Rule Bending in the Contemporary Senate

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Abstract

The election of President Donald Trump in 2016 ushered in the first Republican Congress and White House in a decade. Despite unified party control, House and Senate GOP majorities struggled to legislate in the 115th Congress (2017-8). Moreover, intense partisan conflict in Congress– coupled with GOP fissures and an undisciplined, unpopular president— strained old ways of doing legislative business. In response, Republicans bent or brushed off several institutional constraints in pursuit of their party's legislative priorities. In this paper, I build on Shepsle's (2017) concept of *rule breaking* to explore the conditions that drive parties to circumvent the rules of the game. I focus in particular on Republican efforts in Trump's first Congress to empower majorities in the Senate-- identifying the political and institutional forces that propel rule bending in the contemporary Congress.

> There is not a doubt in my mind that if the majority breaks the rules of the Senate, to change the rules of the Senate with regard to nominations, the next majority will do it for everything. I wouldn't be able to argue a year and a half from now, if I were the majority leader, to my colleagues that we shouldn't enact our legislative agenda with a simple 51 votes, having seen what the previous majority just did. I mean, there would be no rational basis for that.
>
> -- Senate Minority leader, Mitch McConnell (R-Kentucy) (June 18, 2013)

Months before Senate Democrats in 2013 deployed the so-called "nuclear option" to eliminate filibusters of all nominations save for the Supreme Court, then Minority Leader Mitch McConnell (R-Kentucky) vowed that Republicans would surely follow suit when they regained the majority: The days of the legislative filibuster were numbered, McConnell threatened. But even after gaining control of the White House and both chambers of Congress in the 2016 elections, Senate Republicans took only incremental steps to bolster the power of the Senate majority-- most notably deploying the nuclear option to ban filibusters of Supreme Court nominations. Republicans bent several other rules and practices in 2017. But despite McConnell's earlier threat to abolish the legislative filibuster, Republicans stepped back from this ultimate institutional brink.

Why do majorities bend some rules but not others? More generally, how do we account for a rash of recent efforts by Congressional majorities to brush aside formal and informal rules that constrain pursuit of their agendas? In this paper, I build on Kenneth Shepsle's (2017) concept of rule breaking to explore a broader set of conditions that lead partisans to try to circumvent the rules of the game. I focus in particular on Republican efforts in Trump's first Congress to bolster the parliamentary advantage of Senate majorities-- identifying political and institutional forces that shape the incidence of rule bending in the contemporary Congress.

Bending Congressional rules

Students of Congress-- and political institutions more broadly-- often consider institutions (whether formal or informal) more or less binding constraints on the players who live under them. But Congressional institutions are hardly exogenous. It is certainly true, as Riker (1980, 445) noted some decades ago, "that we can get a lot of mileage out of relatively stable institutions." But lawmakers choose the rules of the game and so in theory can revamp or

revoke them. That is true even for institutional norms that limit the players' exercise of discretion—even if the origins of such constraints are unclear or unknown. Of course, as Riker (1980, 445) also observes, even if institutions deliver decreasing returns, an organization's members can find it hard to marshal support for revamping the rules of the game: "If institutions do generate an outcome in which everyone loses, it is reasonable to expect some new and less distasteful institutions...*although it may take generations to alter them*" [emphasis added].

Perhaps in light of the difficulty of formally changing organizational rules or practices, Shepsle (2017, 5) offers two pathways politicians take when they find their ambitions limited by existing institutions: imagination and transgression. Political imagination empowers knowledgeable leaders to devise a "work-around": a path that circumvents existing rules without having to break them. "Disappearing quorums" in the late 19th century House of Representatives, for example, frequently frustrated Speaker Thomas Reed (R-Maine): In an era of slim House majorities, absent majority party lawmakers could imperil their party's ability to legislate. Minority party lawmakers could break a chamber quorum—thereby stopping the House from doing any business-- by refusing to answer the clerk when he called the roll (Binder 1997, Chapter 5). To kill the minority party's disappearing quorum trick, the Speaker imagined a work-around: He directed the clerk to record the names of anyone present in the chamber, thus preventing a silent minority from breaking a quorum by recording their presence to make a quorum. Reed then led a Republican majority days later to enshrine the clerk's new power in House rules.

Transgressions more blatantly violate the rules: "defiance pure and simple" (Shepsle 2017, 29). Imagination involves pushing the envelope in ways that still comply with the letter of the rule or practice; transgressions contravene chamber rules. One such potential example (but see a counter view below) occurred when Democrats in November 2013 "broke" Senate rules when they went "nuclear," banning filibusters of all judicial and executive branch nominees, save for the Supreme Court. The plain language of the Senate's cloture rule (Rule 22) requires a three-fifths majority (or sixty senators) to cut off debate on debatable measures and motions,

including nominations. And the rule requires a two-thirds vote to limit debate on motions to make formal changes to the Senate's standing rules (including Rule 22).

