

Pro-con: Was change to filibuster rules justified?

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For five years, Senate Republicans have refused to allow confirmation votes on dozens of perfectly qualified candidates nominated by President Obama for government positions. They tried to nullify entire federal agencies by denying them leaders. They abused Senate rules past the point of tolerance or responsibility. And so they were left enraged and threatening revenge on Thursday when a majority did the only logical thing and stripped away their power to block the president's nominees. From now on, if any senator tries to filibuster a presidential nominee, that filibuster can be stopped with a simple majority, not the 60-vote requirement of the past. That means a return to the democratic process of giving nominees an up-or-down vote, allowing them to be either confirmed or rejected by a simple majority. The vote was long overdue and necessary to turn the Senate back into a functioning legislative body. – New York Times

The rewriting of filibuster rules by Senate Democrats changed the legislative body in fundamental ways, and for the worse. Republicans whose unjustified recalcitrance provoked the change should be ashamed. Democrats who are celebrating will soon enough regret their decision. The radical action, a product of poisonous partisanship, will also be an accelerant of poisonous partisanship. We believe a filibuster should be rarely invoked. But now that it is not an option, the result is likely to be that the partisanship of Congress will seep increasingly into the judiciary, as presidents feel no obligation to search for balance or moderation in their nominations. The Democratic action also sets a precedent that a future Republican majority will use to change procedures when it gets into a political jam, rather than negotiate with Democrats. The logical outcome is a Senate operating more like the House, with no rights for the minority, no reason for debate and no incentive to cooperate. – Washington Post

Read more here: <http://www.kansas.com/news/local/news-columns-blogs/article1128250.html#storylink=cpy>

Why the nuclear option is justified, and why the Democrats should go the whole hog

July 12, 2013 By [Mark Kleiman](#) @markarkleiman

Senate Republicans have decided to use the power of the filibuster to make it impossible for the President to fulfill his sworn duty to "take care that the laws be faithfully executed." They don't like the law creating the Consumer Financial Protection Bureau, so they're promised to block a vote on any nominee to head the Bureau until the law is rewritten to their specifications. They dislike the idea that workers might be protected from arbitrary actions of their employers, and have refused to allow votes on the confirmation of members of the National Labor Relations Board; save for the President's recess appointments – under court challenge – that agency could not function at all, which would deprive workers any avenue to vindicate their legally guaranteed rights.

It now appears that Republican obstructionism has gotten to the point where even some of the old Senate bulls on the Democratic side have decided to give partisanship and patriotism priority over institutional pride, and allow Harry Reid to move forward with the "nuclear option" the Republicans threatened to use against judicial filibusters in 2005.

There's no polite way to put this: the nuclear option is cheating. The Senate rules, adopted at the beginning of each session, provide that the filibuster rule can be changed only with a 67-vote super-majority. Adopting such a rule is within the constitutional powers of the Senate. (There's a claim that since the Senate is a "continuing body," with only a third of its membership replaced each session, the old rules are binding on the each new Senate, the old rules remain binding on each new Senate, but that interpretation would give a transient Senate majority the power to permanently alter the Constitution, which can't be right.) So there's no way, within the rules of the Senate, that the Democrats can impose majority rule in mid-session. But (as the Texas Senate Republicans just demonstrated in the Wendy Davis abortion filibuster) any ruling of the chair, no matter how transparently wrong, can be sustained by a simple majority. And that's Reid's plan. He's going to propose a rules change, Joe Biden as the President of the Senate is going to over-rule clearly valid Republican procedural objections, and (apparently) there are going to be 50 votes plus Biden's casting vote to sustain that false ruling. Hey, presto! No filibuster for Executive-Branch nominees.

Is the cheating justified? I think it is. When a minority abuses its procedural rights with the stated intention of making it impossible for the government to function as the laws provide, there's a strong case for extraordinary measures. Such measures should not (in Jefferson's words) be undertaken "for light and transient causes;" a functioning republic of shared and divided powers, such as the one the Framers left us, depends on habits of forbearance among political actors: the prudent refusal to press every possible advantage to the maximum. But ever since the Gingrich Revolution, an increasingly insane Republican Party has prided itself on its lack of such forbearance, most recently demonstrated by the decision of a one-vote Republican majority on the Supreme Court to gut the Voting Rights Act. At some point, the Democrats need to play "tit for tat."

