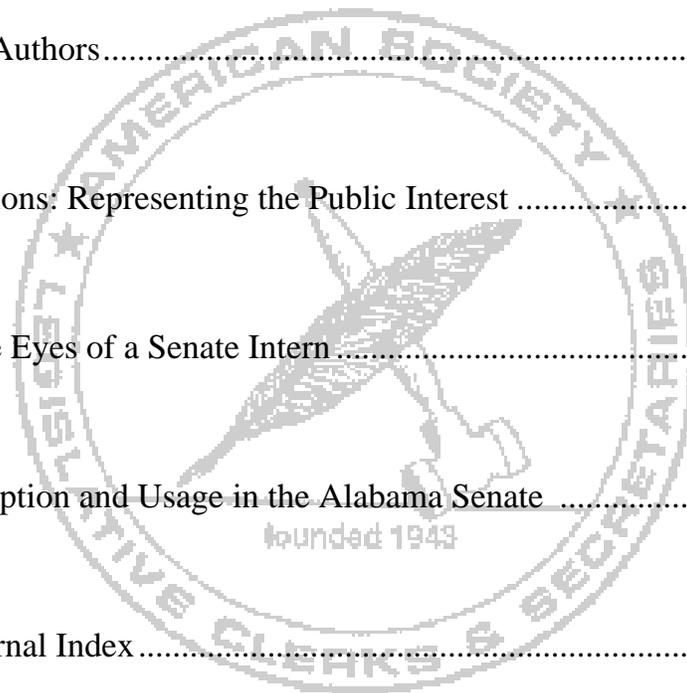


# Journal of the American Society of Legislative Clerks and Secretaries

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# Ethics Commissions: Representing the Public Interest

*By Megan Comlossy, Center for Ethics in Government,  
National Conference of State Legislatures*

In a representative democracy, lawmakers constantly face a critical ethical dilemma—deciding whether to represent the views of their constituents or to pursue their own personal self interest. Such ethical conflicts are an inherent part of the legislative process as elected officials work within the complex, multifaceted sphere of political and legislative ethics.<sup>i</sup> It is within this complicated, ever-changing context that oversight agencies come into play. Ethics commissions work to ensure voters' trust in policymakers and political institutions through external oversight and transparency.

## Introduction

Following the Watergate scandal in the early 1970s, ethics laws received new attention at all levels of government. A large push by state governments resulted in the passage of stronger ethics laws and a focus on the creation of an ethics infrastructure, including ethics training and oversight agencies to monitor compliance by public officials.<sup>ii</sup> Both internal and external oversight entities now provide that oversight.

*Ethics Committees.* Comprised of state legislators, legislative ethics committees offer internal oversight of state legislators in some form in nearly all 50 states. Committee jurisdiction generally extends only to the legislature and members are responsible for ensuring that their peers comply with state ethics laws and chamber rules. One of the greatest challenges to ethics committees is maintaining their credibility with the public.<sup>iii</sup>

*Ethics Commissions.* State ethics commissions, on the other hand, offer external oversight of public officials. Forty-one states provide external oversight of their ethics laws through an ethics commission established in statute, constitution, or, as in the case of the Illinois Executive Ethics Commission, through executive order. Seven states—Alaska, Illinois, Indiana, Kentucky, New Jersey, New York and Washington—have more than one state ethics commission that oversees distinct branches of government. In the nine states that do not have ethics commissions—Arizona, Idaho, New Hampshire, New Mexico, North Dakota, South Dakota, Vermont, Virginia and Wyoming—oversight is provided through an internal ethics committee or other state entity, such as the attorney general, inspector general, or the secretary of state.

As regulatory agencies, ethics commissions serve a vital role in a democratic government. Ethics commissions work to ensure voters' trust in policymakers and political institutions by monitoring compliance with ethics laws and ensuring ethical conduct by those under its jurisdiction. Ethics commissions represent the public's interest and work to maintain the public trust in government.

Based on a comprehensive survey of state ethics commissions by the National Conference of State Legislatures' Center for Ethics in Government, this paper identifies key components of ethics commissions in the U.S., their structure and role in monitoring ethical behavior—from providing ethics training and advisory opinions to investigating complaints and levying sanctions

for violations of ethics laws. The final section discusses recent state legislative action and trends related to ethics commissions during these difficult economic times.

## **Significance**

Since the first state ethics commission was created in Hawaii in 1968, 40 states have followed suit, establishing an additional 47 commissions. Over the past four decades, state ethics commissions have continued to play an important role in monitoring ethics issues including conflict of interest, campaign finance, and financial disclosure. States clearly recognize the need for and value of external oversight agencies, as state legislatures continue to consider, create and expand ethics commissions, their powers and responsibilities. For example, through a 2010 legislature-referred constitutional amendment, Utah became the most recent state to establish an ethics commission. Additionally, during the 2010-2011 legislative session, New Mexico considered bills to create an external oversight board and Illinois, Massachusetts, Mississippi and Missouri successfully enacted bills broadening the authority of their ethics commissions.

## **Structure**

While ethics commissions serve a distinctive purpose, no two are identical. Commissions generally consist of between five and nine private citizens who are appointed by the governor, legislative leaders and other state officeholders.<sup>iv</sup> Many ethics commissions prohibit commission members from being a public official, candidate, registered lobbyist or lobbyist principal, or employee of the state. However, restrictions vary: the Alaska Legislative Ethics Committee, Illinois Legislative Ethics Commission, New York State Legislative Ethics Commission and Washington Legislative Ethics Commission all allow or require that legislative members serve on their state ethics commissions.

*Term Length & Term Limit.* The length of the term that members serve ranges from two years in Florida and Kansas to seven years in Delaware, with the majority of commissioners serving four or five-year terms. About half of ethics commissions limit the number of terms that members may serve to one or two consecutive terms. At least one in four commissions does not limit the number of terms that a commissioner may serve.<sup>v</sup>

*Compensation.* At least 34 commissions compensate their members, while another ten do not compensate commissioners.<sup>vi</sup> Of those commissions that do compensate members, all but two offer compensation on a per diem basis. The chairman of the California Fair Political Practices Commission and the Montana Commissioner of Political Practices are both salaried and serve full time. Finally, whether or not commissions offer remuneration for ethics commission-related business, with the exception of Tennessee and Rhode Island, they typically reimburse commissioners for commission-related incurred expenses.

## **Jurisdiction**

*Purview of Jurisdiction.* The jurisdiction of state ethics commissions vary, but often include legislators, executive officials, lobbyists, candidates, local officials and vendors with state contracts. In most states—with the exception of Michigan, Ohio and South Carolina—the ethics commission has authority over legislators, who are considered “public officials.” In North Carolina, legislators are “invited” but not required to participate. Some commissions have only

limited influence over legislators. In Iowa and Maryland, commissions enforce financial disclosure laws, but internal ethics committees enforce the ethics code.

Executive branch officials fall under the jurisdiction of ethics commissions, Utah being an exception. In at least 30 states, ethics commissions enforce lobbying laws. Both Indiana and New York have specific commissions that regulate lobbyists and lobbyist activities.<sup>vii</sup> The Iowa Campaign and Disclosure Board and the Florida Commission on Ethics have authority over executive branch lobbyists; the Florida commission also has limited authority over legislative lobbyists, who are required to register with the legislature. Commission influence also may extend to officials and employees in more than one branch of government.

*Commission Location Within Government.* Often, though not always, the location of a commission within the government is indicative of its jurisdiction. At least 25 commissions are located in the executive branch and at least eleven are part of the legislative branch. However, a commission's official location may be a matter of budgeting, rather than jurisdiction. Commissions in Alabama and California receive funding from—and thus technically fall under—the executive branch, but are considered to be independent agencies. An additional six ethics commissions either do not fall clearly within the executive or legislative branches of government, or identify themselves as independent agencies.<sup>viii</sup> Initially in the executive branch of government, the Colorado Independent Ethics Commission relocated to the judicial branch of government. The commission's unique relocation was made in effort to better maintain its independence and autonomy.

