

HATCH CENTER

POLICY REVIEW

THE LEGISLATIVE FILIBUSTER: ESSENTIAL TO THE UNITED STATES SENATE

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Preface

I'm a Republican from a blue state. For 12 years, I represented the people of Oregon in the United States Senate. Winning election required reaching across the aisle. It required finding common ground with voters who held different views—Democrats and independents, moderates and liberals, as well as conservative Republicans.

But it was also the right thing to do. Our nation's Founders designed a government that requires broad buy-in to achieve lasting change. Power is divided between the federal and state governments, and then divided again among the three branches of government. Within each branch of the federal government there is then further division of power: House and Senate, President and cabinet agencies, Supreme Court and lower courts. The President and Supreme Court exercise a degree of control over their respective branches, while in Congress, the House and Senate are co-equals.

The purpose of all these divisions and subdivisions is to ensure that no single group, or faction, is able to run roughshod over all the others. We have to work together if we want to achieve meaningful, lasting reform.

I took this lesson to heart as a member of the Senate. Most of my proudest achievements, in fact, were the result of working across the aisle. Laws to improve access to mental health care, facilitate cutting-edge medical research, and expand the availability of disability benefits were enacted because of my work with Democratic colleagues.

My most important legislative partner, in fact, was the Democrat who defeated me in my first race for the Senate, Ron Wyden. Ron and I worked tirelessly together on bills to help make life better for the people of Oregon, including and in particular rural Oregonians. Although we disagreed on many, many issues, we saw eye to eye on the fact that it was our responsibility as Senators to work together for the people of our state, and our country.

That brings me to the topic of this year's *Hatch Center Policy Review*, entitled "The Legislative Filibuster: Essential to the United States Senate." These days, everyone seems to hate the legislative filibuster. It slows things down. It forces you to negotiate with people you don't want to have to negotiate with. It requires you to trim your sails—to moderate, that is—to get your goals across the finish line.

Or rather, everyone seems to hate the legislative filibuster when they're in the majority. When you're in the minority, it's great. It lets you stop bad bills with fewer than fifty votes. It gives you influence even though your party didn't do so well in the last election.

Many people—too many people, in my view—see the legislative filibuster through this sort of situational lens. When it leads to outcomes you like, it's great. When it leads to outcomes you don't like, it's terrible.

This is the wrong way to think about the legislative filibuster. The legislative filibuster is about the *process*, not the particular outcome. It's about working together, about finding common ground. It's about that dreaded word that today's political class seems to hate so much but that most fair-minded people recognize is a *good* thing—compromise.

That's not to say that the legislative filibuster doesn't lead to better outcomes. It can, and it does, as this year's *Hatch Center Policy Review* demonstrates so persuasively. Martin B. Gold, the author of this year's *Policy Review*, deserves significant credit for bringing us a comprehensive, historically grounded treatment of the legislative filibuster that explains its origin, its purpose, and its continued importance in twenty-first century America.

Too often in politics we forget everything that happened more than five minutes ago. We decide whether we like something based on whether we think it's helping or hurting our immediate objectives.

By giving us a grand sweep of the history of the legislative filibuster—and how it's played such an essential role in *improving* legislation, not just stopping it—Marty helps reorient us toward the vision the Founders had when they created our Constitution. They wanted us to work together to achieve the common good. They wanted us to be, in the words of Abraham Lincoln, not enemies but friends.

Marty Gold has produced a work that's both profound and deeply practical. I commend it to you as a former Senator, a lover of politics, and most of all, as a patriotic American.

– FORMER U.S. SENATOR GORDON H. SMITH (R-OREGON)
Treasurer & Board Member, Orrin G. Hatch Foundation

Author's Note

It has been my privilege to serve as the 2022 Visiting Scholar for the Orrin G. Hatch Foundation. Senator Hatch was my friend. I knew him for the entirety of his distinguished Senate service. He understood and reflected the Senate as well as anyone who ever served there. He knew what it took to operate within a chamber whose rules necessarily required negotiation and consensus building. Because he did, he was able to pass many bills and the public laws he helped make have proven durable.

Orrin Hatch was a Senator for 42 years, almost evenly divided between those in the majority and those in the minority. Because the Senate is not like the House, where the majority governs exclusively, Senator Hatch's tenure did not fluctuate between productive and fallow times. The rules of the Senate presented opportunities for him to be central to the action in either capacity. The Senator had the policy and people skills to maximize those opportunities. Utah and the country benefitted handsomely.

Filibusters are the subject of this paper, and Senator Hatch was amply acquainted with them. He was on the winning and losing sides of many of them. Early in his career, Senator Hatch led a filibuster that stopped highly controversial labor law legislation. It was his first important legislative success. A quarter-century later, as Chairman of the Senate Judiciary Committee, he was frustrated as Democrats successfully filibustered ten George W. Bush nominees he wished to confirm to U.S. appellate courts. Those filibusters were perhaps his greatest defeat.

In those and other cases, he knew that filibusters could block causes that did not generate a sufficient measure of bipartisan accord. But he also grasped something more subtle but at least as consequential: the power of the filibuster is essential to secure that accord. In the House, major legislation can be written without regard to minority views. In the Senate, with rare exceptions, that is not possible. Cross-party consensus building occurs because the rule requiring 60 votes to end debate commands it. That is a very big and entirely necessary hedge against the polarization that is far too dominant in our politics.

Filibusters of nominations were pretty much a twenty-first century phenomenon. When they occurred, they contradicted institutional norms and were vexatious to both parties, one after the other. Due to changes made in 2013 and 2017 to Senate procedures, cloture to end them no longer requires a supermajority of 60. However, legislative filibusters remain, with roots reaching back more than 180 years. They are aggressively used by Democrats and Republicans when either is in the minority to assert their interests in stopping or shaping bills. Neutralizing filibusters will diminish minorities and turn the Senate into a legislative juggernaut like the House, rife with unchecked partisan agendas.

This paper consists of five parts. The first explains what a filibuster is and how the cloture rule works as a mechanism to control it. The second part discusses why the filibuster is important. The third part is an historical overview of the emergence of filibusters and the creation and evolution of a rule to contain them. The

fourth discusses filibusters of nominations, principally judicial. Finally, the fifth part addresses efforts to curtail filibusters on legislation. There is a brief conclusion. The cloture rule itself is set out in the Appendix.

It is essential to take the long view and not support or condemn filibusters depending on which party or which Senators may be filibustering. The Framers meant for the Senate to temper legislation. Preserving the filibuster serves that vital constitutional purpose.

– MARTIN B. GOLD
Visiting Scholar, Orrin G. Hatch Foundation

Part I:

What Is a Filibuster
and What Is Cloture?

A filibuster is an effort by Senators to use procedural tools in order to delay or forestall a vote on a pending debatable question. It can involve speeches, amendments, motions, quorum calls, and other maneuvers. It should be noted that these tactics are all in common use in the Senate and, at any given time, their purpose may or may not be dilatory.

How the Cloture Process Works

Cloture is a mechanism to overcome filibusters. Unless limited by a unanimous consent agreement, by the terms of an expedited procedure law,¹ or by operation of a Standing Rule or Standing Order, Senate proceedings on debatable questions can continue indefinitely.²

When no Senator is speaking or seeking recognition, the Presiding Officer is obligated to put the pending question to a vote. Coming to that point can take quite some time. If Senators wish to speed matters up, they can seek cloture, a motion which is provided for under Senate Rule XXII, paragraphs 2 and 3.³ In one form or another, this filibuster control rule has been part of the Standing Rules of the Senate since 1917. In its present iteration, invoking cloture requires the affirmative votes of three-fifths of all Senators duly chosen

¹ An expedited procedure law is a statute that contains procedural provisions to govern consideration of subsequent legislation. The Congressional Research Service explains the purpose for these measures: “The regular legislative procedures of the House and Senate can be time-consuming, and they provide no guarantee that every bill or resolution that is introduced will be considered quickly, or at all, in committee and on the floor. In fact, most bills are never considered, and only a small fraction are passed by the House and Senate and enacted into law. Most of the time, most Representatives and Senators consider the slow and selective nature of the legislative process to be a virtue in that it protects against enactment of new laws without adequate scrutiny and debate. Members sometimes decide in advance that it will be important for Congress to act expeditiously on certain kinds of measures. In these cases, Members devise special procedures that put those measures on a legislative fast track and protect them from being blocked or unduly delayed by the procedural obstacles that prevent most measures from completing all the stages of the legislative process.” Christopher M. Davis, “Expedited or Fast-Track Legislative Procedures,” August 31, 2015, Congressional Research Service, RS20234.

² The opportunity to filibuster is by no means absolute and does not exist on all legislation or on every question. For example, Senate rules explicitly make certain motions non-debatable, such as a motion to adjourn, a motion to consider Executive Business (for nominations and treaties), and a motion to table a debatable question (such as a motion to table an amendment). Other examples of non-debatable motions include ones to consider a conference report, or a House message in an amendment exchange, or a Presidential veto, although all those propositions can be fully debated on their merits once pending before the Senate and are subject to cloture motions.

³ Rule XXII appears in full at Appendix 1.

and sworn, or 60 votes if the Senate is at a full complement of 100 members. The purpose of cloture is to bring finality to proceedings on any question on which it has been invoked. Therefore, it is an antidote to the filibuster, which has the objective of avoiding such finality.

A cloture motion must bear the signatures of no fewer than 16 Senators. Before a cloture vote may occur, there must be an intervening day of Senate session. On the day thereafter, one hour after the Senate convenes, the cloture vote will take place. If the 60-vote threshold is not met, additional attempts can be made. If the motion is successful, up to 30 hours of further deliberations may be had on the proposition on which cloture was invoked. The 30 hours includes all proceedings on the measure—debate, roll call votes, quorum calls, and so forth. If the question is amendable, the rule contains deadlines for filing amendments. At the end of the 30 hours, the Senate votes on amendments that have been called up but not yet disposed of and then on the proposition as and if amended.⁴ Invoking cloture also generates a requirement that any amendment not yet agreed to be germane, and it creates a point of order against dilatory motions.

To convert this into a hypothetical: on Monday a cloture motion is filed on a motion to proceed to a bill. There is an intervening session day on Tuesday. The cloture vote occurs an hour after the Senate convenes on Wednesday. Cloture is invoked and the 30-hour post-cloture period begins. If stretched to the maximum, it means that a vote on the motion to proceed will not occur until late Thursday night or perhaps Friday. Assuming the motion carries, the bill will be pending. Moving a bill to final passage may also necessitate cloture, which means repeating these procedures, and bringing into play filing amendments and voting on them.⁵

⁴ If Senators wish to propose amendments once legislation is pending, and on which a cloture motion has been filed, Rule XXII specifies deadlines preceding the cloture vote by which such amendments must be filed. The theory is “no surprises.” In deciding whether to accelerate an end to proceedings, Senators need to know what amendments may be offered.

⁵ Consider this example: On February 13, 2003, the Senate received the Do-Not-Call Implementation Act, which passed the House on the previous day 418-7. The target was telemarketers, and the bill was non-controversial. By unanimous consent, the bill was held at the desk. After brief debate, the Senate passed the bill on the day it was received, also by consent. Proceedings were the essence of speed and simplicity. However, if one determined Senator had stood up for the telemarketers, especially if he had a couple of allies, proceedings could have stretched over the better part of two weeks—one week to exhaust a cloture process on the motion to proceed and a second on the merits.

The cloture mechanism is intentionally cumbersome. It is designed to be consistent with and to respect Senate traditions related to debate and amendments, while providing a means to conclude proceedings if enough Senators are ready to do so. If the Senate wanted to be efficient, it could model itself after the House of Representatives. However, it plays a different role in our constitutional system and, for good reasons, does not seek to emulate the House.⁶

⁶ Differences between the chambers are stark. For instance, in 2015, the Senate considered S. 1, legislation to authorize construction of the Keystone XL Pipeline. Majority Leader Mitch McConnell (R-KY) filed a motion to proceed to consideration of the bill on January 4. Final passage did not come until January 29. Midstream, there was a failed cloture vote as Democrats successfully filibustered to leverage additional amendments. In the House of Representatives, the bill came up under a closed rule proposed by the House Rules Committee. The rule allowed one hour of debate and no amendments. Under those tight restrictions, the House passed the bill.

Part II:
Why the Filibuster
Is Important

One Congress but Two Very Different Chambers

Senator Carl Levin (D-MI) spotlighted a key distinction between the two Chambers. “The greatest difference between the Senate and the House of Representatives is the approach to minority rights. Senate rules protect the rights of the minority, and the House rules do not. With those rights, the minority or even a single Senator can influence the legislative process. Without those rights, a simple majority can render a minority irrelevant and powerless to influence the legislative process.”⁷

Senators are not inherently less partisan politicians than Representatives, but they tend to behave so because of what Senate rules force them to do.⁸ Weaken those rules and partisanship in the Senate will look much more like the House.

