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WEBINAR

FILIBUSTER 101:
AN EXPLAINER OF THE SENATE RULE AND REFORM

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P R O C E E D I N G S

MS. REYNOLDS: Good afternoon, everyone. Thank you all for joining us today for a conversation on the filibuster. I'm Molly Reynolds. I'm here with my colleague, Sarah Binder. We are both senior fellows in the Governance Studies Program at Brookings and Sarah is also a professor of political science at George Washington University.

We've both written books on the filibuster, Sarah's written with Steve Smith, is entitled "Politics or Principle" and mine, which focuses on the way the Senate has gotten around the filibuster, is entitled "Exceptions to the Rule."

We're going to spend about 30 minutes today answering some common questions about the filibuster. For those of you who submitted questions in advance, thank you. And we'll cover a lot of the ground that you were curious about in our conversation. Then we'll turn to more audience questions. If you're watching live, you can submit a question by emailing events@brookings.edu, or via Twitter by using #Filibuster101.

So let's get started.

Sarah, can you start us off by talking a little bit about the origins of the filibuster, where did it come from, and how has it developed over time?

MS. BINDER: Sure. Thanks, Molly. Thanks, everybody, for joining us.

So I think it's important when we think about the origins of the filibuster to first make clear what is a filibuster. And it really is any effort to stop the Senate from coming to a vote on the underlying matter, whether an amendment, a motion, a nomination, whatever it is. The blocking of taking a vote in the Senate.

So in the House today we don't have filibusters really because the House has a special rule known as the "previous question motion" — fancy procedural mumbo jumbo. What does it mean? It means a majority, when it's ready, can vote to cut off debate. So the question is, if you look at the Senate rules today, they don't have majority cloture, they don't have a previous question motion.

So how do we get the situation where the Senate allows filibusters and the House does not? Well, start 1789. Both chambers actually had in their own separate rulebooks called "the previous question motion." But there was a hitch back in 1789, and for the first decade or so of the new Congress.

It did not have the effect of cutting off debate. It did some other things. In fact, sometimes when it was used, it postponed debate, which was — of course postponed the issue, which is the opposite of cutting off debate.

So it's 1805, Aaron Burr, vice president, has shot and murdered Alexander Hamilton the year before, and Aaron Burr is giving a farewell speech to the Senate, because he's still the vice president, still presiding. And he says you are a great deliberative body, but your rulebook is a little messy. And he proceeds to give some advice. And we don't have verbatim records of what he said, but we have memoirs that roughly tell us. He said, look, you've got rules that do the same thing — motions to postpone, previous question motion. You could drop the previous question motion. And in 1806 we can tell the Senate codified its rules and the previous question motion is gone.

Now, that was probably not noticed at the time because it hadn't been used as majority cloture. And over into the House it takes several more years, 1811, until they turn their previous question motion into the majority measure to cut off debate. Filibusters begin to emerge in the Senate in the 1830s, 1840s. Why? There is no previous question motion in the rulebook to cut off debate.

So I think it's fair to call the origins of the filibuster in essence the unintended consequence. We might even call it a mistake of a procedural motion, even if senators did not understand — could not have understood probably — what they were doing then.

So just what happens? We get filibusters. We get them on all sorts of issues. We get then 19th century, we get them 20th century, we get them over race and slavery and civil rights, but we also get them over just partisan issues. Who should be the printer of the Senate, right? Who should get this appointment? How much money should we spend? The Bank of the United States? Anything and everything was fair game for Senators willing to debate.

Now, today, there's been a lot of talk about talking filibusters. Let's return to the great era where — the reformers say — Senators went to the floor and they talked and talked and offered motions until they wore out the other side. But I think it's worth — maybe we should just spend a little time talking filibusters. Like what happened to it, Molly? Like what is it? What was it? What's the silent filibuster? Can we bring it back? What would happen?

