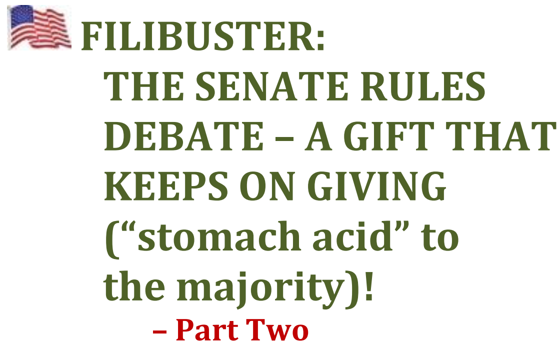
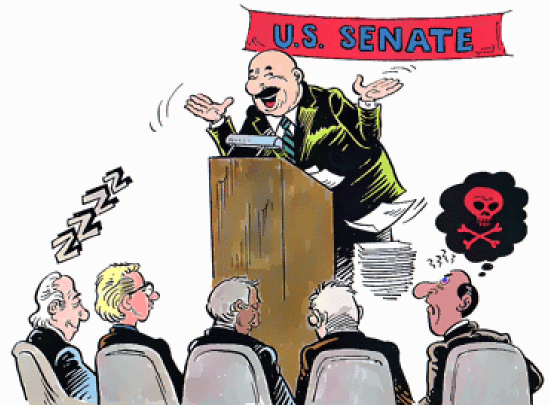


FILIBUSTER: THE SENATE RULES DEBATE – A GIFT THAT KEEPS ON GIVING (“stomach acid” to the majority)! – Part Two

Stephen L. Bakke July 28, 2013



Last time, in **Part One**, we reviewed a description of the current debate about the Senate filibuster rules. We also learned or refreshed our memory about the mechanics of filibuster and cloture. And we graphically saw political winds and emotions changing from one administration to the next – even when the party in power changes.

We learned about the current Constitutional “crisis” being averted relative to confirming several of Obama’s appointees – the Republicans agreed to cooperate (they “caved” in the opinion of some conservatives) on selected appointments. But politics sometimes seems like a “blood sport.” Harry (the) Reid has since flexed his muscles by reminding his political opponents that once again he just might threaten the “nuclear option” (to effectively squash the filibuster rule) if Republicans don’t cooperate on certain justice department judicial appointees. He insists on having it his way no matter what. Go back to the last report and review his and Obama’s quotes about preserving the filibuster when they were in the minority in the Senate. For example:

> ***The filibuster is a critical tool in keeping the majority in check. [Republican threats to change the rules are a] partisan political grab … un-American.*** – Harry (the) Reid – 2005.

I don’t think Reid is very close to carrying out his threats, relative to judicial appointments, because someday soon he may once again be in the minority – and with a Republican president. **Da’ beat goes on! and on! and on!!**

In this report we will look at some more background on this topic. We will take a look at what some influential leaders had to say, and examine comments and opinions expressed by a few of our Founders. **And (drum roll, please …….) I will finally give my opinion (I know you’ve been waiting for it – let me just say, that opinion, plus a coupla’ dollars, might be enough to get you a cup of coffee!).**

Some old time Senate leaders eventually developed strong feelings about the filibuster.

I think the practice of filibuster is often appreciated only in hindsight or after serious reflection. Way back in 1949, Lyndon Johnson, a democratic Senate leader, said this in defense of the filibuster:

> ***If I should have the opportunity to send into the countries behind the Iron Curtain one freedom and only one …… I would send to those nations the right of unlimited debate in their legislative chambers …… If we now, in haste and irritation shut off this freedom, we shall be cutting off the most vital safeguard which minorities possess against the tyranny of momentary majorities.***

And former democratic Senate Majority Leader George Mitchell once told his colleagues this:

> ***When I was majority leader, I didn't always enjoy unlimited debate. There were times when I was frustrated by the ease with which the Senate rules can be used for obstruction. But …… the right of unlimited debate is a rare treasure which you must safeguard. Of course, it can be, and it is, abused. But that is the price that must be paid, and the privilege is worth the price.***

Senate rules, filibuster, cloture, "debate-less" debate – any constitutional or historic basis?

> ***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 Constitution itself didn't create the filibuster rule, but it did create the deliberative philosophy that ultimately led to the adoption of the filibuster procedure. As a result, endless debate had been the "scourge" of the Senate until 1917 when the body adopted the rule that a super majority of 67 votes could terminate debate. I think that's when these terms "filibuster" and "cloture" started to come into common use. But more importantly, what was the "original intent"? Let's take a look.

Let's go back to consider the intent of the Founders. A great way to do so is to review the Federalist Papers which were written to explain the Constitution, clarify our form of government, and to give background as to the Founders' logic and thought process. It's also useful to examine subsequent speeches, letters, and other expressions of opinion and intent by the Founders.

> ***Great innovations should not be forced on slender majorities.*** – Thomas Jefferson expressing one of the Founders' concerns about what can happen in a pure democracy.

The following is a brief quote explaining why the Senate is not to be proportionate to population, as is the House of Representatives, thus guarding against domination by the large states:

> ***…… the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States …… 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. 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.

If you are scratching your heads a bit concerning the reference to "the majority of the states", please recall that **originally, senators were chosen by state legislatures.** In 1913 the 17th Amendment changed so that senators are now chosen directly by a popular vote of the citizens. While the

concept of "equal votes (2) for large or small states" still levels the playing field in favor of the smaller population states, the current process for using a popular vote for senator selection is **claimed to weaken the original intent for the actual influence of the states.** The pros and cons of the 17th Amendment is a topic I will deal with in a future report.

Another sentiment by Madison is expressed in a later Federalist paper – No. 63. Essentially, he asserts that the structure of the Senate may help protect people from themselves:

> ***I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions.*** – James Madison (probably), Federalist No. 63.

A consistent theme is seen throughout – checks and balances – and avoiding a tyranny of a majority. And the Senate has an important role in the process – specifically as a "non-proportionate" representative body which is **there for a cautious look, and balance on others' "folly."** The Founders **intended to make it difficult** to impetuously pass legislation.

Over the years, and between my reports on this topic, my opinion hasn't changed much!

While the House of Representatives is intended to provide proportionate representation, the Senate was set up as a "check and balance" on the pure majority required in the House votes – particularly a thin majority. The Senate gives each state, big or small, equal influence in deliberations and voting. In the House, the minority can be frozen out of discussion. But in the Senate, the filibuster gives minority members real leverage over the majority, or the administration – most believe this has more good repercussions than bad! Filibuster forces REAL compromise (and sometimes none at all) and protects the smaller states from the actions of the proportionate House of Representatives.

> ***We're built for evolutionary, not revolutionary, change.*** – David Harsanyi, characterizing the concept of "checks and balances" very well!

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 (I don't know how it works – only that it exists). There appears to be bipartisan support for some limited changes to the Senate filibuster rules. **But it would be unfortunate if any rule change could be made with a new procedure requiring only 51 votes to change the rules or to terminate debate.**

I believe the Founders' 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. Given the Founders' desire to keep a check on possible tyranny of a simple majority (clearly preferring broad bipartisan consensus for major issues), and the other concepts stated and implied by the Constitution, The Bill of Rights, and the explanations about the Senate's role contained in the Federalist papers, the concept of filibuster and the supermajority required for cloture clearly are **logical applications of the Founders' "original intent," and brings the type of deliberation consistent with their instructions.**

In the Senate, the minority should have an opportunity to be heard and influence legislation. This general nature of the Senate deliberative process was created on purpose! IT WAS INTENDED TO BE DIFFICULT AND MESSY for our legislators to transform our country!