Dr. Sarah Binder, a noted scholar of congressional procedures, argues that even if the filibuster were abolished there would remain important distinctions between the chambers. These relate to equality of representation in lieu of proportionality, length of terms, staggered terms, and age requirements for service. She notes, “Given these structural differences—differences that would likely affect both the Senate’s agenda and the policy and political interests of its members—it would be difficult to say that the Senate would be no different than the House. Keep in mind, after all, that the framers of the Constitution sought out these structural differences to ensure that the Senate could keep a check on the populace and potentially rash lower chamber.”⁹

Dr. Binder is correct that for these reasons the Senate can never be just like the House, but that does not mean its approach to self-governance must be dissimilar. If the Senate removes guardrails that protect minority rights, a transient majority within the chamber can be as ruthless and tyrannical as its House counterparts. For instance, nothing would stop it from establishing a previous question motion, to act as a debate and amendment cutoff as it does in the House, or to establish a Rules Committee mechanism like in the

⁷ *Congressional Record*, January 24, 2013, p. S261.

⁸ Senator John Cornyn (R-TX) notes, “I can tell you from experience that the majority is always frustrated by the 60-vote cloture requirement known as the filibuster, but it is designed for a very specific purpose. It is designed to force us to do what maybe does not come naturally, which means to work together on a bipartisan basis to build consensus legislation that will stand the test of time.” *Congressional Record*, January 5, 2022, p. S36.

⁹ Sarah Binder, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 125.

House.¹⁰ A Senate majority cannot do that now because the minority has rights and can stand up for them. However, eliminating the filibuster neuters the minority and opens the door to a majority steamroller.

Eliminating or eviscerating the filibuster, especially by strong-arm tactics, will by itself seriously aggravate political tensions already on display in the country, and so will the partisan legislation it produces. That cannot be good for the United States. Especially in a unified Congress, the majority party will simply need to negotiate with itself. It will play offense against little to no defense.

In such circumstances, one-sided litmus-test demands from the party base, whether on the left or the right, will be more difficult to resist or to stop outright.¹¹ When it is no longer necessary to temper legislation to reach across the aisle for 60 votes, it will be harder for centrists not to fall in line. Therefore, the question is not simply how the Senate restrains legislation coming from the House, but who can influence and moderate measures emanating from within the Senate.¹²

¹⁰ A Standing Committee of the House, the Rules Committee reports procedural resolutions (also known as special rules) that set out the terms and conditions under which controversial legislation will be considered. The House agrees to these resolutions by simple majority vote. These resolutions are of critical importance to the majority party leadership's control of the House floor. The minority customarily dissents from the resolutions both in the Rules Committee and on the floor, but it is simply outnumbered, and its complaints are inconsequential.

¹¹ Senator Jeff Merkley (D-OR) recognizes that the filibuster can promote negotiations and deal-making but argues that it has become little more than a minority veto, which is so powerful that the minority has little incentive to negotiate: "It does the exact opposite, especially with the polarized tribal politics of today. The base of both parties wants us to stop the other party, and so we paralyze each other. It is Mahatma Gandhi to whom is attributed the phrase 'an eye for an eye makes the whole world blind.' It is the same challenge here. If Democrats do everything they can to prevent Republican ideas from getting into law to be tested and Republicans do everything they can to prevent Democratic ideas from being tested, then no ideas are tested and no issues are addressed. And the legislature fails in its responsibility to the people of the United States of America." *Congressional Record*, January 7, 2022, p. S99.

¹² See also Rules Committee testimony by Professor W. Lee Rawls of the Army War College, stating "the other risk that a majority party without a filibuster runs is being overwhelmed by special interests. Every year, thousands of bills that reflect strong special interest input are introduced but are not addressed by the Senate because of the filibuster. Absent such a constraint, it is difficult to conceive of the majority party in the Senate resisting the whole range of special interest legislation that is introduced on an annual basis. W. Lee Rawls, "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, June 23, 2010, p. 381.

Polarization is already a grave problem in America, and killing the filibuster will almost surely make it worse, especially if there is not divided government. Crippling the Senate minority from being an effective check and balance invites outrage from those who feel marginalized from the process and leads to diminished public acceptance of legislative outcomes.¹³ Because it empowers minority views, the filibuster is a stabilizing influence, restraining extremes and guiding policy toward the middle. In serving divergent purposes, the Senate and House accommodate the needs of an extremely diverse people. This includes, most urgently, preserving a place where minority rights are genuinely important.

In 2010, shortly before he died, Senator Robert C. Byrd (D-WV) observed, “The Senate is the only place in government where the rights of a numerical minority are so protected.” Consequently, he resisted weakening the filibuster and feared the consequences of doing so: “I oppose cloture by a simple majority because I believe it would immediately destroy the uniqueness of this institution. In the hands of a tyrannical majority and leadership, that kind of emasculation of the cloture rule would mean that minority rights would cease to exist in the U.S. Senate.”¹⁴

A Device to Generate Consensus

As Senator John Thune (R-SD) remarks, “The filibuster ensures that the minority party and the Americans it represents has a voice in the Senate. It forces compromise. It forces bipartisanship.” Speaking of instances where one party has at least 60 members, Thune added, “Even in the rare case when a majority party has a filibuster-proof majority in the Senate, the filibuster still forces the majority party to take into account the views of its more moderate or middle-of-the-road members, thus ensuring that more Americans are represented in the legislation.”¹⁵ Current Senate Majority Leader Charles Schumer

¹³ Senator Mike Lee (R-UT) comments, “Most laws pass by unanimous consent or by simple voice vote after hearty consideration and frequent amendments, through a process known as the hotline. That would essentially cease to function if the minority had no significant influence. Opportunities for amending these often smaller and somewhat less controversial bills would be foreclosed, crippling the careful consideration needed. Bills would have to be forced through often on party-line votes over the objection, suspicion, or protest of the minority.” *Congressional Record*, January 12, 2022, p. S176.

¹⁴ Senator Robert C. Byrd, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, May 18, 2010, p. 43.

¹⁵ *Congressional Record*, January 5, 2022, p. S31. Since 1979, one party has had a filibuster-proof majority for approximately six months. Al Franken (D-MN) was sworn in on July 7, 2009, becoming the 60th Democrat in the 111th Congress. That majority reduced to 59 upon the death of Senator Edward M. Kennedy (D-MA) on August 25, 2009, but was restored to

(D-NY), in the context of filibustering the Neil Gorsuch Supreme Court nomination, made a similar point: “The 60-vote threshold on controversial matters is a hallmark of the Senate.... It fosters compromise, it fosters bipartisanship, and it makes the Senate more deliberative.... The 60-vote bar in the Senate is the guardrail of our democracy. When our body politics is veering too far to the right or to the left, the answer is not to dismantle the guardrails and go over the cliff but to turn the wheel back toward the middle.”¹⁶

Cloture motions are far more common than used to be the case. As Schumer now describes it, “The Senate is no longer a cooling saucer. It is a deep freezer. Anyone who has been here for more than a few years knows the gears of the Senate have ossified. The filibuster is used far more today than ever before.”¹⁷

This phenomenon is partially attributable to a well-recognized rise in partisanship as well as political and scheduling pressures that minimize time spent in Washington and therefore maximize the potency of filibuster threats.¹⁸ However, there is more to the story. Cloture motions are routinely filed when unanimous consent is elusive. Sometimes, the problem is that the measure or nomination is controversial. But often, the minority objects just to slow things down, knowing that an efficient Senate is one where the majority party has more time available to press its preferred agenda.

Failed cloture votes on legislation illustrate that filibusters can be an obstacle to passing legislation, but it must be noted that such impediments are often temporary. For example, on July 21, 2021, cloture was not invoked on a motion to proceed to H.R. 3684, the bipartisan infrastructure bill, but a week later, after negotiations, cloture was successful. On October 19, 2020, cloture was not invoked on Senator Marco Rubio’s (R-FL) Uyghur protection bill (S.178), but such legislation eventually passed. On March 20 and March 23, 2020, cloture failed on motions to proceed to Covid-19 relief legislation, but after

60 with the appointment of Paul Kirk (D-MA) on September 24, 2009. During Kirk’s tenure, Senate Democrats passed the Patient Protection and Affordable Care Act (PPACA) as an amendment to a minor House tax bill. Kirk served until February 4, 2010, when Scott Brown (R-MA) replaced him, ending the Democrats’ filibuster-proof majority. Brown had been elected in a special election held on January 2010. Brown’s election made politically untenable further Senate action on PPACA, forcing use of budget reconciliation to pass separate “corrective” legislation that would conciliate House misgivings about the Senate amendment. If the House had simply amended the Senate amendment with further provisions, the House message could have been filibustered in the Senate, where Democrats no longer had 60 votes for cloture.

¹⁶ *Congressional Record*, April 6, 2017, p. S2388.

¹⁷ *Congressional Record*, January 7, 2022, p. S94.

¹⁸ See Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), pp. 30-36.

minority-driven provisions were included in the bill, the measure (H.R. 748) passed 96-0. As well, cloture has failed on stand-alone appropriations measures that have later been folded into omnibus bills that did pass.¹⁹

However, filibusters can also be fatal, customarily on sharply partisan legislation. For example, in the 117th Congress (2021-2022), Republicans four times stopped Democrats' election reform proposals, and twice blocked abortion bills. In the 116th Congress, Democrats derailed GOP policing reform legislation and four times stopped Republican-sponsored abortion measures.²⁰

In 2013, Senator Levin spoke of how Democrats filibustered to promote their own priorities and deflect those of Republicans: "In the recent past, Senate Democrats in the minority used the protections afforded the minority to block a series of bills that would have unwisely restricted the reproductive rights of American women. We beat back special interest efforts to limit Americans' ability to seek justice in our courts when harmed by corporate wrongdoing. We used those protections to seek an extension of unemployment benefits for millions of Americans. We used them to oppose the nomination of nominees to the federal courts who we thought would do great harm to the law. Progressives distressed that the recent fiscal cliff agreement raised the estate tax exemption to more than \$5 million should recall that, without the protections afforded the Senate minority, a total repeal of the estate tax would have passed the Senate in 2006. Forty-one Senators prevented that from happening."²¹

Several years earlier, Senator Lamar Alexander (R-TN) also commented on the influence of the Democratic minority: "As we reflect back upon the time when President Bush was here and the Republicans were in charge of the Congress, maybe our Democratic friends were right about privatizing Social Security. They used the filibuster to prevent President Bush and the Republican Party from privatizing Social Security. They might say that the country is better off after the Great Recession because they used the filibuster. Maybe they were right. They slowed down and prevented a whole number of other important measures, from tort reform to the appointment of conservative judges. Maybe they were right. So, I think we should not define the filibuster by the number of times the majority seeks to cut off debate. And I think we ought to recognize Senator Byrd's advice that sometimes the minority may be right."²²

¹⁹ In addition, non-controversial legislation can pass as riders to other bills if inclusion is agreed to by the chairman and ranking member of both its jurisdictional committee and the committee that manages the host bill.

²⁰ United States Senate, "Legislation and Records: Cloture Motions," www.senate.gov.

²¹ *Congressional Record*, January 24, 2013, p. S264.

²² "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 141.

Distinct from what occurs in the House, the Senate's majority does not make policy simply by negotiating with itself. Instead, the filibuster ensures that a bipartisan consensus of Senators must agree before most legislation can move forward. Indeed, the effect of filibuster rights can be felt from the very onset of legislative drafting, as the search commences for a lead co-sponsor from the opposite party and provisions are written to build bipartisan support.²³

These rules allow, and indeed encourage, Senators to consider measures with greater deliberation. They serve to moderate legislation from partisan House majorities, whether on the left or the right, because of the need to secure 60 votes for cloture before the Senate completes action, including on conference reports or in the amendment back-and-forth known as Amendments between Houses.

The requirement to get a supermajority in the Senate for agreement to a bicameral compromise necessarily tempers the content of that compromise. For example, a conference result is influenced by the fact that a compromise will have to be acceptable to at least 60 Senators.

As then-Senator Joe Biden (D-DE) pointed out, “Moderates are important only if you need to get 60 votes to satisfy cloture. They are much less important if you need only 50 votes.”²⁴ Accordingly, as Senator Schumer explained, “The Senate is a body of moderation. While...the House of Representatives is a voice of the majority, the Senate is the forum of the States. It is the saucer that cools the coffee.”²⁵

What does that concept mean? On December 3, 1996, in the Senate chamber, Senator Robert C. Byrd spoke to an incoming class of 15 new Senators, who had been elected a month earlier. His purpose was to acquaint them with the distinctiveness of the institution and the role it was designed to play in the constitutional system. He began by quoting James Madison on the reasons for creating an upper House. “These were first to protect the people against their rulers,” Madison had said, “secondly, to protect the people against the transient impression into which they themselves might be led.” Madison called the Senate “a necessary fence” against those passions.²⁶

²³ See Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), p. 14.

²⁴ *Congressional Record*, May 23, 2005, p. S5736.

²⁵ *Congressional Record*, May 19, 2005, p. S5456.

²⁶ James Madison, *Notes on the Debates in the Federal Convention*, June 26, 1787, The Avalon Project, Yale Law School, https://avalon.law.yale.edu/18th_century/debates_626.asp.

