Hello, this is Leslie Gielow Jacobs. I'm a professor at McGeorge School of Law and I direct it's Capital Center for Law & Policy. The topic of this In Brief is the filibuster.

To understand the filibuster, it's necessary to recall the broader lawmaking process at the federal level. The Constitution is what sets that out. As you know, the Constitution says that a bill, in order to become law, must pass the House of Representatives by a majority vote and pass the Senate by a majority vote. Those bills must be exactly identical. Then the President has the option to sign or to veto the legislation. If the President vetoes the legislation, the House and Senate can get together and override the veto by a 2/3 vote and make the bill into law.

The important part for purposes of the filibuster is to focus on the majority vote requirement in the Senate. That is, nothing in the Constitution says that the Senate needs to vote by anything other than a majority for legislation. Similarly, the Senate, in the Constitution, can vote by mere majority vote to give its advice and consent on nominees of the President for offices in the United States, meaning Cabinet officers like the Attorney General, or heads of agencies, the like the Equal Protection Agency, or for judges or justices of the United States. That’s what the Constitution itself says.

But what we need to do to understand the filibuster is to look at the overlay of rules and customs that the Senate imposes on itself. Historically, as we know, the House and Senate are composed differently. The House now has Representatives from all the states elected according to the population and elected by districts. Each of them represents a certain district. At this point in the time, the Senate has two Senators from each state and those are elected by the whole entire state. They represent the whole state as opposed to particular constituencies.

Moreover, the members of the House of Representatives are elected every two years, and the Senators stand for election every six years. It provides a different composition, a different steadiness, one might say in the Senate. The rules reflect that, with the Senate viewing itself as a place where the Senators would debate among each other, perhaps persuade each other, and even in bipartisan ways come to agreement through conversation.

Initially, the rules that the Senate imposed upon itself was that any Senator could talk as long as the Senate wanted to and also the head of the Senate had to recognize all Senators who wanted to talk. There was no way to avoid somebody talking and talking forever, if in fact they wanted to. That custom developed, which is what we call a filibuster, although it can refer to a broader range of tactics to make it so that the bills don't come to debate. Here we're talking about a filibuster by talking a lot.

The filibuster by talking a lot came into practice and it wasn’t until the US was on the verge of entering World War I and Senators were filibustering - that is, talking, talking, talking - for 20 plus days to avoid funding a arms for World War I. That ultimately, the Senate changed its rules so that in fact they introduced what's call a “cloture vote.” That's a vote by the Senators to stop the debate of one Senator. Initially, in 1917, it had to be by 2/3 and then in the mid-1970s the Senate changed that rule so its now 60 votes that are required to stop debate.

Also, what changed in the 1970s was that Senators no longer had to actually talk to filibuster; the Senate changed the rules so that in fact, simultaneously debate could go on. It was simply enough for Senators, or a Senator, to say that he or she was going to filibuster and then the other ones would know that they needed to have enough votes for cloture - that's 60 votes.

Although the Constitution only requires a mere majority, the Senators knew by their rules that if one Senator, or a group were particularly opposed to particular legislation, they could in fact say they were going to filibuster and then 60 votes would effectively be required. Now, we have to say that all the time, the Senators didn't necessarily do this. That is, they didn't invoke the filibuster for any sort of legislation that they opposed or for any nominees, but they would do it strategically, and it lay out there as a limit on what the Senate would do and requiring some kind of agreement among at least 60 Senators that the legislation or appointments were appropriate.

When do we see the first change in that? That was in 2013. At this point, President Obama was having a number of nominees, and the Republicans in the Senate were failing to vote for them and invoking the filibuster. Ultimately, it was the Majority Leader, Harry Reed at that point, who invoked what became known as the “nuclear option” and by a majority vote, changed the Senate rules so that the filibuster didn't apply anymore to Executive department nominees and to judges below the Supreme Court level. That was a major rule change, and that was in 2013.

We've had one more change happen, and that's in April 2017, when the Democratic Senators stated that they were going to filibuster the President nominee for Supreme Court, Neil Gorsuch. This was after the Republican Senate had failed to confirm the replacement nominated by President Obama for Justice Scalia. The Democrats said they were going to filibuster, and in response to that, we had the Majority Leader in the Senate, Mitch McConnell, once again invoke the nuclear option and wipe away the filibuster now for Supreme Court nominees as well.

Where do we stand now with respect to this rule? Well, it applies for legislation but not for appointments. For legislation, we can say that at least in certain circumstances and if the minority Senators feel strongly enough, 60 votes as opposed to the mere 51 votes to pass legislation, are required. One example to see with this, where it worked with both parties in control in different instances, is with the Affordable Care Act.

Initially, in the passage of the Affordable Care Act it was passed at a time when the Senate had 60 votes and so the thought was that they would be able to reconcile the House and the Senate versions, which were slightly different, but in between the time of that vote and then when the reconciliation would've taken place, we had Senator Kennedy dying and a Republican replacing him. That took away the 60 votes and that led to the passage of the Affordable Care Act in a way that the people who passed it initially didn't envision. They thought there'd be more back and forth between the Senate and the House as to what its final composition would be.

Then, on the other side, we have the efforts by the Congress to repeal the Affordable Care Act, once it's under Republican control, and a similar issue arising. That is, that for some period of time, through a loophole that had been created in the budget process, a mere

majority would've been required, but then failing to meet that deadline, it moved up to 60 votes once again, and so a threat of filibuster by the minority Democrats in the Senate could thwart changing the Affordable Care Act, at least in respect to its major aspects in overturning it. And so, tit for tat perhaps, or at least different parties needed a filibuster-proof majority and not having it has had a great impact on the Affordable Care Act, both the form it came into law as and also it's continuing as law, rather than being repealed.

In sum, this concludes this In Brief on the filibuster. This is Leslie Gielow Jacobs of McGeorge School of Law. Thanks for listening.