*States With Multiple Commissions.* Seven states have more than one entity which could be considered an ethics commission. Each commission is generally responsible for monitoring officials in distinct branches of government or regulating compliance with specific laws (such as elections, financial disclosure or lobbying laws). Alaska, Illinois, Indiana, Kentucky, New York and Washington all have ethics commissions in both the executive and legislative branches of government. In most cases, the location of these commissions corresponds to their jurisdiction, although there are instances in which their jurisdictions overlap.<sup>ix</sup>

## **Powers & Duties**

State ethics commissions are entrusted with various powers and assigned numerous duties in order to ensure that public servants and others under their jurisdiction are held accountable and behave ethically. Although variation exists across states, some of the most essential responsibilities are common to many ethics commissions. Duties range from administrative—developing forms and manuals and issuing advisory opinions—to monitoring compliance with financial disclosure and campaign finance requirements, conducting ethics training, issuing advisory opinions, initiating investigations and investigating complaints of alleged ethics violations, subpoenaing witnesses, prosecuting violators and imposing sanctions, if necessary.<sup>x</sup>

*Purview of Responsibility.* More than 30 commissions regulate financial disclosures of both legislators and lobbyists, while at least 20 oversee campaign finance laws. At least 41 ethics commissions oversee violations of ethics laws. The handful of state ethics commissions that do not monitor ethics violations generally regulate a specific subset of the ethics code, such as financial disclosure and/or election and campaign finance matters.

*Ethics Training.* For state legislatures, training on ethics laws is of paramount importance. Ethics training provides an opportunity for public officials and lobbyists to be introduced to, or review, state-specific ethics laws and rules. The type and methods of training vary, but ethics training typically explains what one can and cannot do. For public officials, there is no dearth of potential situations of conflicts of interest; an unknowing legislator or lobbyist might easily violate ethics laws if uninformed. In some states, for example, accepting a cup of coffee from a lobbyist is prohibited. Alan Rosenthal, professor of public policy and political science at Rutgers University, highlights the connection between ethics training and healthy political institutions. For these reasons, ethics training is a fundamental tool for ethics commissions to proactively address possible ethics violations and conflicts of interest.<sup>xi</sup>

Training requirements vary greatly by commission. At least 28 ethics commissions are required by statute to conduct ethics training, although by tradition, many others do so. With the exception of the Michigan State Board of Ethics, New Jersey Election Law Enforcement Commission and the Washington Public Disclosure Commission, most commissions do, in fact, offer ethics training voluntarily. Training topics generally consist of ethics laws, ethics rules and value-based ethics, although this may depend on the commission's jurisdiction. The Minnesota Campaign Finance and Public Disclosure Board provides training only on campaign finance and lobbyist disclosure.

Depending on the commission, training is typically offered to some combination of executive officials, executive branch employees, legislators, legislative employees, lobbyists, and local government officials. At least 30 commissions offer training to both legislators and executive branch officials and at least 27 offer training to executive and legislative employees. Only about half of commissions offer ethics training for lobbyists. Relatively few commissions have mandatory attendance at ethics trainings; only 16 require that certain individuals participate in training courses. The Alaska Legislative Ethics Committee requires that all legislators and legislative employees take training within 10 days of the first day of the first regular session and the Alaska Public Offices Commission mandates training for all registered lobbyists and lobbyist employers. In most cases, less than half of the commissions that offer ethics training offer it online. However, online training represents a growing trend.<sup>xii</sup>

*Advisory Opinions.* In addition to offering training on state ethics laws, ethics commissions also serve as advisory bodies, providing counsel to individuals on ethical issues under their jurisdiction. Based on real or hypothetical circumstances, public officials can request advice on the application of any provision of laws over which the commission has authority. This opportunity to seek guidance prior to committing a potential violation complements ethics training by encouraging public officials to comply with ethics laws through better understanding of their application to specific situations. Additionally, in some states, an advisory opinion from the state ethics commission may serve as a defense against allegations of criminal action.

Not only do advisory opinions serve to educate those who request them, they are typically published, augmenting the resources available to others who are interested in the application of ethics laws. Specific information released is determined by the commission; at least 14 commissions omit the identity of the person who requested the advisory opinion. In Pennsylvania and South Carolina, advisory opinions can be requested to remain confidential and in Delaware, Hawaii, and Nevada, only an edited synopsis of the opinion is released unless the subject waives confidentiality.<sup>xiii</sup>

## Ethics Complaints

Despite efforts to educate and advise public officials through training and advisory opinions, ethics violations inevitably occur. State ethics commissions play a vital role in uncovering such offenses by initiating, investigating, and prosecuting complaints of alleged ethics violations and, in some cases, levying sanctions on violators.

*Filing a Complaint.* Commissions have diverse regulations for identifying who is permitted to file an ethics complaint. At least 37 commissions allow anyone to file a complaint, although Ohio limits this to “anyone with factual knowledge” and in Texas, an individual must be a resident or own real property in the state to initiate a complaint. More than half of all commissions allow individual commission members to file a complaint and at least 20 commissions permit the commission to file a complaint of its own motion. With few exceptions, ethics commissions accept complaints filed by the general public and public officials.<sup>xiv</sup> In the Office of the Indiana Inspector General and the Indiana State Ethics Commission, anyone alleging a violation of the code of ethics can file a complaint with the inspector general; however, only the inspector general may file a complaint with the ethics commission.<sup>xv</sup>

*Frivolous Complaints.* Upon receiving a complaint, most commissions have the authority to dismiss it if the complaint is determined to be “frivolous.” The definition of “frivolous” varies by commission, but is often defined as lacking basis in fact or law. Ethics commissions approach frivolous complaints in a variety of ways: at least 10 commissions promptly dismiss a complaint if found to be insufficient or frivolous on its face. If a preliminary review or initial investigation determines that a complaint is frivolous, at least nine commissions will dismiss it; other commissions dismiss a complaint after finding “no probable cause” that a violation has occurred, on grounds of insufficient facts, or if the complaint fails to comply with standard complaint filing requirements. At least seven commissions—those in Connecticut, Hawaii, Missouri, Pennsylvania, Rhode Island, West Virginia and Wisconsin—require individuals who knowingly file a frivolous, groundless, or false complaint to pay the attorneys’ fees of the accused.<sup>xvi</sup>

*Investigating, Prosecuting & Levying Sanctions for Ethics Violations.* Once a complaint is received and determined not to be frivolous, an investigation begins. While most ethics commissions are authorized to investigate complaints against individuals under their jurisdiction, a few do not have investigatory power. For these commissions, the responsibility falls to another authority. In Delaware, ethics commission counsel is responsible for the investigation; in Illinois and Tennessee, the duty belongs to the attorney general. With the exception of commissions in Michigan, North Carolina, Ohio and Utah, the majority of ethics commission investigations are aided by their statutory ability to subpoena witnesses.

While some commissions have the power to prosecute violations of the ethics code, others have only the authority to refer violations to the appropriate authority, legislative body, or governor for prosecution. The Louisiana Board of Ethics refers findings of violations to the Ethics Adjudicatory Board, a three-member panel of administrative law judges from the Division of Administrative Law.

If the ethics commission finds that a violation has occurred, nearly all commissions have the power to levy sanctions. Civil fines and penalties are the most common sanctions and are

assessed for violating conflict of interest, campaign finance, financial disclosure, lobbying, or ethics laws. Most maximum fines range between \$2,000 and \$5,000, but can be as high as \$25,000 for certain offenses in a few states, and up to \$40,000 per violation in New York. Sanctions vary by commission and may also include letters of reprimand, requirements to pay treble damages, cease-and-desist orders, suspension or expulsion from office or employment, or license revocation. Ethics commissions in Florida, Michigan, Ohio and Oklahoma do not have the power to impose sanctions for ethics violations.<sup>xvii</sup>

## **Trends**

Ethics commissions instill voters' confidence in policymakers and political institutions by ensuring that the groups under their jurisdiction follow state ethics laws. While some state legislatures are restricting powers, merging agencies and reducing agency funding, others are expanding commission authority, establishing new oversight entities and guaranteeing commission funding.

*Consolidation.* Tight budgets and tough fiscal times are prompting legislative action that affects state ethics commissions in various ways. During the 2010-2011 legislative session, in Connecticut, North Carolina and Washington, policymakers proposed bills that would consolidate the functions of various oversight agencies. In 2009, Tennessee consolidated the management and administrative functions of two commissions to increase efficiency and reduce costs without compromising either agency's independence or authority. However, given this trend, critics are concerned about the potential loss of autonomy for ethics agencies that merged with agencies which fall under the authority of those individuals whom they are intended to regulate.

*Resource Reduction.* The Government Transparency and Finance Commission in Georgia is also facing an extreme financial situation, raising questions about whether the commission will be able to carry out its responsibilities given available resources. The commission's budget has experienced a 40 percent cut over the past three years and seven out of eight positions have been cut, including all commission lawyers, investigators, and the executive and deputy secretaries.