Byrd argued that, to fulfill this mission, the Senate must have rules that served a deliberative purpose. “Senators were intended to take the long view and be able to resist, if need be, the passions of the often-intemperate House,” the Senator noted. “Few, if any, upper chambers in the history of the western world have possessed the Senate’s absolute right to unlimited debate and to amend or block legislation passed by a lower House.”

“The Senate is often soundly castigated for its inefficiency,” Byrd continued, “but in fact, it was never intended to be efficient. Its purpose was and is to examine, consider, protect, and to be a totally independent source of wisdom and judgment on the actions of the lower house and on the executive. As such, the Senate is the central pillar in our constitutional system.”²⁷

That reference to the cooling saucer is accurate because the Senate rules make it so.

As rights of debate and amendment are exercised, not just by minority parties but by individuals from whatever party, Senate work slows down. But that is how it should be, frustrating as it may be to those with an agenda to prosecute.

Multiple Reasons to Filibuster

Filibusters can serve to kill legislation, and both parties have used it for precisely that reason, often on high-profile, politically significant measures. In 2020, in the aftermath of George Floyd’s murder, Senator Tim Scott (R-SC) introduced S. 3985, the aforementioned policing reform bill, with 48 cosponsors, all Republicans. The Senator’s effort to secure support across the aisle were unavailing, and Democrats determined to block the bill. On June 24, 2020, on a 55-45 party-line vote, cloture failed on the motion to proceed, and the bill died. In 2022, with Democrats in the majority, Republicans filibustered S. 4132, legislation to protect abortion rights. On May 11, by 49-51, the Senate did not invoke cloture on the motion to proceed. One Democrat joined every Republican in opposing cloture, dooming the measure.

However, it is badly oversimplified to think of the filibuster solely as a way to kill legislation. Senate Parliamentarian Emeritus Robert Dove points out, “It has become the fashion in academia and in the public media as well to view the filibuster strictly as a tactic of obstruction and as an affront to the sacrosanct majority rule. Nearly forgotten or simply dismissed is the role which extended debate has played in the moderating role of the Senate as a ‘saucer’ intended by the Framers in requiring minority participation and the protection of the Senate’s role as a counterweight to an otherwise unchecked executive.”²⁸

²⁷ United States Senate, “Remarks by Senator Byrd at the Orientation of New Senators,” December 3, 1996, www.senate.gov.

²⁸ Statement of Robert B. Dove, Parliamentarian Emeritus, United States Senate, “Examining

Thus, the filibuster is also a mechanism that allows minority interests to be heard, and to shape procedural and substantive legislative outcomes.²⁹ Moreover, blocking and leveraging are not mutually exclusive concepts. If a minority cannot get what it considers to be a fair amendment process or consideration of its views, it may choose to stop legislation that it would have permitted to go through.

Senator Byrd often commented that the two great rights of Senators are the right to debate and the right to amend.³⁰ They are common to any legislative body, but nowhere are they more robust than in the United States Senate. Unlike the House of Representatives, where the majority party governs with an iron hand and the minority is mostly a spectator, the Senate's rules guarantee that the minority party, minority coalitions, and even individual members can be heard and enjoy real influence. The filibuster forces open the door to amendments. A meaningful right to amend is inseparable from requiring a supermajority to end debate.³¹

the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 65.

²⁹ Longtime congressional procedure specialist at the Congressional Research Service, Dr. Stanley Bach, set out these two objectives in 2010 testimony before the Senate Rules Committee. He argued that executing the filibuster to leverage minority positions could more easily be justified than using it to block legislation. Statement of Stanley I. Bach, Retired, Senior Specialist in the Legislative Process, Congressional Research Service, "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 25. However, in both cases, the filibuster serves to strengthen and amplify minority voices, and its use in stopping untoward legislation is as valid as amending it. As Professor Gregory Koger notes, "Legislative minorities with the power to block legislation may use that power for 'positive' ends by bargaining to push issues onto the Chamber floor." Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, (Chicago: University of Chicago Press, 2010), p. 6. The professor states that there are seven motives for filibustering. They are to kill a target bill, to delay the target bill, to amend the target bill, to kill a secondary bill (presumably by consuming precious floor time on the filibustered bill), to delay a secondary bill, and to take a stand. Looking at the historical record, he also mentions an eighth motive, that being to force a special session, but that purpose has lapsed since adoption of the Twentieth Amendment in 1933. *Ibid.* p. 111. Formerly common, special sessions are now rare.

³⁰ Senator Byrd served from 1959 until his death in 2010.

³¹ In hearings before the Senate Rules Committee, an exchange between Senator Lamar Alexander and Senate Parliamentarian Emeritus Robert B. Dove lays out the centrality of the filibuster to the protection of minority rights. "Senator Alexander: Mr. Dove, if the filibuster were ended, what would be the way in which the Senate then could continue to protect minority rights? Mr. Dove: It could not." "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 33.

Consider the example of major education legislation that passed in 2015. The Every Student Succeeds Act made important changes to the No Child Left Behind Act of 2001. Reported as an original bill from the Committee on Health, Education, Labor and Pensions in April 2015, the bill was the product of bipartisan negotiations between Chairman Lamar Alexander and Ranking Member Patty Murray (D-WA).³² At the committee markup, 29 amendments were adopted, most of them proposed by Democrats. On July 7, by unanimous consent, the Senate proceeded to consider it, under a robust amendment process. Over the next four session days, 34 amendments were presented, 12 from Republicans and 22 from Democrats. On July 13, Majority Leader Mitch McConnell (R-KY) offered a cloture motion, intended to nudge consideration to a close. Under Senate rules, the vote would occur two session days later, on July 15. Sixty votes were needed for success.

Notwithstanding the strong bipartisanship in committee and the openness of floor proceedings, the minority was not yet satisfied that they had enjoyed adequate opportunities to amend the bill. “We need an agreement, or we’re not going to get cloture,” Democratic Leader Harry Reid (D-NV) announced on July 14. He continued, “Until my Senators are protected, we’re not going to invoke cloture tomorrow morning.”³³

“Until my Senators are protected.” Minority Leader Reid emphasized that Democrats would require even more amendments. Was that obstructionist or untoward? It may be asked what is more problematic: the minority opposing cloture or the majority moving prematurely to cut off debate and amendments?

To leverage Democratic power, Reid threatened to withhold the votes for cloture, without which the bill could not move forward to passage. The strategy worked. Before the vote on July 15, Chairman Alexander was able to announce agreement to consider 42 additional amendments, 21 of which would be grouped into a “managers’ package” and a further 21 that would be voted on independently. Many of these were proposed by Democrats. With that agreement in hand, produced under the threat of filibuster, the votes for cloture materialized by a margin of 86-12. The bill itself passed the Senate on July 16 by a vote of 81-17.³⁴

³² An original bill is legislation that a committee prepares and reports without acting on a measure that has been introduced and referred to it.

³³ *Congressional Record*, July 14, 2015, p. S5023.

³⁴ House action on S. 1177 followed later in the year. The Senate invoked cloture on the conference report by a vote of 86-12 on December 8, 2015 and by 85-12 agreed to the conference report on the following day. President Obama signed the measure into law on December 10, 2015.

The final bill was likely to gain greater public acceptance because both parties had a major part in shaping it. Knowing that the legislation could not pass without significant minority support, Republicans engaged the Democrats from the moment the bill was originally drafted and accommodated them throughout the process. But what if the Senate operated like the House? In that case, Republicans could have written the bill as they pleased, and Democrats would have gotten no more amendments than the majority was prepared to tolerate, which could be zero.

Senator Jeff Merkley (D-OR) argues that filibusters absorb so much time that opportunities for floor amendments have declined.³⁵ However, a major reason for fewer amendments is the aggressive efforts by majority leaders to fill the amendment tree, a parliamentary strategy to prevent minority amendments or to police them. Amendment trees are four diagrams that depict the maximum number of amendments that can be pending at any one time and the sequence in which they are offered and voted upon. Which of the four trees applies depends on the scope of the underlying amendment (for example, does it propose a full substitute for a bill or something less sweeping?). These diagrams reflect years of Senate precedents.

Because the Majority Leader has the right to be recognized by the Presiding Officer before other Senators, he can secure recognition time and again to fill all available branches on an amendment tree. When a Majority Leader fills an amendment tree, he can assert that no amendments should be allowed, or he can set aside one of his amendments to permit one from another Senator, perhaps drawing a line against non-germane amendments (that, in most circumstances, would otherwise be allowed under Senate rules), or against amendments that present difficult votes for his majority party colleagues.

A major motive for minority's filibustering, particularly on motions to proceed, is to counter a Majority Leader's attempts to restrict the minority's ability to propose amendments. While filling a tree can limit minority amendments, more is needed to pass a bill. In most instances, for legislation to move forward, cloture is necessary. Therefore, if the minority skillfully exercises its leverage, the result should be to generate more amendment opportunities. That's what Minority Leader Reid demonstrated on the 2015 Every Student Succeeds Act.

³⁵ "We have seen that—as the filibuster is used more and more and eating up the time of the Senate—we have seen amendments decline dramatically. We saw, for example, in the 109th Congress, some 314 amendments. That has declined to just 26 amendments in the last Congress, the 116th Congress.... Why is it? Well, Senators can't come to the floor and offer an amendment." *Congressional Record*, January 7, 2022, p. S99.

In the House, it is rare for the minority to be successful in making procedural demands on major legislation. However, because of filibuster rights, minorities in the Senate will be heard, which means not only their voices but their amendments. As Senator Charles Grassley (R-IA) has noted, “The most significant effect of blowing up the 60-vote cloture rule would be denying the right of all Senators to offer amendments on the Senate floor.”³⁶

A vivid example of use of the filibuster as leverage occurred during 2020 consideration of the first major Covid-19 relief bill, known as the CARES Act. On March 20, Senate Majority Leader Mitch McConnell moved to proceed to H.R. 748, a minor revenue measure that passed the House in the previous year. His purpose was to amend the House bill with a relief package that Democrats felt was inadequate because it did not reflect enough of their own priorities. McConnell’s motion was debatable. As has become routine on motions to proceed, he filed for cloture.

The cloture vote occurred on March 22. Without exception, Democrats opposed cloture. The final 47-47 tally left the cloture motion 13 votes shy of success. McConnell moved to reconsider the vote. Upon reconsideration on March 23, cloture again failed. This time, the vote was 49-46. Again, every Democrat opposed it. Bipartisan negotiations followed, to the satisfaction of Democrats who were able to put some of their own priorities into a revised package. With negotiations completed to everyone’s satisfaction, the measure could move forward. A renewed cloture motion that McConnell filed on March 23 was withdrawn by unanimous consent, and the Senate amendment to H.R. 748 passed 96-0 on March 25.

As the House evolved over time, it became a place where the majority party dominated, and the minority was eclipsed. Speaker Thomas Reed (R-ME), who led the House in the late nineteenth century, strongly believed in majoritarian governance. “The best system is to have one party govern and the other party watch,” he said.³⁷

In the modern House, this approach is on vivid display. Whether under Democratic or Republican control, the House is in the viselike grip of its majority party so long as that party can maintain cohesion. Amendments are highly restricted or outright foreclosed. Minority opportunities to shape legislation are often inconsequential.

Killing the filibuster would convert the Senate into a miniature House, transforming it into a legislative juggernaut, able to move bills at the velocity of high-speed rail. No doubt the Senate would become more efficient if transient majorities could easily have their way. However, the price would be grievous.

³⁶ *Congressional Record*, January 10, 2022, p. S109.

³⁷ Congressional Research Service, “The Evolving Congress,” Senate Committee on Rules and Administration, 113th Congress, 2d Sess., S. Prt. 113-30, p. 16.

As Senator Byrd expressed in his bicentennial history of the Senate, “Arguments against filibusters have largely centered on the principle of majority rule. Delay, deliberation, and debate, though time-consuming, may avoid mistakes that would be regretted in the long run. Senators have to discuss, without hindrance, what they please for as long as they please. A minority can often use publicity to focus popular opinion upon the matters that can embarrass the majority and the executive.”

Byrd contended that the present cloture rule appropriately weighed majority and minority interests: “I believe Rule XXII today strikes a fair and proper balance between the need to protect the minority against hasty and arbitrary action by a majority and the need for the Senate to be able to act on matters vital to the public interest.”

He stressed that the Senate was the only place in the American system where minority rights are meaningfully protected: “The very existence of the Senate, however, embodies an equally valid tenet in American democracy: the principle that minorities have rights. Furthermore, a majority of Senators at a given time and on a particular issue may not truly represent majority sentiment in the country... Delayed deliberation and debate, though time-consuming, may avoid mistakes that would be regretted in the long run. The Senate is the only forum in the government where the perfection of laws may be unhurried and where controversial decisions may be hammered out on the anvil of lengthy debate.”³⁸

The Framers designed a bicameral legislature so that the Senate would check and balance the passions of the House and Presidential overreach. Stifle minority rights, and the Senate’s capacity to serve these purposes will be badly diminished. This will especially be true if the House, the Senate, and the Executive are controlled by the same party, as Senator Harry Reid himself recognized. In 2005, he told the Senate, “The right to extended debate is never more important than when one party controls Congress and the White House. In these cases, the filibuster serves as a check on power and preserves our limited government.”

