

BOX 7.5 A Summary of the Nuclear Option Proceedings of November 2013

On November 21, 2013, the Democrats took unusual procedural actions to reinterpret Senate Rule XXII and reduce the threshold to invoke cloture on nominations—except those to the U.S. Supreme Court—from three-fifths of the Senate to a majority of those voting. Through a successful appeal of a ruling by the Presiding Officer, the Democrats imposed majority cloture on nominations without changing the text of Rule XXII.

Step one: On October 28, 2013, the Senate failed to invoke cloture on the nomination of Patricia Ann Millett to be U.S. Circuit Judge for the District of Columbia Circuit. Senator Reid entered a motion to reconsider the cloture vote. Entering a motion to reconsider, as opposed to moving to reconsider, allows the Senate to have a revote at a subsequent time of its choosing. It has become common practice for the majority leader to enter a motion to reconsider a failed cloture vote.

Step two: On November 21, 2013, Senator Reid moved to proceed to the motion to reconsider the Millett cloture vote. The motion is not subject to debate. The Senate agreed to the motion, 57–40.

Step three: Once the Senate agreed to take up the motion to reconsider, the majority leader immediately moved to reconsider the Millett cloture vote. This also is a nondebatable motion. The Republican leader posed some parliamentary inquiries and he moved (unsuccessfully) that the Senate adjourn, but he made no further attempt to delay the vote. The Senate voted in favor of reconsideration, 57–40. (These two steps, to proceed to reconsider a cloture vote and then to reconsider the vote, are quite common in modern practice, although typically roll call votes are not requested on them.)

Step four: After the Senate agreed to vote again on the question of invoking cloture on the Millett nomination, but before that revote, Senator Reid made a point of order that, “the vote on cloture under rule XXII for all nominations other than to the Supreme Court of the United States is by majority vote.” With this step, the proceedings became unusual. Senator Reid made a point of order in anticipation of an event happening (the cloture vote) prescribed—particularly through the exclusion of Supreme Court nominations—procedural terms to be applied in future circumstances.

Step five: The president pro tempore of the Senate, Patrick Leahy, D-Vt., ruled against the point of order in his capacity as presiding officer, based on advice provided by the Senate Parliamentarian. Senate Rule XXII explicitly requires a vote of three-fifths of the Senate to invoke cloture on all questions except those proposing changes to Senate Rules.