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BACKGROUNDER

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Son of a Filibuster

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Abstract

The Senate was not originally designed so that Senators who lacked votes to defeat a pending matter could do so by preventing any vote on that matter from taking place. That practice, called the filibuster, quickly became part of the fabric of the legislative process—but was never intended to be part of the confirmation process. After using the filibuster aggressively to defeat majority-supported nominations during the George W. Bush Administration, Democrats effectively abolished nomination filibusters when a President of their own party was in office. Today, however, the "son of a filibuster" still lives through the Democrats' practice of forcing the Senate to take cloture votes on nominations—even when the eventual confirmation is not in question.

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [the filibuster] stalks [the confirmation process] once again.[1]

No feature of how the United States Senate does business is more simultaneously loved and hated than the filibuster, which allows less than a majority of Senators to prevent a final vote on pending Senate business. The minority party prizes the filibuster, while the majority party despises it.

The opportunity for smaller groups of Senators to prevent votes on pending matters, however, was not in the original design of the Senate. And while the filibuster quickly became part of the Senate's legislative process, over which Congress has primary control, it was never intended to be part of the appointment process, over which the Presi-

Key Points

- As Senator Orrin Hatch has explained: "A filibuster occurs when the Senate cannot vote on passage of legislation or confirmation of a nomination because an attempt to end debate on it fails."
- No feature of how the United States Senate does business is more simultaneously loved and hated than the filibuster, which allows less than a majority of Senators to prevent a final vote on pending Senate business.
- The filibuster did not become part of the appointment process until the George W. Bush Administration and, while it was formally abolished in 2013, the nomination filibuster still lives through the Democrats' continued practice of forcing the Senate to take unnecessary cloture votes on nominations and using hours and hours of post-cloture debate time.
- This practice not only undermines the basic integrity of the confirmation process, but it is especially serious when judicial vacancies are at record highs, shortchanging those who rely on the judicial system.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3329**

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dent has primary control. In fact, the filibuster was not used to defeat an executive branch nomination until 1994[2] or a judicial nomination until 2003.[3] Even though the nomination filibuster was supposedly abolished 10 years later, a form of the filibuster continues to significantly impact the confirmation process.

The Appointment Process

The Constitution gives the President authority to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint"[4] federal judges and many executive branch officials.[5] This language, including the reference to the Senate's role, appears in Article II, which delineates executive branch power, rather than in Article I, which outlines legislative branch power. Alexander Hamilton wrote that requiring the "co-operation of the Senate" for appointments would be a "silent operation" that would be "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[6] The Senate's role of "Advice and Consent" is, therefore, not an independent or co-equal power to appoint judges—but a check on the President's power to appoint.

The Constitution also gives to each house of Congress authority to establish "the Rules of its [own] Proceedings,"[7] and, therefore, the Senate determines how to carry out its advice-and-consent function. Since the Judiciary Committee was created in 1816, for example, it has evaluated most Supreme Court nominations and, after the Senate rules revision of 1868, many lower-court nominations as well.[8]

While nearly one-quarter of Supreme Court nominations have not been confirmed,[9] the overall judicial confirmation process saw little conflict for most of American history. The Senate, for example, confirmed more than 3,100 judges[10] between the years 1789 and 2000, 97 percent of them without any opposition and 96 percent without even a roll call vote. In the 20th century, however, advocates for a more powerful judiciary increasingly challenged the modest role designed by America's Founders, and this debate began to affect the process of appointing those judges. Specifically, Senators and their grassroots allies began to consider strategies for preventing the confirmation of a judicial nomination they opposed but lacked the votes to defeat.

