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The Filibuster Rules in the U.S. Senate*

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With the election of a Republican President and with the Republicans holding a majority in both the House and the Senate, interest has been focused on the ability to use a filibuster to delay or prevent legislation objectionable to the minority party. This paper will explain the workings of the filibuster rule in the Senate, and the techniques that may be used to get around the filibuster.

Background

The original rules governing the Senate, adopted in 1789, provided that a simple majority of the Senate could stop the debate and force the body to immediately proceed to a vote on the matter before the Senate, using a motion to "move the previous question." However, in 1806, the Senate rules were recodified, and at the urging of Aaron Burr, the ability of the Senate to cut off debate was eliminated. Thus, beginning with this change, the rules did not provide for a procedure for terminating debate so long as a Senator held the floor and was willing to speak at length.

This situation continued until 1917, when, at the urging of President Woodrow Wilson, the Senate adopted Rule 22, providing for "cloture" on Senate consideration of legislation with the affirmative vote of two-thirds of the Senators present and voting. In 1949, the Rule was amended so that cloture could also be filed in relation to nominations, so that debate on Presidential appointments could also be limited. In 1975, the Senate further amended Rule 22 by reducing the number of votes required for cloture from two-thirds to three-fifths, or 60 of the current one hundred Senators. However, unlike the original cloture rule, which was based on the number of Senators present and voting, the current rule requires a vote of three-fifths of the Senators "duly chosen and sworn." In addition, the 1975 amendment retained the requirement for "two-thirds of Senators present and voting" to institute cloture on any amendment to the Senate rules. It should also be noted that under Rule V, the Senate rules continue from one Congress to the next Congress and do not expire at the end of the session.

Cloture Procedure

Pursuant to Rule 22, the cloture process begins with a petition signed by 16 Senators proposing to bring to close the debate on the pending matter. The cloture motion is read, and then put aside for two days. One hour after the Senate convenes on that second day, a roll call vote on the motion is taken

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without debate. If three-fifths of the Senators selected and sworn vote in favor of the motion, cloture is invoked.

Under the cloture rule, further consideration on the matter is limited to no more than 30 hours, and no Senator may speak for more than one hour. However, when the 30 hours expire, any Senator who has not used or yielded at least ten minutes, is given up to ten minutes to speak. In addition, any amendments pending or offered post-cloture must be "germane." For a first-degree amendment to be in order post-cloture, it must be submitted to the clerk by one o'clock on the day before the cloture vote is to take place. A second-degree amendment must be filed at least one hour prior to the closure vote.

Nominations

A motion for the Senate to go into executive session and proceed to consider a nomination or treaty is not subject to debate, and therefore cannot be filibustered. A simple majority is sufficient. However, the confirmation vote is debatable, and can be the subject of a filibuster.

On November 21, 2013, Majority Leader Reid effectively changed the cloture rules for Presidential nominations other than for the Supreme Court using a procedural device informally known as the "Nuclear Option." Although the exact procedural steps are complicated, the Majority Leader accomplished his goal by raising a point of order that the cloture of debate on Presidential nominees, other than for the Supreme Court, is by majority vote. Since this is not consistent with Senate Rule 22, the Presiding Officer ruled against this point of order. But Senator Reid appealed this decision to the entire Senate. Because the point of order related to a non-debatable matter (cloture), there could be no debate on the appeal. The Presiding Officer was reversed by simple majority, and the precedent was established that cloture of debate for nominees, other than for the Supreme Court, is by majority vote. As long as this precedent is not changed, cloture for nominees other than the Supreme Court can now be effective by simple majority vote.

It should be noted that under this precedent the Senate can still initiate a filibuster of a Presidential appointee. If cloture is approved through a majority vote, those opposed to the nomination can effectively delay confirmation for 30 hours of Senate time. And since only one nominee can be placed before the Senate at a time (absent unanimous consent), a determined minority can delay the confirmation of a new team of Presidential appointees for a considerable period.

Non-Debatable Motions

The power to filibuster is tied to the authority of a Senator to debate an action. Thus, any Senate action that is not subject to debate cannot be delayed by a filibuster. This includes motions to proceed to conference reports, budget resolutions, reconciliation bills, and measures to impose disciplinary sanctions against Senators. Motions to go into executive session to consider a nomination, treaty, or resolution on the Senate Executive Calendar are also privileged and nondebatable. Motions to table a measure are also non-debatable.

Examples of Statutes that Preclude Senate Filibusters

Many statutory provisions provide expedited procedures for Congressional actions that have the effect of preventing the use of a filibuster to delay Senate approval. Below are two examples of the more significant measures.

Congressional Review Act

The Congressional Review Act provides a procedure whereby Congress can prevent the implementation of final agency rules through the passage of a joint resolution (which must be signed into law by the

President, or passed through a veto override). Congress is given 60 days to pass a joint resolution of disapproval. If the resolution is vetoed by the President, Congress has 30 session days to override the veto. In the Senate, expedited procedures, which include both removal from a jurisdictional committee by a petition signed by 30 senators and a limitation on floor debate to 10 hours, prevents the use of a filibuster to delay action. If a rule is submitted to Congress within 60 session (or legislative) days prior to adjournment, the time for Congressional review is restarted on the 15th session (or legislative) day after the new session of Congress begins. Therefore, rules submitted after June 13, 2016 are subject to review under the Congressional Review Act.[1]

The Act does not apply to rules relating to monetary policy issued by the Federal Reserve Board or the Federal Open Market Committee. Also excluded are rules that approve or prescribe rates, wages, prices, services, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing. Finally, the Act does not cover rules relating to agency management or personnel and any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

Budget Reconciliation

The Budget Reconciliation Act provides an expedited process that Congress can use to effectuate spending and revenue changes necessary to meet budget targets. The Act directs the budget committees to report a budget in the form of a concurrent resolution that is to be voted on by both Houses of Congress by April 15 of each year. The concurrent budget resolution is not subject to a filibuster in the Senate and debate is limited to 50 hours. Only germane amendments are in order.

The concurrent resolution includes "reconciliation directives" that instructs committees to produce legislation by a specific date that meets certain spending or tax targets. The Budget Committee packages these legislative pieces into a Conciliation Act that goes to the floor for an up-or-down vote and no ability to filibuster. Any differences between the House and Senate versions are resolved through a conference, and the final legislation is again subject to floor votes without the ability to filibuster. As with all legislation, the Reconciliation Act requires the signature of the President, or an override of a Presidential veto.

After the House and Senate resolve the differences between their competing bills, a final conference report is considered on the floor of each house and then goes to the President for his signature or veto.

Pursuant to the so-called "Byrd Amendment," the reconciliation legislation cannot contain "extraneous provisions." These are defined as provisions that do not produce a change in outlays or revenue, produce a change in outlay or revenue that is not in compliance with the budget resolution's instructions, are outside of the jurisdiction of the committee, result in change in revenue is merely incidental to the non-budgetary components of the provision, would increase the deficit for a fiscal year beyond those covered by the reconciliation measure, or changes in Social Security.

Any Senator may raise a procedural objection to a provision believed to be extraneous, which will then be ruled on by the Presiding Officer, customarily on the advice of the Senate Parliamentarian. A vote of 60 senators is required to overturn the ruling.

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[1] ***CRS Insight, Agency Final Rules Submitted on or After June 13, 2016 May be Subject to Disapproval by the 115th Congress*** (Dec. 15, 2016)