A Loss of Stability

Undermining the minority through erosion of filibuster rights would mean the potential for big policy swings whenever the Senate changes hands. That also is not good for the country. As James Madison wrote in *Federalist* 62, “The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws are so voluminous that they can

³⁸ Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, (Washington: USGPO, 1991), p. 162.

not be read or so that they cannot be understood; if they be repealed or revised before they are promulgated or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.”³⁹

Filibuster rights cushion against such whiplash because the Senate minority has real influence. For example, when Republicans won both Chambers and the Presidency in 2017, Democrats were neutered in the House, but retained substantial power in the Senate. Their ability to filibuster was a source of immense frustration to President Trump, who had a program he wanted to pursue. Time and again, the President tweeted that filibuster rights must be eliminated.⁴⁰ However, Majority Leader McConnell brushed these demands aside. Accordingly, Democrats were able to stop some bills, and legislation that arrived on the President’s desk was more modest.

A Check on the Executive Branch

Without the filibuster, and the consensus building it generates, the Senate would not only be less of a check on the House but also on the Executive Branch. Instead, the filibuster enables the Senate to fulfill one of the main purposes for which the Founders created it.⁴¹

W. Lee Rawls, former Chief of Staff to Senate Majority Leader Bill Frist (R-TN) and a professor at the Army War College, emphasized the importance of the filibuster as a hedge on Executive power: “Members of the Senate Majority may not appreciate how much they are in control of the entire legislative machine. In the American system, the resistance provided by the minority makes their political judgments the essential ingredient in establishing and

³⁹ *Federalist 62* (James Madison), Library of Congress Research Guides, <https://guides.loc.gov/federalist-papers/text-61-70#s-lg-box-wrapper-25493449>.

⁴⁰ For instance, on July 29, 2017, Trump wrote, “The very outdated filibuster rule must go. Budget reconciliation is killing Rs in the Senate. Mitch M go to 51 votes now and WIN. IT’S TIME! Republicans in the Senate will NEVER win if they don’t go to a 51 vote majority NOW. They look like fools and are just wasting time. 8 Dems totally control the U.S. Senate. Many great Republican bills will never pass like Kate’s Law and complete health care. Get smart!” Stefan Becket, “Trump Calls for End to Filibuster, Says Republicans ‘Look Like Fools,’” CBS News, July 29, 2017, www.cbsnews.com.

⁴¹ Political scientists Gregory J. Wawro and Eric Schickler observe that, “The Senate rules that protect unlimited debate and effectively require supermajorities for the passage of legislation were not part of the Framers blueprint for the Senate. Nevertheless, these rules are consistent, at least in principle, with their conception of the Senate as a bulwark protecting minorities and as a brake on precipitate action.” They further note, “If anything, Senate rules and practices concerning unlimited debate have become more important as the Senate has evolved.” Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*, (Princeton: Princeton University Press, 2006), p. 10.

implementing legislative strategy. Without such resistance, they will lose their strategic function and their role becomes one of either supporting or opposing the policies of an Executive Branch of the same party.”⁴²

For example, historian Robert Caro contends that extended debate serves the Senate’s responsibility to be a check on Presidents. Writing to Senators in 2003, Caro said, “In short, two centuries of history rebuts any suggestion that either the language or the intent of the Constitution prohibits or counsels against the use of extended debate to resist presidential authority. To the contrary, the nation’s Founders depended on the Senate’s members to stand up to a popular and powerful president.”⁴³

Senator Byrd strongly cautioned against changing debate rules and therefore weakening the Senate as a check on the Executive. “We must never, ever, ever, ever tear down the only wall, the necessary fence, that this nation has against the excesses of the Executive Branch and the resultant haste and tyranny of the majority.”⁴⁴

Permitted Under the Constitution

American government is a finely balanced instrument, built in good measure on the Framers’ mistrust of pure majority rule. They did not create the Senate to look like the House because they grasped that, even in the eighteenth century, the country had disparate political, social, and economic interests that must be given weight. In modern America, this fundamental understanding is even more essential. It is not an antiquated theory, but a national priority.

Scholars have observed that the Framers did not create the filibuster.⁴⁵ That is true. It is also true that they did not establish any rules for either chamber, but empowered Members of Congress with the authority to govern themselves. The filibuster emerged from this grant of self-governance. It makes the Senate a more deliberative body, and the consensus building and moderation that it generates is consistent with the reasons for creating a Senate in the first place.⁴⁶

⁴² W. Lee Rawls, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, June 23, 2010, p. 380.

⁴³ Carl Hulse, “From One Esteemed Corner a Lesson About the Senate’s Filibuster Rule,” *New York Times*, June 5, 2003, p. A32.

⁴⁴ Senator Robert C. Byrd, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, May 18, 2010, p. 161.

⁴⁵ Gregory Koger, *Filibustering*, (Chicago: University of Chicago Press, 2010), p. 39. See also Statement of Sarah A. Binder, Department of Political Science, George Washington University, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 17.

⁴⁶ “The filibuster, although not created by the Framers themselves, grew out of the

Opponents of the filibuster argue that the Framers set out five conditions for supermajority voting.⁴⁷ Those are constitutional amendments, veto overrides, consent to treaties, expulsions of Members, and impeachment convictions.⁴⁸ To them, it is an exclusive list. As Senator Tom Harkin (D-IA) stated, “It should be clear, especially to those who worship at the shrine of ‘original intent,’ that if the Framers wanted a supermajority for moving legislation or confirming a nominee, they would have done so.”⁴⁹

independent precedents and procedures evident in the Senate from the outset, which themselves grew out of the constitutional design for the Senate.” Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), p. 3.

⁴⁷ Adam Jentleson recounts debates within the Constitutional Convention in which there were efforts to mandate supermajority voting for other topics, such as trade and navigation laws, but that such were rejected. “In the end, the convention made clear that supermajority thresholds should be reserved for the matters of greatest consequence, such as impeachment, treaties with foreign nations, and amendments to the Constitution.” Thus, he asserts, “On all other matters, the delegates were clear that the Senate was to be a strictly majority-rule institution.” Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 16.

⁴⁸ Senator Jeff Merkley has argued, “Never, ever, ever, did our Founders want this Chamber to have a supermajority barrier, and we know this so clearly because they said so.” Referencing Alexander Hamilton in *Federalist 22*, Merkley said, “With the minority in control of the majority, the result will be ‘tedious delays...and...contemptible compromises of the public good.’” Merkley also quoted James Madison from *Federalist 58* on the matter of supermajority voting, “It would no longer be the majority that would rule; the power would be ‘transferred to the minority.’ He was noting that the principle of free government would be reversed.” Merkley went on to say, “The principle of free government is that you go the direction the majority weighs in on, not the minority. But when you require 60 votes to go down Path A, and without them you go down Path B, then you go in the direction the minority wants. You have done exactly what Madison said we must not let happen. We are reversing the principle of free government.” *Congressional Record*, January 7, 2022, pp. S98-S99.

⁴⁹ Harkin went on to say, “The Founders were very clear why a supermajority requirement was not included.... That is what Madison said. A supermajority would mean that a small minority could ‘destroy the energy of government.’” Referencing *Federalist 58*, the Senator added, “James Madison—sort of the author of our Constitution—said, no, you cannot have a supermajority; if you do that, then the minority would rule, the power would be transferred to the minority—unfortunately.” *Congressional Record*, January 24, 2013, p. S252. Madison was without question an advocate for majority rule. He came from Virginia, then the nation’s largest state. He was one of the architects of the Virginia Plan in the Constitutional Convention, which called for the Senate to be proportional in representation, just like the House. Madison believed in bicameralism and advocated for distinctions between the chambers, such as in minimum age or term of service. However, he had a strong majoritarian bias and opposed equality of representation in the Senate. See Max Farrand, *The Records of the Federal Convention of 1787*, Vol 2, (New Haven: Yale University Press, 1911) pp. 8-9. However, the Convention did not concur with Madison’s argument. To conciliate the interests of small states, on July 16, 1787, it agreed to the Connecticut Compromise. On that vote, Madison’s Virginia was in the negative.

I disagree. The power of self-governance includes the right to require supermajority voting thresholds. It is therefore reasonable to argue that the five circumstances in which the Framers specified supermajority voting represent a floor and not a ceiling. Supermajorities are required in those instances but not foreclosed in others. If the Framers intended to bar them, they could have said so, but beyond what they insisted upon, they left the rest to the discretion and judgment of those who would serve in Congress.

The Modern Norm of 60 Votes

Filibusters are associated with a 60-vote threshold necessary to break them. Such supermajority requirements materialize not only in cloture votes, but in waiver provisions associated with certain rules and expedited procedure laws. In addition, the 60-vote threshold appears with some frequency in unanimous consent agreements relative to voting on amendments and/or the main question.⁵⁰

Under such circumstances, Senators allow the cloture process to be circumvented while applying its voting standard. In that way, Senators assure their interests will be reckoned with as legislation moves forward. It is often the minority that insists upon the 60-vote threshold, but not always. For example, in late 2021, Senator Ted Cruz (R-TX) promoted legislation that would have impeded the Nord Stream 2 Pipeline. Seeking at that stage to maintain flexibility in discussions with Russia and with energy-dependent U.S. allies, the majority stipulated that his bill, S. 3634, could come up only under a consent order requiring 60 votes for passage.⁵¹

⁵⁰ Under the rule-making power, the Senate has imposed 60-vote thresholds to waive certain points of order and has generated many consent orders imposing similar hurdles when voting on amendments or the main question. I do not believe these are unconstitutional, notwithstanding arguments that the express supermajority provisions in the Constitution present an exclusive list.

⁵¹ The order stated, “*Ordered*, That at a time to be determined by the Majority Leader, following consultation with the Republican Leader, no later than January 14, 2022, the Senate proceed to the consideration of S. 3436, a bill to require the imposition of sanctions with respect to entities responsible for the planning, construction, or operation of the Nord Stream 2 pipeline and their corporate officers and to apply congressional review under the Countering America’s Adversaries Through Sanctions Act to the removal of sanctions relating to Nord Stream 2, and for other purposes; provided, that there be two hours of debate on the bill, equally divided between the Leaders or their designees; provided further, that upon the use or yielding back of that time, the bill be considered read a third time and the Senate vote on passage of the bill, with 60 affirmative votes required for passage, with no amendments in order, and without intervening action or debate.”

On January 13, 2022, the Senate voted 55-44 to *reject* the bill. Of the 44 negative votes, 43 were Democratic and one was Republican. Six Democrats, five of whom were up for election in 2022, joined 49 Republicans to vote in favor. In this example, the 60-vote threshold protected majority interests and frustrated the minority.

Just like the enlarged use of filibusters, imposition of supermajority voting requirements, whether in connection with cloture or not, have become the Senate norm, insisted upon by both Republicans and Democrats.⁵² If the filibuster were defused because cloture only needed a simple majority, instances in which Senators could protect their own interests would obviously be diminished.

A Relic of Jim Crow?

At the 2020 funeral for civil rights leader John Lewis, former President Barack Obama labeled the filibuster a “relic of Jim Crow” and called for its elimination. Beyond question, the filibuster was successfully used to derail anti-lynching legislation and to block or weaken other civil rights measures, and Southern Democrats tried to use it in an unsuccessful attempt to stop the Civil Rights Act of 1964.⁵³ Senator Tim Kaine (D-VA) argues that notwithstanding the filibuster’s widespread use, special attention must be paid to its role with respect to civil rights: “The fact that the filibuster is now used indiscriminately against everything does not cleanse it of the stench of its predominant use in our history to block civil rights legislation.”⁵⁴ That conclusion is understandable but distorting. As the *New York Times* has written, “The filibuster has a storied place in the nation’s history, and in popular culture. During the Great Depression, Huey Long of Louisiana fought off a bill he opposed by reciting recipes for fried oysters and potlikker. In the 1939 film *Mr. Smith Goes to Washington*, Jimmy Stewart triumphed over crooked politicians with a 23-hour filibuster. Filibusters were used, notoriously, by Southern Senators to fight civil

⁵² Professors Gregory Wawro and Eric Schickler write, “The need to gain the support of the filibuster pivot is common knowledge in the contemporary Senate: all of the players understand that in the absence of a 60-vote coalition, legislation will fail to pass.” The authors noted that of 90 major laws passed between 1975 and 1994, all but ten gained more than 60 votes. Many of the exceptions were bills subject to debate controls under expedited procedure laws. They continue, “This suggests that the three-fifths threshold is a genuine pivot point for major legislation in the contemporary era, with the exception of bills subject to specific statutory debate limitations.” Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*, (Princeton: Princeton University Press, 2006), p. 27.

⁵³ Southerners’ control over committee chairmanships amplified their effectiveness in using filibusters against civil rights legislation. Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 71.