By a simple majority vote, however, Democrats overruled the presiding officer's ruling that cloture requires sixty votes for nominations. That was the Democrats' nuclear move. By overruling the chair, a majority set a new chamber precedent establishing that a simple majority was sufficient to cut off debate on most nominations—even though the formal standing rule remained unchanged. Democrats thereby reinterpreted "three-fifths" to mean "simple majority" when applied to nominations, even though senators had not technically adopted a motion that would bring the language of Rule 22 in conformity with the new precedent.[1] That is likely why then Senate minority leader, Mitch McConnell (R-Kentucky), charged that Democrats had *broken the rules* to change the rules (Maier 2013).

At considerably lower institutional cost, parliamentary norms can also be transgressed. Take for example the Senate's "blue slip," a century-old Senate Judiciary Committee practice that allows home state senators for executive or judicial appointments to delay or derail judiciary panel consideration of a nominee under varying conditions (Binder 2007, Box-Steffensmeier et. al. 2016). The judiciary panel chair sets his or her own blue slip policy and can enforce it, backed by a majority vote of the committee.[2] By virtue of being an informal committee practice—rather than formal element of the Senate or its committees—the cost to the chair of breaking (or reinstating) the norm is low. The recent, frequent alteration of the policy suggests a low barrier for change.

Are such transgressions better conceptualized as rule bending or breaking? Senate majorities after all hold the power to interpret (by a majority vote on the Senate floor) how a

[1] Senate Democrats were not the first majority to reinterpret chamber rules without actually changing them, a practice often termed "reform by ruling" (Wawro and Schickler 2006). Nor was the 2013 episode the first time Democrats had exploited a "nuclear" move to limit the minority's right to amend or debate legislative or procedural motions.

[2] Most blue slip policies set the conditions under which a nominee can secure a committee hearing. Judiciary Committee rules empower the chair to set the panel agenda, and a majority of the committee can vote to back up his or her call for a vote. So committee majorities can enforce deference to home state senators that is (conditionally) enshrined in the policy.

chamber rule should be applied in a particular parliamentary circumstance (Dauster 2016, 651).[3] By doing so, majorities set new binding precedents for the future—unless and until a subsequent majority votes to alter the precedent. That power itself is enshrined in the Senate's precedents. As Riddick and Frumin (1992, 987) note in their compilation of Senate precedents:

> Any ruling by the Chair not appealed or which is sustained by vote of the Senate, or any verdict by the Senate on a point of order, becomes a precedent of the Senate *which the Senate follows just as it would its rules*, unless and until the Senate in its wisdom should reverse or modify that decision [emphasis added].

In other words, there is no technical prohibition to stop the Senate from evading or bending formal rules in this way.[4] Senate rules and practices after all have no means of "protecting" themselves from senators seeking to change or reinterpret them. Still, there is a difference between what senators *can* do and what is considered "in order" in the Senate.[5] Setting new precedents that contradict formal chamber rules are hardly "in order" in the Senate—by which I mean that they contravene established Senate practices. Rule bending might simply be a less pejorative way to describe the outcome of reinterpreting rules in a manner at odds with the formal language of the chamber's standing rules. Majority parties surely prefer to call it rule "bending"; minority parties, "breaking." Regardless, it is likely a distinction without a clear difference.[6]

To be sure, legislative scholars more often focus on the conditions that foster formal reform of congressional rules than on the concepts of imagination and transgression. But the idea of setting new precedents that alter the application of Senate rules is not new to the study of the Senate. Wawro and Schickler (2006, 2010), Koger (2010), and Binder, Madonna and Smith (2007) each explore the politics of "reform by ruling." Shepsle's pathways to unyoking Congressional majorities from constraining rules seem particularly useful in analyzing

[3] Such votes are technically taken in response to a ruling of the presiding officer. If a senator appeals the ruling of the chair, the question before the Senate becomes whether or not to uphold the ruling of the chair. For constitutional-related questions, the presiding officer typically doesn't rule, but instead turns over the question to the Senate to decide.

[4] Or as Binder, Madonna and Smith (2007) put it, these reform by ruling scenarios are certainly *technically* feasible even if not always *politically* feasible.

[5] I thank Congressional Research Service experts for conversations making plain the import of the distinction.

[6] For consistencies' sake (and with a nod to Riddick), I refer to such transgressions at "bending" rather than "breaking."

parliamentary developments during Trump's first Congress. Republican efforts in 2017 to evade institutional constraints raise interesting and important questions about the durability of both formal and informal Congressional institutions in a time of deeply polarized, highly competitive—and yet sometimes fractured—political parties.

Why bend the rules?

Under what conditions will lawmakers bend—rather than formally change-- Senate rules or practices? In this section, I draw from scholarship on procedural politics to explore the dynamics that underlie legislative efforts to circumvent the rules of the game. Before we consider rule bending, however, Shepsle's focus on imagination and transgression begs a question: Why don't lawmakers—especially senators-- just follow established order for formally changing Senate rules? First, and most obviously, Senate Rule 22 requires a two-thirds vote to end debate on motions to change the rules-- a higher threshold than Rule 22 requires for cloture on all other debatable motions. That means that motions to change the rules in a way that would limit the rights of senators to delay or derail the majority can themselves be filibustered. In a period of intense partisan conflict—when majorities would be more likely to want to restrict than expand minority rights—opponents would surely filibuster and (absent an oversized majority) succeed.

