

The future of the filibuster: will Supreme Court fight open the floodgates?

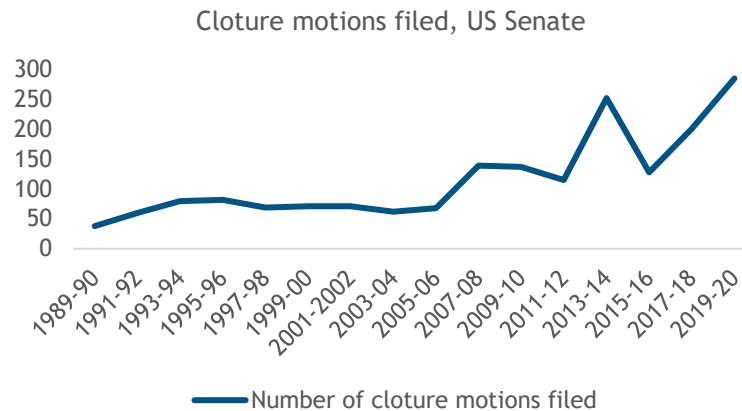
Blog post by Senior Associate Miranda Lutz and Associate Ben Bassett, 23 September 2020

The death of Supreme Court Justice Ruth Bader Ginsburg on 18 September has renewed the debate over filling seats on the High Court in an election year. By extension, it has sparked a similarly contentious discussion over the Senate filibuster, a legislative tactic that can be deployed by the minority party to prevent the majority party from passing legislation. **If Republicans confirm Ginsburg's replacement on the Supreme Court this year as they have pledged to do, Democrats may well eliminate the filibuster if they retake the Senate and Joe Biden wins the White House - opening up the possibility of major policy shifts across a range of US industries.**

Under current Senate rules, 60 votes are needed to invoke 'cloture' to end a debate on a legislative matter so that the chamber can proceed to a vote. If a cloture motion is not supported by 60 senators, then the measure has been 'filibustered' - a term given to the hours-long speeches senators have used over the decades to keep debate open. A successful filibuster prevents the Senate from voting on a bill. The idea behind the filibuster is to force the majority to earn support from at least a few members of the other party and build greater consensus. However, as partisanship has increasingly stymied debate in Washington, the filibuster has been blamed for sending countless pieces of legislation to their political graves, and use of cloture has skyrocketed (see below).

If Democrats sweep the White House and Senate and weaken the filibuster (all "ifs", granted), a Biden administration could enact many Democratic priorities and take far greater control over the federal budget. While an increase in government spending could coincide with a corporate tax rate increase, it could also open up opportunities in other key sectors. We expect a Biden administration would invest heavily in healthcare, especially given the covid-19 pandemic (see GC's [report](#) on covid-19's impact on American hospitals, April 24, 2020). Democrats' emphasis on addressing climate change could result in major financial incentives for green energy R&D, grid upgrades, renewables, and storage technologies.

Eliminating the filibuster would weaken opposition to Biden's Build Back Better plan, so manufacturing would also get a boost. Lawmakers could pass a major infrastructure package as most obstacles to infrastructure legislation result from how to fund such investments. Removing the filibuster would likewise remove Democrats' incentives to work with Republicans, especially on contentious topics like racial, criminal, and economic justice. Progressives who have championed policies in these areas would enjoy far more influence.



Source: US Senate

There are two primary methods to end the filibuster. The simplest would be to change the Senate rule requiring 60 votes to end cloture. However, alterations to Senate rules require two-thirds support. Unless Democrats have a large Senate majority (highly unlikely in this election cycle), this method will not be viable. This leaves the “nuclear option” to establish a new precedent. To achieve this, a senator would raise a point of order arguing a Senate rule has been violated. If the presiding officer (a senator from the majority party) agrees, a new precedent is established. If the presiding officer rules against the new precedent, his or her ruling can be overturned by a simple majority, thus overriding an existing rule (e.g. the 60-vote requirement to end a filibuster). The new precedent could be abolishing the filibuster entirely, or simply ending it for certain ‘types’ of legislation (e.g. spending bills).

While advocates for eliminating the filibuster have traditionally been more progressive, a rising number of moderate Democrats are embracing this viewpoint. In the wake of Justice Ginsburg’s death, Sen. Brian Schatz (D-HI) [said](#) that the “procedural violence” from Republicans makes it impossible for Democrats to play it “soft” on the filibuster. Senator Chris Coons (DE), a close Biden ally, who is on record advocating for the filibuster, recently indicated that he would be supportive of its elimination due to the “urgent [...] action” Democrats think is needed, contradicting support for the filibuster in 2017. Speaking at the funeral for Congressman and civil-rights leader John Lewis in July, former President Barack Obama described the filibuster as a “Jim Crow relic,” calling for its elimination if it gets in the way of legislation that addresses civil rights issues. Perhaps most importantly, Biden himself has said he would investigate weakening the filibuster.

If they go ahead, Democrats must also be prepared for the filibuster’s removal to be used against them - and corporates and investors with US interests must be prepared for US policy to change more with election cycles. When Democrats ended the filibuster for presidential appointees in 2013, Republicans used the same maneuver to eliminate the filibuster for Supreme Court nominees in 2017. Nevertheless, the fact that an institutionalist such as Biden, who served in the Senate for over 30 years, demonstrates just how caustic the partisanship in Washington has become. If Republicans hold off on filling Ginsburg’s Court seat, it is not a foregone conclusion that Democrats will scrap the filibuster. However, outlook for the filibuster, questionable before, has become even more dour given recent events.