⁵⁴ *Congressional Record*, January 18, 2022, p. S262.

rights legislation, notably the Civil Rights Act of 1964. But even during those dark days, the Senate considered the right to filibuster sacrosanct.”⁵⁵

To label the filibuster a Jim Crow relic uses an aspect of history to condemn a process that remains immensely important on numerous issues that have nothing to do with civil rights. Senators of both parties have conducted filibusters on the broadest range of social and economic issues, questions of foreign policy and national security, and energy and environmental policy, among numerous others.

Examples are diverse. Here is a sample listing of extended debate conducted since 1950 on legislation other than civil rights measures. In each case, there was resort to the cloture process, sometimes successfully and sometimes not. There are vastly more examples than those set out in this note, which is an effort to illustrate the range of topics on which these tactics have been used: 1950 on fair employment practices; 1954 on amendments to the Atomic Energy Act; 1962 on a communications satellite bill; 1965 on right-to-work legislation; 1969 on deployment of an anti-ballistic missile system; 1970 on a constitutional amendment to abolish the Electoral College; 1970 on appropriations of funds for the development of a supersonic transport; 1971 on extension of conscription; 1972 on a bill to establish an independent Consumer Protection Agency; 1974 on extending the Export-Import Bank; 1977 on public financing of congressional elections; 1977 on natural gas deregulation; 1978 on a contested election for a Senate seat to represent New Hampshire; 1978 on labor law reform; 1980 on restoring draft registration; 1981 on implementation of voluntary school prayer; 1983 on repealing tax withholding on interest and dividend income; 1984 on a resolution to televise the Senate; 1985 on legislation to authorize the line-item veto of appropriations bills; 1987 on a moratorium on aid to the Nicaraguan Contras; 1987 on restricting the Strategic Defense Initiative; 1987-1988 on campaign finance reform; 1990 on Armenian genocide legislation; 1992 on a motor voter bill; 1995 on product liability limitations; 1997 on McCain-Feingold campaign finance legislation; 2002 on drilling in the Arctic National Wildlife Refuge; 2002 on creation of the Department of Homeland Security; 2005 on a bill to end the estate tax; 2006 on a constitutional amendment to define marriage as the union of a man and a woman; 2007 on a sense of Congress resolution related to the surge of troops in Iraq; 2008 on oil windfall profits legislation; 2011 on leasing on the Outer Continental Shelf; 2013 on firearms background checks; 2013 on immigration reform; 2016 on increased penalties for apprehended illegal immigrants; 2018 on abortion legislation (pain-capable unborn children); 2020 on policing reform legislation; 2022 on amendments to the Federal Election Campaign Act to provide for strengthened disclosure requirements; and 2022 on abortion rights protection. Many additional illustrations are possible.

⁵⁵ “Mr. Smith Goes Under the Gavel,” *New York Times*, November 28, 2004, www.nyt.com.

A Tool Both Parties Exploit

It is easy to defend minority rights when one is in the minority. Again, one's position on the filibuster should not change depending on who is doing the filibustering.⁵⁶ When tables are turned, even vigorous critics of the filibuster often become ardent defenders.

Consider, for example, the views of the *New York Times*, which often inveighed against the filibuster when it was executed to frustrate the agendas of Democratic Presidents. However, the *Times* defended its use when Democrats blocked President George W. Bush's judicial appointments, and condemned Republicans for considering extraordinary procedures to eradicate it: "Senators need only to look at the House to see what politics looks like when the only law is to win at any cost.... The Senate, of all places, should be sensitive to the fact that this large and diverse country has never believed in government by an unrestrained majority rule. Its composition is a repudiation of the very idea that the largest number of votes always wins out.... A decade ago, this page expressed support for tactics that would have gone even further than the 'nuclear option' in eliminating the power of the filibuster. At the time, we had vivid memories of the difficulty that Senate Republicans had given much of Bill Clinton's early agenda. But we were still wrong. To see the filibuster fully, it's obviously a good idea to have to live on both sides of it. We hope acknowledging our own error may remind some wavering Republican Senators that someday they, too, will be on the other side and in need of all the protections the Senate rules can provide."⁵⁷

⁵⁶ "Majorities are frequently frustrated by the pace of the Senate and the difficulty of enacting the majority's agenda. With that frustration sometimes comes a demand to destroy the filibuster. The forces on the attack against the filibuster and its defense have a way of switching sides as the majority power shifts." Statement of Robert B. Dove, Parliamentarian Emeritus, United States Senate, "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 65.

⁵⁷ "Walking in the Opposition's Shoes," *New York Times*, March 29, 2005, p. A16. Also consider commentary from *The Nation*, a progressive publication that ardently defended the filibuster when applied to Bush judicial appointments: "If the filibuster is eliminated, Congress will become an altered branch of government. In the absence of rules that require consideration of minority views and values, the Senate will become little different from the House, where the party out of power is reduced almost to observer status." Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), p. 6.

The irrefutable fact is that the filibuster has been amply exploited on both sides of the aisle. Based on the number of cloture votes between 1991 and June 2021, Democrats conducted 720 filibusters and Republicans conducted 698.⁵⁸

To consider this on a more granular level, between January 2021 and December 1, 2022, with a Republican minority, there were 325 cloture motions filed. Of those, 269 concerned nominations, where cloture is invoked by majority vote. Fifty-six other cloture motions involved legislation. Of the 56, cloture failed 14 times. In 12 other of those instances, the cloture motion was either formally withdrawn or was made moot because dispositive action, such as bill passage, occurred before the motion ripened.

In the previous Congress (2019-2020), with a Democratic minority, the pattern was essentially the same. There were 328 cloture motions filed, of which 268 concerned nominations. As to the 60 of them involving legislation, cloture failed 24 times. In nine other cases, the motion was withdrawn or mooted.

I am confident that both Democrats and Republicans were frustrated by filibusters that blocked their initiatives outright or forced them to make concessions to get over the hurdle of cloture. My point is that both parties have recognized and exploited the power of the filibuster to serve the public interest as they saw fit.

⁵⁸ Stevie Rossignol-Cortez, “Did Democrats Make Record Use of the Filibuster in the Last Congress?” June 27, 2021, www.gigafact.org.

Part III:
Historical Background

The Senate has never had a way to end debate on legislation by majority vote.⁵⁹ The first Senate rules, adopted in 1789, contained a motion for the previous question, much as House rules did then and still do today. In 1811, the House interpreted the rule to make it a cloture-type device. Ever since, it has been used there as a procedural guillotine, by which a simple majority can end debate and cut off amendments abruptly.

However, majority cloture was not its use or purpose in the early House or in the Senate. As Princeton University Professor Franklin L. Burdette wrote, “It is common knowledge among persons interested in that procedure that until 1806 the rules provided for a previous question, but about the nature of that motion there is often misunderstanding. The previous question as it is generally known today is a non-debatable motion, which, if carried, will close debate. In the early Senate, the motion was itself debatable.”⁶⁰

⁵⁹ Senator Paul Douglas (D-IL), a staunch advocate in the 1950s and 1960s of cloture reform to facilitate civil rights legislation, interpreted the Senate’s previous question motion differently. He submitted extensive arguments in the *Congressional Record* for the idea that the Senate could write new rules at the start of a Congress and end debate on them by majority vote. Within that material is an argument by historian Irving Brant that there was an antecedent to majority cloture in the previous question rule that existed between 1789 and 1806. In other materials, Senator Richard Russell (D-GA) took a contrary view and submitted extensive materials. Based on those readings from Russell, some of his colleagues, and historians such as George Haynes and Asher Hinds, I judge that Russell had the better argument. For Douglas’ submission, see *Congressional Record*, January 3, 1957, pp. 13-44.

⁶⁰ Franklin L. Burdette, *Filibustering in the Senate* (Princeton: Princeton University Press, 1940), p. 219. Political scientist Richard R. Beeman states, “Although the rules of April 16, 1789, allowed for moving the previous question, this device was originally intended to postpone discussion and thereby delay proceedings on a bill, rather than end debate and bring about immediate action.” Beeman indicates that on several occasions there were futile efforts to use the motion to cut off debate abruptly, prior to its being dropped from the rules altogether. “Yet on four occasions in the next 17 years, the previous question was used for its modern purpose, to end debate. Its effectiveness was limited; it was ruled out of order by the speaker once, and even when adopted, did not always succeed in silencing those Senators determined to continue the debate.” Richard R. Beeman, “Unlimited Debate in the Senate: The First Phase,” *Political Science Quarterly* 83, no. 3 (1968): 419-434, <https://doi.org/10.2307/2147507>. “The previous question, which was provided for by the rules but rarely used, and was omitted from the rules in 1806, was not used to limit debate, but as in the Continental Congress and in the Parliament of England, the previous question was used to avoid a vote on a given subject.” Clara H. Stidham, *The Origin and Development of the United States Senate*, (Ithaca, New York: Andrus and Church, 1895), p. 59.

If the motion was made, and was decided in the affirmative, legislation to which it pertained would remain pending. If the motion was decided in the negative, the Senate would defer the matter at hand and go to other business. The motion was not available on amendments or in the Committee of the Whole.⁶¹ Distinct from its use in the modern House, it was not a way to end debate on underlying issues.⁶² Vice President Aaron Burr recommended it be dropped. According to then-Senator John Quincy Adams (F-MA), “[Burr] mentioned one or two rules which appear to him to need a revisal and recommended the abolition of that respecting the previous question, which he said had in the four years been only once taken, and that upon an amendment. This was proof that it could not be necessary, and all its purposes were certainly much better answered by the question of indefinite postponement.”⁶³ Based on Burr’s advice that it was surplusage, the motion was eliminated in an 1806 rules recodification.⁶⁴

By excising the previous question motion, the Senate inadvertently opened the door to filibusters. That is not because the motion was a cloture-like device in 1806. It wasn’t. However, if it had remained in the rule book, it could have been converted for that purpose, just as happened in 1811 in the House.⁶⁵ Although neither the Framers nor early Senators designed or enshrined the

⁶¹ In 1930, the Senate eliminated the Committee of the Whole for consideration of legislative business. It was used for proceedings on treaties until 1986.

⁶² In 1938, the great historian George Haynes wrote, “To one familiar with the frequent present-day use of the previous question in the House of Representatives as an effective form of closure, this rule gives an entirely erroneous impression of the Senate’s original practice.... Asher C. Hinds, author of the monumental *Precedents of the House of Representatives*, commented on the [Continental Congress] rule of 1784, on which the previous question rules of the House and Senate were modeled five years later. ‘There was no intention thereby of providing a means of closing debate in order to bring the pending question to an immediate vote,’ and Senator Lodge declared: ‘It was not in practice a form of closure, and it is, therefore, correct to say that the power of closing debate in the modern sense has never existed in the Senate.’” George Haynes, *The Senate of the United States*, Vol. 1, (New York: Russell & Russell, 1960), p. 393. Lodge’s statement would no longer be true after the cloture rule came into effect in 1917, but it does reflect on the notion that the previous question motion was a cloture mechanism in the early Senate.

⁶³ *Memoirs of John Quincy Adams* (Charles Francis Adams, ed. 1874), quoted in Joseph Cooper, “The Previous Question: Its Standing as a Precedent for Cloture in the United States Senate,” S. Doc. 87-104, (1962), p. 4.

⁶⁴ Sarah Binder, “The History of the Filibuster,” Brookings Institution, April 22, 2010, www.brookings.org (accessed September 24, 2022).

⁶⁵ See Testimony of Sarah Binder before the Committee on Rules, U.S. Senate, April 22, 2010, “Examining the Filibuster,” Hearings Before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, p. 17.

filibuster, it is a practice that evolved over time and one that later Senators permitted and protected. It is reasonable to argue that although the filibuster was not part of the Senate's original framework, it serves important purposes for which the Senate exists.

If the previous question motion was really a predecessor form of majority cloture, then it would be true that, when they removed it, Senators knowingly embraced filibustering. However, since the motion did not abruptly end debate, one cannot draw that conclusion.⁶⁶

Filibusters Emerge

Dilatory tactics would periodically surface during the first half-century after the Senate's founding. However, the first major Senate filibuster can be said to have occurred in 1841 over a proposal by Senator Henry Clay (W-KY) to revive the Second Bank of the United States.⁶⁷ Clay's bill was deeply controversial.⁶⁸ Jacksonian Democrats, such as Senators Thomas Hart Benton (D-MO), John C. Calhoun (D-SC), and William King (D-AL), would not permit a vote.⁶⁹ Frustrated by their obstruction, Clay sought to revive the previous question motion and to model its use after House procedure. Had he succeeded, debate on the bill could have ended by majority vote.⁷⁰ Those who had been filibustering pledged strong resis-

⁶⁶ Ibid.

⁶⁷ There were earlier filibusters of less consequence. Professor Gregory Koger notes an 1831 filibuster on public works legislation, an 1837 filibuster on a measure to expunge the Senate's 1834 censure of President Andrew Jackson, and an 1841 filibuster over the appointment of public printers. Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, (Chicago: University of Chicago Press, 2010) pp. 62-63.