*Authority Restriction.* Other ethics commissions have been fighting to regain power eliminated by state supreme courts. Rulings in Rhode Island and Nevada in 2009 effectively limited these state ethics commissions' authority to discipline legislators who vote on issues in which they have potential conflicts of interest. The Rhode Island Supreme Court decision restricted the ethics commission from prosecuting core legislative actions, defined as "proposing, passing, or voting upon a particular piece of legislation." In Nevada, the Supreme Court essentially barred the Commission on Ethics from conducting any disciplinary proceedings related to the conduct of a legislator if it involved "core legislative functions such as voting and, by extension, disclosure of potential conflicts of interest."

However, a victory for the Nevada ethics commission in June came in the form of a unanimous U.S. Supreme Court ruling, which upheld the state law prohibiting legislators from voting when they have a personal interest in the outcome and rejecting all arguments that such laws infringe on legislators' First Amendment rights. The court determined that when lawmakers vote, they do not exercise a personal right, but rather one that belongs to the people. This decision by the

U.S. Supreme Court may send a message to all states that restrictions of authority must not reduce oversight of the public right of voting as an elected representative of the people.

While the case may be closed in Nevada, Rhode Island's travails continue, as the General Assembly considers a constitutional amendment to restore the commission's power of investigation and prosecution.

*Expansion.* Despite the fiscal challenges that most states are facing, promising steps are being made for legislative ethics and state ethics commissions. A law passed by the Alabama legislature and signed by Governor Robert Bentley guarantees funding for the Alabama Ethics Commission. And in a much acclaimed deal, New York lawmakers and Governor Andrew Cuomo recently reached an agreement on ethics reform negotiations. The ensuing bill, among other things, creates a 14-member bi-partisan Joint Commission on Public Ethics that has jurisdiction over both the legislative and executive branches of government, and the authority to initiate investigations and recommend penalties to existing oversight agencies.<sup>xviii</sup>

## Conclusion

The work of ethics commissions clearly is crucial in a complex political world. While the structure varies from state to state and the jurisdiction around ethics is clear yet diverse, the power and responsibilities of ethics commissions remain embedded in the values and promises espoused by the founding fathers of this nation. However, the challenges of limited resources including money and time, conflicting priorities in different states and sectors, and prevailing political preferences will all have an effect on all elements of ethics commissions. Looking forward, the trends of limited resources, divergent priorities, and the public's demand for transparency and oversight will all influence the work done by commissions as well as their composition and responsibilities. Considering technological advances, ethics commission work may continue to evolve and increasingly rely on web-based resources for training and other responsibilities. Voter confidence in policymakers and public institutions is as crucial now as ever. As long as America is a representative democracy, lawmakers will face ethical dilemmas and though their roles may change, oversight entities such as ethics commissions will help ensure the public trust.

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<sup>i</sup> Lawrence, Mark W. "Legislative Ethics: Improper Influence by a Lawmaker on an Administrative Agency." *Maine Law Review* 42, no 423 (1990)

<sup>ii</sup> Kerns, Peggy and Megan Comlossy. "Ethics Commissions: Gathering Momentum or Under Fire?" *LegisBrief* (National Conference of State Legislatures) 19, no. 14 (March 2011).

<sup>iii</sup> NCSL "Ethics Committees and Commissions" <http://www.ncsl.org/Default.aspx?TabId=15333>.

<sup>iv</sup> Outliers include: Montana's single commissioner of political practices, the Louisiana Board of Ethics, which has 11 members, the West Virginia Ethics Commission, which is made up of 12 part-time citizen members, and New York's Commission on Public Integrity of 13 members.

<sup>v</sup> Based on the information from the Center for Ethics in Government's survey of state ethics commissions, term limits are fairly evenly split. At least twenty-five percent of commissions allow members to serve only one term; another quarter of commissions permit members to serve two consecutive terms; an additional 25 percent do not have any limitations on the number of terms commissioners may serve; the remaining 25 percent of ethics commissions did not respond to this question.

<sup>vi</sup> Commissions whose members are not compensated include: CO, HI, MI, NY-Pub, NY-Leg, NC, OK, RI, TN, TX.

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<sup>vii</sup> Casal Moore, Nicole and Peggy Kerns. “State Ethics Commissions.” *LegisBrief* (National Conference of State Legislatures) 14, no. 23 (April-May 2006).

<sup>viii</sup> The Washington Public Disclosure Commission and commissions in Massachusetts and Nevada do not fall clearly within either the executive or legislative branches of government. Commissions in Connecticut, Maine and Pennsylvania identified themselves specifically as independent agencies.

<sup>ix</sup> For example, Washington’s State Legislative Ethics Board is located in the legislative branch, which directly corresponds to its jurisdiction over legislators, while the purview of the state’s Executive Ethics Board extends only to the executive branch.

<sup>x</sup> NCSL “State Ethics Commissions: Powers & Duties” <http://www.ncsl.org/Default.aspx?TabId=15348>

<sup>xi</sup> Casal Moore, Nicole and Peggy Kerns. “Ethics Training.” *LegisBrief* (National Conference of State Legislatures) 11, no. 42 (October 2003).

<sup>xii</sup> According to the Center for Ethics in Government’s *Ethics Commission Survey*, at least 30 commissions offer online training. For more on web-based ethics training, see: Kerns, Peggy and Luke Martel. “Technology Meets Ethics Training.” *Legisbrief* (National Conference of State Legislatures) 16, no. 35 (August/September 2008).

<sup>xiii</sup> NCSL “Advisory Opinions & Appeal Process” <http://www.ncsl.org/default.aspx?tabid=22280>

<sup>xiv</sup> At least 26 commissions allow individual ethics commissioners to file a complaint, at least 44 commissions allow the general public to do so, and at least 42 allow complaints from public officials. At least 39 commissions allow staff to file complaints, and in at least 20 commissions, the commission itself may file a complaint of its own motion. From NCSL “Ethics Commissions: Who Can Initiate a Complaint” <http://www.ncsl.org/default.aspx?tabid=22276>

<sup>xv</sup> NCSL “Ethics Commissions: Who Can Initiate a Complaint?” <http://www.ncsl.org/default.aspx?tabid=22276>

<sup>xvi</sup> NCSL “Ethics Commissions: Frivolous Complaints” <http://www.ncsl.org/default.aspx?tabid=22290>

<sup>xvii</sup> NCSL “Ethics Commissions: Authority to Investigate, Prosecute & Levy Sanctions for Violations of Ethics Law” <http://www.ncsl.org/?tabid=22412>

<sup>xviii</sup> NCSL “Ethics in the News” <http://www.ncsl.org/Default.aspx?TabID=746&tabs=1116,84,208#208>

## **Life Through the Eyes of a Senate Intern**

*By Nicholas Galvin, Intern  
Senate Clerk's Office of Virginia*

It was only a year ago that I walked across a stage in a crowded Richmond convention center and was handed a slip of paper rolled up and wrapped neatly with a yellow ribbon. After four years, three colleges, and over twenty-thousand dollars in loans, I was surprised at how fragile and light the diploma felt in my hands, even if it was merely ceremonial. There I stood, a so-called political scientist, waving and smiling for my family hidden somewhere in the crowd. I felt a multitude of emotions that day; joy at finally having graduated, sadness at the thought of leaving my friends behind, but most of all a combination of terror and excitement at what awaited me in this next chapter of my life.

The next six months were an equally emotionally conflicting time for me. For the first time in my life, I had no idea what my future held for me. I applied to Americorps, worked for a Russian-American student exchange program, moved back in with my family two-hundred miles away, studied for my GRE, applied to more internships, and tended bar at a Holiday Inn to start paying off my student loans. Then one day in November, I received a phone call from the Clerk's Office, offering me an interview for the internship position I had applied for. Three weeks later, sure that I had been passed over for the job, I received a call from Susan Schaar, Clerk of the Senate of Virginia, offering me the position. After that, everything happened quite quickly. I had only a week to quit my current job, find an apartment, and move to Richmond to begin work; and, did I mention, I was scheduled for the Thanksgiving shift at work the next day?

Somehow, it all worked out, and after finding an apartment and getting moved in, I had two days to catch my breath before putting on my shirt and tie and starting what I hoped would be the first day of a successful and fulfilling internship. Two years earlier, I had interned just two buildings away with then Governor Tim Kaine's administration in the Secretary of Education's office, so I was not completely unfamiliar with the atmosphere of the General Assembly. My first month or so working for Senate Committee Operations reminded me a lot of my internship with the executive branch; each day went more or less the same. We received a handful of phone calls each day, the filing burden was pretty light, and the office was mostly silent, save for the click-clack of keyboards and the occasional siren in the distance. It was only after those first five weeks ended that I would learn just how much I had taken that silence for granted. It was, I realized in hindsight, the calm before the storm.