Second, Senate time is zero sum. Time spent building support for parliamentary gambits limits time available for pursuing policy change. Opportunities for majority parties to secure favored policy goals tend to be limited and short-lived. That suggests majorities should typically be loath to invest in formally changing the rules—even when their party controls Congress and the White House. That of course is precisely and ironically the context in which a party could gain the most by changing Senate rules to empower a simple majority.

Under what conditions then should we expect senators to bend the rules? I offer a stylized model that pits the intensity of majority party preferences against the costs (broadly construed) of evading rules in pursuit of the majority party's agenda. Trading off costs and benefits is commonplace in studies of institutional dynamics in the Senate. Wawro and Schickler (2010), for example, observe that Senate majority parties sometimes very narrowly

curtail Senate rules governing debate. Such tailored procedural moves limit a party's policy gains, but also cap party losses. Koger (2010) also focuses on the costs of altering rules. He suggests that ideologically extreme senators should be more likely to oppose banning filibusters since they have the most to lose in policy terms if reform empowers the median senator. More generally, Binder, Madonna and Smith (2007) suggest that variation over time in the political costs of reform conditions the chances the Senate will "go nuclear" to reinterpret rules to party advantage.

Figure 1 offers a simple way to think about the tradeoffs endemic in bending rules. The intensity of the majority party's interest in reform is arrayed along the Y-axis; costs of bending the rules, along the X-axis. Majority party intensity reflects both the salience and homogeneity of interest in a particular agenda item across majority party members. How important is the issue to party leaders and rank and file? How widespread is the intensity of interest shared across the party? Intensity would be highest when party members broadly agree on the importance of pursuing a particular policy goal. Intensity declines as importance wanes or cleavages emerge within the party.

Figure 1: Forces shaping Senate rule bending

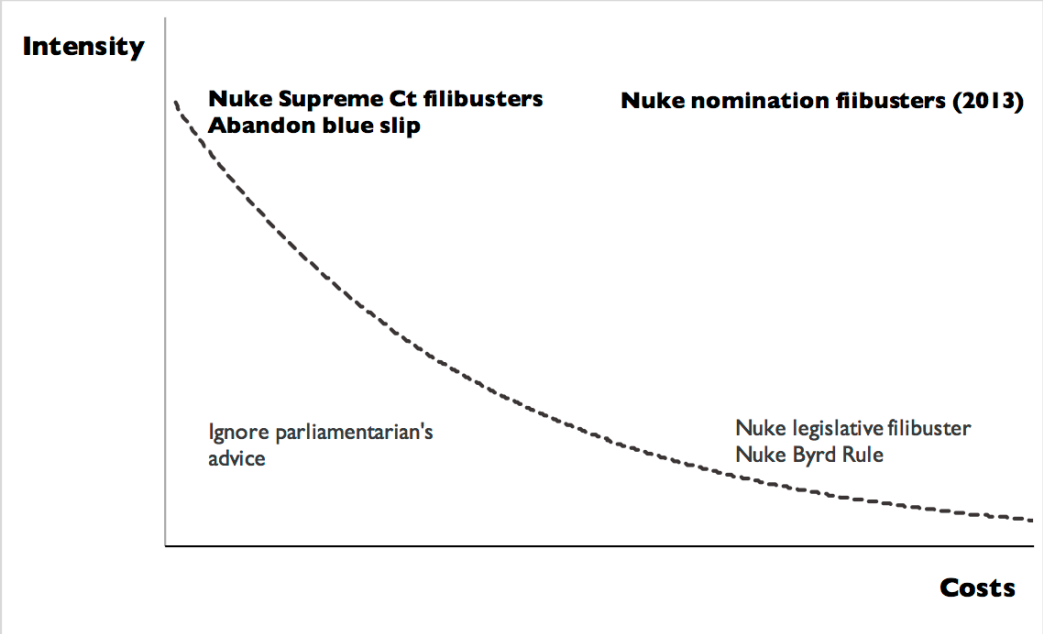

Figure shows likelihood of Senate rule bending as a function of majority party intensity and costs of rule bending. Bolded rule changes were implemented in 2017 or 2013; gray rule changes were proposed in 2017 but not adopted.

Consider these examples from Trump's first year in office. Republicans shared the president's top priority of repealing and replacing the Affordable Care but disagreed about how to do it. When the House passed a version of repeal and replace, it included provisions that likely violated the Senate Byrd Rule—a provision of the Congressional Budget Act that limits the sorts of provisions that can be included in or added to filibuster-proof "reconciliation" bills that are considered on the Senate floor.[7] Federal budget law requires sixty votes to overturn points of order related to the Byrd Rule or to waive potential Byrd Rule violations. Thus, some conservative GOP senators advocated taking procedural steps that would evade the bite of the Byrd Rule as a means of protecting House-passed provisions in the bill. The steps envisioned would have required Senate Republicans to ignore the advice of the parliamentarian that the provisions violated the Byrd Rule—setting up a series of motions that would have allowed a simple majority (rather than sixty votes) to pass a more conservative-leaning health care bill.[8] But other Republicans balked: Because they disagreed on policy solutions, few wanted to ignore the advice from the parliamentarian or to evade the Byrd Rule's sixty-vote requirement. Fissures on policy lessened party intensity in transgressing the rules to repeal and replace Obamacare.

