clearer whether or not filibuster reform-by-ruling was truly a "surgical strike" (Binder et al. 2007) or a "nuclear" blast.

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