MS. REYNOLDS: So those are all great questions. Certainly ones that we are hearing a

lot brought up by President Biden, by others, both inside and outside of the chamber, of course thinking about reforms to the rule. So, you know, what happened to the talking filibuster.

So Sarah has given us some of the history through kind of the early part of the 19th century. We'll I think maybe come back to some of the sort of history between the middle part of the 19th century and about 1970, the early 1970s, which is where I'm going to start with my answer to Sarah's question. Come back and talk about how did we get the cloture rule in the first place.

But in the early 1970s, in part because the Senate's workload was growing, so we have coming out of especially the New Deal, just a more active federal government, more things for Congress to be doing, more and more work on the Senate's plate. Mike Mansfield, who's the majority leader, working with Robert Byrd — I think we'll probably come back to Robert Byrd at some point when we talk about reconciliation in a little bit — but they kind of worked out an arrangement, working with the minority party, with the Republicans, to allow for several pieces of legislation to be pending on the floor at the same time as unfinished business. This meant that when something was being filibustered, rather than someone needing to go to the floor and keep talking, the thing being filibustered, the thing being obstructed could just be set aside rather than having to be kind of dispensed with, as long as senators kind of agreed to this arrangement.

Importantly, this made engaging in obstruction much less costly for senators. Instead of having to sort of actively engage in speaking or otherwise offering dilatory motions or holding things up on the floor, senators could engage in what Sarah referred to as a more silent filibuster, something to indicate that they intended to obstruct something. By making the act of engaging in obstruction less costly, less demanding for senators, and there are other changes in the political environment that are happening here at the same time, and together those kind of increased the incentive for individual senators to engage in obstruction. But really importantly, it became easier for an individual senator or group of senators to engage in the sort of obstruction on the floor once we moved away from a talking filibuster.

So folks often are curious, you know, would this work, would some kind of return to the talking filibuster really change the way the Senate works. And I think it's important to note that it probably wouldn't require an actual change to the Senate's rules to do this, it would really just more likely involve a

change to the way the Senate operates, the way Majority Leader Schumer sort of manages the institution. But to my mind, it's really unclear sort of whether it would work.

Here are a couple of things to keep in mind. So, first of all, even in a world where the minority party, members of the minority party, if they're obstructing something the majority party wants to do, even when they have to kind of talk at length on the Senate floor, they actually have an incentive to use that Senate floor time for attention. We don't often see this kind of extended speechifying in the contemporary Senate. We see it sometimes and it's important to kind of think about some of those examples from recent years and remind ourselves of what was the purpose, why did a Senator choose to do that.

So things like several years ago Senator Chris Murphy of Connecticut went to the floor and spoke for many hours on gun control issues, an issue on which he's been very active. And the purpose of that was in part to try to get to secure a promise for a couple of votes to happen on the Senate floor, but it's also really to draw a lot of attention to the issue that he cared a lot about. And so if you're thinking about members of the minority party, so currently the Republicans, if you make them talk, they actually have an incentive to use that talking to fund-raise, and to otherwise draw attention to whatever issue they're trying to block. And I think the incentive to really dig in an actually talk as long as possible might be especially high on that first attempt by Democrats to force Republicans to actually engage in a talking filibuster, in part to prove — or try and prove — that that strategy, that approach to running the Senate is not especially valuable over the kind of short or medium-term.

It's also important to remember that making the minority talk is actually costly to the majority as well. So as kind of an operational matter if it's the middle of the night it's 3:00 a.m., the majority is making the minority actually go to the floor and speak in order to effectuate the filibuster, that person in the minority party who's speaking could look around, say, hey, there's not a quorum present in the Senate right now, there's not the minimum required number of senators to conduct business, raise — you know, say that there's not a quorum here, and then the majority would actually have to produce a quorum in order to keep the Senate's business going. And so that's a sort of physical cost to the majority. Their members actually would need to be nearby. And then there's an opportunity cost. The longer you let the minority use the — sort of hold the floor speaking about one issue, that's time floor time you're not

using for something else.