In contrast, Senate Republicans were strongly united in favor of Trump's nomination of Neil Gorsuch for a seat on the Supreme Court, and they agreed on the importance of confirming him swiftly. But they lacked the necessary sixty votes to kill an anticipated

[7] For an explanation of Byrd Rule violations of the Congressional Budget Act, see Heniff (2016). On GOP proposals to "nuke" the Byrd Rule, see Haberkorn and Kim (2017).

[8] Technically, the parliamentarian evaluates contested provisions of (and amendments to) filibuster-proof budget reconciliation bills and then advises the Senate's presiding officer (i.e. the chair) on whether or not they violate the Congressional Budget Act's Byrd Rule (or other provisions of the law). If a senator offers a point of order on the Senate floor that a provision or amendment violates the Byrd Rule, the chair turns to the parliamentarian for advice on how to rule on the point of order; he or she typically rules based on the parliamentarian's interpretation of the Budget Act. If the chair upholds the point of order, it takes sixty votes to overturn the chair's ruling—thus green-lighting the provision or amendment. (Alternatively, supporters of the provision or amendment could try to muster sixty votes to *waive* the Byrd Rule.) If the parliamentarian advises that the chair uphold the point of order and the chair then *ignores* the advice and fails to sustain the point of order, opponents of the provision would have to secure sixty votes to overturn the chair's ruling in order to jettison the apparent Byrd Rule violation. In other words, once no longer bound to follow the parliamentarian's interpretation of the Budget Act, a majority is free to legislate independent of past practice or precedent. Ignoring the parliamentarian when Senate precedent is relatively clear would be highly unusual in the contemporary Senate. As Beth (2013, 12) argues, "under fundamental principles of Anglo-American parliamentary law, the chair in a deliberative assembly is not supposed to make procedural rulings according to the individual preferences and discretion of its occupant, but rather is to rule in accordance with existing rules and their established precedential interpretations."

Democratic filibuster of Gorsuch's confirmation vote. When Majority leader McConnell led Republicans through the procedural steps to allow a simple majority to cut off debate on Supreme Court nominees (following the precise set of motions and votes Democrats had taken in 2013 to eliminate other nomination filibusters), all Republicans voted lock step in favor. In short, the more intense the majority party's position in support of a particular policy goal, the more willing partisans are to transgress the rules.

Costs are defined more broadly to capture both policy and institutional effects of transgressing rules and norms. Policy effects of rule bending vary by scope (narrow or broad) and horizon (short or long term). The narrower the effects of the rule or norm change, the lower the costs to the majority for evading it. One example of a narrow effect was reducing Rule 22's supermajority threshold for ending debate on Supreme Court nominations to a simple majority. Only future Supreme Court nominees (and likely only those selected when the same party controls the Senate and the White House) would be affected.[9] In contrast, going nuclear on the legislative filibuster (which would eliminate supermajority cloture requirements for *all* debatable motions related to legislative measures) would have extremely broad policy effects. The unbounded impact of nuking the legislative filibuster surely raises the majority party's policy costs for transgressing the rule. That type of rule bending could be particularly costly (and granted, unlikely) for a less intense, fractured majority that disagreed on policy problems and solutions.

The temporal effects of the rule change also matter: transgressions with immediate-- but not necessarily long-term—effects should cost the majority less. Changes to the Senate blue slip practice, for example, are relatively time bound: Each new Judiciary chair has typically set his own blue slip policy. In contrast, proposals to evade the Byrd Rule would have longer-lasting effects. Even an intense majority might find such a procedural move quite costly given uncertainty about future party control of the Senate and how the next majority might exploit a weakened budget law to their party's advantage.

[9] Recall that Republicans in 2016 evaded the norm that the Senate consider Supreme Court nominees selected by the opposition party president (Bravin 2017).

Granted, all senators do not necessarily place the same weight on their future parliamentary needs. As I explore below, more senior senators or those who have served in both the Senate majority and minority might place more weight on the procedural rights afforded to individuals and the minority in the future. More junior senators or those who have never served in the minority might discount future parliamentary needs.

Plotting intensity against *policy* costs, however, inadequately captures costs imposed by transgressing rules rather than following the rules to change them. One view is that bending rules *lowers* the political costs for future rule transgressions. Once one party bends rules or norms with little negative political fallout or policy repercussions, the costs are arguably lower for the next party because the other party "did it first." That is largely how Republicans in 2017 justified their decision to use the nuclear option to ban filibusters of Supreme Court nominees: The Democrats did it first when then Majority leader Harry Reid (D-Nevada) led his party to eliminate filibusters of all other nominations. Notably, despite his 2013 threat, McConnell vowed before the GOP started the process for eliminating Supreme Court nomination filibusters that he would not lead an effort to ban the *legislative* filibuster—highlighting the differential costs of the two forms of transgressing the rules. Arguably, rule breaking generates a form of path dependence by increasing returns to the party that transgresses rules or norms. As a particular procedural path becomes well worn, the costs of following it go down. These increasing returns to parties bending the rules make it less likely future majorities will take a different path and abide by the rules. Indeed, McConnell might have promised skittish colleagues that he would not pursue a ban on legislative filibusters precisely for this reason. Foreswearing more rule bending might have been an acceptable cost to McConnell to secure support for majority cloture for Supreme Court confirmation votes.