The Filibuster

Neither the House nor the Senate can vote on a pending matter until first ending debate, or invoking cloture, on that matter. From its inception, the House

1. Adapted from Justice Antonin Scalia's opinion concurring in the judgment in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398–399 (1993).
2. In May 1994, by votes of 54–44 and 56–42, the Senate defeated motions to end debate on the nomination of Sam Brown, President Bill Clinton's nominee to be Head of Delegation to the Conference on Security and Cooperation in Europe. The nomination was returned to President Clinton at the end of the 102nd Congress, and he did not re-nominate Brown.
3. Between March and July 2003, the Senate defeated seven motions to end debate on President George W. Bush's nomination of Miguel Estrada to the U.S. Court of Appeals for the DC Circuit. Each had at least 52 votes in favor, enough for confirmation but not enough to end debate. President Bush withdrew the Estrada nomination on September 4, 2003.
4. U.S. Constitution, Art. II, Sec. 2. For more discussion of the Appointments Clause, see John O. McGinnis, "Appointments Clause," in David F. Forte and Matthew Spalding, eds., *The Heritage Guide to the Constitution*, 2nd ed. (Washington, DC: The Heritage Foundation, 2014), https://www.heritage.org/constitution/#!/articles/2/essays/91/appointments-clause.
5. "In recent years, more than 300 positions in 14 cabinet agencies and more than 100 positions in independent and other agencies have been subject to presidential appointment. Approximately 4,000 civilian and 65,000 military nominations are submitted to the Senate during each two-year session of Congress." U.S. Senate, "Nominations," https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm (accessed June 26, 2018).
6. Alexander Hamilton, *The Federalist* No. 76, http://avalon.law.yale.edu/18th_century/fed76.asp (accessed June 26, 2018).
7. U.S. Constitution, Art. I, Sec. 5, Cl. 2.
8. See Denis Steven Rutkus, "Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate," Congressional Research Service *Report for Congress*, February 19, 2010, pp. 17–18, https://fas.org/sgp/crs/misc/RL31989.pdf (accessed June 26, 2018).
9. Ibid., p. 1. As recently as 1970, the Senate confirmed Supreme Court Justice Harry Blackmun 27 days after his nomination by a unanimous roll call vote. Eight years earlier, the Senate confirmed Justice Byron White only eight days after his nomination without a roll call vote. Other quick Supreme Court confirmations include Justices Charles Whittaker in 1957 (confirmed in 17 days by voice vote); Harold Burton in 1945 (confirmed in one day by voice vote); and James Byrnes in 1941 (confirmed the same day by voice vote).
10. These include nominations to the U.S. District Court, U.S. Circuit Courts, U.S. Court of Appeals, and the U.S. Supreme Court.

has had a rule allowing a simple majority to "move the previous question...which shall have the effect of cutting off all debate and bringing the House to a direct vote" on the pending matter.[11] The Senate originally had a similar rule[12] but dropped it in 1806 without replacing it. With no rule setting a specific vote threshold, ending debate in the Senate (after 1806) required unanimous consent, or the approval of all Senators.[13]

As Senator Orrin Hatch (R–UT) has explained: "A filibuster occurs when the Senate cannot vote on passage of legislation or confirmation of a nomination because an attempt to end debate on it fails."[14] The more votes required to invoke cloture, the easier it is to filibuster. Requiring only a simple majority, as in the House today and in the Senate until 1806, makes filibusters virtually impossible. Requiring unanimous consent, however, makes them very attractive to Senators who could not otherwise defeat a pending matter outright.

It took about three decades after dropping the "previous question" rule for Senators to discover that a pending matter could be defeated by preventing a final vote on it. In 1837, Senate supporters of President Andrew Jackson made a motion to expunge from the record the Senate's 1834 censure of Jackson over withdrawals from the Bank of the United States. Since there was no cloture rule, Jackson's Senate opponents "talked and talked" to defeat an attempt to end debate.[15]

By 1917, filibusters had become so common that the Senate adopted a rule to lower, from unanimous consent to a supermajority, the number of votes required to invoke cloture. The intention of this new rule was to make filibusters more difficult by making it easier to end debate. Rule 22 required "a two-thirds vote of those voting" to invoke cloture on "any pending measure."[16] The word "measure," however, was interpreted very narrowly. It included a bill itself, but not the procedural step of making that bill the Senate's pending business. That step, called a motion to proceed, could still be filibustered. This prompted then–Senate President *pro tempore* Arthur Vandenberg (R–MI) to say that the Senate had "no effective cloture rule at all."[17] In 1949, the Senate addressed this by expanding Rule 22's application to all pending "matters"—but also raising the vote threshold to two-thirds of Senators "duly chosen and sworn."[18] Since 1975, when the rule was revised again, Rule 22 has required three-fifths of Senators "chosen and sworn," or 60 votes, to invoke cloture on pending matters.[19]

Nomination Filibusters Begin

Even though the Senate dropped the simple-majority "previous question" rule in 1806 because it had rarely been used,[20] the filibuster soon became an entrenched feature of the legislative process. Rule 22 was adopted and amended to improve the legislative process, not to make filibusters a feature of the confirmation process.

