Filibuster

The Senate in most instances allows its Members to debate an issue for as long as they want. When opponents of a measure or nomination use this ability to try to prevent final action on the matter at hand, it is generally called a filibuster. It is a tactic that is frequently used when the Senate is considering legislation.
It is difficult to know exactly when Members of the Senate began to use the tactic of the filibuster on nominations. Prior to 1929, action on confirmation of nominations by the full Senate was done in executive (closed) session, open only occasionally when the Senate voted to do so. Also clouding the issue is the question of what kinds of actions Senators must take to be considered to be filibustering. Is it merely lengthy debate or must there be an attempt to use dilatory tactics to slow or stop consideration of the matter at hand?

One indication of a filibuster is the taking of one or more cloture votes to bring debate on an issue to an end. (There have also been filibusters where there was no cloture vote; so, looking at cloture votes provides only a partial picture.)
The Senate adopted the cloture rule in 1917, which then for the first time provided Members with a way of ending debate. After a lengthy debate in 1949, the Senate adopted a change to its rules that, in addition to many other things, allowed the Senate to vote cloture on items of executive business, such as treaties and nominations. While proponents of the 1949 cloture change talked about the need to get to a final vote on treaties, they did not mention nominations or any situations they might have had in mind concerning filibusters of nominations.[46] Also, the two most comprehensive historical analyses of the Senate's role in advice and consent, one published in 1938 and the other in 1953, do not mention the word "filibuster" in conjunction with nominations.[47]

One reason could be that the other devices in place — the blue slip and senatorial courtesy — allowed Senators to prevent confirmation by the full Senate when they were concerned about a particular nomination. Another interpretation is that Senators did not previously use filibusters against nominations or, when they did, the Senate used other methods other than cloture to try to bring the debate to a close, such as enforcing the Senate rule which prohibits Members from making more than two speeches on the same subject on any day.

One historian found that President Woodrow Wilson's nominee to be director of the census was blocked several times in executive (closed) sessions in 1913. Once it became clear that a full filibuster of the nomination was a possibility, supporters of the nomination agreed to postpone consideration of the nomination until the end of the fiscal year.[48]

There are also several examples of parties in the Senate blocking action on a group of nominations toward the end of a President's term, particularly when a new administration from a different party was poised to take power. At the end of the administration of President Taft, for example, Progressives and Democrats in the Senate prevented that chamber from going into executive session until Congress ended, thus killing some 1,300 nominations submitted by President Taft.[49]

The first clear-cut example of a successful use of a filibuster against a nomination, including taking a cloture vote, occurred in 1968 over President Lyndon B. Johnson's decision to elevate Associate Supreme Court Justice Abe Fortas to be Chief Justice.[50] Senators spoke for several days on the motion to proceed to the nomination. The vote to invoke cloture on the motion to proceed failed, 45-43, on October 1, and, at Fortas's request, President Johnson withdrew the nomination on October 4, roughly one month before the presidential election.

There was considerable concern among Senators about whether what they were doing was establishing a precedent of using a filibuster against a nominee, particularly one to the Supreme Court. New York Republican Jacob K. Javits said:

> It seems to me that the use of the filibuster, which is signaled by the extended debate now indicated on the motion to take up the nomination, is a matter of utmost concern to me and to the Nation. I condemn this step unreservedly; the filibuster has never been used for this purpose, and it is shameful that it may be so used now. There is ample opportunity afforded in this matter to debate, and an effort to suffocate the nomination through the filibuster is unwarranted and destructive, in my judgement, of the national interest and the prestige and character of the Senate. Those who charged that the President should not have acted with respect to the appointment at all, notwithstanding his constitutional duties as President, have a perfect opportunity to test out their case after debating it by a motion to table the nomination, or by voting against the motion to take it up. But the Senate has the right to vote on the nomination on the merits after reasonable debate.[51]

Michigan Democrat Philip A. Hart also spoke in opposition to the filibuster:

> To reject the nomination, with all of its implications for the future of the Supreme Court, is so serious that the matter should be proceeded with on its merits. If we, for the first time in our history, permit a Supreme Court nomination to be lost in a fog of a filibuster I think we would be setting a precedent which would come back to haunt our successors. We tend to overstate the importance of anything in which we are involved here. I have a lingering suspicion that history will record this to have been one of the most significant actions – and I hope it will be action – that the Senate will be confronted with in the period that many of us have been permitted to sit here. I do hope we will be permitted to discharge our constitutional responsibility to advise and consent or not consent.[52]

Opponents of the Fortas nomination said they believed it was their constitutional duty to advise and consent, which gave them the right to talk about the nomination as long as they felt necessary under Rule XXII of the Senate Rules, which sets out the process for cloture. Tennessee Republican Howard Baker said:

> And, so, Mr. President, I am also not overly taken with charges which are made from time to time in the press and elsewhere, and from time to time on the floor of this body, that dilatory tactics, sometimes characterized as filibusters, otherwise extended debate, frequently as obstructionism, but which are clearly within the framework and scope of the rules of procedure in the Senate, and

