

Solving the Judicial Nomination Filibuster Crisis

The Crisis

During the 108th Congress (2003-04), the Senate voted on 20 motions to end debate, or invoke cloture, on 10 different judicial nominees. The average tally was 53-43, enough to confirm them but less than the 60 votes Rule 22 requires to invoke cloture. Opposition to cloture on each vote was completely partisan. Before 2003, the Senate took 15 cloture votes on 14 different judicial nominees, and 13 of those were confirmed (three after a cloture vote failed). The 1968 nomination of Abe Fortas to be Chief Justice was withdrawn, at the nominee's request, the day after a failed cloture vote indicated he did not have clear majority support. Opposition to cloture, and to the nomination, was almost evenly bi-partisan.

Before 2003, no judicial nomination with clear majority support was defeated by a filibuster.

Senate Rules

Rule 5.2 “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”

Rule 20.1 “A question of order may be raised at any stage of the proceedings...and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate...and every appeal therefrom shall be decided at once, and without debate; and any appeal may be laid on the table without prejudice to the pending proposition, and thereupon shall be held as affirming the decision of the Presiding Officer.”

Rule 20.2 “The Presiding Officer may submit any question of order for the decision of the Senate.”

Rule 22.2 passage of “a motion...to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business” requires “three-fifths of the Senators duly chosen and sworn -- except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting”

The Constitution

Article I, Section 5 “Each House may determine the Rules of its Proceedings”

Article II, Section 2 “The President...shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for”

Historical Notes

The first Senate's Rule 8, adopted in 1789, allowed a simple majority to move the “previous question” and had been used by the British Parliament and Continental Congress. Though there is no evidence that America's founders contemplated what we today call a filibuster, dropping Rule 8 in 1806 at least made filibusters possible because ending debate then required unanimous consent. The first filibusters in the 1830s sparked a continuous effort at filibuster reform. In 1917, public criticism of a filibuster blocking a bill for arming merchant ships prompted the Senate to pass Rule 22, which required two-thirds of Senators present and voting to invoke cloture

on a “pending measure.” In 1949, coverage was broadened to include any “matter pending” before the Senate and the threshold raised to two-thirds Senators chosen and sworn; motions to amend Senate rules were exempt. The debate over this rules change included no mention of nomination filibusters. In 1959, the threshold was reduced to two-thirds of Senators present and voting, including on motions to amend the rules, and the statement added to what is today Rule 5 that Senate rules continue unless amended according to the rules. In 1975, the threshold was reduced to today’s level of three-fifths of Senators chosen and sworn except for motions to amend the rules, still subject to the two-thirds present and voting requirement.

Solving the Crisis

Amending Rule 22. Since the crisis arises from abuse of Rule 22, the most direct solution would be to amend Rule 22. The Senate *implicitly* determines its rules by operating under existing rules, re-adopting them “by acquiescence.” The Senate *explicitly* determines its rules by amending them, as it has done to Rule 22 in the past. A new amendment could change the cloture threshold, affect only nominations rather than to legislation, and its effect on future nominations would be relatively certain, determined by the new text of the rule. While a simple majority can adopt an amendment, invoking cloture depends on its timing.

- **During a congressional session.** Rule 22 requires two-thirds of Senators present and voting.
- **At the beginning of a congressional session.** Before the Senate acquiesces to existing rules, its constitutional authority to determine its rules trumps existing rules and allows a simple majority to invoke cloture on a rules change. In 1957, Vice President Nixon ruled: “It is the opinion of the Chair that...the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress” (*Congressional Record*, 1/4/57, p.178). He (*CR*, 1/8/59, p.96) and Vice President Humphrey (1/14/69, p.593), reaffirmed it.

Seeking a parliamentary ruling. The second approach does not amend Rule 22 but seeks a parliamentary ruling to allow a vote on an individual nomination. Democrats can appeal a favorable ruling on a “question of order” but a motion to table that appeal requires only a simple majority. Tabling the appeal effectively affirms the ruling. If the presiding officer instead submits the question to the full Senate for decision, it would be debatable (*Congressional Record*, 1/18/67, p.919; *CR*, 2/20/75, p.3839), requiring 60 votes for cloture. As such, this approach will work only if the presiding officer decides rather than submits the question of order.

Most of the speculation about this approach posits a question of order raising a constitutional issue such as Rule 22 is unconstitutional, at least as applied to judicial nominations. Under longstanding precedent, however, the presiding officer submits to the full Senate questions of order raising constitutional questions, and has consistently done so in the specific context of efforts to change Senate rules. Vice President Nixon ruled in 1957 that “under Senate precedents, a question of constitutionality can only be decided by the Senate itself, and not by the Chair” (*Congressional Record*, 1/4/57, p.178). He reaffirmed this ruling in 1959 (*CR*, 1/7/59, p.9), as did Vice Presidents Johnson (*CR*, 1/28/63, p.1214; 1963 *Congressional Quarterly Almanac*, p.375, saying this tradition dates back to 1803), Humphrey (*CR*, 1/18/67, p.918; 1/14/69, p.594), and Rockefeller (*CR*, 2/20/75, p.3837). To avoid a filibuster, this approach requires the presiding officer’s favorable ruling on a question of order framed in non-constitutional terms and a majority voting to table the ensuing appeal of that ruling. The question of order, and the ruling sustaining it, will determine whether this approach has a limited or substantial effect on future confirmation procedures.

Only the Senate can solve this filibuster crisis, and each of these approaches requires a vote of the Senate, either a vote to amend Rule 22 or a vote to affirm a parliamentary ruling. In doing so, the Senate will be exercising its constitutional authority to determine its own rules, a constitutional solution to a constitutional crisis.