Lastly, on this question on kind of would it work, it's also not entirely clearly I think under some of the kind of current conversation around this idea of restoring the talking filibuster, how debate would actually end if the return to a talking filibuster is not accompanied by some change to the number of votes needed to invoke cloture.

So if the idea is you try and, as the majority, force the minority to keep talking, once they tire of speaking, if you've kind of outlasted them to that point, have you reached a point where you still need to file what's called a cloture motion? Which is the way that the Senate currently has available to it to end debate? Do you still need to get 60 votes to invoke cloture? Those questions are a little unclear. I think often we sort of raise the specter of returning to the talking filibuster. And it actually provides I think a pretty useful segue into the next question that I have for Sarah, which is given kind of this uncertainty about whether returning to the talking filibuster would work, what are some other options the Senate has for curtailing the filibuster, when has the Senate changed its practices in the past?

MS. BINDER: Sure.

So I think it's always important to keep in mind that this question of debate and reform, in particular filibuster reform, that is an age old question, it's an age old problem, and it's an age-old challenge for the Senate, right. We can go back 19th century and find 19th century leaders trying to get the Senate to impose and to create limits on debate

When Steve Smith and I back a quarter century ago, we were doing our book, digging through the political history of the filibuster and trying to pinpoint particular leaders, the great Senate leaders who we recognize and celebrate as sort of the great debaters. You know, Henry Clay, Daniel Webster. They all favored limits on debate. And, of course, every time they proposed a limit, it would be filibustered.

So I think it's a point to keep in mind that reform efforts today come on the end of a long, right — or a stopping point on a long history. And I would say a long, slow, march towards essentially majority rule, right. Whether they ever get real majority rule on this, get rid of the legislative filibuster so that you can't filibuster legislation, we don't know. And if they can get there, when. That we don't know. But the long movement here is towards sometimes small, sometimes larger changes, like banning

nomination filibusters.

So what would it take? I think there are many challenges, but there are at least two I think to keep our eyes on. First, obviously, is most people, even our colleagues who are political scientists, aren't experts on rules and don't spend a lot of time thinking about rules. And most Americans don't spend a lot of time thinking about rules. I think they spend more time today, just because of sort of naturalization of politics and more 24/7 coverage and the quality of the press corps that goes narrow deep sometimes into these issues, but it typically takes the forging of a policy around which the filibuster has been blocking progress.

It's been national security around World War I, and that was the point at which the Senate majority created its first cloture rule, 1917. The question was where these 11 willful men who were blocking a particularly important bill for the war effort. They did several years in a row until Woodrow Wilson as president pinpointed them and said the national security depends on creating the cloture rule. So they created compromising between the majority cloture folks and the super, super majority cloture folks. They created a two-thirds vote to cut off debate.

So it's been national security, it's been — civil rights has been a focal point. Then, not surprisingly, much of the Democratic movement today is focused around voting rights, right. Is voting rights so important to both congressional Democrats and more broadly Democrats and perhaps others outside the Congress, that enough — would 50 senators rally together to think about rules changes in order to secure voting rights.

So that's the first challenge. Like what is the policy issue that is going to attract and be sufficient to get 50 Democratic senators, when we know today the Democrats don't have that, in order to even make any type of change, at least we think, to the filibuster rule.

There's a second challenge though which is really how are you going to reform the rules. And this gets into — we have a couple of questions from the audience about the nuclear option and what does that mean. Well, to actually change the rules — and here we're typically talking about Rule 22, which is the cloture rule — if you follow literally the rules, there is a large high threshold for cutting off a filibuster of efforts to reform the filibuster. So it takes a two-thirds vote to cut off debate on a measure or motion related to changing the rules.

Well, we know we'd seen the ban of nomination filibusters, the ban on Supreme Court nomination filibusters, and it's been done with the majority vote. So there's another way to do it, and that's what we now tend to call the nuclear option. So what does that mean? Instead of technically following the procedural path dictated by the rules, it means that a majority decides to reinterpret the rules, to set what we call a precedent. And majorities set precedent on all aspects of the Senate because the rules can't tell us, right, every single episode. We don't know how to apply them in every single circumstance. So when Democrats went nuclear in 2013 they reinterpreted the Rule 22.

