

FILIBUSTER – THE NEW SENATE RULES DEBATE

Stephen L. Bakke – January 6, 2011

The Founders designed this system, as frustrating (as) it is, to make sure that there's a broad consensus before the country moves forward. – Senator Barack Obama – 2005, on reasons for Senate-style debate when the Democrats were in the minority.

You've got to break out of what I call, sort of, the 50-plus-one pattern of presidential politics. Maybe you eke out a victory of 50-plus-one, then you can't govern. – Senator Barack Obama – 2007, on the importance of Senate rules of filibuster and cloture.

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed. – Thomas Jefferson, on how to interpret the Constitution.

The Issue of Filibuster

Filibuster is a technique available to any single senator to enforce the right to force debate on any legislation on the floor. Originally, in order to maintain the floor, debate had to be maintained continuously, or procedures can bring it to a halt. In recent years the senate took a practical approach by establishing “debate-less” filibuster and the “cloture” rules. Under this revision, debate could be “officially” conducted without constant speaking on the floor – and debate could be ended and the legislation brought to the floor for a vote. This requires 60 senators to vote in favor of cloture (note – ending this form of debate-less filibuster originally required 67 votes).

What Did the Democrats Try?

There we have it. The senate minority can block voting on an issue, by continuing the period of debate, unless the majority can muster the 60 required votes to bring it to the floor. One of the things considered by the Democrats as the Senate entered the 112th Congress was to loosen the reigns of the “filibuster rule.” The democrats don't have the required 60 “automatic” votes to wrest influence from the now strengthened republicans – and they want to try to gain strength through a rules change. However, since it requires 67 votes to change these rules, they are again stymied. They have argued, however, that on the **first day** of the 112th Congress, they can vote for a rules change and that it would only take 51 votes, which they have, to change the rule. **To accomplish this they would have to prevail on the argument that the U.S. Senate is not a “continuing body.”** They now argue that, just like the House, they can easily rewrite the rules.

Liberals say filibusters confuse and frustrate the public ... Liberals are deeply disappointed with the public, which fails to fathom the excellence of their agenda. But their real complaint is with the government's structure. – George Will

Continuing Body? Sounds Like a Real Tall, Gorgeous Woman?

The Senate's official website disagrees with the democrats' own argument that the Senate is not a "continuing body." It states clearly that "the Senate does not have to reorganize itself each new Congress." In addition, the "Rules" website states "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules" – that's what "continuing body" means. Hence, it seems obvious to me that 67 votes are required to prevail on a rules change. Since new rules are not required, old ones continue until changed by a vote of 67 senators. Remember that the House does establish the rules at the beginning of each Congress – it has to, because it is not a "continuing body."

Day One Came and Went – They Missed Their Opportunity – Right? Wrong!

Majority Leader Reid, in his commitment to continue this effort to reduce the influence of the minority republicans, recessed the Senate late on Wednesday. **Recessed, not adjourned! Therefore, as long as no adjournment occurs, day one continues.** That means "he and his" have time to "muster their forces" in an effort to eventually accomplish what they are after. This trick has been used before. I found an example from 1980 when the late Majority Leader Senator Byrd, "stopped the clock" from January 3 through mid-June. Cute! We shall see what happens.

The Constitution

The tradition that the senate is a "continuing body" has its roots in the fact that the Constitution provides a system of staggered six-year terms for senators. At the conclusion of each two-year congress, the terms of only one-third of the 100 senators expire, allowing two-thirds of the senators to continue serving without interruption. Article One, Section 3 of the Constitution says it like this:

Immediately after they shall be assembled they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year

Hence, we witness the origins of the concept of "continuing body."

My Opinion

As with so many of the policy issues we are debating these days, the competing positions distinguish themselves by reflecting liberal and conservatives world views about our form of government and the importance of the original intent of our Founders.

I believe that the concept of filibuster it is consistent with the Founders' intent and I reach that conclusion in the context of their stated fear of a "tyranny of the majority." I believe their intentions were clear and sound – and they remain relevant. The Senate is to be a deliberative body with sometimes excruciating effort necessary to debate, bring cloture, and ultimately vote.

I have noted that there are areas that some Senators believe should be changed in the rules, and which could improve the process. I am disturbed with the way judicial appointments are blocked with regularity – by republicans and democrats. This should be addressed. Also, there is a mechanism called “secret hold” whereby individual senators can singlehandedly block nominees or legislation anonymously and for no stated reason. There appears to be bipartisan support for some needed changes to the Senate filibuster rules.

It would be unfortunate if a rule change could be made with a new procedural interpretation requiring only 51 votes. **And without the possibility of filibuster/debate on regular legislation, the Senate would not be the type of deliberative body intended by the Founders.**

Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then a majority of the States. James Madison (probably), Federalist No. 62

The last two sentences above show the inspiration for the eventual rules that permit a single person, perhaps from a small state, to filibuster and continue debate while attempting to defeat a measure that may be bad legislation and has only a thin majority supporting it. Originally, senators were chosen by state legislatures. In 1913 the 17th Amendment changed that so that senators are now chosen directly by a popular vote of the citizens. The pros and cons of the 17th Amendment is a topic I will deal with in a future report.

Madison goes on to acknowledge that sometimes this process can have less than ideal results, but that the importance of the goal outweighs potential negatives. Consistent with Madison’s sentiment, the filibuster rule has been characterized as a method to “put brakes on the majority.” Thomas Jefferson also was worried about a tyranny of the majority when he stated:

Great innovations should not be forced on slender majorities.

That’s what this argument about “rules of filibuster” is all about. We will see continued debate contrasting competing world views about our form of government and the importance of the original intent of our Founders.