⁶⁸ President Andrew Jackson was a committed opponent of the Bank, but Whigs took the opposite view. To advance major public works programs that Whigs promoted, they advocated bringing back the Bank. Jackson's presidency ended in 1837, but he had plenty of allies remaining in Congress. They were committed to blocking Whig legislation on the Bank.

⁶⁹ "Benton readily adopted obfuscating tactics to block Clay's bills.... The previous summer, Benton proposed killing a Whig bill simply by holding the Senate floor until adjournment. Now, in 1841, he and his Democratic allies took a different tack. Each night, they met in caucus to draw up amendments with which to attack Clay's pending bill.... They offered almost 40 amendments and forced delaying roll call votes on 37 of them." Neil MacNeil and Richard Baker, *The American Senate*, (Oxford: Oxford University Press, 2013), pp. 307-308. Clay also proposed instituting a rule limiting each Senator to an hour of debate, much like the one-hour rule in the House. In the face of resistance, that idea did not move forward.

⁷⁰ "The gag rule proposal never became a formal motion, and thus does not appear on any list of Senate precedents, but the advocacy of such a rule, and the reaction that it induced, is suggestive of a growing concern for senatorial prerogative. Senate assent to a gag rule providing

tance to the rules change.⁷¹ Denounced for trying to impose a gag rule, Clay gave up. A compromise bill ultimately passed, but President John Tyler vetoed it on August 16, 1841.⁷² On August 19, an attempt in the Senate to override the veto failed 25-24, far short of the two-thirds vote needed for that purpose.

In the years thereafter, more filibusters would occur, usually as Congress was approaching *sine die* adjournment and time was short. Professor Gregory Koger notes that attrition was a common strategy through the nineteenth century to cope with filibusters. “Obstructionists had to make an effort to stall the Senate, while the majority had to be willing to wait for them to make a mistake or become exhausted.”⁷³ The price of filibustering was high, because it could be physically demanding, and it had the effect of impeding other Senate business. If time was too short and the schedule too compressed, attrition would not work, and the obstructionists prevailed.

for a majority cloture would have set a precedent making the later development of planned filibustering techniques impossible. Clay’s personal prestige, the Whig majority in the Senate, and the importance of the bill at stake makes circumstances for the passage of a gag rule more favorable in 1841 than at almost any time in Senate history. With all these factors in his favor, Clay was unable to get even his own party to back him.” Richard R. Beeman, “Unlimited Debate in the Senate: The First Phase,” *Political Science Quarterly* 83, no. 3 (1968): 419, 427, <https://doi.org/10.2307/2147507>.

⁷¹ Senator Thomas Hart Benton, one of Clay’s opponents, described in memoirs a confrontation between Clay and Alabama Senator William King over the filibuster: “Mr. King said the Senator from Kentucky complained of three weeks and a half being lost in amendments to his bill. Was not the Senator aware, that it was himself and his friends who had consumed most of the time? But now that the minority had to take it up, the Senate is told that it must be a gag law. Did he understand that it was the intention of the Senator to introduce that measure?”

Mr. Clay. I will, Sir; I will!

Mr. King. I tell the Senator then that he may make his arrangements at his boarding house for the winter.

Mr. Clay. Very well, Sir.

“Mr. King was truly sorry to see the honorable Senator so far forgetting what is due to the Senate, as to talk of coercing it by any possible abridgement of its free action. Freedom of debate has never been abridged in that body since the foundation of this government. Was it fit or becoming after 50 years of unrestrained liberty, to threaten it with a gag law?” Thomas Hart Benton, *Thirty Years View*, Vol. II, (New York: D. Appleton and Company, 1883), p. 253.

⁷² James C. Klotter, *Henry Clay: The Man Who Would be President*, (New York: Oxford University Press, 2018), pp. 266-267.

⁷³ Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, (Chicago: University of Chicago Press, 2010), p. 5.

For example, in 1870, the Senate was considering legislation to amend immigration and naturalization laws. The Naturalization Act of 1790 had provided that only white persons could be naturalized as citizens. On Saturday, July 2, 1870, Senator Charles Sumner (R-MA) proposed an amendment to provide that no person could be denied the right of naturalization based on race. His amendment carried. Agitated about the prospect of Chinese workers on the Pacific Coast being eligible for citizenship, Senator William Stewart (R-NV) rose. He threatened a filibuster unless the Sumner amendment was removed from the bill. Attrition was not effective. As the Senate was looking toward a July 15 adjournment, with much legislation in the queue, his threat was potent. Several other Senators stood with him.

The Senate worked late into the evening that Saturday but remained stalemated. It returned on Monday, July 4, with the controversy still pending. When it became clear that Stewart and several of his allies would not relent, there was a motion to reconsider the vote on the Sumner amendment and relieve the logjam. The motion carried and the amendment was removed from the bill. From there, the legislation was positioned to pass.

The effect of the filibuster on Chinese communities in the United States was grievous. The first of multiple Chinese exclusion laws came approximately a decade later, imposed against a population who mostly could not become voters and thus had diminished political rights. From 1882 until 1943, the Chinese Exclusion Laws were in effect. During that period, no person of Chinese descent born anywhere outside of the United States itself was eligible to become an American citizen.⁷⁴

If attrition would not suffice, what else might work? Rules changes were periodically proposed but never acted upon. As the renowned historian of the Senate, George Haynes, wrote, “In the years soon after the Civil War, repeatedly motions were made with the object of empowering the Senate, after a bill had been under consideration for a reasonable time, by simple or special majority, to fix a time when debate should close and a vote be taken, but none of these attempts to place general restrictions upon the Senate’s right to debate secured favorable committee action.”⁷⁵

Things came to a boil in 1890, when legislation was pending to permit federal supervision of Southern elections. Southerners condemned it as a “force bill” and Southern Senators filibustered it. Fed up with the blockade, Senator

⁷⁴ Martin B. Gold, *Forbidden Citizens: Chinese Exclusion and the U.S. Congress* (Alexandria, Virginia: TheCapitol.net, 2012), pp. 1-33.

⁷⁵ George Haynes, *The Senate of the United States*, Vol. 1, (New York: Russell & Russell, 1960), p. 396.

Nelson Aldrich (R-RI) proposed a mechanism that would allow a motion to close debate by majority vote. However, it was futile. As the Congressional Research Service notes, “There were five test votes on the cloture proposal which commanded various majorities, but in the end, it could not be carried in the Senate because of a filibuster against it which merged into a filibuster on the ‘force bill.’”⁷⁶ In all, the filibuster lasted 29 days.

Throughout the remainder of the nineteenth century and into the early years of the twentieth, filibusters continued to occur, such as an unsuccessful one in 1893 by silver advocates against repeal of the Silver Purchase Act. Frustrated Senators occasionally, but fruitlessly, sought remedies.⁷⁷ As political scientist Sarah Binder has noted, “More often than not, Senators gave up on their quest for filibuster reform when they saw that opponents would kill it by filibuster because it would put the majority’s other priorities at risk.”⁷⁸

However, support for restrictions was building. Professors Gregory Wawro and Eric Schickler write that up until the late Nineteenth Century, Senate norms generally restrained filibustering. However, what they term “a system of relation-based governance” began to collapse and was replaced by “rules-based governance.”⁷⁹ Thus, as the Senate grew larger, as its agenda became more complex, and as burdens on Senators’ time became more acute, efforts to devise a cloture rule replaced attrition as the preferred strategy to address filibusters.

Following a successful 33-day filibuster in 1915 on Democratic legislation to purchase German ships marooned in U.S. ports, reformers moved ahead with a plan to institute such a rule. Anger over the growing use of filibusters was palpable. A leading reformer, Senator Robert Owen (D-OK), reflected it in comments on the Senate floor: “During the last two years, since March 1913, the Senate of the United States has had one important measure after another brought before it for consideration by the Democratic administration. There was a prolonged and obvious filibuster in the Senate dealing with the tariff bill. In order probably to prevent any action upon the Federal Reserve bill, there was a resolute filibuster even on the question of allowing a water supply for the

⁷⁶ “Senate Cloture Rule,” Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, p. 15.

⁷⁷ After Clay’s failure in 1841, there were efforts in 1850, 1869, 1873, 1918, 1925, and 1961 to bring back the previous question motion, to no avail. In 1918, a resolution to this effect that had been favorably reported from the Rules Committee but failed 34-41 on June 13, 1918.

⁷⁸ Testimony of Sarah Binder before the Committee on Rules, U.S. Senate, April 22, 2010, “Examining the Filibuster,” Hearings Before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, p. 18.

⁷⁹ Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate*, (Princeton: Princeton University Press, 2006), p. 41.

city of San Francisco; there was a filibuster, using that bill as a general buffer, against progressive legislation, which made it necessary in handling that bill, as well as in handling the tariff bill and the Federal Reserve Act, for the Senate to meet in the morning and to run until 11:00 o'clock at night. We had no vacation during the summer of 1913 or during the summer of 1914 because of the vicious filibustering of the Republican Senators."

Owen hastened to add an axiom, however: "The practice of filibustering has not been confined to one side of the Chamber only. I agree with the Senator from Nebraska [Mr. Norris], that the filibuster quickly passes from one side of the chamber to the other as an exigency may arise, according to the desire of those who may be on the either side of the aisle."⁸⁰

On May 16, 1916, the Senate Rules Committee favorably reported S. Res. 149, which provided for cloture by two-thirds of voting Senators. There was floor debate on the resolution, but it did not come to a vote.

The Cloture Rule Arrives

Change came in 1917, in connection with another measure related to the war. In January, to starve out the British, Germany announced a policy of unrestricted submarine warfare in the North Atlantic.⁸¹ Knowing that such a policy was likely to bring the United States into the war, Germany tried to insulate itself. On January 19, 1917, its Foreign Minister sent a coded message to Mexico proposing an anti-American alliance and suggesting that Japan should also join. British intelligence intercepted the message, broke the code, and alerted the United States. At the end of February, the American government made it public, leading to widespread outrage among the American people.

⁸⁰ *Congressional Record*, February 13, 1915, p. 3717.

⁸¹ Germany had such a policy earlier in the war, which it largely abandoned after the sinking of the British vessel *Lusitania* in 1915. However, considering stalemate conditions on the Western Front, the German General Staff convinced Kaiser Wilhelm II to reinstitute and broaden it. Arthur S. Link, *Woodrow Wilson: War, Revolution, and Peace* (Wheeling, IL: Harlan Davidson, 1979), p. 59. See also Patricia O'Toole, *The Moralist: Woodrow Wilson and the World He Made*, (New York: Simon & Schuster, 2018), p. 243.

President Woodrow Wilson spoke before a Joint Session of Congress on February 26, seeking legislation to arm U.S. merchant ships.⁸² By a vote of 403-13, the House passed the bill on February 28 after three hours of debate. It went to the Senate with time to spare before adjournment of the 64th Congress on March 4.⁸³ However, it ran into the buzzsaw of the Willful Eleven, a collection of Senators who feared the legislation would open the door to American entry into the war.

Led by Senators Robert LaFollette (R-WI) and George Norris (R-NE), the group wanted no part of Wilson's proposal.⁸⁴ They engineered a filibuster to run out the clock, notwithstanding the pleadings of Senator Gilbert Hitchcock (D-NE), who was managing the bill for the proponents. As time ran down, Hitchcock presented for the *Congressional Record* a letter signed by 75 Senators stating that they were prevented from voting on a bill they wished to support. At noon on March 4, the 64th Congress adjourned by law *sine die*, the filibuster having succeeded.⁸⁵ Several days later, Senator John Sharp Williams (D-MS) summed up their frustration: "Seven-eighths of this body wanted the legislation and took the unprecedented step of affixing their names to a paper, saying to all the world 'we are cabined, cribbed, confined, manacled, bound, helpless, and contemptible, because we have no way of expressing a legislative opinion.'"⁸⁶

⁸² Wilson campaigned for re-election in 1916 on the slogan "He kept us out of war." Even after the German declaration, Wilson still hewed to that course. Historian Barbara Tuchman writes that Wilson "made-up his mind to ask Congress for the bill, not as his step toward war but as a warning to the Germans, which he hoped might deter them.... He decided upon it as a last buttress of America's crumbling neutrality. He had the executive right to arm the ships on his own authority, but the use of arms was a step of awful portent for which he wanted Congress' seal of approval." Barbara Tuchman, *The Zimmermann Telegram* (New York: Penguin Books, 2014), p. 155.

⁸³ Prior to the Twentieth Amendment, which came into force in 1933, the end of a Congress occurred at noon on March 4 of odd-numbered years unless by resolution Congress adjourned sooner.

⁸⁴ As war clouds darkened, there was already substantial skepticism within Republican ranks of leaving Wilson alone in Washington while Congress adjourned between March and December (the system in place before the Twentieth Amendment). Therefore, in late February, Republicans slowed down Senate consideration of a measure to fund the Army and Navy, hoping to force a special session. If Wilson called one, it would keep Congress around during a potentially perilous time. As it was, on February 23, 1917, Wilson issued a proclamation for the Senate to convene on March 5, but not both Houses. See Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 118.