What do we mean by "reinterpret?" The rule says it takes 60 votes to cut off debate on a nomination. A majority of the Senate decided 60 means just a simple majority. Republicans in 2017, when they decided to nuke Supreme Court filibusters, they reinterpreted what was left of that part of Rule 22 to say super majority cloture actually means simple majority.

Now, it sounds kind of crazy pants. I mean this is the Senate and much of the Senate is not written in rules, it's written in the precedents and practices, which is — I'm sure we'll get to this when we talk about reconciliation. That's why the advice of the parliamentarian is so important. Somebody has to do the work of trying to interpret. And the majority of the Senate can always decide do we like that interpretation or do we want a new one.

So where are we here? Democrats have two challenges. One, is there a set of procedure reforms that they could agree on? And there's only 50 of them and they will need 50 plus the vice president. And, if so, do they agree on doing it through the nuclear option? And they're not there yet, right. And there's just an interview with Senator Sinema today from Arizona who said I mean we need to change behavior, we don't need to change the rules. And I think she and probably Senator Manchin as well, who's been a little more open to the concept of reforming the rules, neither of them — and my guess is several other Democrats at this point — don't seem on board for the nuclear route.

So of course whenever Democrats, here in this case, talk about pursuing the nuclear option, it raises threats of retaliation from Republicans. So, Molly, you want to tell us a little bit about like what do we make of the threats that Mitch McConnell as Republican leader has replied to the Democrats? What are those threats about? What would — he's talking about scorched earth Senate, what would that look like? And then maybe we can talk a little bit about like what other options are there

for the Democrats in particular amid this question of stretching reconciliation into greater, more purposes.

MS. REYNOLDS: Yeah, so Minority Leader McConnell has recently said, you know, if Democrats eliminate the legislative filibuster he's going to go scorched earth on the Senate. And there are certainly things that McConnell and Republicans could do if they wanted to, to really throw sand in the gears of the Senate's routine day-to-day operations.

They could object to, for example, very routine unanimous consent requests. So one other kind of secret of the Senate is that — Sarah has just kind of walked us through the Senate's rulebook, the Senate's precedents, but lots of things that happen on a daily basis in the Senate happen simply because a senators says I ask unanimous consent to do so and so, no one objects, and then the Senate goes on about its day. And if Republicans wanted to, they really could slow down a lot of the kind of routine operations of the Senate. I think folks who were kind of watching the debate over the American Rescue Plan back in February and March probably remember Senator Ron Johnson of Wisconsin objecting to a unanimous consent request to waive the reading of the entire substitute amendment text on the floor. That's the sort of thing that they could do if they really wanted to slow things down.

Importantly, I would expect that if Republicans tried to do that and really kind of grind the Senate to a halt, like Democrats would probably find a way to at least try to respond. So Sarah was talking before about some changes that were made to the precedents around the number of votes needed to end debate on nominations, first in 2013 and then again in 2017. There's another precedent change that happened in 2019 that I think is sort of illustrative of this kind of one party does something, the other party responds procedurally, and then the party in the majority takes another step. And so in 2019 we saw Republicans change the precedence for the amount of time after which cloture has been invoke, after which debate has been ended on many nominations, not all nominations, but they made a change to reduce the amount of time available for post cloture consideration from — brought it down from 30 hours in response to Democrats having kind of refused to waive that 30 hour post cloture consideration requirement in many cases.

So I think that's a good recent example of kind of what we might — the sort of thing that we might expect, even if Republicans kind of really dug and tried to slow down the Senate in response to a change by Democrats.