When I arrived at work on the morning of January 12, 2011, I had to double-check to

make sure I had walked into the right office. I was greeted by people rushing around like leaves in the wind, and was assailed by a pandemonium of noise; the thunder of the copier's mechanical grinding, the pitter-patter of the coffee pot's bubbling, the clicking of the keyboards like hail on the roof, and the screeching winds of a dozen ringing phones. The General Assembly's session had begun; the storm had arrived.

As an intern, I fulfilled multiple roles, but my two primary roles were as a back-up committee clerk and office receptionist. While I was able to work with virtually every committee on at least one occasion, I was officially assigned to the Committee on Rehabilitation and Social Services. That committee was known for receiving the least amount of legislation, and I soon learned it was something the members often liked to joke about. When I was first introduced to Senator Puller, chair of the committee, she shook my hand and winked as she said, "Welcome to the *all-powerful* Rehabilitation and Social Services committee." My responsibilities as a clerk included, but were not limited to, clerking the committee and subcommittees first and foremost, updating the progress of legislation on an online database (Legislative Information System), attending weekly committee docket meetings, creating and distributing that docket to the committee members, polling members for suitable meeting times, reserving and preparing committee rooms, compiling "bill books," delivering patron notifications, and providing any other assistance to committee members. Being a clerk taught me that the maze that a bill often has to go through to become law is much more complex than School House Rock made it out to be.

As mentioned above, the committee did not typically receive a significant amount of legislation, and did not even require subcommittees during certain years. This year saw somewhat of a surge in legislation however, which led to the decision to create three subcommittees: Corrections, Alcoholic Beverage Control, and Social Services. This year the committee was referred a total of 61 bills (24 House and 37 Senate), as compared with the 2010 session when it was referred only 42 bills (26 House and 16 Senate). There was also somewhat more media attention on the committee this year, thanks in part to Governor McDonnell's ABC privatization plan.

His plan would have made Virginia the first state since Prohibition to privatize the wholesale, distribution and retail sale of liquor. The idea was to use the projected windfall profits to improve Virginia's transportation infrastructure. The Governor expected the plan to collect for the state \$458 million up front, and then another \$229 million annually. Doubts about the actual size of the windfall, fears it would lead to lower state revenues in the long run, and disputes over whether it would increase taxes all fueled opposition to the proposal. In the face of all those doubts, the plan was not well received by a majority of either the public or the legislators. Throughout session, neither the House nor the Senate committees to which the Governor's bill had been referred would place it on their dockets, and at the last committee meeting of Rehabilitation and Social Services, I remember anxiously expecting a heated debate between the Democratic majority and the Republican minority. Several TV station

cameras were present, and it was the largest public turnout we had had since the autism bills a few weeks earlier. However, when one of the Republican members made a motion to add the Governor's bill to the docket, Senator Puller simply but firmly ruled it "out-of-order," to which the Republican member politely conceded. The whole exchange took less than a minute, and like *that*, the privatization bill was no more.

That event taught me that you could never predict how a committee meeting might turn out. Some Friday mornings I would sit down in committee expecting the meeting to last no more than an hour, only to end up a mere halfway through the docket three hours later due to an unexpected flood of citizen testimony and heated debate amongst the members. The turbulent nature of the committees was at times frustrating, but at others refreshing. Doing the same thing day in and day out can quickly become monotonous, and my days during session were anything but repetitive.

Aside from my duties as a clerk, I also acted as an office receptionist. This required me to answer phone calls, create a daily schedule of important meetings in the Senate, assist with filing, and take on a number of side projects. Calls came primarily from constituents, legislative assistants, other staff members, and on some occasions from the legislators themselves. At first, I essentially acted as a switchboard, diverting most of the difficult questions I received to my more knowledgeable co-workers and listening over the cubicle to hear how they responded. Before long, I was answering calls with as much confidence and ease as I had at the Governor's office. To create the daily meeting schedule, I had to keep in constant contact with committee clerks, caucus leaders, and legislative staff, to confirm the date, time, and location of every single meeting. Considering that the schedule would end up in the hands of hundreds of people in the Capitol each day, it was one of my most nerve-racking responsibilities.

Some of the side projects I've been assigned have included working at Boys' State at Liberty University, clerking several interim commissions, organizing bill shucks, re-organizing the office's filing system, and assisting with the many aspects of the redistricting process. Each project has taught me something different about the legislative process, and broadened my understanding of the way Virginia's state government works.

Although I work directly for Senate Committee Operations, I work for the Senate Clerk's Office above all else. That tiered structure has allowed me to work in virtually every department encompassed by the Clerk's Office, rather than be confined strictly to my desk and the duties that come with it. Whether working at Boys' State as a legislative counselor, serving as a page on the Senate floor, or delivering the mail, no job has been too big or too small. The flexibility of the Clerk's Office in allowing me to experience the inner-workings of the Senate has made me into a more

knowledgeable, more skilled, and more appreciative worker. There was, and still is, an intense feeling of pride that comes with working for the oldest continuous state legislature in North America. With that pride, there also comes a sense of responsibility (and at times, a modicum of panic). Not only have I been fortunate enough to have landed an internship inside the Senate of Virginia, I have done so during a time when many of my fellow college graduates are struggling to find even part-time jobs. The significance of that has not been lost on me, and it only drives me to work harder each day.

Meteorologists were never fully able to understand the nature of hurricanes until some pioneering storm chasers decided to fly their planes straight into them. Satellite images and radar could only reveal so much, and it took going in and getting a firsthand account to truly grasp the storms' complexities. This internship has allowed me to learn about state government in a way textbooks could never equal. It has put me in the passenger seat next to those "pilots," and given me the chance to see everything from the tempestuous storm of committees, to the calm and serene eye of the legislative interim at the center. I have learned to appreciate how every element, from clerks to committees to senators, works together to create the perfect storm.

## Cloture: Its Inception and Usage in the Alabama Senate

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Cloture. It is a word familiar to millions of Americans, through the exposure of twenty-four hour news and political opinion shows, through internet news stories and blogs, and through its vastly increased usage in the United States Senate.

It is a word inextricably tied to the word “filibuster,” a word much more familiar to Americans, and for a longer time, as it has been the bane of majorities of the upper chambers of legislative bodies throughout the country, and conjures images of a handful of Senators seizing control of the body and holding it hostage through seemingly endless debate.

It is, perhaps, ironic that both words are of non-English extraction, but entirely in harmony with America’s proclivity to appropriate words and expressions from nearly every extant language, and blithely utilize them in sentences that appear as if they were from a singular native tongue.

And, it is not altogether surprising that each word – one the apparent problem, the other the apparent cure – is imbued with negative connotations, a perception found within and without legislative bodies.

In the public conscience, it has ever been the case that the filibuster and cloture seem as aberrations of the right order of things.

This public prejudice toward the filibuster and the use of cloture is not ill-placed. Within deliberative legislative bodies, there has always been the hovering danger that liberal debate, a noble concept, is an easy victim at the hands of those whose purposes go well beyond mere expression of argument and opinion.

### The Filibuster

It was in the 1850’s, in the United States Senate, that the term “filibuster” first came into usage, as those engaged in lengthy debate over the Kansas-Nebraska Act were labeled as *filibusteros*, Spanish for the pirates who roamed the West Indies in those days. It was an appellation of a “piracy of the Senate” that stuck, and as a noun, the term “filibuster” has become a uniquely American expression of the same use of debate to forestall a vote, which has evidenced itself in deliberative legislative bodies around the world, from the ancient days of the Senate of the Roman Republic.

For, in deliberative bodies, given as they are the privilege of more liberal debate and a mission to be a check upon the massive amount of legislation which can flow from the lower bodies, there has always been within those of a minority position a desire to find loopholes in the standing rules and usages. And, nowhere have these been found than in extended debate, which in its severest degree becomes the American notion of the “filibuster”.

## Senate of the Roman Republic

It was Cato the Younger, a junior member of the Senate of the Roman Republic, who the prodigious writer and Senator, Marcus Tullius Cicero handed to history as the prime example of a Senator who abused the unlimited debate of the Roman Senate.

In his *Letters To Atticus*, Cicero wrote of the practice of speaking until dusk -- *diem dicendo eximere* (“to take away the day through speaking”) -- or more often utilizing the term, *diem consumere* (“to waste the day”), used so effectively, as it was the standing procedure of the Roman Senate that it must adjourn at dusk.