Naturally, Republicans threaten retaliation. If the Democrats act now to make Executive Branch nominations confirmable by a simple majority, they will do the same, should they ever regain a majority, with judicial nominations and ordinary legislation. I say, "Bring it on!" in the long run, the progressive cause is strengthened by having fewer veto players.

It's understandable that some Senate Democrats want to solve the current crisis with as little damage as possible to their own power and that of their successors. That's why Reid plans to move ahead with a rules change covering executive nominations only. But the Republican threat of retaliation – the one sort of Republican utterance that is invariably sincere – makes the proposed strategy of limited rules change incoherent. Since the Republicans will retaliate against a limited rules change with a comprehensive rules change, Democrats will never again get any benefit from being able to use the filibuster. So, in a rational world, having been forced to use the nuclear option to move the current batch of blocked confirmations they'd use it on everything at once. There's no point in getting a little bit pregnant.

Alas, Reid seems to have the votes for a partial reform but not for the whole thing. And I think he's right to take half a loaf, if that's all he can get, rather than no bread. But we will all live to regret the Senate Democrats' failure to dare greatly.

Senate approves change to filibuster rule after repeated Republican blocks

Historic rule change means presidential nominees require only a simple majority to proceed to Senate confirmation

Tom McCarthy Thursday 21 November 2013 13.35 EST

The US Senate voted on Thursday to change the rules that have enabled Republicans to block Barack Obama's nominees for top administration posts.

By 52 votes to 48, senators approved along partisan lines a measure that would ban the use of the filibuster to prevent nominees from being confirmed. In a speech in support of the measure, majority leader Harry Reid accused Republicans of blocking nominees in the pursuit of unrelated legislative goals.

"For the first time in the history of our republic, Republicans have routinely used the filibuster to prevent President Obama from appointing an executive team and from appointing judges," Reid said. "The need for change is so, so very obvious. It's clearly visible. It's manifest we have to do something to change things."

Until now, 60 votes have been required to lift or avoid a filibuster. Under the new rules, a simple majority of 51 would suffice. The new measure would not apply to supreme court nominees. "It's an undeniable fact that the obstruction we've seen in recent years is altogether new," Reid said after the vote.

Republicans have used the filibuster three times in November, to prevent confirmation votes on judges nominated by Barack Obama to fill vacancies on the US appeals court for the Washington DC circuit. Reid said that of 128 filibusters of nominees in the history of the Senate, half had occurred during the Obama administration.

In an appearance at the White House Thursday, Obama said he "welcomed" the rules change, which he said was needed to fix an "unprecedented pattern of obstruction in Congress."

"A simple majority vote no longer seems to be sufficient for anything, even routine business, in what is supposed to be the world's foremost deliberative body," Obama said. "Today's pattern of obstruction, it just isn't normal, it's not what our founders envisioned."

Obama said nearly 30 presidential nominees to executive positions had been filibustered during his presidency, compared with 20 such cases previously in history. "In each of these cases it's not been because they opposed the person... it was simply because they opposed the policies the American people voted for in the last election," Obama said.

Reid's move came after months of warnings by the Democratic majority in the Senate that it would resort to a rules change if Republicans refused to allow confirmation votes. As the majority party in the Senate, Democrats would be able to make the change on a strict party-line vote.

Republicans have warned, however, that Democrats may regret the move when they next find themselves in the minority. "Some of us have been here long enough to know the shoe is sometimes on the other foot," minority leader Mitch McConnell said, on the Senate floor. "You'll regret this, and you may regret it a lot sooner than you think."

Chuck Grassley, Republican of Iowa, who has been a senator since 1981, took the Senate floor to condemn the rules change. He quoted Democrats who were opposed to filibuster reform when the party was last in the minority. "Not too many years ago, my colleagues on the other side described their fight to preserve the filibuster with great pride," Grassley said. "Today the other side is willing to forever change the Senate because the Republican have the audacity to hold them, the majority party of today, to their own standard."

Power grab

He said the change would remove "one of the last meaningful checks on the president – any president". He went on: "It is nothing short of complete and total power grab. It is the type of thing we've seen again and again out of this administration and their Senate allies."

Reid acknowledged he was proposing an "important change to the rules of the United States Senate" but said something had to be done to repair the legislative process. "Is the Senate working now? Can anyone say the Senate is working now?" he said. "I don't think so."