Rule bending also requires majorities to accept a special tradeoff: lowering institutional barriers to action arguably weakens legislators' respect for the binding constraints of rules and practices more generally. In other words, rule bending could be *institutionally costly* to both parties. Shepsle (2017, 140) puts it best: "persistent violation of rules jeopardizes not only the particular rules being violated but also the *concept* of collective self-regulation by rules." That of

course suggests a different form of path dependence, one that survives despite *decreasing* returns.[10] Once rules are perceived as easily broken, their normative authority (and binding power) weakens. Why abide by the rules if you doubt others will? This dynamic is a prime example of what Levitsky and Ziblatt (2018, 122) call "politics without guardrails": hardball exploitation of the rules rather than mutual forbearance (i.e. restraint) by the parties.

As suggested in Figure 1, intense majorities might sometimes be willing to pay these high costs given the intensity of party interest in securing their goals. The Democrats' move to nuke judicial and executive branch nominations in 2013 (upper right corner of the figure) illustrates an intense majority willing to carry the high costs of being the first party to selectively lower Rule 22's cloture threshold by reinterpreting the rule by majority vote.[11] That might be why many observers were surprised that Reid and the Democrats actually used the nuclear option in that way in 2013. And despite Republican warnings at the time that the majority leader had "killed the Senate," Republicans followed suit in 2017 to eliminate the Supreme Court nomination filibuster at significantly lower cost (as shown in the shift in costs to the left in Figure 1).

More often, however, high costs—especially with a less intense majority—will temper a majority party's willingness to break the rules. Thus, as shown in the lower right corner of the figure, a fissured GOP in 2017 failed to eliminate the sixty-vote threshold in the Byrd Rule or for legislative filibusters more generally as proposed by conservatives when Republicans were unable to repeal and replace Obamacare. Even less costly moves—such as the Senate's presiding officer ignoring the parliamentarian's advice when ruling on points of order (lower left corner)—can be thwarted when parties fracture. Institutional costs, Shepsle (2017, 133) argues, reinforce the stickiness of rules, intensify gridlock, and perhaps deter some rule bending.

One might object that only preferences—and not institutional costs—matter in shaping the majority's calculus about transgressing the rules. Once a majority is sufficiently united on policy grounds, it will bend rules that stand in its way. Failure to evade the rules would thus

[10] For another perspective on the ways in which Senate parliamentary dynamics can generate decreasing returns, see Binder, Madonna and Smith (2007).

[11] To be clear, past majorities have pursued these nuclear "reform by ruling" moves (Wawro and Schickler 2006, Koger 2010). But no party had successfully gone nuclear to lower Rule 22's cloture threshold.

reflect the diversity of policy views within the majority and not the costs of transgressing the rules. It is tough to fully discount this alternative given the difficulties of measuring the costs of evading rules, norms, or practices. That said, the surgical precision with which the Republican majority in the 115th Congress cut back particular rules and practices—such as abolishing the blue slip for federal appellate court nominees but not for district court or U.S. attorneys—is hard to explain on the basis of preferences alone. If a majority party is sufficiently united on breaking down institutional barriers that can thwart confirmation for nominees slated for the federal appellate bench, why leave in place practices that protect the parliamentary right of senators to block other nominees considered by the same committee? A strong possibility is that the institutional costs—depriving senators of influence over nominees to salient home state offices—rather than policy views drives selective evasion of Senate practices.[12]

Moreover, some GOP senators suggested in the heat of their party's consideration of measures to repeal the Affordable Care Act that undermining the Byrd Rule through a nuclear-like procedure might be an institutional-step too far: Bending the Congressional Budget Act (a law) struck some senators as costlier than evading rules or practices. "We're not at liberty to do that," Senate GOP majority whip John Cornyn (R-Texas) argued. "We can't just change a law that way" (Haberkorn and Kim 2017). That reluctance of course could be strategic; perhaps Republicans just disagreed over how to repeal or replace the Affordable Care Act, making them reluctant to void the Byrd Rule and thus favoring keeping the budget law intact. No doubt that is partially true. But senators seem to recognize the varying institutional costs that accompany different modes of evading the rules. If so, both preferences and institutional costs likely shape decisions about when or how to bend the rules.

Politics of rule bending in the Senate

Table 1 catalogues salient institutional transgressions either proposed or undertaken by Senate Republicans over the course of Trump's first year in office. The list includes targets that run the gamut from formal rules (Rule 22), committee practices (freezing a nomination if a home

[12] Leaving in place the blue slip for U.S. Attorneys certainly was costly for President Trump. More than a year after firing the sitting U.S. Attorney for the Southern District of New York (home to the prosecutors actively investigating Trump's personal lawyer, Michael Cohen), the president had yet to nominate the U.S. Attorney given opposition from the New York Democratic senators (Weisler 2018).

state senator objects via the so-called "blue slip"), informal norms (waiting for CBO estimates before voting) and floor precedents (following the parliamentarian's advice) to statutory law (the Congressional Budget Act's Byrd Rule). Republicans succeeded in evading Rule 22's supermajority threshold for voting on Supreme Court nominations—arguably a goal that garnered intense GOP interest and could be achieved at low cost. But Republicans declined to pursue costly rule transgressions suggested by their own colleagues: using the nuclear option to ban legislative filibusters and to evade supermajority requirements embedded in federal budget law. The breadth of the effects of those changes would have been far wider than nuking Supreme Court filibusters, raising their costs for a majority with numerous fissures on major issues of the day. Weak intensity and high costs arguably enhanced the stickiness of the rules.