And, as it was also the standing procedure that each Senator must have the opportunity to speak, Cato always had his chance to take the floor and speak until dusk on matters not to his liking.

Cato and the practice of *diem consumere* have transcended the centuries, placing Cato as the parliamentary progenitor of the *filibusteros* of the United States Senate, as well as those of every deliberative body in the western world who have sought to “waste the day.”

It was in the 19<sup>th</sup> Century, also, that European deliberative bodies experienced an upsurge in the number of extended debates, designed to stall a vote on a measure they opposed.

After the widespread revolutions of 1848, many upper chambers became ideological forums for passionate proselytes, as the precepts of socialism, communism and republicanism were advanced day after day, and this in an era when the public was much more attuned to the daily debates and newspapers flourished with the content of the debates, often printing the full text of speeches.

And, being the upper, deliberative bodies, held as they were as the bastions of liberal debate, no parliamentary device existed to *force* an ending of debate, or establish a time certain for a vote.

## The Previous Question

To be sure, in 1604, the British House of Commons had adopted Sir Harry Vane’s device for dispensing with further consideration of a matter, which he had gleaned from study of the Senate of the Roman Republic and which he called a motion for the “previous question,” but its usage in that body was far different from what it became in American legislative bodies in the 19<sup>th</sup> Century. There, the motion was, and is, put by those opposed to a measure, in order to obtain a negative vote on the question the motion embodies: “Shall the previous question be now put?” Because this normally applies to more sensitive measures, opponents can often solicit the negative votes of proponents, fearing the content of the debate to follow, in order to put the measure aside for the day and move on to another.

In the Senate of the Roman Republic, this was called *noctem postulare* (“to ask for a night”), often posed by a more senior statesman, regarding a matter of grave importance, as a gentle suggestion to the Senate that it might be wise to allow Senators more time to think the matter over.

The previous question was utilized in the early years of the United States Senate and was embraced in *Jefferson's Manual*. But, it must be remembered that Jefferson was a devout admirer of the methodology of the British House of Commons, and in his Manual, the motion was the same as that of the Commons.

By the mid-19<sup>th</sup> Century, however, just as minority opponents of measures in the United States Senate used unlimited debate to their advantage, so the United States House of Representatives witnessed the slow transformation of the usage and intent of the previous question, such that the proponents of a measure would use it in order to shut off debate and move to an immediate vote, a practice which has continued to this day, not only in the Congress but in state legislatures throughout the country.

Today, the previous question is used in both upper and lower bodies, as a means employed by the majority to shut off debate and move to an immediate vote upon the pending matter.

### **Cloture The French National Assembly**

Likewise, it was during this period in history that abuse of the concept of liberal debate in upper bodies was worsening, and it was in the National Assembly of France, widely held to be the most notorious cauldron, that a solution was found.

It was in 1871.

France, under the provisional leadership of Adolphe Thiers, had made some headway in making amends with Prussia, following the Prussian victory in the Franco-Prussian War of 1870-71.

An armistice with Prussia had been signed in January, and within the National Assembly, sentiment had swung again toward the restoration of the monarchy. Complicating matters was the Paris Commune – that leftist, socialist movement, which had been formed to oversee local government in Paris, but lately had developed ambitions to establish itself as a separate national assembly. At the apex of its popularity and power, the *Communards* had driven the Thiers Assembly from Paris and controlled all government within the capital.

Hastening to Versailles, Thiers accumulated his power through solicitation of both the royalists and republicans.

In May 1871, Thiers had garnered enough support to put down the Commune, sign the Treaty of Frankfurt with Prussia, and begin the orderly process of passing laws toward the eventual formation of the Third Republic.

Thus, after vanquishing these impediments, Thiers turned his attention toward the rebuilding of a new republic, despite intense fervor within the Assembly for a restoration of the monarchy.

Yet, in the end, Thiers had barely to lift a finger on this sensitive subject, as all three of the major royal pretenders insisted on a restoration, which would provide an all-powerful monarchy, a concept unacceptable to the most ardent royalists. Worse, the pretenders demanded abolition of the tri-color flag, adopted in 1789 upon the fall of the *ancien regime*, and so dearly loved by people of all classes in France.

Misreading the sentiment for a restoration, all three of the royal pretenders doggedly pursued this course of political self-immolation, and the movement for restoration instantly faded.

Thiers was a dedicated republican. Having seen one restoration erode from within, making it ripe for the toppling which occurred in the wake of the 1848 revolutions which swept Europe, he was now determined to take the best of the Second Republic and build a new, stronger Third Republic.

As Thiers was oft to state, “republicanism is the form of government which divides France least”.

Thiers knew that only through order and a genial peace with Prussia could France move forward. Foremost, the raging, time-consuming debates, so prevalent in the Assembly during the balmy, pre-war era of the Second Republic, had to be suppressed, else Thiers’ entire legislative program would wither through the summer.

This was problematic. Deliberative bodies had been held sacrosanct in the western world, and no successful effort had ever been made toward limiting debate within them. It was commonly held among parliamentarians that to do so would strip such bodies of their essential character, and thus render them as less than the lofty, austere bodies, which they believed themselves to be.

And, it was amidst all this, that under the leadership of Thiers, the notion of the “cloture” – the French translation of the Latin *clausura*, literally “a closing,” was devised, as a compromise between a truly deliberative body and a merely dilatory one.

In an instant, the French National Assembly – that most renowned haven of abuse – had invented a method by which a majority could retain its deliberative nature, yet provide for a method by which a “time certain” could be established to bring a matter to a vote, ongoing debate notwithstanding.

It was a move by Thiers of such profound parliamentary implications that news of it rapidly swept throughout Europe, and even beyond to the United States.

The concept of a means of forcing an end to debate in a deliberative body was, if nothing else, an intriguing, if not enticing notion – that a deliberative body *could* retain its most cherished property, yet, at the same time, incorporate an emergency provision allowing the body to set a time for a matter under debate to be voted, thus shutting off the debate of opponents.

This delicate balance, which had proved so elusive for centuries, was now within the grasp of parliamentarians in every upper chamber of Europe and beyond.

For Thiers, it proved vital toward the formation of the French Third Republic in 1875.

The French experiment of cloture dominated conversations in every parliamentary body in Europe, the United States and Canada.

## Prussia and Austria Hungary

It was not long before others followed the French example. Prussia incorporated this invention by its defeated foe into its own assembly in 1873, as Kaiser Wilhelm I viewed it as a healthy check upon debate, which ventured into such unsavory topics as the various benefits of democracy, socialism or communism.

Next, it was embraced by the Austrian National Assembly, Emperor Franz Joseph following the lead of Prussia, as he was so often inclined to do.

## British House of Commons

Through the balance of the 1870's, discussions of the cloture were rampant within the British House of Commons, this unique parliamentary body which held the overwhelming share of legislative power, and yet held all the properties of liberal debate of upper houses – an uncommon mixture, to be sure, of a lower, representative house. And, as in every deliberative body, the House of Commons experienced its share of extended debate for purposes of avoiding a vote on a pending question, called “talking a bill out.”

Yet what had evolved in France, then Britain, established a template which was to follow in the United States and elsewhere – that cloture has most commonly been adopted in times of parliamentary crisis.

This was the era of the great parliamentary jousts between Benjamin Disraeli and his Conservatives *versus* William Gladstone and his Liberals. From the late 1860's, throughout the 1870's, these giants had dominated the politics of Britain.

In 1881, the House of Commons was embroiled in yet another of a series of debates over “the troubles,” as they had come to be known, in Ireland. Britain's ill-conceived plan to supplant the Roman Catholic Church in Ireland with a state-run Church of Ireland had been a supreme failure.

The oppressive owner/tenant laws, compounded by the famines, had reduced the Irish to a state of generational poverty, with thousands emigrating to America. Of those who stayed behind, many took up arms for the Irish Republican cause, engaging in a guerilla style of fighting designed to demoralize the ruling Anglo-Irish and the British troops stationed to maintain order.

Even amongst the highest social circles of London, the state of the people of Ireland was proving a scandal, and an embarrassment to every postulation of the Empire as a benign exporter of genteel civilization.

The desperation of the Irish could no longer be hidden behind the fiction of Anglo-Irish rule. Irish Republicanism was flourishing. And now, at last, it had a leader in a position to give voice to the cause of Irish home rule – one residing within the most august parliamentary body of the western world.

Charles Parnell, the leader of the Irish Nationalist Party in the House of Commons, kept the House in constant uproar, utilizing long debates and dilatory tactics, all designed to force the Commons' hand and grant home rule to Ireland. Even when arrested and jailed, Parnell did not lose his seat, and his popularity reached zenith.