It's also I think important to remember that McConnell has made these kind of threats before and then not entirely followed through on them, but that could certainly change if this were seen as — a change to the filibuster now was seen as kind of higher profile or a higher threat. And it's also worth remembering that part of why the Senate operates as it does now currently is because predictability and certainty about what's going to happen on the floor is in the shared interest of individual senators and the current set of individual senators I think largely believes that the benefits of ceding power to their party leaders to manage the floor exceeds the cost to them of doing that. And I just don't know how willing members would be to kind of upset the whole apple cart even if Democrats did make this change to the filibuster.

Another sort of question that kind of comes up in this vein that I will turn to before I talk a little bit about reconciliation is this question of what — would Democrats regret making a change to the filibuster now? And certainly this is a concern. I think it's important to remember that there is a difference between — Sarah was talking before about the linkage that majorities in the Senate have made between a particular policy issue and a particular procedural change in the past. And I think there's often a difference between the thing that would kind of break the dam and actually lead a majority, in this case the Democrats, to make a change to the filibuster, versus what are the things that then would become easier to pass when the filibuster was no longer in place, even if they themselves are not the issue that's high enough salience, has enough agreement to be the action forcing mechanism, the thing that breaks the dam.

And so when we think for Democrats, for folks who might be worried about what a future Republican majority might do, I think thinking about well what are the things where Republicans maybe themselves do not have enough agreement on to make — or think was important enough to make a change to the filibuster, but might flow down that legislative river more easily if the filibuster wasn't in place.

And so it's also possible that the next time Republicans find themselves in unified party control of Washington, there is an issue for which they would be willing to eliminate the filibuster. There does not appear to have been one in the kind of 2017-2018 period when Republicans enjoyed unified party control of Washington. That's not to say that there couldn't be one in the future. So that leaves

Democrats with this sort of question of do we hold back now when Republicans might themselves not hold back in the future.

The kind of last thing I'll say on this question before I talk a little bit about reconciliation is depending on sort of the policy in question, it's not actually always straight forward whether a different partisan majority in the future would find it easy to roll back what a previous partisan majority had done. So I think the experience of the Affordable Care Act is a really great example of this.

So in 2017 Republicans made an attempt to repeal the ACA, which they had been saying that they would do if they had unified party control for seven years since the law originally was enacted, and then when they had the opportunity to do so and attempted to do so through the reconciliation process, which is not subject to a filibuster, they couldn't do it, not because the rules were preventing them from doing so, but because they did not have the votes, they could not come up with a proposal that a majority in the House and a majority in the Senate were willing to vote for.

And so it could be the case that a Democratic majority now would pass something that a Republican majority in the future would more easily roll back if the filibuster was gone, but I think that that's — how likely that is to happen varies more by individual policy than I think sometimes we sort of assume with a broad brush.

So what is reconciliation? Is it a viable alternative? So it's a viable alternative for some major policy changes, but it's not an unlimited tool. So reconciliation is a particular set of legislative procedures that can allow for legislating through the Senate without the threat of a filibuster. But there are limits. There are limits on what kinds of policies you can use it for. There are limits on what the budgetary effects of those changes can be. And, relatedly, there are often also limits on how long those changes can sort of be in effect for.

Reconciliation has long been used to make policy changes that are important to the majority party. We can go back to the early 1980s, which is kind of the first use of reconciliation in a way that looks similar to the way it has been used in more recent years. And if we trace that history, we can see lots of examples of the Senate using the process to do things that are important to the majority party's chances of retaining their majority party status in the next election. But over time, and I think particularly since 2010, the process has become more central to both parties prospects of getting big legislative

accomplishments, simply because it has become harder to legislate in the presence of the filibuster in other ways.

One kind of important thing about the filibuster and whether it's — or, excuse me, reconciliation, and whether it's a viable alternative is that there is some imbalance between how much of the kind of Republican agenda and how much of the Democratic agenda I think can be meaningfully accomplished in the process.