In fact, while the Senate took its first cloture vote on legislation just four months after adopting Rule 22 in 1917, the Senate did not take its first cloture vote on a nomination until 1968. President Lyndon Johnson had nominated Supreme Court Associate Justice Abe Fortas to be Chief Justice on July 28, 1968. Even though Democrats had a 64–36 Senate majority, concern that Richard Nixon might win the presidency[21] prompted Johnson to push for

11. Karen L. Haas, "Rules of the U.S. House of Representatives: One Hundred Fifteenth Congress," January 5, 2017, Rule XIX(1)(a), p. 33, https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf (accessed June 26, 2018).
12. See Martin B. Gold and Dimple Gupta, "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," *Harvard Journal of Law & Public Policy*, Vol. 28, No. 1 (2004), p. 213.
13. Ibid., pp. 215–216.
14. *Congressional Record*, December 12, 2013, p. S8754.
15. See Gold and Gupta, "The Constitutional Option to Change Senate Rules and Procedures," p. 216. While this filibuster was unsuccessful, it sparked "a long history of attempting filibuster reform." Ibid., p. 217.
16. Ibid., pp. 226–227.
17. Ibid., p. 228.
18. Ibid.
19. Ibid., pp. 259–260.
20. Ibid., pp. 215–216.
21. Gallup polls between August and late October 1968 showed Nixon leading Hubert Humphrey by eight to 15 points. "Gallup Presidential Trial-Heat Trends, 1936–2008," Gallup.com, http://news.gallup.com/poll/110548/gallup-presidential-election-trial-heat-trends.aspx (accessed June 26, 2018).

an expedited confirmation process. The Judiciary Committee hearing, however, revealed that, as a sitting Justice, Fortas had "regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam."[22] On October 1, 1968, the Senate voted 45–43 in favor of the motion to invoke cloture on the Fortas nomination, far short of the votes needed to end debate. Since that tally also suggested that Fortas did not have a simple majority for confirmation,[23] President Johnson promptly withdrew the nomination.[24]

Over the next 32 years, the Senate took a cloture vote on only 10 judicial nominations and confirmed each of them. Three of those 10 cloture votes failed, resulting in filibusters, but none was for the purpose of defeating the nomination. A clear example occurred in 1999. During the previous 105th Congress, with a 55–45 Republican majority, Judiciary Committee Chairman Orrin Hatch held hearings for 110 of President Bill Clinton's judicial nominations. The Senate confirmed 99 of them—nearly 90 percent without any opposition—and took no cloture votes on judicial nominations. Republicans maintained the same majority after the 1998 election, but Hatch did not hold a confirmation hearing until June 16, 1999, prompting Democratic complaints about the confirmation pace.[25]

Democrats saw the opportunity for leverage in July 1999. President Clinton nominated to the U.S. District Court in Utah Brian Stewart, a friend of Senator Hatch, who had previously served on his staff. Hatch scheduled a confirmation hearing just two days after Stewart's nomination, and the Judiciary Committee reported the nomination to the full Senate later that same day. On September 16, 1999, Senator Patrick Leahy (D–VT) noted that 30 nominations had been waiting longer than Stewart and said that while "having to invoke cloture on judicial nominations" is "bad precedent," it "may be necessary."[26]

Even though Stewart was nominated by President Clinton, Democrats filibustered the nomination, resulting in a 55–44 cloture vote on September 21, 1999. When an agreement was reached for confirmation votes on additional judicial nominees, however, the Senate voted 93–5 to confirm the Stewart nomination on October 5, 1999.[27]

Using the filibuster not as a temporary tool for achieving other objectives but as a permanent way to defeat judicial nominations did not begin until the George W. Bush Administration. Within days of Bush taking office, Senate Democratic Leader Tom Daschle (D–SD) vowed to use "whatever means necessary" to oppose the President's nominees.[28] To that end, Senate Democrats met in Florida to strategize how to "change the ground rules" of the confirmation process,[29] including using the filibuster to defeat nominations.[30] They sought to introduce into the confirmation process a way for Senators lacking the votes to defeat a nomination outright to do so by preventing confirmation votes from taking place altogether.