> particularly rule XXII, are permitting a wilful minority, as one distinguished daily newspaper characterized it, to obstruct the will of the majority. … It occurs to me further that it is basic and fundamental to the governing process in a democracy and consonant with the traditions of this Nation, that at any given moment the majority is not always right all of the time. And it is clear and predictable that the people of America, in their compassionate wisdom, require the protection of the rights of the minority as well as the implementation of the will of the majority.[53]

North Carolina Democrat Sam Ervin, who opposed the Fortas nomination and voted not to end debate on the motion to proceed, defended the use of the filibuster and cloture procedure:

> Mr. President, I think that rule XXII is perfectly constitutional. The Constitution provides that each House may determine the rules of its proceedings. The Senate adopted rule XXII in pursuance of that constitutional authority. I think rule XXII is very wise. It protects a minority which thinks it is right against the tyranny of the majority. That is very desirable. Majorities need no protection. It is only minorities which need protection…Rule XXII is needed. It tends to expand the ability of the minority to convert an erroneous majority to its views. It is a wise and enlightened process and should be treated with great veneration by all men.[54]

Including the Fortas nomination, cloture has been sought on 29 judicial nominations and 24 executive branch nominations between 1968 and 2004.[55] For 14 of those 53 nominations, the nomination ultimately failed of confirmation: 10 judicial nominations in the 108th Congress, the nomination of Thomas C. Dorr, to be under secretary of Agriculture for Rural Development in the 108th Congress; Fortas; the 1994 nomination of Sam Brown to be ambassador to the Conference on Cooperation and Security in Europe; and the 1995 nomination of Dr. Henry Foster to be Surgeon General.

There has been significant debate about whether filibustering nominations is a violation of the Constitution's requirement that the Senate advise and consent to a nomination.[56] Opponents of using filibusters against nominations say that the Constitution requires the full Senate to act on nominations sent to it by the President and that the need to win 60 votes to invoke cloture is an unconstitutional supermajority.[57]

Those who defend the use of filibusters against nominations note that one of the dominant themes during debates on the Constitution was how to protect the rights of the minority, something extended debate has the effect of doing. And they note that the Senate is empowered by the Constitution to set its own rules of procedures.[58] In the 108th Congress, a resolution to amend Senate rules on cloture was reported by the Senate Rules and Administration Committee. Senate Majority Leader Bill Frist proposed to change the Senate's rules regarding debate on presidential nominations. His resolution (S. Res. 138) would have changed Rule XXII by imposing on succeeding cloture votes an ever-decreasing threshold for invoking cloture on a nomination, until it could be achieved by a majority vote. The Senate Rules and Administration Committee reported the resolution to the full Senate on June 26, 2003.[59]

In the 109th Congress, there has been significant debate about whether Senate rules on cloture for nominations should be changed, and, if so, how they could be changed. Majority Leader Frist has said he might consider using a complicated set of parliamentary steps to allow a majority of Senators to change Senate rules over the objections of the minority, an option called the "nuclear option," by opponents and the "constitutional option," by its supporters.[60]

[47] Haynes, *Senate of the United States, Its History and Precedent*, and Harris, *The Advise and Consent of the Senate*.
[48] Franklin L. Burdette, *Filibustering in the Senate* (Princeton: Princeton University Press, 1940), p. 95.
[49] Harris, *The Advice and Consent of the Senate*, p. 94. A similar situation occurred in 1881 with the outgoing administration of President Rutherford B. Hayes and the incoming administration of James A. Garfield.
[50] Recently, some have questioned whether the Fortas situation was a filibuster. While there is no generally accepted definition of what constitutes a filibuster, typically filibusters are characterized by lengthy debate and the use of parliamentary tactics to prevent a final vote on a measure or a matter. The debate on the motion to proceed to the Fortas nomination consumed more than 25 hours over five days. News stories at the time of the debate called the floor action against Fortas a filibuster, and the leader of the fight against Fortas, Senator Robert P. Griffin, said his group was prepared to "keep the debate going indefinitely." See Robert C. Albright, "GOP to Lead a Filibuster Against Fortas," *Washington Post*, Sept. 20, 1968, p. A7.
[51] Sen. Jacob Javits, "Supreme Court of the United States," *Congressional Record*, vol. 114, Sept. 26, 1968, p. 28268.
[52] Sen. Phillip A. Hart, "Supreme Court of the United States," *Congressional Record*, vol. 114, Sept. 26, 1968, p. 28252.
[53] Sen. Howard Baker, "Supreme Court of the United States," *Congressional Record*, vol. 114, Sept. 26, 1968, p. 28253.
[54] Sen. Sam Ervin, "Supreme Court of the United States," *Congressional Record*, vol.114, part 22, Sept. 27, 1968, p. 28585.
[55] This figure includes five executive branch nominations that received consideration and cloture action concurrently as a single case. See CRS Report RS20801, *Cloture Attempts on Nominations*, by Richard S. Beth.
[56] CRS General Distribution Memorandum, *Constitutionality of the Senate Filibuster*, by Jay R. Shampansky, Oct. 3, 2003.
[57] Ibid., p. 8.
[58] Ibid.
[59] See CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by Christopher M. Davis and Betsy Palmer.
[60] For more on this subject, see CRS Report RL32684, *Changing Senate Rules: The "Constitutional," or "Nuclear" Option*, by Betsy Palmer.