⁸⁵ An excellent account of these proceedings is Thomas W. Ryley, *A Little Group of Willful Men*, (Port Washington, NY: Kennikat Press, 1975).

⁸⁶ *Congressional Record*, March 6, 1917, p. 6.

In his memoirs, Norris defended the resisters. “I have felt from that day to this the filibuster was justified. I never have apologized for the part I took in it.... We honestly believed that by our actions in that struggle, we had averted American participation in the war.”⁸⁷

Wilson was furious, complaining on March 4 that the Senate was the only legislative body that could not act when its majority was ready for action. “A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible. The remedy? There is but one remedy. The rules of the Senate shall be so altered that it can act.”⁸⁸

The following day a special session of the Senate convened at the call of the President. Wilson’s proclamation for this special session had been made weeks earlier and originally was for the purpose of having the Senate consider and confirm appointments for his second administration.⁸⁹ However, many Senators had something additional they wanted to do.

The *New York Times* of Monday, March 5, carried the headline, “Armed Ship Bill Beaten; President Issues a Statement, Saying We Are ‘Helpless and Contemptible’ Without Remedy Until the Senate Amends Its Rules; 33 Senators Already Pledged to End Obstruction.”⁹⁰

The leader of the pledge was Senator Owen, who, during the merchant ships filibuster, organized a March 3 letter that called for a majority cloture rules change. It read, “We the undersigned hereby mutually covenant and agree to cooperate with each other in compelling such changes in the rules of the Senate as to terminate successful filibustering and enable the majority to fix an hour for disposing of any bill or question subject to the rule of one hour to each senator for discussion before or after the hour is fixed.”

In addition to the 33 signatories, seven additional Senators indicated support for the effort.⁹¹ In a statement to the press, Owen said, “Seems that nothing but a cataclysm can remove this stupidity from the practice of the Senate. But the time has come when members themselves will no longer submit to

⁸⁷ George W. Norris, *Fighting Liberal: The Autobiography of George W. Norris*, (New York: The MacMillan Company, 1945), pp. 181-182.

⁸⁸ “Text of the President’s Statement to the Public,” *New York Times*, March 5, 1917, p. 1.

⁸⁹ Wilson had been re-elected in November 1916. His second term began on March 4, 1917.

⁹⁰ “Armed Ship Bill Beaten,” *New York Times*, March 5, 1917, p. A1

⁹¹ “Thirty-three Senators Give Pledge to Amend Rules to Halt Filibustering,” *New York Times*, March 5, 1917, p. 1.

this conduct by the minority. The rules of the Senate are going to be changed, and nothing will be permitted to be done until the rules are changed. We have reached a complete impasse, a situation in which there was a complete destruction of the powers of the Senate, and it will be tolerated no longer, I am sure, by a majority of the members of that body.”⁹²

When the Special Session convened on March 5, Owen took the floor to make a declaration. It was intended to break free of the dilemma that permitted a filibuster to block a rules change to restrict the filibuster. The Senate was not a continuing body, Owen said, and was not bound to proceed in a particular fashion by carryover rules: “We shall not be put in the attitude of proceeding under the rules of any preceding Congress. To that I will not consent.”⁹³

The following day, Senator Thomas Walsh (D-MT), one of Owen’s allies, proposed a resolution to re-adopt all Senate rules that had existed in the previous Congress except for Rule XXII, to which he intended to add cloture provisions. He elaborated on why, to make the change, they had to break free of existing rules: “It is simply impossible to change the rules so long as one man has the physical endurance requisite to prevent the change. I offered a resolution this morning which contemplates a change of the rules. Under the rules, if they do exist, any senator may debate that motion without end and without limit.”⁹⁴ Thus, there was a need for new thinking, Walsh said: “As we have no rules, we proceed under general parliamentary law, which permits us to put an end to debate at some time.”⁹⁵

⁹² Ibid. Owen’s views on the filibuster were well known, but he himself had used the tactic. In a floor statement on February 13, 1915, he made note of and dismissed this apparent discrepancy: “It has been offered as a criticism of my view with regard to a cloture rule for the Senate, that on one occasion, March 4, 1911, when the question arose with regard to the admission of New Mexico to statehood, with a corporation-written constitution and an unamendable constitution, and the prevention of Arizona at the same time being admitted to statehood, I did not hesitate to use the practice of the Senate to filibuster in order to compel a vote of the Senate jointly upon the admission of Arizona and New Mexico. My use of this bad practice to serve the people does not in any wise change my opinion about the badness of the practice of permitting a filibuster. I acted within the practice, but I think the practice is indefensible, and illustrated its vicious character by coercing the Senate and compelling it to yield to my individual will.” *Congressional Record*, February 13, 1915, p. 3717.

⁹³ *Congressional Record*, March 5, 1917, p. 5.

⁹⁴ *Congressional Record*, March 7, 1917, p. 15.

⁹⁵ *Congressional Record*, March 7, 1917, pp. 16-17.

The novel approach from these reformers, a harbinger of “nuclear option” methods now more in vogue, met resistance from Senators who were amenable to a cloture rule but who insisted it be instituted by regular order. Those Senators would not accept the theory that a procedural vacuum existed that would allow new rules to be created on a whim. “I am quite content to say that I favor some modified form of cloture rule,” then-Senator Warren Harding (R-OH) announced, “but I am not ready to accept the soundness of the Senator’s argument that this is not a continuing body; and I cannot accept the contention that we must first enter into a state of chaos in order to bring about the reform which the Senator seeks.”⁹⁶

Harding asserted that reform was possible under traditional procedures: “I have the abiding faith that a conservative cloture rule can be made a rule of this body along the lines of regular procedure for the amendment of the rules, without adopting a chaotic condition here wherein a majority of the Senate can fix the rules.”⁹⁷

Mindful of the broadly based sentiment for reform, each party appointed five negotiators to work out a solution. Among them, there were divergent views, but the group settled on a cloture threshold of two-thirds of voting Senators. If cloture was invoked, each Senator could not speak for more than one hour. The rule was applicable to pending measures.⁹⁸

This framework did not materialize in just a few days. Instead, the negotiators modeled their proposal on the cloture resolution, described several pages above, that the Senate Rules Committee unanimously reported in 1916.⁹⁹

⁹⁶ *Congressional Record*, March 6, 1917, p. 16.

⁹⁷ *Congressional Record*, March 7, 1917, pp. 16, 18.

⁹⁸ Dr. Sarah Binder of the Brookings Institution notes, “Creation of the cloture rule in 1917 was not a statement of the Senate’s love of supermajority rules. Instead, it was the product of hard-nosed bargaining with an obstructive minority.” Statement of Sarah A. Binder, Department of Political Science, George Washington University, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 17. With 40 of 96 Senators on record in support of majority cloture, hers is a fair conclusion.

⁹⁹ *Congressional Record*, March 8, 1917, p. 20. The 1916 reform effort followed a lengthy filibuster in 1915 on a ship purchase bill. The filibuster blocked legislation to purchase German ships marooned in American ports. Beginning on January 4 and lasting until February 18, the filibuster succeeded in killing the ship purchase bill as well as three appropriations bills. See Congressional Research Service, Library of Congress, “Senate Cloture Rule,” S. Prt. 112-31 (2011), pp. 16, 46.

Majority Leader Thomas Martin (D-VA) proposed the rules change in a resolution to amend Senate Rule XXII. Unlike prior efforts to impose filibuster controls, there was no filibuster to block the resolution, which was made pending by a unanimous consent order. Sentiment for reform was palpable, and the two-thirds voting threshold was a compromise on which almost all Senators could agree. During the debate, Senator Henry French Hollis (D-NH) offered an amendment to lower the threshold to a simple majority. His proposal evoked charges of betrayal. “The motion made by the Senator from New Hampshire is a breach of good faith,” exclaimed Senator Boies Penrose (R-PA). “The minority was informed that the Democratic Conference, and we knew the Republican Conference, had, with practical unanimity, agreed on the resolution in its present form. I do not think unanimous consent could have been obtained for any other than the pending proposition.”¹⁰⁰ Hollis withdrew his amendment.

Senator Lawrence Sherman (R-IL), one of a handful of Senators to oppose the resolution, was not confident that the requirement for supermajority cloture was durable. He worried that a future majority, frustrated with the voting threshold, would use similar pressure tactics to force further change. “Wait and see whether this rule itself will not in turn be some time amended by mere majority vote,” Sherman predicted. “The same precedent made here today... will be binding as authority to again amend section 22 by striking out the two-thirds part of the amendment and making it a bare majority.”

In time, he contended, truncating debate would make the Senate resemble the House, which would be inappropriate considering their different constitutional purposes: “The change in the rules will eventually lead to making of the Senate just such a legislative body as the House of Representatives is. It is well enough that a popular body be so, as it represents people. We do not. We represent the sovereignty of the states in which we dwell. We represent those states. It is of no concern how small the state is territorially, or in population, or in business resources. We represent the states primarily. For that reason, this ought to be like no other legislative body in the country.”¹⁰¹

On March 8, after six hours of debate, the resolution passed 76-3. Dissenters were Senators LaFollette, Sherman, and Asle Gronna (R-ND). LaFollette stated, “This Senate is the only place in our system where, no matter what may be the organized power behind any measure to rush its consideration and to compel its adoption, there is a chance to be heard, where there is an opportunity to speak at length, and where, if need be, under the Constitution of our country and the rules as they stand today, the constitutional right is reposed in a Member of this body to halt a Congress or a session on a piece of

¹⁰⁰ *Congressional Record*, March 8, 1917, p. 27.

¹⁰¹ *Congressional Record*, March 8, 1917, pp. 21, 23.

legislation which may undermine the liberties of the people and be in violation of the Constitution.” However, he decided to acquiesce in the evident sentiment of his colleagues. “I realize how the hysteria of the moment may be driving Senators to acquiesce here in a procedure which, at another time, they would resist with all their force. But so far as I am concerned, I will never by my voice or vote consent to a rule which will put an end to freedom of debate in the Senate.... The time will come when men who are now clamoring for this change and who by their votes, are imposing cloture upon the Senate, will see the rule invoked to deprive them and their states of what they deem their rights. I cannot prevent the adoption of this rule, so I am content at this time to protest and vote against it.”¹⁰²

Senator Norris, who had been so instrumental in the merchant ships filibuster, announced his support for the new rule, which he considered non-draconian and workable. “It requires, in the first place, a two-thirds vote to invoke the rule, and after it is invoked, every senator has a right to speak one hour,” Norris observed. “To my mind, that is a reasonable proposition.”¹⁰³

The 1917 rule altered the filibuster in an important way. Prior to the rule, the burden fell on those who were trying to maintain the filibuster. After the rule, it rested on those who would have to produce a supermajority vote to end it.¹⁰⁴

Early Implementation of the Cloture Rule and Ongoing Disquiet

The new cloture rule was first used on November 15, 1919, to close proceedings on the Treaty of Versailles.¹⁰⁵ However, the Senate made sparing use of its new procedure. After failed cloture motions in 1921 and 1922 on tariff legislation, the second successful cloture attempt occurred in 1926 on protocols for the World Court.¹⁰⁶ Cloture was invoked twice in 1927, but not again until 1962.¹⁰⁷

¹⁰² *Congressional Record*, March 8, 1917, pp. 41-45.

¹⁰³ *Congressional Record*, March 8, 1917, p. 27.

¹⁰⁴ “This shift in power was not a foregone conclusion. It hinged on making the cloture vote toxic, which required overturning the long-standing ethic that the minority should eventually yield to the majority. To replace that deferential standard with one better suited to their purposes, Southerners deployed the ‘gag rule’ rhetoric that Calhoun at first hurled at Clay.” Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 68.

¹⁰⁵ *Congressional Record*, November 15, 1919, pp. 8455-8456.

¹⁰⁶ “Senate Cloture Rule,” Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, p. 47.

¹⁰⁷ “Senate Cloture Rule,” Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, p. 115.

Imposition of the 1917 rule with its voting threshold of two-thirds did not quiet advocates of more sweeping reforms.¹⁰⁸ One of the most prominent was Vice President Charles Dawes, who had been elected in 1924 on a ticket with Calvin Coolidge. Addressing the Senate on Inauguration Day, March 4, 1925,¹⁰⁹ the Vice President was vigorous in his advocacy against the filibuster and in favor of curtailing debate by majority vote. “Who would dare to contend that under the spirit of democratic government? The power to kill legislation providing the revenues to pay the expenses of government should, during the last few days of a session, ever be in the hands of a minority or perhaps one Senator? Who would dare oppose any changes in the rules necessary to ensure that the business of the United States should always be conducted in the interest of the nation and never be in danger of encountering a situation where one man or a minority of men might demand unreasonable concessions under the threat of blocking the business of the government? Who would dare maintain that in the last analysis, the right of the Senate itself to act should never be subordinate to the right of one Senator to make a speech?”¹¹⁰

During that Congress, six resolutions were introduced to modify the cloture rule, but none received action.¹¹¹

For some 30 years after it was established, the cloture rule remained unchanged and rarely used.¹¹² Nine times during that period it was used in attempts to end debate on civil rights-related measures, but never successfully.