From March 2003 to July 2004, Democrats forced the Senate to take 20 cloture votes on 10 nominees to the U.S. Court of Appeals. Each of those votes failed, resulting in filibusters. The Senate had previously

22. U.S. Senate, "Filibuster Derails Supreme Court Appointment," https://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm (accessed June 26, 2018).
23. See John Cornyn, "Our Broken Confirmation Process and the Need for Filibuster Reform," *Harvard Journal of Law & Public Policy*, Vol. 27, No. 1 (2003), pp. 218–223, https://www.thefreelibrary.com/Our+broken+judicial+confirmation+process+and+the+need+for+filibuster...-a0114283880 (accessed June 26, 2018).
24. See "Attempt to Stop Fortas Debate Fails by 14-Vote Margin," *CQ Almanac 1968*, https://library.cqpress.com/cqalmanac/document.php?id=cqal68-1284316 (accessed June 26, 2018) [subscription required].
25. Judiciary Committee Ranking member Patrick Leahy (D–VT), for example, noted in April 1999 that the committee "has yet to hold or even schedule a confirmation hearing." *Congressional Record*, April 14, 1999, p. S3670.
26. *Congressional Record*, September 16, 1999, p. S11040.
27. Senator Leahy discussed the negotiations and agreements in several floor speeches. See, e.g., *Congressional Record*, October 1, 1999, pp. S11794–11795, and *Congressional Record*, October 4, 1999, pp. S11867–11868.
28. See Muriel Dobbin, "Dems Send President a Message," *Chicago Sun-Times*, February 2, 2001, p. 21.
29. Neil A. Lewis, "Washington Talk; Democrats Readying for Judicial Fight," *New York Times*, May 1, 2001, https://www.nytimes.com/2001/05/01/us/washington-talk-democrats-readying-for-judicial-fight.html (accessed June 26, 2018).
30. See Reuters, "A Democratic Message to Bush: Ashcroft Foes Press On, But Concede He'll Win," *Newsday*, February 1, 2001, p. A17.

taken *two* cloture votes on the same judicial nomination only once, yet during this 2002–2004 period, the Senate defeated *seven* cloture votes on Miguel Estrada's nomination to the DC Circuit, *four* on Priscilla Owen's nomination to the Fifth Circuit, and *two* on William Pryor's nomination to the Eleventh Circuit.

While the Stewart nomination offered an example of a filibuster for other purposes, the Owen nomination was an example of a filibuster intended to defeat a nomination that would otherwise be confirmed. President George W. Bush had first nominated Owen on May 9, 2001, shortly before Democrats took over the Senate majority. The Democrats' first strategy to prevent confirmation was to deny Owen a hearing for the remainder of the 107th Congress. When Republicans won Senate control in the 2002 election, the Democrats' second strategy was to use the filibuster to prevent a confirmation vote by the full Senate.

On April 8, 2003, Senator Robert Bennett (R–UT) asked "unanimous consent that there be an additional 6 hours for debate on the Owen nomination... and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination."[31] Minority Leader Harry Reid (D–NV) objected. Senator Bennett then requested consent for a confirmation vote after 10 additional hours of debate. Senator Reid again objected. Finally, Senator Bennett asked whether "any number of hours [of debate] would be sufficient," and Senator Reid replied that "there is not a number in the universe that would be sufficient."[32]

In both theory and practice, this was a profound change in the confirmation ground rules. In theory, the filibuster itself was not in the original design of the Senate, and filibustering nominations was not the intention of Rule 22 in 1917 or its revision in 1949. And in practice, prior to 2003, no judicial nomination that would have been confirmed had ever been defeated by a filibuster. No one, for example, suggested a cloture vote for the 1991 Supreme Court nomination of Clarence Thomas even though, as the final 52–48 tally showed, it could have prevented confirmation.

The most direct way to solve this new nomination filibuster problem would have been to amend Rule 22. That strategy, however, was impossible because Rule 22 required "two-thirds of the Senators present and voting" to invoke cloture on a proposed rules change. In other words, Democrats could preserve this new use of the filibuster simply by filibustering any filibuster reform effort.