Table 1: Salient rule-bending proposals and outcomes in the Senate (2017)

Proposal	**Outcome**
Ignore negative "blue slips" from home state senators for U.S. Court of Appeals nominees	Implemented
Set precedent to reduce cloture threshold to simple majority for Supreme Court nominations	Implemented
Floor votes before Joint Tax Committee estimates available	Implemented
Floor votes before CBO estimates available	Implemented
Set precedent to reduce post-cloture debate time for some nominees	Senate committee hearing
Set precedent to reduce cloture threshold to simple majority for legislative measures/motions	No action
Set precedent to eliminate Byrd Rule's 60 vote requirement	No action
Direct chair to rule contrary to advice of the parliamentarian on settled matters	No action

A closer look at senators' positions on nuking the legislative filibuster affords us a better sense of the politics of transgressing Senate rules. Some Republicans, including Paul Cruz of Texas, advised that Republicans reinterpret Rule 22 to lower the threshold from supermajority to simple majority for measures and motions related to legislation (as opposed to nominations) (Klein 2018). Republicans leaders in 2017 did not bring the proposal to a vote on the Senate floor. Thus, we lack direct evidence of senators' preferences regarding changes to Rule 22's

cloture threshold for legislative measures. However, we have a letter circulated to the majority and minority leaders by a bipartisan pair of senators while Republicans were preparing to nuke the filibuster to secure confirmation of Trump's Supreme Court nominee, Neil Gorsuch. The letter urged leaders to oppose any effort that would curtail the rights of senators to filibuster legislative measures and motions. Senators Susan Collins (R-Maine) and Chris Coons (D-Delaware) secured a total of 61 signatures, including just over half of the Republicans (29 of 52) and roughly two-thirds of the Democrats (32 of 48).

We can use senators' decisions on whether or not to sign the letter as a proxy for their views on whether or not they would vote to nuke the legislative filibuster. To be sure, letter signing is an imperfect measure of whether a senator would vote to nuke the legislative filibuster. Talk is cheap, especially in the Senate. Neither does signing a letter necessarily capture a lawmaker's sincere procedural preferences. For example, Senator Bob Corker (R-Tennessee) refused to sign the letter, arguing that it provided cover to the majority leader for bending the rules on Supreme Court nominees (Schor 2017).[13] Nor did McConnell or Schumer sign the letter (given that it was addressed to them). And McConnell made plain (conveniently forgetting his 2013 statement that there would be no rational basis *not* to act) his opposition to eliminating legislative filibusters. "I would be the beneficiary, and my party would be the beneficiary" of requiring only a simple majority to cut off debate on legislative measures and motions, McConnell noted. But he added, "I'm opposed to changing it. I think that's what fundamentally changes the Senate" (Schor 2017). And unfortunately the letter does not afford us a direct test of the impact of perceived institutional costs of bending Senate rules.

Still, the broad-scale effort by Collins and Coons to maximize support for the letter (Schor 2017) suggests that senators' decisions about whether or not to sign the letter offer a valid if rough proxy for preferences on bending the cloture rule for legislative measures and motions. To examine the forces that shape senators' procedural preferences, I estimate a statistical model of senators' letter signing decisions. First, as a measure of majority party intensity in favor of

[13] Still, Senator Corker voted with Republican colleagues to lower the threshold for cutting off debate on Supreme Court nominees. Senate Roll Call Vote #109, April 6, 2017.

rule breaking, I test whether Republicans were disproportionately less likely to sign the letter—thus expressing their support for further bending the filibuster rule. Failure to detect a relationship would signal insufficient GOP cohesion on their conservative colleagues' proposal to nuke the legislative filibuster.

Second, I explore whether a senator's ideological bent shapes his or her support for limiting the right to filibuster.[14] Following Koger (2010), ideological outliers should be more likely to favor protecting the filibuster: a senator's ability to block the majority from pressing its agenda on the floor should be especially valuable the more extreme a lawmaker's preferences. And if ideological outliers benefit from the filibuster when they serve in either the majority or the minority party, ideologues from both parties should be more likely to sign the letter. Alternatively, the most conservative and liberal senators could be the *strongest* supporters of eliminating the filibuster. The frustrations of right-wing Republicans in 2017—who felt stymied by supermajority requirements—could lead them to disproportionately refuse to the sign the letter. Similarly, left-wing Democrats—who stand to benefit the most from simple majority cloture when they regain the majority-- might disproportionately refrain from signing the letter. By this logic, both parties' leaders might also be more likely to withhold their signatures, on the grounds that supermajority rules perennially frustrate a majority party's ability to secure an off-center agenda.[15]