It was within this atmosphere that Prime Minister William Gladstone's Liberal government assumed power for the second time, Gladstone having previously served as Prime Minister ten years before. Gladstone was somewhat sympathetic to the Irish Republican cause, yet his higher devotion was to the Commons, and he viewed the tactics of Parnell and his followers as near treasonous.

In his four volume *A History Of The English-Speaking Peoples*, Winston Churchill labeled Parnell as "having acquired a hatred and contempt for English ways and institutions," and further quoted an unnamed member of the Commons as saying of Parnell, that "dealing with him was like dealing with a foreign power."

Gladstone's Liberals had already been in discussions regarding the desirability of incorporating cloture in the Standing Orders (rules) of the Commons. But, even among British parliamentarians opposed to the Irish Republicans, the thought of introducing cloture was odious. Yet, the idea gained more and more attention, and sooner than most realized, outright support.

The catalyst came in early 1881, over the Coercion Bill, a measure which would enable the Viceroy of Ireland to arrest and jail anyone in Ireland, at any time, and without trial or due process, for any reason he felt warranted a charge of treason. The legislation was so volatile that even its own sponsor, William Edward Forster, stated that offering it was "the saddest duty of my life."

On February 2, 1881, after forty-one hours of continuous debate by Parnell's Irish nationalists, the Speaker of the House, Henry Brand, took the unprecedented step of suddenly and unilaterally interrupting the debate with his own motion to adjourn, followed by his decision that the House stood adjourned.

The uproar which followed was predictable, and resounded from all corners of the House. By custom and tradition, the Speaker did not make motions. He rarely spoke, except on matters of order and procedure. Upon his selection, he formally resigned from his political party. He did not vote, except in cases of a tie. Since 1858, he had even been provided a spacious, well-appointed house on the grounds of Westminster, a physical symbol of his supposed detachment from the political maneuverings within the Commons.

For a Speaker to take the action Henry Brand did on that day was cause for grave concern. But, few were privy to the motive which lay behind his actions. They were a deliberate maneuver, exercised to serve as a gateway for a higher mission Gladstone had in mind.

It was a tactic designed to allow Gladstone to intervene a few days later, with a proposed change in operating procedure, by allowing a majority of the House to move for "closure," to shut off debate or to set a time certain for a vote on the question before the House. Given the choice between allowing the Speaker such power or holding it within the province of the body, the House engaged in heated debate, some over the matter of whether the motion should retain the French "cloture," or the English derivation, "closure," of similar etymology.

*Hansard's Parliamentary Debates* records, perhaps, the most succinct argument for the new procedure, as stated in debate by Liberal Member John George Dodson:

"...They [the opponents] have heard that the effect of the Resolution [proposing closure] will be the suppression of free speech, and that the proposed Rule is not intended to defeat Obstruction, but to put down

opposition. There is a confusion of ideas in the minds of hon. Members opposite. The freedom of speech which their ancestors asserted, the freedom of speech which has been inherited from them, the freedom of speech which the Speaker claimed at the beginning of a new Parliament, is the privilege and the right of the House to discuss any particular subjects it sees fit; and the right of Members in discussing these subjects, to express opinions freely, without fear of consequences. But this freedom of speech is not unrestricted loquacity. The right of speech is exercised, and always has been exercised, subject to Rules, conditions, and limitations imposed by the House itself and have varied from time to time. There are Rules which prevent a Member from bringing forward a subject at all under certain conditions. The Rules as to Adjournment and the Halfpast 12 Rule have that effect. Mister Speaker, they were not shocked at such Rules as those; but, the House is shocked at a minor proposition to close a debate on a subject after it has been fully and exhaustively discussed...In every practical Assembly—in every Assembly which pretends to be more than a debating club—there must be a time when discussion must cease, and the judgment of the House be ascertained with certainty, and expressed with authority. That is the object of this Rule—to secure that power to the House...The truth is that this Resolution was necessary to enable the House to get through the multiplicity of its own Business, and to become master of its own time...”

When finally a vote was taken, Gladstone’s proposal for the inclusion of the motion of “closure,” was adopted.

With the addition of Great Britain to the roster of those parliamentary bodies which had adopted a means of shutting off debate, either immediately or through a mechanism to establish a time certain for debate to end on a question, serious consideration reached across the Atlantic, felt not only in the Canadian House of Commons and the United States Senate, but in some upper houses of the various provinces and states of Canada and the United States as well.

### **The United States and Canada**

Forces within the United States Senate tried on at least four occasions to restore the previous question to the Senate Rules, having witnessed its effective usage in the United States House of Representatives, and sorely regretting that the Senate had omitted the motion in 1806. But, as has been stated herein, the usage of the previous question in 1806 was entirely different in intent from what it later became, and besides, the parliamentary aberration of the filibuster did not become a noticeable incubus until the 1830’s, when sectional strife and complicated matters attendant to President Jackson’s establishment of the Federal Reserve evolved as the country expanded westward and, thus, the federal Executive and Legislative branches inherited far greater responsibilities than in the simpler, cozier days of the original states.

Yet, even as each successive decade evinced successive filibusters, soliciting enough support for cloture within the United States Senate remained unrealized throughout the 19<sup>th</sup> Century and into the early 20<sup>th</sup> Century.

The philosophy of the deliberative body, with liberal debate, remained such cherished characteristics of the Senate, that even when forced to withdraw desired legislation, due to escalating use of the filibuster, the tug of this historical “ideal” prevailed among the Senators. The reality of the retreat of the majority became a necessary risk, not a crisis, and the United States Senate clung to its noble calling, long after the more ancient bodies of Europe had yielded to the cloture compromise.

But, as has most often been the case, it would indeed take an imminent crisis before adoption of cloture (or closure) would be seriously considered by a majority of lawmakers in Canada and the United States.

In the Canadian House of Commons and the United States Senate, such a crisis would manifest itself as a world war.

### **Canadian House of Commons**

By the second decade of the 20<sup>th</sup> Century, Canada was the first to reach what Churchill, no admirer of closure, called “that breach of parliamentary tradition.”

It came in May 1913, when debate roared in the Canadian House of Commons over the Naval Aid Bill, that proposal of Prime Minister Robert Borden’s Conservative government which would appropriate upward of thirty-five million dollars for the construction of battleships and heavy cruisers, “to be placed at the disposal of His Majesty’s government.”

With pressure increasing from Westminster, Borden could not shrink. The crisis had come, and on May 2, 1913, the Conservatives adopted the “closure” as used in the British House of Commons. Though temporarily a Pyrrhic victory for the advancement of the bill (it would be defeated by the Senate two weeks later), Borden and the Conservatives had installed a tool to be utilized, albeit judiciously, to allow the majority in the Commons to work its will.

### **United States Senate**

Four years later, with the Great War well ongoing and Germany openly threatening American vessels bound for England, a filibuster in the United States Senate tipped the scales, rendering the noble ideal of the august, deliberative Senate, subordinate to the welfare of the nation.

The occasion was debate upon a bill, strongly desired by President Woodrow Wilson, which would allow United States merchant vessels to be armed.

A clear majority of Senators was strongly in favor of the bill, but it was opposed by one of the most formidable liberals of the day, the legendary Robert LaFollette of Wisconsin. With only a small group of devout followers, Senator LaFollette, who felt that the President was mistakenly leading the country into the war, was able to render the Senate helpless for twenty-three straight

days, and the bill eventually died in the grips of the filibuster, as the regular session of Congress adjourned.

Enraged, President Wilson was able to capitalize on increased public outrage toward the sinking of American ships by those early German U-boats. In a speech given widespread publication, the President openly attacked the institution of the Senate in a statement that would reverberate across the country, and become enshrined in American history as the words which finally forced the Senate to seriously consider its rules of debate:

“The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered this great Government of the United States helpless and contemptible.”

Days after, Senate Majority Leader Thomas Martin (D-Virginia), fellow Virginian and longtime friend of the President, called a special caucus meeting and announced that he would be introducing a binding resolution to amend the Rules of the Senate – meaning that all Democratic Senators would be bound to vote for it.

On March 5, 1917, President Wilson, assured by Majority Leader Martin of adoption of a cloture procedure, called an Extraordinary Session of the Congress to consider a declaration of war against Germany.