The Republican leadership instead discussed how a simple majority of Senators could effectively achieve the same goal by changing Senate practice without changing Senate rules. This came to be called the "nuclear option" because of its expected explosive impact on Senate norms and comity. One version, which had been discussed for many years but never tried, would change the text of Senate rules but could only be implemented at the beginning of a two-year Congress.[33] A second version, which *had* been tried before, could be implemented at any time but would change the interpretation, but not the text, of Senate rules.[34] This second version would involve a parliamentary ruling, approved by a simple majority of Senators, that would end nomination filibusters by reinterpreting Rule 22.[35] The day before Majority Leader Bill Frist (R–TN) was expected to take this step, however, a bipartisan group of 14 Senators reached an agreement that prevented any change to Rule 22 but also limited judicial nomination filibusters to so-called "extraordinary circumstances."[36]

Nomination Filibusters End

Filibusters were an insignificant factor in the confirmation process during President Barack Obama's

31. *Congressional Record*, April 8, 2003, p. S4949.
32. Ibid.
33. See Hatch, "Nomination Filibuster Cause and Cure," pp. 851–855.
34. Ibid., p. 856–859.
35. Ibid., p. 838, note 197.
36. Democrats had 45 Senate seats in the 109th Congress. In the so-called "Gang of 14," the seven Democrats were enough to determine whether a cloture vote would pass or fail, and the seven Republicans were enough to determine whether a parliamentary ruling reinterpreting Rule 22 would be affirmed or rejected. The terms of their agreement, drafted as a "Memorandum of Understanding," applied only during the 109th Congress. The text of that memorandum is available online. See "Text of Senate Compromise on Nomination of Judges," *New York Times*, May 24, 2005, https://www.nytimes.com/2005/05/24/politics/text-of-senate-compromise-on-nominations-of-judges.html?mtrref=www.google.com&gwh=72E14E339F352CC777D08779FCA44712&gwt=pay (accessed June 26, 2018).

first term. During his first two years in office, the Senate took 12 cloture votes on executive or judicial branch nominations, and only two of them failed, resulting in filibusters.[37] Even though nomination filibusters had declined since the Bush Administration, however, pressure was building to limit or abolish them.[38] The *Washington Post*, for example, reported on a developing campaign by Senate Democrats to curb the filibuster.[39] Senator Tom Harkin (D–IA) introduced a proposal for a declining vote threshold on successive cloture votes.[40]

During the 112th Congress (2011–2012), the Senate took cloture votes on five executive branch nominations. Three of these cloture votes failed, resulting in filibusters, but all three nominations were later confirmed, one by voice vote. The Senate also took cloture votes on six judicial branch nominations. While three of these cloture votes failed, at least one of the resulting filibusters was not intended to defeat its targeted nomination. In mid-June 2012, then-Minority Leader Mitch McConnell (R–KY) said that, consistent with Senate practice in presidential election years, he would not allow confirmation of more appeals court nominations that year.[41] On July 30, 2012, in support of that position, Republicans voted against invoking cloture on the nomination of Robert Bacharach to the U.S. Court of Appeals for the Tenth Circuit, even though he had been recommended by Oklahoma's Republican Senators. At the beginning of the 113th Congress, however, the Senate voted 93–0 to confirm the Bacharach nomination.[42]

Judicial nomination filibusters declined by 65 percent between the first terms of Presidents Bush and Obama. In addition, the Senate confirmed 111 judges to the federal district and appeals courts during the 112th Congress, 23 percent more than the two-year average over the previous three decades. The judicial confirmation process, in other words, was becoming more productive and less contentious since President Obama first took office.