Speaking after the vote, Reid said he was comfortable that Republicans would take advantage of the new rules when they were in power. "When the Republicans are in power, these changes will apply to them as well. That's simple fairness."

On the Senate floor, Reid listed nominees whose confirmation votes Republicans had blocked, including defense secretary Chuck Hagel; Richard Cordray, nominated to lead the Consumer Financial Protection Board; Mel Watt, nominated to be administrator of the Housing Finance Agency; and Caitlin Halligan and Patricia Millett, both DC circuit court nominees. In total, Reid said, 75 executive branch nominations had waited an average of 140 days for confirmation.

Republicans block Obama nominees "not because they object to the qualifications, but because they seek to undermine the very government they were elected to serve", Reid said.

McConnell called the suggestion that Republicans had been unduly obstructionist "patently ridiculous in light of the facts, an utterly absurd suggestion, in light of the facts".

"Senate Republicans have been very, very fair to this president," McConnell said.

Bypassing the question of the vacant executive branch positions, McConnell implied that the DC district court did not need a full complement of judges, saying the court was not busy. McConnell compared the proposed rules change to the president's withdrawn promise that, under the Affordable Care Act, consumers could keep health insurance they liked. "He may have just as well have said, 'If you like the rules of the Senate, you can keep them,'" McConnell said.

McConnell said Democrats had pioneered the technique of filibustering presidential nominees during the presidency of George W Bush. "They started it," he said.

Understanding the Filibuster

Purpose and History of the Filibuster

The filibuster was initially conceived of as **a way to ensure that minority opinions were heard and understood** before the Senate voted on an issue. Senate rules first allowed for filibusters in 1806, though the first filibuster actually occurred more than 30 years later, in 1837. They continued to be rare for more than another century.

The idea behind the filibuster was simple: As long as a senator kept talking on the floor, a bill could not move forward. Throughout the 19th century, the Senate left ending the filibuster up to the filibustering senators. When they felt they had been adequately heard, they could give up the floor and allow debate to move on to a vote.

In 1917, at the behest of President Wilson, the Senate adopted a procedure known as the **cloture vote**, which could end a filibuster. If a cloture vote is called for, a super-majority of senators can force an end to debate and bring the question under consideration to an up-or-down vote. Initially, achieving cloture required a vote from two thirds of all elected senators; the number was later changed to three fifths of all elected senators. For the next sixty years, the filibuster continued to be used sparingly.

In 1975, though, the Senate made a change that made it significantly easier to filibuster by adopting rules that allow other business to be conducted while a filibuster is, technically underway. Since 1975, senators have not needed to stand up on the floor and make their case to their colleagues and their constituents in order to halt legislation. Instead, these “**virtual filibusters**” can be conducted in absentia.

Use of the Filibuster

The filibuster has been used **1,300** times since 1917. However, the vast majority of those filibusters have taken place in recent years.

Filibuster use began to increase dramatically in the 1970s. Even so, there still had only been a grand total of 413 Senate filibusters by 1990. Over the last 12 years, however, the filibuster was used nearly 600 times!

These filibusters aren't just being used to extend debates or stall votes—today, **senators filibuster motions to proceed, preventing bills from being debated at all**. A device intended to promote comprehensive discussion has turned into a tool to keep ideas from even being heard.

Effects of the Filibuster

Even with the 1975 rules change allowing the Senate to conduct other business while a filibuster is underway, every filibuster kicks off a complex set of Senate procedures that can **bring the Senate to a halt for up to a week** and prevents other critical issues from being addressed.

Filibusters on motions to proceed **prevent the Senate from even being able to consider ideas** for how to solve our country's big problems. For years now, small numbers of senators representing as little as 11% of the country have kept the Senate from even discussing important legislation that has passed committee review.

Virtual Filibusters allow small numbers of senators to **effortlessly place personal political agendas above the work of government with no consequence**. As a result, even routine Senate functions like approving executive appointees get mired in partisan politics, resulting in **85 vacancies on federal judiciary benches**. Major pieces of legislation, including a bill that would have provided medical care for 9/11 responders, have enjoyed majority support in the Senate yet died in the face of filibusters for lack of cloture.

Legislation that should pass into law has been canceled and courts have been thrown into disarray, but the senators who have helped make that happen have never needed to actually make a case to their colleagues or their constituents.