Third, I include a number of controls for other forces that may shape lawmakers' procedural views including each senator's seniority in the chamber and whether or not they have ever served in the Senate minority party. Both of these factors might increase senators' fealty to the legislative filibuster, increasing the chances that they might sign the letter to protect the procedural status quo. Finally, I probe whether senators signing the letter were also more likely to face voters in 2018. And more specifically, given Trump's repeated tweets urging senators to

[14] To identify each senator's distance from the average senator, I calculate the absolute value of each senator's DW-NOMINATE (first dimension, Common Space) distance from the mean DW-NOMINATE score for the chamber. NOMINATE scores available from http://voteview.com

[15] I code Democratic and Republican leaders as indicated by the U.S. Senate http://www.senate.gov/senators/leadership.htm [Accessed February 1, 2018].

eliminate the filibuster (Pramuk and Wilkie 2018), I test whether GOP senators running for re-election in 2018 were disproportionately more likely to sign on.

I present parameter estimates from a logic model for the decision to sign the letter in Figure 2. (The full estimates appear in appendix Table A.1.) Most notably, ideological outliers appear markedly less inclined to save the legislative filibuster: The farther a senator ideologically from the average senator, the less likely he or she is to sign the letter. That relationship captures the attitudes of arch conservatives like Ted Cruz and Mike Lee, as well as staunch liberals like Bernie Sanders and Elizabeth Warren. Contrary to the view that ideologues benefit the most from rules that facilitate obstruction, the results suggest that contemporary outliers are more likely to favor rule bending—perhaps as a means of securing their preferred, off-center policy outcomes.[16]

Figure 2: Ideologues and party leaders are less likely to support saving the filibuster

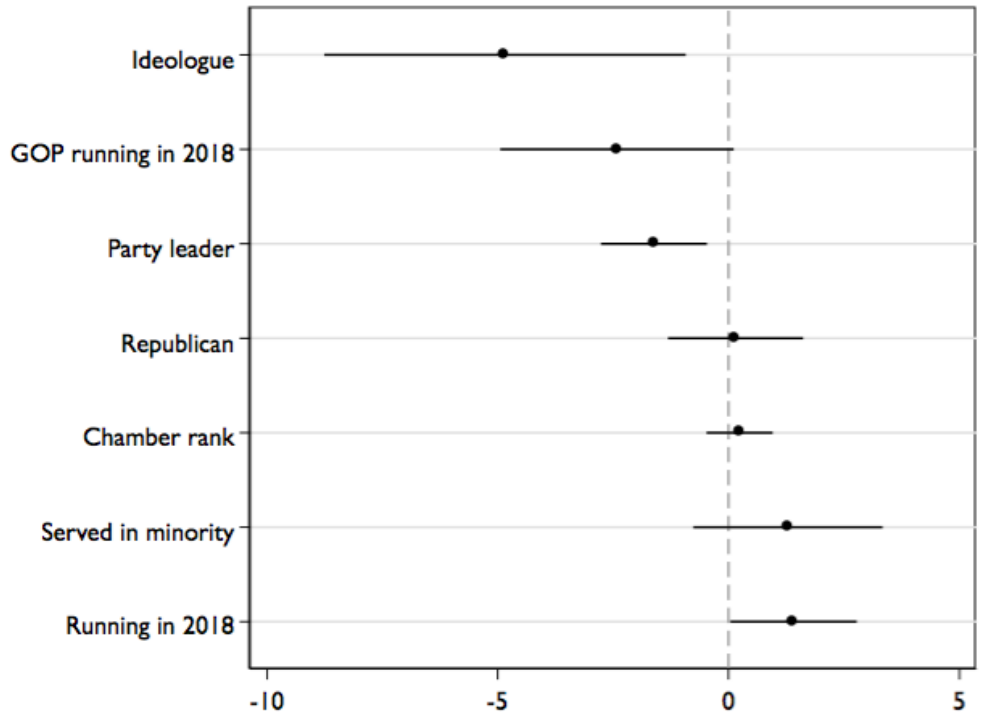

Figure plots coefficients and 95% confidence intervals from logit model estimating senators' likelihood of signing the Collins-Coons letter to protect the Senate filibuster. The dependent variable is coded 1 for letter signers, 0 otherwise. Estimates from Stata 14.2, using robust standard errors clustered by state.

[16] Splitting senators by party and re-estimating the model yields similar results: Ideological wings of both political parties refrained from signing the letter.