Nonetheless, shortly after the 2012 election in which Obama was re-elected and Democrats maintained Senate control, media reports indicated that "Democratic legislators led by Senate Majority Leader Harry Reid are contemplating an effort to overhaul or even eliminate the filibuster."[43] Hoping to avoid a wholesale change in confirmation practice, Senate Republicans agreed to modify Rule 22 for the 113th Congress. Rule 22 provided that, even when cloture is invoked, there can be up to "thirty hours of consideration of the...matter on which cloture has been invoked."[44] Senate Resolution 15,[45] introduced by Senator Reid, would limit available post-cloture debate to eight hours for sub-Cabinet executive branch nominations and to two hours for U.S. District Court nominations. The Senate voted 78–16 to adopt this resolution on January 24, 2013.[46]

The Senate took 15 cloture votes on executive branch nominations during 2013. Thirteen passed,

37. On May 13, 2009, a cloture vote on the nomination of David Hayes to be Deputy Secretary of the Interior failed, but the nomination was confirmed by voice vote one week later. On February 9, 2010, a cloture vote on the nomination of Craig Becker to the National Labor Relations Board failed, and President Obama gave him a recess appointment that expired at the end of the 111th Congress.
38. In January 2010, for example, one liberal commentator offered a theory about "how to kill the filibuster with only 51 votes" and the beginning of a two-year Congress. Ian Milhiser, "How to Kill the Filibuster with Only 51 Votes," *The American Prospect*, January 29, 2010, http://prospect.org/article/how-kill-filibuster-only-51-votes-0 (accessed June 26, 2018). On September 14, 2010, Senator Tom Udall (D–NM) introduced Senate Resolution 619 that would formalize this method for changing Senate rules. *Congressional Record*, September 14, 2010, p. S7094.
39. Paul Kane, "Some Democrats Seek Change in Filibuster Rules, But Others Are Wary," *Washington Post*, February 20, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/07/AR2010020702403.html (accessed June 26, 2018).
40. A Resolution Amending the Standing Rules of the Senate to Provide Cloture to Be Invoked with Less Than a Three-Fifths Majority After Additional Debate, S. 416, 111th Cong., 2nd Sess., https://www.govtrack.us/congress/bills/111/sres416/text (accessed June 26, 2018).
41. See, e.g., Andrew Rosenthal, "The Thurmond Rule," *New York Times*, June 14, 2012, https://takingnote.blogs.nytimes.com/2012/06/15/the-thurmond-rule/ (accessed June 26, 2018).
42. *Congressional Record*, February 25, 2013, p. S805.
43. "Should the Filibuster be Overhauled?" *U.S. News & World Report*, November 28, 2012, https://www.usnews.com/debate-club/should-the-filibuster-be-overhauled (accessed June 26, 2018).
44. U.S. Senate, "Rules of the Senate," https://www.rules.senate.gov/rules-of-the-senate (accessed June 28, 2018).
45. A Resolution to Improve Procedures for the Consideration of Legislation and Nominations in the Senate, S. 15, 113th Cong., 1st Sess., https://www.govtrack.us/congress/bills/113/sres15/text (accessed June 26, 2018).
46. *Congressional Record*, January 24, 2013, p. S272.

avoiding filibusters, and the confirmation vote occurred on the same day for 12 of them.[47] All four of the cloture votes on nominations to the U.S. Court of Appeals for the DC Circuit failed, resulting in filibusters.[48] At the same time, in 2013, the Senate confirmed 43 of President Obama's judicial nominations—twice as many as in the first year of President George W. Bush's second term and 20 percent more than in the same year under President Clinton.

This record of cloture votes and filibusters forms the backdrop for Senate Democrats doing in 2013 what Senate Republicans had only considered in 2005. On November 21, 2013, Senator Reid claimed that there had been more than 80 filibusters of President Obama's nominations[49] and declared that the entire confirmation process "has become completely unworkable."[50] He then obtained a parliamentary ruling from the Senate's presiding officer, affirmed by a 52–48 Senate vote, to reinterpret the words "three-fifths" in Rule 22 to mean a simple majority.[51] Applied initially to all but Supreme Court nominations,[52] this step effectively abolished nomination filibusters by making the vote threshold for cloture no higher than the vote threshold for confirmation. In effect, it was as if the simple-majority "previous question" rule had been reinstated. No longer could a group of Senators who lacked the votes to defeat a nomination outright prevent confirmation by blocking a confirmation vote altogether.

But had the confirmation process become "completely unworkable"? Between 1949—when Rule 22's coverage was expanded from "measures" to "matters" and, therefore, could apply to nominations—and 2013, the Senate confirmed nearly 2,600 judicial nominations and approved thousands more to executive branch positions. Only 20 nominations were kept from confirmation by a filibuster and the Senate actually voted down only six others.

