

# Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief

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## Introduction

On April 6, 2017, the Senate reinterpreted Rule XXII to allow a majority of Senators voting, a quorum being present, to invoke cloture on nominations to the U.S. Supreme Court. Before the Senate reinterpreted the rule, ending consideration of nominations to the Supreme Court required a vote of three-fifths of Senators duly chosen and sworn (60 Senators unless there was more than one vacancy). The practical effect of the Senate action on April 6 was to reduce the level of Senate support necessary to confirm a Supreme Court nominee.

The method used to reinterpret Senate Rule XXII is, perhaps, of as much interest as the practical effect of the ruling. The proceedings of April 6, 2017, were similar to those of November 21, 2013, when the Senate reinterpreted the cloture rule to lower the threshold for invoking cloture for all nominations *except* to the Supreme Court.<sup>1</sup> Proceedings of this kind have been called “the nuclear option” because they required actions arguably at variance with established principles underlying Senate procedure.<sup>2</sup> Specifically, in both of these cases, a simple majority of Senators took unusual and contested floor actions to limit the ability of a minority to filibuster.

As a result of these two precedents, the Senate can now invoke cloture on any nomination by a majority vote. Importantly, neither the 2013 nor the 2017 precedent removed the potential need to invoke cloture on a nomination to reach a vote. The process for invoking cloture on a nomination remains the same. A cloture motion filed on a nomination receives a vote after two days of Senate session. If, on that vote, a majority of Senators voting supports cloture, the Senate will reach—after no more than 30 additional hours of consideration—a vote on the nomination, with final approval subject to a simple majority vote.

This brief report explains the actions taken on April 6, 2017, by which the Senate effectively extended to Supreme Court nominations its November 2013 reinterpretation of Rule XXII. It concludes with a list of related CRS products that provide more history and context regarding the method used to reinterpret the Senate Rule, the nominations process, and cloture and filibusters.

## Senate Proceedings Establishing Majority Cloture on Nominations to the U.S. Supreme Court

Although several votes, each detailed below, occurred on April 6, 2017, the Senate reinterpreted the application of Rule XXII to Supreme Court nominations through its vote on an appeal of a ruling of the presiding officer. In doing so, the Senate established a new precedent to guide the application of its rules in similar circumstances in the future.<sup>3</sup>

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<sup>1</sup> See Congressional Record, daily edition, vol. 159 (November 21, 2013), pp. S8416-S8418; and CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitshusen.

<sup>2</sup> For a full discussion of the challenges facing a Senate majority wishing to change its procedures under Senate Rules and long-standing precedents, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth; and CRS Report RL32843, *“Entrenchment” of Senate Procedure and the “Nuclear Option” for Change: Possible Proceedings and Their Implications*, by Richard S. Beth.

<sup>3</sup> In response to a point of order, the Senate’s presiding officer issues rulings consistent with the chamber’s rules and precedents (based on the advice of the non-partisan Senate Parliamentarian). However, the Senate itself is the final arbiter of the interpretation and application of its rules, and it may—through action in relation to an appeal—either confirm an existing application of a rule or establish a new one. See CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

On April 4, 2017, the Senate proceeded to executive session to take up the committee-reported nomination of Neil M. Gorsuch to be an Associate Justice of the U.S. Supreme Court.<sup>4</sup> Majority Leader Mitch McConnell filed a cloture motion on the nomination.

After the intervening day of Senate session required by Rule XXII, the vote on the cloture motion occurred, pursuant to the rule, one hour after the Senate came into session on April 6. To invoke cloture on a Supreme Court nomination, the relevant vote threshold was three-fifths of the Senate (60, in this case). **The Senate vote on cloture failed, 55-45.**<sup>5</sup>

Senator McConnell moved to reconsider the vote. This motion may be made only by a Senator on the prevailing side of the vote. Since he had voted against cloture (and cloture had been rejected), he was eligible to make this motion. **The Senate agreed, 55-45, to the motion to reconsider the failed cloture vote.**<sup>6</sup>

Minority Leader Charles E. Schumer made three parliamentary inquiries in relation to the filing of cloture motions on nominations in the past and on other Senate rules and practices for considering nominations. The presiding officer provided answers, based in part on information apparently provided by the Secretary of the Senate.