The model also suggests that party leaders disproportionately refrain from signaling support for the legislative filibuster. To be sure, GOP McConnell in 2017 reversed his previous position, stating now that he favored saving the filibuster. McConnell aside, party leaders' reluctance to sign the letter suggests either leaders' frustration with rules that bind the majority party or their desire to hold their fire given the diversity of preferences within their party. The former might explain GOP leaders' (save McConnell) refusal to sign the letter. The latter makes more sense for Democratic leaders given record heights of partisanship and a deeply unpopular Republican president. We should hardly expect Democratic leaders to support nuking the filibuster while Trump is president. But they might prefer to avoid procedural commitments given disagreement within their caucus. Notably, I find no evidence for the received wisdom about longer-serving senators: More senior senators and those with experience in the minority party do not disproportionately sign the letter.[17]

Finally, senators facing the electorate in 2018 are more likely to sign the letter, favoring the parliamentary status quo. However, if we model letter signing by Democrats and Republicans separately, only Democrats running for re-election in 2018 are more likely to sign on. That makes sense given that Democrats need to turn out their anti-Trump base and independents come November. Rule bending now would advantage Republicans, creating an incentive for re-election seeking Democrats to sign the letter. That said, the handful of Republicans running for re-election do not lean decidedly to the president's position in favoring elimination of the filibuster.[18]

Conclusions

No party has a monopoly on bending rules. Albeit to varying degrees, both parties have transgressed the rules when their members have been both sufficiently united in pursuit of a party agenda and willing to bear the concomitant costs. Granted, both parties justify bending

[17] Nor are longer-serving senators or those who have served in the minority party more likely to be closer to the ideological center (mean) of the chamber.

[18] Note that only five Republicans are running for re-election in 2018: Wicker (Mississippi), Fischer (Nebraska), Heller (Nevada), Cruz (Texas), and Barrasso (Wyoming). As of June 2018, senators are retiring in the remaining three seats that the GOP party is defending (Tennessee, Utah, Arizona). The five Republicans split 3-2 in signing the letter.

the rules to empower the majority party by pointing to obstructive tactics of the minority. In Smith's (2014) terms, a logic of "obstruct and restrict" underlies interactions between the two parties in the contemporary Senate. The majority party reacts to minority party obstruction by further repressing the minority's parliamentary rights. The opposition party responds in kind by developing new ways to obstruct the majority, behavior that convinces the majority to tighten the thumbscrews yet again on the minority. And so on. Bending the rules—whether by abolishing informal practices, violating institutional norms, or reinterpreting formal rules—in this sense is a natural part of the chamber's contemporary, parliamentary warfare.

This procedural arms race intensifies as the parties polarize. Recently, this institutional dynamic features majority parties—frustrated by the difficulty of securing their policy goals with a slim Senate majority-- willing to evade regular order to alter the rules of the game. The greater the partisan payoff, the more willing intense, cohesive majorities are to trade off the policy and institutional costs of rule bending. To be sure, majority parties are not highly cohesive on all elements of their agenda. Nor is every agenda item equally salient to their members. And minority parties do not always seek to block the entirety of a majority party's program-- although some parties (particularly Republicans from 2009 through 2014 during the Obama administration) do.[19] On balance though, when intense majorities face declining costs of bending the rules, they appear more likely to at least try to transgress them. That was certainly the lesson of 2017 when Republicans discovered that unified party control was insufficient to deliver the off-center policies they had trumpeted for years to their partisan base.

The view that majority parties try to exploit the rules of the game in pursuit of partisan advantage is consistent with recent work on the Senate (e.g. Reynolds 2017). But a simpler explanation is also worth entertaining: Senators know so little about the rules today that they are unlikely to challenge leaders who seek to bend them. Senators' lack of procedural knowledge—compounded by their lack of experience presiding over the Senate (given the practice of rotating junior senators in and out of the chair)—significantly reduces the costs of bending the rules. Of course, although hard to quantify, the loss of procedural expertise

[19] Recall then Minority leader McConnell's vow to make President Obama a "one-term president."

amongst senators has no doubt been underway for some time (Wallner 2014). And longer serving senators—those who likely have more parliamentary experience under their belts and thus might better appreciate the limits imposed by Senate rules—were not especially likely to sign onto the Collins-Coons letter to save the Senate filibuster. Neophyte senators might support ambitious party leaders seeking to bend rules. But senators' diminished familiarity with Senate procedures probably plays at best an incidental role in driving this phenomenon.

Party tribalism—albeit only on the most salient issues that unite their conference—likely shapes majority senators' willingness to tear down barriers to majority rule, often leading lawmakers to bend the rules. Notably, however, lawmakers' willingness to imagine their way around institutional barriers—or to bulldoze right through them—has not made Congress appreciably more productive. Even when Republicans succeeded in enacting landmark tax cuts late in 2017, rule bending (facilitating swift passage of a measure that disproportionately favored corporations and higher income voters) likely contributed to the law's partisan odor and its marginal popularity with voters (Warshaw 2017). How institutions regain their binding power in a highly charged, partisan environment remains to be seen.

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Appendix

Table A.1. Ideologues and party leaders are less likely to support saving the filibuster

Independent variable	Coefficient (robust s.e.)
Republican	.15 (.75)
Running in 2018	1.41 (.70)
Republican running in 2018	-2.42 (1.29)
Ideological wings	-4.84 (1.20)
Party leader	-1.61 (.59)
Chamber rank	.24 (.37)
Served in minority party	1.29 (1.05)
Constant	.99 (1.51)

Estimates for model shown in Figure 2. Table shows coefficients from logit model estimating likelihood of signing the Collins-Coons letter to protect the Senate filibuster. The dependent variable is coded 1 for letter signers, 0 otherwise. Logit estimates from Stata 14.2, using robust standard errors clustered by state.

N=100, Wald Chi2 = 26.09, Log pseudolikelihood = -54.52