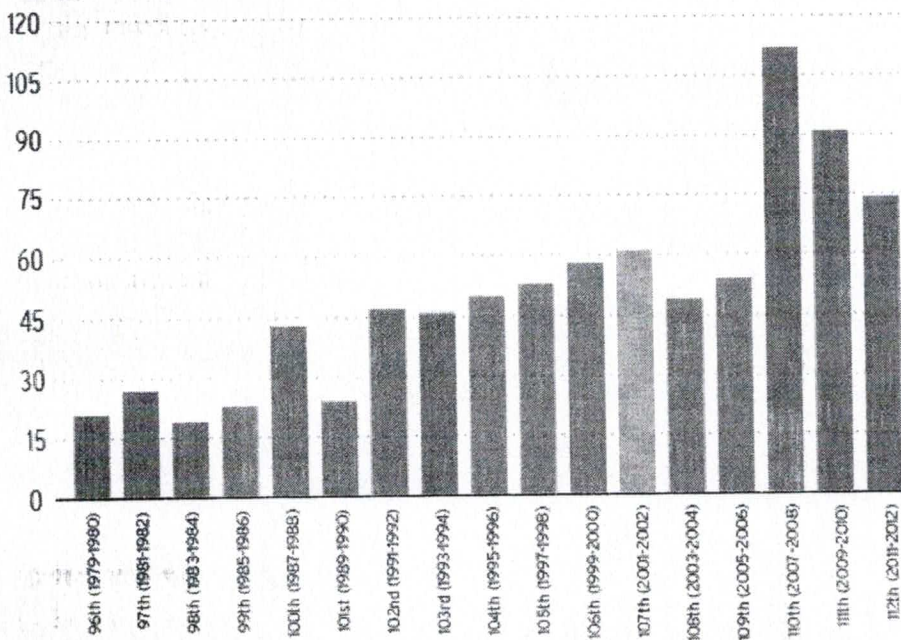
Written by Rick Barry

Attempted Senate cloture votes, 96th - 112th Congress (1979 - 2012)

Bars are colored according to the **minority** party - blue for Democrats, red for Republicans

Avg. cloture votes when **REPUBLICANS** are in minority: **57.25**

Avg. cloture votes when **DEMOCRATS** are in minority: **41.63**



BROOKINGS

Nine reasons the filibuster change is a huge deal

By Ezra Klein November 21, 2013

1. The change the Senate made today is small but consequential: The filibuster no longer applies to judicial or executive-branch nominees. It still applies to bills and Supreme Court nominations.

Goodbye, filibuster. (Kevin Lamarque/Reuters)

2. Well, technically it still applies to all bills and Supreme Court nominations. In practice, legislation that mainly uses the government's tax and spending powers can evade the filibuster using the budget reconciliation procedures. That's how George W. Bush's tax cuts passed, and how Obamacare was finished. As for the Supreme Court, it's very hard to believe that Democrats or Republicans would accept filibusters of qualified Supreme Court nominees, either. And, as Democrats proved today, they don't have to.