On March 8, Senator Martin offered a resolution, to incorporate the cloture rule by amending Senate Rule XXII (Precedence of Motions) by adding the following language:

“Provided, however, That if at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any pending measure, is presented to the Senate, the presiding officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and upon ascertainment that a quorum is present, the presiding officer shall, without debate, submit to the Senate by an aye-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?' And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of. Thereafter no Senator shall be entitled to speak in all more than [one] hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the presiding officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory amendment, or amendment not germane, shall be in order. Points of order, including question of relevancy, and appeals from the decision of the presiding officer, shall be decided without debate.”

The Martin Resolution was adopted, 76-3.

The first use of cloture in the United States Senate came in 1919, during a filibuster on the question of ratification of the Treaty of Versailles.

This Rule would remain in effect until 1949, when it was again amended to make the vote for adoption of cloture “two-thirds of the Senators sworn.”

In 1959, faced with growing discontent of the cloture rule, Senate Majority Leader Lyndon Johnson offered an amendment to the rule, which was adopted, which changed the vote for adoption of cloture back to a simple two-thirds.

In 1975, the rule was again amended, and as it stands today, requiring a “three-fifths vote of the Senators sworn” for adoption (60 affirmative votes).

### **The Alabama Senate**

Twenty-three years before the United States Senate first adopted a cloture rule, the Alabama Senate adopted its cloture rule, utilizing a different formula for establishing a time certain for debate to cease and a vote be taken on the pending question.

As has been stated, most cloture rules are adopted in deliberative bodies in the face of a crisis. This proved true in Alabama, though the Alabama Senate had been the scene of a multitude of colorful debates since the first session in 1819.

It was not until after Reconstruction that the Alabama Senate included any time limitations on debate. Until that time, debate was unlimited, as in the United States Senate.

With only a singular exception, the rules adopted in each session of the Alabama Senate in the last quarter of the 19<sup>th</sup> Century, limited Senators to two (2) opportunities to debate, limited to thirty minutes each time.

Still, even with this limitation, only a small number of Senators were needed to engage in a filibuster, each rotating in debate twice each, then the offering of amendments, with the rotation beginning anew.

But, by the late 1880's, a crisis developed, of the nature feared most by the leadership of the Alabama Senate.

In Alabama, the crisis at hand was the growing Agrarian movement, calling themselves Jeffersonian Democrats, combined with a similar, yet separate, Populist Party.

The “Bourbon Democrats” who had captured the elections of 1874, witnessed the withdrawal of Union occupational troops, and who crafted the Constitution of 1875, were embarked upon the goals of making the state solvent again, capitalizing upon the growth of the Gilded Age and, most importantly, entrenching themselves again as the ruling class, as they had been in the antebellum years. Dominated by the wealthy, educated land-owning class, they knew the ways and means of securing power and steering the state toward eventual prosperity.

But, all did not benefit from Bourbons, and this was problematic for the Bourbons, as the small farmers of the state represented the single largest voting bloc, yet lived in an increasing condition of penury.

Agriculture had always been the bedrock of Alabama's economy, and even with the emergent industrial growth of the post-war era, this fact dominated even the social and cultural fabric of Alabama.

Indeed, the overlapping-year sessions of the General Assembly were established for agricultural reasons. From Alabama's origin as a state, almost every Representative and Senator was tied to agriculture.

Even in the Senate, where attorneys were found in larger number, the practice of law rarely provided enough money, and most attorneys who served in the Alabama General Assembly, also farmed.

It was for agricultural reasons that sessions of the Assembly began in November, after the fall harvest, and ended in January or early February, well ahead of spring planting. It would not be until 1903 that the Legislature's session schedule was changed to begin in May.

Such was the fabric of agriculture in Alabama, and no group had a more profound impact on the economy than the small farmer. When the small farmer prospered, so too did many others. When he experienced hard times, others likewise suffered.

The small farmer was well aware of his dismal prospects, and unlike his kind as evidenced in the old peasantry of so many class-bound European countries, the farmer in Alabama knew something could be done to better his circumstance, and he was not reticent in laying his discontent upon the doorstep of the Bourbons.

Thus emerged the Agrarian coalition in Alabama.

The Agrarian movement had been slow to develop, as small farmers in the 1870's forward, realized that while several other interests were prospering, notably the growing labor force in Birmingham, as well as merchants of varying goods, the small farmer appeared to be experiencing retrogression in income.

The Agrarian interests were, for a considerable period, up to the early 1890's, divided into various groups, notably the "Grange," which was proving to be a powerful force throughout the South. Others belonged to the second largest group, the "Farmers Alliance." Yet, while the grievances of the small farmer were real enough, their division and lack of leadership in those decades rendered them relatively powerless at the ballot box.

Finally, in the late 1880's, the Agrarians gained a leader, though a seemingly unlikely personage for that assignment.

Reuben F. Kolb hailed from Barbour County, his late mother having been from the very prominent Shorter family. Kolb's uncle was former governor John Gill Shorter. Kolb had distinguished himself as a leader in the Confederate Army, and served as Alabama's first

Commissioner of Agriculture & Industries. He prospered as a farmer, and commanded all the characteristics of the quintessential Bourbon Democrat.

Yet, something had happened to Kolb during his experiences. He saw the condition of the poor farmer, and wanted to right it. Kolb possessed a unique desire to help the less fortunate. Never content to live a leisurely life and indulge in the luxury fortune had dealt him, Kolb burned with a passion to lift up the least of those in Alabama.

In 1890, he advanced himself as a candidate for governor, but his views being anathema to the Bourbons, Kolb was ignored at the state convention.

He was, however, highly popular among farmers.

In 1892, when Kolb tried again for the nomination for governor, and once more was passed over, he publicly quit the Democratic Party and ran for governor as a Jeffersonian Democrat, carrying with him many Agrarians who ran for seats in the General Assembly (which, in 1901, was officially entitled the Legislature).

Amidst charges of corruption, Kolb lost by less than 10,000 votes. But, several Agrarians who ran as Jeffersonian Democrats fared better. An incredible seven were elected to seats in the Alabama Senate.

This was more than symbolic to the ruling Bourbons. The presence of seven Agrarians in the Alabama Senate, with Reuben Kolb guiding them behind the scene, vexed the leadership of the Senate. A body composed of thirty-three members could be disrupted by seven virulent opponents of any legislation desired by the Bourbon Democrats.

When the General Assembly convened in November 1892, the Bourbon leadership, who held an overwhelming majority to select officers and adopt the Rules of Procedure, was forced to examine the Senate Rules, which had been adopted again and again for many years.

The Bourbons could control the committees and the flow of legislation, but the rules governing debate had to be addressed. Since the 1870's, the Senate Rules had allowed each member to speak on a debatable motion no more than twice and no longer than thirty minutes at a time.

With seven avowed enemies, suspicion of filibusters were well-founded, and the leadership took the expedient of crafting rules which limited Senators to no more than five minutes of debate at a time. It was a temporary solution that prevented crippling filibusters, but at the same time, frustrated fellow Bourbons who wished to indulge in the flowery oratory to which they had long been accustomed.

But, if there was hope among the Bourbons that the Agrarian movement would quickly fade, the elections of 1894 proved worse. True enough, Kolb lost yet another close race, attended by the same charges of corruption, particularly at the polling places, which were governed entirely by local Bourbons.

Kolb never had a chance, but the legislative elections resulted in an increase of Agrarian Senators to nine. If the Bourbon leadership was vexed before, they were near panic in the fall of

1894. The old method of limiting debate time was not workable, considering their fellow party members found it undesirable.

And, then, they shifted their focus from preventing filibusters to finding a method to put them down once they inevitably began. There was no doubt that with the educated Kolb orchestrating their actions, filibusters would erupt on every Bourbon piece of legislation.

While settling on restoring the traditional thirty minutes of debate allotted per speech, the Bourbons were now prepared to prepare a mechanism through which they could adopt cloture.

Eschewing simple motions or, worse, common petitions, the Bourbons devised a rule, the core of which has been retained in the Senate Rules to this day.

The method chosen was to use the Rules Committee, and for the first time in Alabama history, the Senate had adopted a cloture rule:

“Rule 32. The committee on rules may at any time report a special rule that debate on a pending measure shall cease at a certain hour, and a vote be taken on the measure. The consideration of such special rule shall not exceed thirty minutes, when a vote shall be taken thereon.”

The rule was perfect for the Alabama Senate. It retained the thirty minutes granted per speech; it provided not only a method to shut off debate in the event a filibuster may emerge, but also allowed the Senate to decide on a time certain for a vote on a pending measure under debate; and, it retained the essential property of the Senate as a deliberative body.

Surprisingly, no need arose for its use against a filibuster in that biennial session. Somehow, both sides were able to tolerate the other, with occasional agreements and compromises. And, even on those days when a filibuster might appear to begin, the Agrarians would retreat before the rule could be used against them.