Senator Schumer then made a motion to postpone to a time certain,<sup>7</sup> specifically to 3:00 p.m. on April 24, 2017 (the day the Senate was expected to return from its impending recess). **The Senate voted against the motion to postpone, 48-52.**<sup>8</sup>

Senator McConnell made a point of order that the precedent set by the Senate on November 21, 2013, applied a majority vote cloture threshold to all nominations. The presiding officer ruled that the precedent did not apply to Supreme Court nominations but that such nominations are to be “considered under plain language of rule XXII,” which requires three-fifths of the Senate to invoke cloture.<sup>9</sup> Thus, the presiding officer did not sustain the point of order.

Senator McConnell appealed the ruling of the chair. In this circumstance, the appeal was not subject to debate.<sup>10</sup> Before the presiding officer put the appeal to the Senate for its decision, Senator Schumer posed three additional parliamentary inquiries to the presiding officer, each relating to past Senate actions on nominations. After responses from the chair, Senator Schumer made a motion to adjourn the Senate until 5:00 p.m. **The Senate rejected the motion to adjourn, 48-52.**<sup>11</sup>

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<sup>4</sup> See *Congressional Record*, daily edition, vol. 163 (April 4, 2017), pp. S2190.

<sup>5</sup> Senate Roll Call Vote #105.

<sup>6</sup> Senate Roll Call Vote #106.

<sup>7</sup> The *Congressional Record* indicates that Senator Schumer proposed to “postpone the nomination.” Based on the Senate’s roll call vote summary (as well as the actions recorded in the Legislative Information System and Congress.gov), the motion was to postpone the failed cloture vote (“Motion to Postpone the Motion to Invoke Cloture, Upon Reconsideration, of the Nomination of Neil M. Gorsuch Until a Time Certain”). The Senate, prior to Senator Schumer’s parliamentary inquiries, had just agreed that it would take another vote (“reconsider”) the cloture motion.

<sup>8</sup> Senate Roll Call Vote #107.

<sup>9</sup> The rule’s text sets three-fifths of the Senate as the vote threshold, except on an amendment to the chamber’s Standing Rules (in which case two-thirds of Senators voting is required).

<sup>10</sup> Because the appeal was in relation to a non-debatable question—in this case a cloture motion—the appeal was treated as not being subject to debate. This same principle was applied in the November 21, 2013, precedent. See Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, 101<sup>st</sup> Cong., 1<sup>st</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 726.

<sup>11</sup> Senate Roll Call #108.



The presiding officer then put the appeal of the ruling to the Senate for a vote, stating “Shall the decision of the Chair stand as the judgement of the Senate?” **On the question of upholding the chair, the Senate voted 48-52, thereby overturning the ruling (and establishing the new precedent).**<sup>12</sup>

The clerk proceeded to report (i.e., read) the cloture motion again, and the Senate “re-voted” on the cloture motion (since it had earlier agreed to the motion to reconsider the failed cloture vote). The Senate had, in the meantime, established that when applied to nominations to the Supreme Court, cloture could be invoked by a numerical majority (a quorum being present) rather than three-fifths of the Senate. **Therefore, on this vote, the Senate invoked cloture on the nomination, 54-45.**<sup>13</sup>

The Senate then continued to consider the Gorsuch nomination “post-cloture,” a period that, pursuant to Rule XXII, is limited to 30 hours of consideration prior to a final vote. **On the next day, April 7, 2017, the Senate confirmed the nomination, 54-45.**<sup>14</sup>

## Related CRS Products

CRS reports listed below provide more information on Senate processes for applying and interpreting its rules, as well as on nominations procedure and practices and cloture generally.

### *Senate Actions to Apply and Interpret Its Rules*

CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth

CRS Report RL32843, *“Entrenchment” of Senate Procedure and the “Nuclear Option” for Change: Possible Proceedings and Their Implications*, by Richard S. Beth

CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen

### *Nominations Procedure, History, and Recent Related Precedents*

CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki

CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitshusen

CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development*, by Richard S. Beth

CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion

CRS Report RL33247, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011*, by Richard S. Beth and Betsy Palmer

CRS Report R42996, *Changes to Senate Procedures at the Start of the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki

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<sup>12</sup> Senate Roll Call Vote #109.

<sup>13</sup> Senate Roll Call Vote #110.

<sup>14</sup> Senate Roll Call Vote #111. By voice vote, the Senate then tabled the motion to reconsider the final vote, effectively finalizing the vote, such that it could not be reconsidered by the Senate.

### ***Cloture and Filibusters***

CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Valerie Heitshusen and Richard S. Beth

CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis

CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by Christopher M. Davis and Valerie Heitshusen

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