Even focusing specifically on the Obama Administration, the record looks little different. From January 2009 to November 2013, 13 cloture votes failed, resulting in filibusters, and seven of those filibustered nominations were ultimately blocked from confirmation. While this outcome might be frustrating to Democrats, no reasonable standard could possibly justify the conclusion that it amounted to a "completely unworkable" process.

Senator Reid's claims, which he offered as the basis for abolishing nomination filibusters altogether, were so far from accurate because, in fact, he was not counting *filibusters* at all. As Senator Orrin Hatch explained, Senator Reid was actually counting *cloture motions* rather than filibusters. A cloture motion, however, "is only a request to end debate and can be filed at any time for any reason."[53] A cloture vote answers that request—and only a failed cloture vote results in a filibuster.

Indeed, many cloture motions do not result in any cloture vote at all. Consider one example of what Senator Hatch called Senator Reid's "filibuster fraud."[54] On March 12, 2012, Senator Reid filed cloture motions on 17 judicial nominations and, therefore, would count these as 17 filibusters. Yet Senator Reid withdrew those cloture motions without a single cloture vote being taken, and all 17 nominations were confirmed within less than four months—five without a roll call vote and another eight with fewer than three negative votes.[55] It makes little sense to say that, especially without a cloture vote at all, nominations that were so easily confirmed had nonetheless been filibustered.

47. The first cloture vote on the nomination of Chuck Hagel to be Secretary of Defense failed. *Congressional Record*, February 14, 2013, p. 747. The second vote, 12 days later, passed, and the nomination was confirmed later that day. *Congressional Record*, February 26, 2013, p. 833.
48. One of these was on the nomination of Caitlin Halligan to the DC Circuit Court. The Senate had defeated a previous cloture motion on the Halligan nomination on December 6, 2011. *Congressional Record*, December 6, 2011, p. S8361.
49. Senator Reid said that there had been "168 filibusters of executive and judicial nominations. Half of them have occurred during the Obama administration." Ibid.
50. *Congressional Record*, November 21, 2013, p. S8414.
51. Ibid., p. S8418. Orrin G. Hatch, "How 52 Senators Made 60=51," *Stanford Law & Policy Review Online*, Vol. 52, No. 14 (March 19, 2014), p. 9.
52. On April 6, 2017, the Republican majority used the "nuclear option" to apply the 2013 reinterpretation of Rule 22 to Supreme Court nominations in order to confirm Neil Gorsuch to the Supreme Court. *Congressional Record*, April 6, 2017, p. S2390.
53. Hatch, "How 52 Senators Made 60=51." See also *Congressional Record*, December 12, 2013, pp. S8754–8756.
54. Hatch, "How 52 Senators Made 60=51," p. 14, note 24.
55. He continued this practice after nomination filibusters were abolished. On December 13, 2014, for example, he filed 11 cloture motions on judicial nominations. He withdrew the motions on December 16, and all 11 were confirmed without a roll call vote later that same day.

Son of a Filibuster Lives

Reducing the votes necessary to invoke cloture to a simple majority had the effect of abolishing nomination filibusters. While Democrats reinterpreted Rule 22 in November 2013, however, they did not change its text. As a result, the two parts of the cloture process under Rule 22 continue to have a significant effect on the confirmation process.

First, Rule 22 still provides for taking cloture votes if the minority party refuses to give consent to scheduling a confirmation vote. Second, since Senate Resolution 15 expired at the end of the 113th Congress, the full 30 hours of post-cloture debate time provided by Rule 22 is again available for every nomination. Democrats are exploiting both of these procedural maneuvers to at least delay confirmation votes that they cannot prevent altogether.

Cloture Votes. Even though Democrats had abolished nomination filibusters in November 2013, Republicans forced the Senate to take cloture votes on most nominations for the rest of the 113th Congress. As Senator Charles Grassley (R–IA) explained in March 2014, they did so "to ask the majority to utilize the procedure they voted to adopt."[56] Democrats had fundamentally changed the cloture process by reinterpreting, rather than changing, Rule 22—and Republicans sought to demonstrate the consequences of that choice.