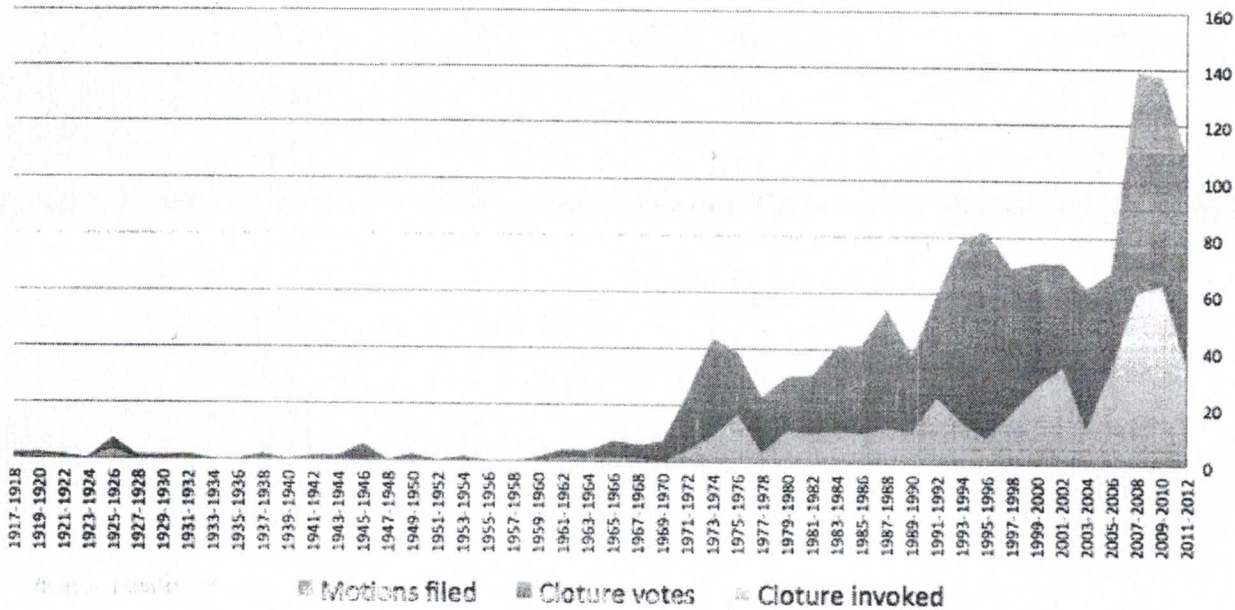
3. The filibuster now exists in what you might call an unstable equilibrium. It theoretically forces a 60-vote threshold on important legislation. But it can — and now, in part, has — been undone with 51 votes. Its only protection was the perceived norm against using the 51-vote option. Democrats just blew that norm apart. The moment one party or the other filibusters a consequential and popular bill, that's likely the end of the filibuster, permanently.

4. The practical end of the Senate's 60-vote threshold is not plunging the chamber into new and uncharted territories. It's the omnipresence of the filibuster in recent decades that plunged the chamber into new and uncharted territories. At the founding of the Republic, the filibuster didn't exist. Prior to the 1970s, filibusters — which required 67 votes to break for most of the 20th century — were incredibly rare.

5. As Gregory Koger, a University of Miami political scientist who researches the filibuster, told me: "Over the last 50 years, we have added a new veto point in American politics. It used to be the House, the Senate and the president, and now it's the House, the president, the Senate majority and the Senate minority. Now you need to get past four veto points to pass legislation. That's a huge change of constitutional priorities. But it's been done, almost unintentionally, through procedural strategies of party leaders."

6. The rise of the filibuster and the death of the filibuster can be traced to the same fundamental cause: Party polarization. Before the two parties became reasonably unified and disciplined ideological combatants, filibusters were rarely used as a tactic of inter-party warfare because each political party had both members who supported and opposed the bills in question. As that era waned, the filibuster became constant because parties could agree on what to oppose. But that's also why the filibuster's days were (and are) numbered: The majority party agrees on what to support, and continual filibusters against those items increase the majority party's anger at the filibuster itself.

Killing the filibuster, 1917-2012



7. Republicans take a lot of the blame here. They've used the filibuster more aggressively than Democrats, by a wide margin. They've also been less willing to cooperate with Democrats on general legislative efforts, making the presence of the filibuster more costly to the Democratic Party. And they've been so unwilling to work with Democrats this year that they essentially removed all reason for Democrats to stay their hand. The way Senate Democrats saw it was that if they weren't going to get immigration reform or gun control or jobs bills or anything big that they cared about, then at least they would get their judicial and executive-branch nominations.

8. There's a lot of upside for Republicans in how this went down. It came at a time when Republicans control the House and are likely to do so for the duration of President Obama's second term, so the weakening of the filibuster will have no effect on the legislation Democrats can pass. The electoral map, the demographics of midterm elections, and the political problems bedeviling Democrats make it very likely that Mitch McConnell will be majority leader come 2015 and then he will be able to take advantage of a weakened filibuster. And, finally, if and when Republicans recapture the White House and decide to do away with the filibuster altogether, Democrats won't have much of an argument when they try to stop them.

9. With gun control dead, immigration reform on life support and bitter disagreement between the House and Senate proving the norm, it looked like the 113th Congress would be notably inconsequential. Today, it became notably consequential. It has changed how all congresses to come will work. Indeed, this might prove to be one of the most significant congresses in modern times. Today, the political system changed its rules to work more smoothly in an age of sharply polarized parties. If American politics is to avoid collapsing into complete dysfunction in the years to come, more changes like this one will likely be needed.