So on the kind of Republican agenda, you know, one of the most important things, as we saw in 2017, that Republicans and Congress want to do is cut taxes. You can do that through the reconciliation process. On the Democratic side you can do a lot of the kinds of things the Democrats want to do through the reconciliation process, especially given how much of our social policy is delivered through the tax code, given that you can legislate revenue provisions through the tax code. There's a lot you can do. You know, the expansion of the child tax credit in the American Rescue Plan as a way to combat child poverty is a great example of this.

But there are also a lot of things that are really important on the democratic agenda that can't be touched by the reconciliation process. Sarah was talking before about voting rights. So I think that that's — and there are other examples as well. We saw back in February and March the debate over whether you could raise the federal minimum wage through the reconciliation process. So I think that sort of imbalance between — and the asymmetry between the share of the two parties agendas that they can meaningfully enact through the reconciliation process is important as we think about whether it's a viable alternative.

And so we can talk more I think about kind of the specific way that the debate over the reconciliation process is unfolding.

I'm going to sort of pose one question back to Sarah, but I'll also remind folks that if you have questions you can email them to events@brookings.edu or use #Filibuster101 on Twitter.

But, Sarah, one thing that we were talking about before in terms of ways that the Senate could make changes to the filibuster short of full abolition. I talked a little bit about the talking filibuster. There are a couple of other proposals that we hear about sometimes. Could you talk a little bit about some of those and kind of what they are and just give our viewers a sense of what the other options might

be?

MS. BINDER: Sure. So I think two things to know about Rule 22, the cloture rule, will help us think about what these potential reforms are that have been occasionally over the years talked about.

Two parts here. First is to keep in mind that the cloture rule sets the threshold. Is it 60, is it 51, is it 67? And in some senses, other than the simple majority, we might call it arbitrary, right. It's typically, when they got to 60 it was a power play between the folks who wanted 51 and the folks who wanted to keep it at 67. So one variable is how many votes for cloture.

The second variable is if you look into the Senate rulebook more broadly, there are what we call debatable motions and non-debatable motions. And the ones that are listed as non-debatable means you can't filibuster them. So there are lots of measures and motions subject to filibusters. So the first question is what should the cloture threshold be and to what should it be applied. And if you start to think about Rule 22 in that sense, I think it opens up the possibilities of potential reforms.

So, one, sort of focusing on what the cloture threshold is itself, the number required to cut off debate, one thing that Steve Smith and I put in our book years ago was the notion of ratcheting down the number of votes required for cloture. This is something Senator Tom Harkin had proposed and in fact had proposed it while in the minority in the 1990s. As you can imagine, that didn't go over so well with any of his colleagues. But what was his point? His point was that let's start at 60 and let's have a set of days pass whereby every time you attempt a cloture motion, if you fail to get 60, wait 3 days and it goes down, the next challenge will be 57. Wait 3 days, implement cloture process, it does down to 54. And then eventually we'll get it down to 51. So a sliding scale of cloture.

Now, the way cloture works is there are delays built into it. So in fact you could have a debate that's stretching over almost two weeks at least before you actually got to the 51. Now, some people would say well, if everybody knows what's happening at the end, then they're going to keep voting against cloture. And so isn't that just majority cloture?

But of course part of the argument from the opposition party is we want to have debates. Often opposition party senators will say because we want to air the issues and we want to draw more people to our side. And there is some truth, at least if we think about past decades ago filibusters where

we used to see that type of negotiations ongoing on the floor. Like would an amendment make a difference here. Let's talk out that amendment for some time.

So I think there's some value to thinking about — and some senators will say, well, maybe we should think about lowering the cloture threshold.

Now, the other issue, which would probably be easier for minority party senators to bite on — not to say that they will, but they might — is to try to reduce the number of motions or the type of motions subject to filibusters. So several years ago there was an agreement between the parties, which as stuck, to lower the — reduce the number of motions it takes to get into conference with the House. There are three separate motion, because this is the Senate — well, there are several in the House too, to be fair to the Senate. There are three. They basically condense them down to one. You can still filibuster it, but now we don't have potentially three filibusters just to get a bill which the Senate has already passed to get to Congress.