New Presidents, however, have not faced the obstruction that Democrats today are using against President Trump's nominees. Democrats have so far forced the Senate to take 100 cloture votes on nominations, 40 of them to the judiciary. This total is *five times* as many nomination cloture votes as occurred at this point under every new president in American history—*combined*. Democrats' indiscriminate demand for cloture votes has even swept in nominations by President Trump of individuals who had previously been nominated by President Obama.[57] One of those was David Nye, nominated to the U.S. District Court in Idaho. On July 10, 2017, for only the fifth time in history and the first in 15 years, the Senate unanimously voted to invoke cloture on the Nye nomination. If no Senators wanted to debate, a cloture vote was entirely unnecessary.

Post-Cloture Debate. Some might suggest that Democrats forcing cloture votes in the 115th Congress is no different than Republicans doing so in the 113th Congress. The significant difference, however, occurs *after* cloture is invoked. Post-cloture debate was not an issue in the 113th Congress because the limits imposed by Senate Resolution 15 affected more than 80 percent of the judicial nominations on which the Senate invoked cloture. The Senate also took cloture votes on appeals court nominations (which were not subject to Senate Resolution 15), but confirmation votes in 2014 still occurred on the next day the Senate was in session.

Things are very different in the 115th Congress. The percentage of nominations on which cloture and confirmation votes occurred on the same day has dropped from 53 percent during the Obama Administration to 24 percent so far during the Trump Administration. The time between cloture and confirmation votes has also increased by more than 50 percent, as Democratic Senators eat up hours and hours of valuable floor time in post-cloture debate on nominations that are certain to be confirmed.[58]

During the 113th Congress, Senate Resolution 15 limited post-cloture debate to two hours for nominations to the U.S. District Court; during the 115th Congress, Rule 22 provides up to 30 hours for each nominee.[59] As a result, a maximum of 88 hours of debate was available for the 44 district court nominations on which cloture was invoked at this point during the 113th Congress. So far in the 115th Congress, the Senate has invoked cloture on only 16 district court nominations, but Rule 22 has made available 480 hours of post-cloture debate.

56. *Congressional Record*, March 4, 2014, p. S1265.
57. President Trump re-nominated seven of President Obama's choices for the U.S. District Court. The Senate has so far taken a cloture vote on five of them, with a combined 21 negative votes against cloture and 16 against confirmation. It is unlikely that those Democratic Senators would have voted similarly if the votes on these nominations had occurred during the Obama Administration.
58. *Congressional Record*, March 20, 2018, p. S1814.
59. Senator James Lankford (R–OK) has introduced Senate Resolution 355, which would amend Rule 22 to impose the same limits on post-cloture debate that Senate Resolution 15 did in the 113th Congress. The Senate Rules Committee approved the resolution on April 25, 2018. For now, at least, this reform proposal is not politically viable since, as noted above, Rule 22 requires two-thirds of Senators present and voting to invoke cloture on any proposed rules change.

Conclusion

The Senate was not originally designed so that Senators who lacked votes to defeat a pending matter outright could do so by preventing any vote from taking place on that matter. That practice, called the filibuster, quickly became part of the fabric of the legislative process but was never intended to be part of the confirmation process. After using the filibuster aggressively to defeat majority-supported nominations during the George W. Bush Administration, Democrats effectively abolished nomination filibusters when a President of their own party was in office.

Today, however, the "son of a filibuster" still lives through the Democrats' continued practice of forcing the Senate to take cloture votes on nominations and using hours and hours of post-cloture debate time—even when there is never any doubt that the nominee will eventually be confirmed. The only purpose for hanging onto this vestige of the filibuster is to delay nominations that cannot be defeated outright. This not only undermines the basic integrity of the confirmation process, but it is especially serious when judicial vacancies are at record highs, shortchanging those who rely on the judicial system.[60]

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60. Ironically, when a Democrat was President, Senator Patrick Leahy (D–VT) declared 67 judicial vacancies to be a "crisis." *Congressional Record*, September 8, 2015, p. S6456. Today, 140 positions on the federal district and appeals courts are vacant. See U.S. Courts, "Judicial Vacancies," http://www.uscourts.gov/judges-judgeships/judicial-vacancies (accessed June 26, 2018).