

What the recent Senate rules change means & how to prepare for future obstruction

On November 21, 2013, the U.S. Senate voted for a minor procedural change to its rules by eliminating the filibuster for most judicial and executive nominations.ⁱ This means that judicial and executive nominees can now receive a full Senate vote without having to jump over unnecessary hurdles that cause delay and make the Senate ineffective.

This is not the first time the Senate has voted to change its rules. The U.S. Senate has changed its practices by a simple-majority vote 18 different times since 1977.ⁱⁱ

Obstruction for obstruction sake

When the filibuster was in place, a supermajority, or 60 Senators, would have to vote for the judicial or executive nominee to advance and receive a full Senate vote. The current Senate has 53 Democrats, 45 Republicans and two Independents. The filibuster gave the minority Republican senators the ability to obstruct simply because they didn't want to confirm any of President Obama's nominees, no matter how qualified.

With the rule change, all that is required to advance a nominee is a simple majority – or 51 votes. This is no different than how the first Senate ran. The original rules of the Senate said nothing about the filibuster. The filibuster, in fact, was created by mistake and it was never intended to be abused as it has in recent years to prevent votes on qualified nominees for political sake.ⁱⁱⁱ

Consider these telling facts:

- The Senate first allowed cloture to be sought on nominations in 1949. Prior to that, presidential nominees were rarely, if ever, blocked using the filibuster.^{iv}
- Since then, the U.S. Senate has filibustered a total of 147 individual nominees. More than half of these have been during the Obama administration. (79 of Obama's nominees as of the day of the Senate rules change.)^v
- To put it another way, throughout history, there have been 168 cloture motions ever filed (or reconsidered) on nominations, and 82 of these were made since 2009.^{vi}

Unprecedented obstruction is not over

Unfortunately, even with the minor rules change, the Senate Republicans have plenty of ways to obstruct the judicial nominations process. The filibuster was only one road block to confirming fair and diverse federal judges but there are plenty of others we must still overcome.^{vii}

Remaining ways to obstruct

Home state senators can fail to recommend candidates to the president: If there is a vacancy on a federal court, the White House consults with the senators who represent the state in which the vacancy will occur, often referred to as the “home state senators.” The selection process can be slowed if home state senators fail to timely recommend a candidate to the president.

Home state senators can fail to return the blue slip or disapprove of the nominee: Once a nomination is made, the process moves to the Senate Judiciary Committee. The committee sends a “blue slip,” correspondence printed on light blue paper, to each home state senator asking for approval. In recent years, blue slip approval from a home state senator has been a de facto requirement to move forward with a candidate and because of this, if a senator does not return the blue slip, all committee action on a nominee comes to a halt. There are no hearings, no votes, until both senators submit their blue slips. It effectively gives home-state senators a veto.^{viii}

Members of the Senate Judiciary Committee can delay the committee vote: Following a hearing, there will be a vote by the 18 members of the Senate Judiciary committee. The first time a vote is scheduled, any member of the Senate Judiciary Committee can delay the vote until the committee’s next executive business meeting (usually one week, but sometimes much longer), without reason. This has become routine.

What You Can Do

Remind friends, colleagues, and others in your community that a minor rules change doesn’t solve the obstruction problem. Elevate the areas in which obstruction still can occur and tell your senators to provide names of candidates to the president and return blue slips.

Federal judges make decisions that affect our lives – from hearing cases impacting the environment, health care, Social Security benefits and immigration – to having the final say in determining who we can marry, whether our speech is protected or how we can vote. Federal judges are appointed for life and their decisions can have a much more lasting impact than any one election.

Visit WhyCourtsMatter.org to take action.

ⁱ Kane, Paul. “Reid, Democrats trigger ‘nuclear’ option; eliminate most filibusters on nominees.” *The Washington Post*, November 21, 2013, available at Reid, Democrats trigger ‘nuclear’ option; eliminate most filibusters on nominees

ⁱⁱ “ICYMI: U.S. Senate Has Changed its Practices By Simple Majority Vote 18 Different Times Since 1977,” available at <http://fixthesenatenow.org/news/entry/icymi-u.s.-senate-has-changed-its-practices-by-simple-majority-vote-18-diff/#.Up9iweKIGHu>

ⁱⁱⁱ Sarah A. Binder, “The History of the Filibuster,” Testimony before the U.S. Senate Committee on Rules and Administration, “Examining the Filibuster: History of the Filibuster,” April 22, 2010, available at <http://www.brookings.edu/research/testimony/2010/04/22-filibuster-binder>

^{iv} Richard S. Beth, “Cloture Attempts on Nominations: Data and Historical Development” (Congressional Research Service, 2013) available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%2C%3B%3C%20P%20%20%0A

^v Louis Jacobson, “Harry Reid says 82 presidential nominees have been blocked under President Barack Obama, 86 blocked under all other presidents,” *Politifact*, November 22, 2013, available at <http://www.politifact.com/truth-o-meter/statements/2013/nov/22/harry-reid/harry-reid-says-82-presidential-nominees-have-been/>

^{vi} Richard S. Beth, “Cloture Attempts on Nominations: Data and Historical Development” (Congressional Research Service, 2013) available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%2C%3B%3C%20P%20%20%0A

^{vii} Jeremy Paris. Interview with author, October 23, 2012. Email.

^{viii} Matt Viser, “Senators can still block nominations without filibuster,” *Boston Globe*, November 29, 2013, available at <http://www.bostonglobe.com/news/politics/2013/11/29/with-filibuster-gone-senate-attention-will-shift-alternative-means-thwart-obama-court-nominees/7Xo7mLycJLokNlnOurAHQN/story.html>