I think the number one issue where reformers have talked more about is eliminating the filibuster of the motion to proceed to a bill. So not the amendment on a bill, not the bill itself, but, hey, Senate, are we ready to have a vote on the motion to proceed to a bill, call it up, set the agenda. So that might be a way or an area or the target where perhaps — because of super majority, perhaps — especially if Republicans today thought Democrats actually had the votes to go nuclear. That might not be a credible threat, but if they were, perhaps they would be willing to lower the temperature by essentially giving to the Democratic majority here the chance to actually set the agenda by putting gun rights, immigration, and gun control, and so forth, onto the Senate floor. And perhaps in exchange for having some type of agreement where the minority party is guaranteed amendments on the floor so that the majority wouldn't say, okay, now we've got the bill on the floor, we've got to filibuster. Now we just cut off debate with cloture.

So there are opportunities here for thinking more creatively about how Senate rules might be more responsive to the interests of the majority, assuming that on any of these issues there are 51 senators for that issue.

Just seeing we've got some questions coming down the pike here. Ooh, we've got some hidden procedural experts. Do you have a city you want to —

MS. REYNOLDS: Yes, so — go ahead, Sarah.

MS. BINDER: I'll just take one here from Marcello. Do you see a future in which the removal of filibuster is supported by both parties?

And I think it's an excellent question and in part if we look at what happened when they eliminated nomination filibusters in 2013 by the Democrats, Republicans won back control of the Chamber in 2014 elections. And they had conference debates about reinstating nomination filibusters. Now, it didn't make any sense at the time because President Obama, a Democrat was in the office, so the Republicans in the majority just didn't call up any of the nominations. And so under the 20% of the nominees actually got confirmed. So in that sense it didn't matter that they didn't restore it. But if you listen to what senators were saying, it was just like all of the sudden the idea you couldn't filibuster nominations, it was very quickly absorbed into what I think of as like the fabric of the Senate. Like Senator Blunt said well, of course — of course we have nominations and you can't filibuster and of course we reserve the filibuster for more legislative measures, right. It becomes tradition. Senators create tradition out of whole cloth. And so is it possible that both parties could come, right, to support a super majority Senate? It's entirely possible. We don't know that. But senators do rationalize and come to exploit the rules as are presented to them, so I don't think we can rule out that we'd have two majority parties, both appreciating the value to their party. And also the cost and the challenges of majority rule.

MS. REYNOLDS: Yeah, so I'm going to take question that came in from Twitter about reconciliation, which is a question — it's super in the weeds. But you found yourself in the right place if you have this kind of question about the budget reconciliation process.

I mean it's question about whether there's a deadline for revising the fiscal year 2021 budget resolution under the Congressional Budget Act. And what I'm going to say is so if you haven't been immersed in Senate parliamentary news over the past 24 hours, the kind of context for this question is that the reconciliation process — so in February Democrats in the House and the Senate adopted what's called the budget resolution, which is the necessary first step for initiating a use of the reconciliation process to pass a reconciliation bill. They did that with the American Rescue Plan. Democrats have long said that they intend to use reconciliation to do subsequent legislative priorities during this Congress, but here's this question of kind of how many more times can they go to that well

and that the number of times that they can go to that well is constrained in part by the rules of the reconciliation process and what the Senate parliamentarian whose job it is to, kind of, advise senators on the interpretation of the rules and precedents, which she says the kind of previous rules and precedents allow in terms of the number of reconciliation measure that you can do. And yesterday she advised that a revision of the previous budget resolution, the one for fiscal year 2021, is permitted, that could contain new reconciliation instructions.