But, the cloture rule was retained in successive sessions, although its language would gradually be amended and expanded.

The first use of the rule came in the session of 1898-99, when Populist Party Senators had joined those Agrarians of the Jeffersonian Democratic Party still in the Senate, to engage in a filibuster over a resolution making the bill, which would call for a constitutional convention, a special order for the next day.

It would be a constitutional convention these Senators knew would be dominated by Bourbon Democrats, and they feared what kind of organic law might replace the relatively benign, enfranchising Constitution of 1875.

The Senate Journal reveals the first ever report of the Rules Committee, pursuant to Senate Rule 32, in response to a filibuster on the resolution:

“TWENTY-FIRST DAY  
Friday, December 9th, 1898

AFTERNOON SESSION

REPORT OF THE COMMITTEE ON RULES

Mr. Matthews, from the Committee on Rules, reported a special rule as follows:

To the Senate of Alabama:

Your Committee on Rules recommend that a vote be taken not later than 4 p. m. today on the pending question, to-wit:

The resolution making Senate bill No. 162 a special order for Saturday, December 10, immediately after the call of districts.

R. W. Cunningham,  
W. H. Matthews,  
W. D. Jelks

The Report was concurred in and the rule adopted.

On motion of Mr. Moody the vote by which the rule was adopted was reconsidered.

Mr. Boykin offered an amendment as follows:

Amend by striking out Saturday, the 10th *inst.* and insert in lieu thereof Monday, the  
12th.  
Which was lost. Yeas, 15; nays, 16.

Yeas:

Messrs. Boykin, Brown, Buchanan, case, Deans,  
of Shelby, Deens of Covington, Grant, Hall,  
McCain, Moody, Rather, Sowell of Walker, Stevens,  
Thomason, Windham—15

Nays:

Messrs. President, Brooks, Caffee, Horton, Jelks,  
Jenkins, Lee, Lyons, Matthews, Meador, Moore,  
Nunnellee, Pulley, Sowell of Limestone, Thompson, Wiley--16

And the rule was adopted.”

One need only examine the Senate Journals for the sessions ensuing over the years in order to see that the cloture rule was rarely employed until shortly after the Second World War, when legislation enlarging the role and scope of government would be before the Senate. Then, the number of cloture votes increased, decade by decade.

The rule establishing cloture in the Alabama Senate, and first adopted in 1894, would remain unchanged, until 1951, when the vote for adoption of the special rule was changed from a simple majority to two-thirds of the elected members of the Senate.

In 1975, the rule was enlarged to include a petition from the floor, as well as a report from the Committee on Rules, to-wit:

“Rule 21. The Committee on Rules may at any time report a special rule that debate on a pending measure shall cease at a certain hour and a vote be taken on the measure. In addition thereto, a petition signed by eighteen or more senators to the effect that debate on a pending measure shall cease at a certain hour and a vote be taken on the measure, filed with the Secretary while the Senate is in session, shall have the same effect as a report of the Committee on Rules regarding debate. The consideration of such special rule shall not exceed thirty minutes, when a vote shall be taken thereon; and, if two-thirds of the members elected shall vote to limit debate, then said rule shall have been adopted by the Senate.”

In 1991, the rule was again amended, changing the vote for adoption of the special rule from two-thirds of the elected members, to three-fifths of the elected members, whether such special rule is proposed by the Committee on Rules or by petition.

In 2003, the rule was amended, raising the number of names required on a petition from eighteen to twenty-three.

In 2007, the rule was amended, lowering the number of names required on a petition from twenty-three to twenty-one, and adding other voting threshold language as can be found in the current rule.

In 2011, the rule was amended, reducing from thirty to twenty minutes the amount of time for consideration of the proposed special rule, but retaining other voting thresholds added in 2007, to-wit:

“Rule 20. The Committee on Rules may report a special rule that debate on any measure shall cease at a certain hour and a vote be taken on the measure. The consideration of such special rule shall not exceed twenty minutes, when a vote shall be taken thereon; and if three-fifths of the members elected shall vote to limit debate, then said rule or petition shall have been adopted by the Senate. However, such consideration of a special rule dealing with only the Special Education Trust Fund Budget and/or the General Fund Budget and their related appropriation bills and/or a bill to redistrict the Alabama Legislature and/or Alabama Congressional Districts shall only require 18 affirmative votes to enact

such special rule from the Senate Rules committee to limit debate. In addition thereto a petition signed by twenty-one or more Senators to the effect that debate on a pending measure shall cease at a certain hour and a vote be taken on the measure filed with the Secretary while the Senate is in session, shall have the same effect as a report of the Committee on Rules regarding debate. This petition shall be an official time/date stamped petition secured from the Secretary of the Senate for circulation for signatures and this petition shall not be released by the Secretary until the measure has been considered for at least twenty minutes. Said petition shall be considered only for the legislative day it was issued. However, on the 30th legislative day the time requirement of waiting twenty minutes before considering a petition to limit debate shall not be applicable. The consideration of such special rule shall not exceed twenty minutes, when a vote shall be taken thereon; and if three-fifths of the members elected shall vote to limit debate, then said rule or petition shall have been adopted by the Senate.”

It is important to note that the cloture rule in the Alabama Senate is necessarily tied to the Rule 39(a), which identifies those motions upon which “full debate” applies:

“Rule 39. (a) No member shall speak more than twice on any question under debate and none shall, without leave of the Senate, speak for more than one hour at each time on motions for the adoption of an amendment to a bill or substitute, a substitute to a bill, the bill itself, motions to concur or non-concur, including a motion to non-concur and request a committee on conference, or motions to confirm an appointment. Debate on resolutions and debatable motions (other than those above), shall be subject to a reasonable time limit not to exceed fifteen (15) minutes. The originator of the pending question, or the Chairperson of the Committee reporting the measure, shall have the right to conclude the debate.”

In addition, by precedent of the Senate, other motions which fall under “full debate” provisions (twice/one hour each time) of Rule 39(a) include a motion to “re-pass a bill, the governor’s objections to the contrary notwithstanding” (override veto).

As evidence of the increased number of filibusters and the use of cloture to end these in the Alabama Senate, it is noteworthy that in the 2011 Regular Session of the Alabama Legislature, March 1 through June 9, there were forty-four (44) reports from the Rules Committee, pursuant to Senate Rule 20, seeking cloture. Of that number, thirty-nine (39) were adopted and debate ceased at the time certain indicated in the Rules Committee Report.

This was more than twice the number of cloture votes taken in the 2001 Regular Session.

The increased number of cloture votes in the Alabama Senate can be charted with the rise of the two-party system in the Alabama Senate. In the 2010 elections, the Republicans, who had been growing in number in the past decade, captured a majority in the Alabama Senate, for the first time since Reconstruction (1867-1874).

Combine the evolution of the two-party Senate with Alabama's tradition of frequent filibusters, and the increased number of cloture votes is not surprising.

Likewise, when one considers the rich history of extended debate in the Alabama Senate, it is not surprising that the Alabama Senate was one of the first (if not the first) upper chambers among the state legislatures to adopt cloture, and less surprising that the filibuster and cloture have remained continuing and vital elements of procedure in the Alabama Senate.

Since incorporating cloture into its rules 117 years ago, the Alabama Senate has experienced many filibusters and attempts, both successful and unsuccessful.

The filibuster and use of cloture are such a part of the Alabama Senate that it is difficult to imagine the body without them.

### **Summary**

The history of deliberative legislative bodies is an evolutionary examination of the ideal of liberal debate, and the efforts by legislators to stem human nature's inclination to pervert the ideal for purposes of political expediency.

The sensitive balance between the ideal and the human ability to maintain it has been a struggle since the era of the Senate of the Roman Republic. For every Cicero, there is a Cato.

Combined with the fact that legislative bodies are the incubators of compromise between forces colored by interests, region, political party, political philosophy, and, often, self-interest, the proclivity to set aside the ideals of deliberative bodies in pursuit of less noble goals will forever be irremovable elements of procedure.

Thus, the realization of this fact made cloture inevitable and necessary, and the question has never truly devolved as to whether the concept of cloture is good or bad.

Human nature necessitates cloture. Yet, our spiritual desire to aspire to noble ideals will provide those qualities which enable us to make sound decisions as to the judicious use of cloture.

And, therein lay the keys to the pursuit of the ideal of liberal debate, and the sober judgment necessary for maintaining the orderly process. It is the combination of these, which results in the very environment within which all great compromises are born, and all sound legislation created.

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