

Learning about Legislation #10 - The 60 vote super-majority, cloture votes and the filibuster

Last week we discussed how some issues were so critical that our Founders felt they could not be left to the majority, but instead needed a supermajority of $\frac{2}{3}$ of legislators to pass. We reviewed that this was mandated by the Constitution for certain issues (like treaty ratification and impeachment). This week we will turn our eyes to the Senate, and try to weed our way through their rules, and why the number "60" is just so important there.

As with most things around here, it starts with the Constitution. Article I, Section 5 states "Each House may determine the Rules of its Proceedings." But it says nothing about either Cloture or Filibuster, the reasons why the number 60 is so critical in the Senate. The simplest explanation of those two terms are that cloture is the Senate agreeing to cut off debate, and filibuster is the process of holding the floor and talking (and talking... and talking...) to hold the floor so that no one can call for a cloture vote. But how did that come about? And why is it only in the Senate?

In a [Brookings Institute essay](#) from 2010, the argument was made that the filibuster was actually created by mistake. The author, Professor Sarah Binder of George Washington University, describes it as follows:

The House and Senate rulebooks in 1789 were nearly identical. Both rulebooks included what is known as the "previous question" motion. The House kept their motion, and today it empowers a simple majority to cut off debate. The Senate no longer has that rule on its books.

What happened to the Senate's rule? In 1805, Vice President Aaron Burr was presiding over the Senate (freshly indicted for the murder of Alexander Hamilton), and he offered this advice. He said something like this. You are a great deliberative body. But a truly great Senate would have a cleaner rule book. Yours is a mess. You have lots of rules that do the same thing. And he singles out the previous question motion. Now, today, we know that a simple majority in the House can use the rule to cut off debate. But in 1805, neither chamber used the rule that way. Majorities were still experimenting with it. And so when Aaron Burr said, get rid of the previous question motion, the Senate didn't think twice. When they met in 1806, they dropped the motion from the Senate rule book.

Why? Not because senators in 1806 sought to protect minority rights and extended debate. They got rid of the rule by mistake: Because Aaron Burr told them to.

Despite this change in the rules, no one really used the filibuster the way we think of it until the decades before the civil war. The Senate's website describes its early usage as follows:

In 1841, when the Democratic minority hoped to block a bank bill promoted by Kentucky Senator Henry Clay, he threatened to change Senate rules to allow the majority to close debate. Missouri Senator Thomas Hart Benton rebuked Clay for trying to stifle the Senate's right to unlimited debate.

Three quarters of a century later, in 1917, senators adopted a rule (Rule 22), at the urging of President Woodrow Wilson, that allowed the Senate to end a debate with a two-thirds majority vote, a device known as "cloture." The new Senate rule was first put to the test in 1919, when the Senate invoked cloture to end a filibuster against the Treaty of Versailles. Even with the new cloture rule, filibusters remained an effective means to block legislation, since a two-thirds vote is difficult to obtain.

In the last 100 years, there have been a number of efforts to curtail the impact of the filibuster and make it easier to invoke cloture. First, in 1975, the Senate changed their rules so that instead of needing a $\frac{2}{3}$ supermajority to bring an end to debate, they only needed $\frac{3}{4}$, or 60 votes. **(There's that 60!)** Also in the 1970s the Senate came up with the concept of reconciliation, where budget related legislation could pass with a simple majority of the Senate.

Then, in 2013, Democratic Senator Harry Reid, the then-Senate Majority Leader, brought a rule change for a vote before the Senate. That change was that a cloture vote for debate on any executive branch nomination and judicial nominees (except the Supreme Court) could be approved by a simple majority. His rationale for this was that the Republicans in the Senate were blocking President Obama's nominations at every possibility, and since there were less than 60 Democrats (and Independents caucusing with Democrats) in the Senate, they needed a simple majority to confirm these nominations for so many open positions. Opponents of this so-called "nuclear option" noted, at the time, that since no single party would maintain the majority forever, this could come back to harm them. Regardless of this warning, the rules change passed, 52-48, with all the Republicans and three Democrats voting against the change.

More recently, the Senate voted to enact another rules change related to the filibuster and cloture. In April of 2017, Republican Senator Mitch McConnell, the current Senate Majority Leader, proposed to end the 60-vote cloture rule for ALL nominations, including the Supreme Court. That change passed 52-48 along party lines, and thus we now have Supreme Court Justice Neil Gorsuch.

The sole remaining area where filibusters and 60-vote cloture holds sway is for legislation. President Trump frequently tweets that we want that to be changed as well, but so far the leaders of both parties seem to be resisting those "suggestions" from the Executive Branch. Our Founders spoke often of the tyranny of the majority and protecting the rights of the minority. While it may have been a procedural error, the filibuster and the 60-vote cloture rules have protected minority rights for almost two centuries. They may slow the legislative process, but they allow space for ample deliberation and protect us from precipitous action on the part of our Congress.

Are there questions that you have about how Congress works, about elections, about voting... or anything to do with government processes? I am looking for topics for future "Learning about Legislation" topics, so please - email me your questions at KierstynPZ@gmail.com - I can't promise that I already know the answer, but I will research the issue and share my findings with our readers in a future segment.