But one of the things that was also true when this news broke yesterday is that Majority Leader Schumer said that — and I'm I believe quoting here — some parameters still need to worked out. So exactly what that means and exactly how that will kind of unfold is an open question. And the kinds of things that still need to be figured out are like the kinds of things this questioner is asking about. How long would Democrats have to do this? How broad could — sort of what could those instructions that were part of a revised budget resolution look like? And so maybe there's been more news while we've been having this conversation, but that's the sort of thing that kind of — that Schumer meant when he was talking about kind of not all the details being worked out.

And the last thing I'll say on this question of kind of revising a budget resolution for an additional bite of the reconciliation apples is that the rules and procedures are constraining here, but they're not the only thing that's constraining here. Writing a reconciliation bill and getting it through all of the very particular procedural hoops of the reconciliation process is really a time consuming legislative endeavor.

So the analogy folks sometimes use about the reconciliation process is that you only get so many bites of the reconciliation apple. To kind of stretch that analogy, once you've taken a bit it like takes you some time to eat the apple. And so you have to write the legislative language, you have to get the House and the Senate to agree on the proposal, you have to send it through the very particular legislative hoops. There's debate on the floor, there's lots of amendment votes, and you have to get the two chambers to agree. So you only have — like that takes legislative time, and it's legislative time that you're focused on that particular process that you're not using for something else that can be done.

I'm going to — I think we have probably about time for one more question. I'm going to kick it back to Sarah and ask another question from Twitter about what's the — could you talk about the

history of filling the amendment tree and how that plays into filibuster dynamics?

MS. BINDER: Sure. So filling the tree is just — the simplest way to think about is that the majority leader who can be recognized first by practice and precedent on the Senate floor essentially takes up all the opportunities and blocks amendments from being offered. By the end of the day, depending on how aggressively the majority leader does that, it can preclude both amendments being offered by the majority party, but as well amendments being sought by the majority party.

And we know that over time over the last, say, starting the late 1990s, when it might have been used sparingly, but increasingly over the years since then, that we've had the situation where when and if they can get cloture on the motion preceding the bills on the floor, the minority accuses the majority of filling the tree quite quickly in order to get to a vote to prevent the minority from reshaping the bill. Majorities will say we've carefully crafted these proposals, sometimes in a bipartisan fashion in committee, and we want to protect them and so we don't want them around on the floor. But whichever way it is, it adds to the frustration, certainly amongst members of the opposition party that they've not had an ability to affect the bill.

But at the outset it also leads to grumbling my members of the majority party, and you'll hear it from a range — in this case Democratic senators, and also Republican senators at times, that their opportunities to try to make the Senate work just weren't there anymore. But at the end of the day, majority numbers often just basically defer to the leader. As Molly said, look, their lives are more certain. They know what's going to happen when and so they're less willing to challenge the leader when he does this. They'll give consent whenever the leader tries to negotiate.

So how does this relate to the filibuster? As we're ending our time limit here, which is possibly how filibusters win in the old days — adjournment. You've got to go; sorry, guys.

So at risk of taking time talking about the deadline here — what does it matter here? We're in a world here where the Senate is just not doing much at all in the floor, right. This is not a world of talking filibusters or talking legislators. It's so rare that we can turn from a floor. And we see it on reconciliation, in this weird amendment sort of way, but that's not the world we live in, right. And as Molly pointed to earlier, that's because time is such a scarce commodity. And we knew it the '80s when we saw silent filibusters, but it's in spades today where senators have multiple commitments, parties have

commitments. And I'll believe it when I see it, which I hope to see version of a talking filibuster. But leaders have to make it a priority on both sides of the aisle, and that's just not where the Senate seems to be today.

And on that bright note, oh, we got an extension of the adjournment. On the advice of the parliamentarian we have another minute.

Any final points, Molly, you want to?

MS. REYNOLDS: I don't think so. I just want to say thank you to everyone who joined us today and for all the great questions that folks submitted, both in advance and during the live event. Hopefully Sarah and I were able to clear up some of those questions that folks have. And I'm sure that over the next several months we'll be having more conversations about this topic.

So thank you all for joining us today and we appreciate you watching.

MS. BINDER: Thank you all.

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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