¹⁰⁸ For example, by a near-unanimous vote in 1922, Senate Republicans endorsed majority cloture on revenue and appropriations bills. The proposal did not proceed further, however.

¹⁰⁹ Before the Twentieth Amendment to the Constitution, Inauguration Day was March 4. In 1937, it changed to January 20. Under the old system, it was customary for the Vice President to take the oath in the Senate chamber, followed by a speech, before the Presidential oath, which occurred on the Inaugural platform constructed on the east front of the Capitol. That is the context for Dawes’ speech in 1925. The custom was discontinued in 1937.

¹¹⁰ *Congressional Record*, March 4, 1925, pp. 1-2.

¹¹¹ One was a proposal by Senator Oscar Underwood (D-AL), introduced the day after Dawes speech, to bring back a version of the previous question motion. Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 126.

¹¹² “Senators expressed a reluctance to vote on cloture, even when they were in favor of an obstructed item. Cloture represented a departure from the Senate’s tradition of unlimited debate, and Senators were clearly concerned about the implications of using cloture for the way the Senate conducted its business generally, and for how it might limit their own influence in the legislative process.” Statement of Professor Gregory J. Wawro. “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 54.

One such effort occurred in August 1948, when Southern Democrats filibustered a motion to proceed to an anti-poll tax bill. When a cloture motion was filed to end debate, Senator Richard Russell (D-GA) made a point of order that the Rule covered pending measures and not motions to proceed.¹¹³

President Pro Tempore Arthur H. Vandenberg (R-MI) was presiding. An opponent of the poll tax, he nonetheless upheld Russell's point of order. "The President Pro Tempore must act in his capacity as an officer of the Senate to enforce the rules as he finds them to exist, whether he likes them or not, and whether he agrees with them or not," he said. Vandenberg continued, "The President Pro Tempore fully recognizes the implications of the resultant situation.... They mean that, in the final analysis, the Senate has no effective cloture rule at all." The remedy, he added, was in the Senate's hands, because it was empowered to amend its rules. However, he would not rule from the Chair to impose a change. "The President Pro Tempore does not have the authority except as he arbitrarily takes the law into his own hands. This he declines to do in violation of his oath."¹¹⁴

The attempt to pass the anti-poll tax bill was stymied, but in the next Congress, there would be an effort to close the cloture loophole that made the filibuster fatal. In the 1948 elections, President Truman won a new term and both Houses of Congress went Democratic. The President hoped to advance a civil rights agenda, which meant broadening application of the cloture rule and easing the voting threshold.

At the opening of the 81st Congress in 1949, Majority Leader Scott Lucas (D-IL) proposed an amendment to Senate Rule XXII to accomplish just that.¹¹⁵ After ten days of debate, he filed cloture on the motion to proceed. As in 1948, Russell made a point of order. Ruling opposite of what Vandenberg had done the previous year, Vice President Alben Barkley construed the term "pending measure" to cover motions to proceed. Vandenberg responded, "The rules of the Senate as they exist at any given time, and as they are clinched by precedents, should not be changed substantively by the interpretive action of the Senate's Presiding Officer, even with the transient sanction of an equally transient Senate Majority. The rules can be safely changed only by the direct and conscious action of the Senate itself, acting in the fashion prescribed by the

¹¹³ Accordingly, Senators could conduct old-time filibusters on motions to proceed without concern that a successful cloture vote could stop them. Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 78.

¹¹⁴ *Congressional Record*, August 2, 1948, p. 9604.

¹¹⁵ The resolution from the Senate Rules Committee was known as the Hayden-Wherry resolution after its sponsors, Chairman Carl Hayden (D-AZ) and Minority Leader Kenneth Wherry (R-NE).

rules. Otherwise, no rule of the Senate is worth the paper it is written on....”¹¹⁶ On appeal by Senator Russell, the Senate overturned Barkley 41-46.¹¹⁷

The President entered the fray. On March 3, 1949, he told a press conference that he endorsed majority cloture. The response from southerners on Capitol Hill was hostile.¹¹⁸

It was clear the Senate was not going to alter the meaning of Rule XXII by such extraordinary methods and that a change would have to come via amendment. On March 17, the amendment passed 63-23.¹¹⁹ It applied cloture to all debatable questions other than motions to proceed to rules changes, and it raised the voting threshold from two-thirds of Senators voting to two-thirds of all Senators duly chosen and sworn.¹²⁰ Exempting rules change proposals from cloture was new and was disconcerting to reformers. As Senator Robert Byrd has written, “This meant that future efforts to change the cloture rule would themselves be subject to extended debate without the benefit of the cloture provision. Previously, under the old rule, debate limitation on a rules change had at least been theoretically possible.”¹²¹

¹¹⁶ *Congressional Record*, March 11, 1949, p. 2227.

¹¹⁷ *Congressional Record*, March 11, 1949, p. 2275. The question on appeal was whether the decision of the Chair should stand as the judgment of the Senate. Forty-one Senators voted to affirm Barkley, but 46 Senators did not, so the Vandenberg precedent remained. Professor Gregory J. Wawro of Columbia University notes, “The Senate upheld Russell’s appeal of Barkley’s decision, in part because many Senators were concerned about how reversing Vandenberg’s earlier ruling might weaken the integrity of Senate procedure.” Statement of Professor Gregory J. Wawro, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 54.

¹¹⁸ “Mr. Truman’s espousal of a rules change to permit the limiting of debate by a simple majority of Senators present has been seized upon by Southern Senators as evidence that the ultimate aim of the current effort was to destroy completely the right of Senate minorities to be heard.” John D. Morris, *New York Times*, March 5, 1949, p. 1.

¹¹⁹ *Congressional Record*, March 17, 1949, p. 2724.

¹²⁰ By 7-80, the Senate rejected an amendment by Senator Wayne Morse (R-OR) to lower the cloture threshold to a simple majority and to apply cloture to rules changes. The Senate also rejected by 29-57 an amendment by Senator Raymond Baldwin (D-CT) to keep the cloture threshold at two-thirds of Senators voting and to apply cloture to rules changes. See *Congressional Record*, March 17, 1949, pp. 2722-2723. Referring to Senator Russell, Adam Jentleson writes, “As the benevolent victor, all he asked in return was that Rule 22’s supermajority threshold be made a little harder to clear... To Senators tired of debating Senate rules, he suggested that they make it nearly impossible to alter Rule 22 in the future. Under Russell’s suggestion, Rule 22 would be placed in a special category, immune to any form of cloture.” Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 83.

¹²¹ See Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 128.

The cloture issue did not settle down. In the 82nd Congress (1951-1953), four resolutions were introduced to amend Rule XXII. One provided for simple majority cloture, another for cloture by a majority of Senators sworn, a third for cloture by two-thirds of Senators voting (after a 48-hour waiting period or simple majority cloture after a measure was pending for 15 session days), and a fourth to lower the threshold back to two-thirds of Senators voting. The Rules Committee favorably reported the resolution lowering the cloture threshold, but the Senate took no action on it.

Beginning in 1953, the Senate began two decades of nearly biennial fights to amend Rule XXII. Initially, Senator Clinton Anderson (D-NM) was the lead proponent. He pursued an extraordinary strategy, but one that could be justified because the 1949 amendment made rules changes immune from cloture. Challenging the theory that the Senate is a continuing body whose rules automatically carry over from one Congress to the next, Anderson asserted that the Senate could change its rules by majority vote at the outset of a new Congress.¹²² He proposed to readopt all rules except Rule XXII, which he intended to weaken. Newly installed Majority Leader Robert Taft (R-OH), not wanting to begin his tenure with a protracted rules fight, quickly moved to table Anderson's resolution. The tabling motion carried 70-21.

In 1957, at the start of the 85th Congress, reformers tried again. Anderson reprised his effort to amend the rules at the beginning of the Congress. Senator Hubert Humphrey (D-MN) secured an advisory opinion from Vice President Richard Nixon that the Senate need not adhere to carryover rules if it did not acquiesce to them by operating under them. Nixon declared, "While the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress. Any provision of Senate rules

¹²² Former Senate Parliamentarian Bob Dove and his co-author Richard Arenberg warn about the dangers to the Senate in proceeding under that theory to make rules changes. Not just the cloture threshold would change, they argue, although that would be plenty consequential enough. "If a 51-vote majority is empowered to rewrite the Senate rules, the day will come, as it did in the House of Representatives, when a majority will construct rules that give it near absolute control over amendments and debate. And there is no going back from that. No majority in the House of Representatives has or ever will voluntarily relinquish that power in order to give the minority a greater voice in crafting legislation." See Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), p. 56. They also posit that a majority party so empowered would almost certainly replicate the House Rules Committee, giving itself even more control over floor proceedings, and stack Senate committees with disproportionate numbers of majority party members. *Ibid.* pp. 80-82.

adopted in the previous Congress which has the express or practical effect of denying a majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the chair, unconstitutional.”¹²³

Declaring that “the rules of the Senate are a bulwark against the rash action by a temporary majority,” Senate Majority Leader Lyndon Johnson (D-TX) moved to table Anderson’s motion. As Taft had been four years prior, he was successful. This time, however, the vote was 55-38. As the civil rights movement was gaining steam, so was sentiment to liberalize the cloture rule.¹²⁴ Meanwhile, in that Congress, eight proposals were introduced to amend Rule XXII.¹²⁵

The 1958 election was a watershed for Democrats, bringing notable liberals like Edmund Muskie (D-ME), Eugene McCarthy (D-MN), Thomas Dodd (D-CT), and Ernest Gruening (D-AK) to the Senate.¹²⁶ Anderson renewed his efforts to change the cloture rule and Majority Leader Johnson intervened to preempt him. By 72-22, the Senate agreed to a Johnson resolution that lowered the voting threshold back to two-thirds of Senators voting and that made rules changes subject to the cloture process. Johnson also included language, now codified in Senate Rule V, stating that “the rules of the Senate shall continue from one Congress to the next Congress, unless they are changed as provided in these rules.” As pushback against the Anderson initiatives, Senator Russell insisted upon this provision.

A turn in the fortunes of the filibuster occurred in 1963, when Senator Wayne Morse (R-OR) initiated an intermittent two-month filibuster of the Communications Satellite Act. Northern liberals, who had been outspoken

¹²³ *Congressional Record*, January 4, 1957, p. 178.

¹²⁴ In the 85th Congress, eight resolutions were introduced to amend Rule XXII. All were referred to the Rules Committee, which favorably reported S. Res. 17 by Senator Paul Douglas. It provided for cloture by two-thirds of those voting, two days after a cloture motion was filed, or by a simple majority vote 15 days after the cloture motion was filed. The Senate did not act on the resolution. However, it would serve as a model for similar resolutions introduced in subsequent years. The principle was that a high threshold would be necessary to cut off debate early in deliberations, but after a measure or matter was pending for a considerable time, a lower threshold would suffice. Given the amount of time that would have to elapse before the lower threshold was triggered, one can assume that simple majority cloture would apply to very few measures. “Senate Cloture Rule, Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, p. 24.

¹²⁵ See Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 129.

¹²⁶ When the 84th Congress concluded in 1958, the party ratio was 49 Democrats to 47 Republicans. As the 85th Congress convened in January 1959, two Senators were added from Alaska. The ratio was 64 Democrats to 34 Republicans. Later in that Congress, Hawaii was admitted, and the ratio changed to 65 Democrats and 35 Republicans.

opponents of filibustering, assisted Morse in trying to block the bill.¹²⁷ As the Senate Historical Office comments, “Moderates and liberals, who traditionally sought to reduce the existing two-thirds’ cloture requirement and who considered the filibuster as tainted by its lethal use against civil rights, found themselves starting to embrace extended-debate tactics that they had previously condemned their southern colleagues for using.”¹²⁸ Finally, Majority Leader Mike Mansfield (D-MT) sought cloture. On August 14, 1962, by a vote of 63-27, it prevailed. It was the first time cloture had been invoked in 35 years.

In 1964, the Senate voted 71-29 to invoke cloture on the Civil Rights Act, breaking a Southern filibuster. The following year, cloture was successfully invoked on the Voting Rights Act.

Notwithstanding these successes, pressure on the filibuster continued. From the dawn of the 1960s until the middle of the 1970s, there were numerous efforts to relax Rule XXII. Some proceeded through regular order but died in committee or on the floor. There were also further attempts to follow the Anderson model to make changes by majority vote at the start of the Congress. Such efforts occurred in 1967, at the initiative of Senator George McGovern (D-SD), and in 1969, at the instigation of Senator Frank Church (D-ID). The objective in each case was to relax the cloture threshold to three-fifths of Senators voting. Both initiatives were helped by rulings from Vice President Hubert Humphrey that would have obviated the need to achieve two-thirds cloture on the rules change. However, the Senate overturned his decisions on appeal.

In 1971, proponents of liberalizing the rule tried again. Senators Church and James Pearson (R-KS) proposed to reduce cloture to three-fifths of Senators voting and sought a favorable ruling from Vice President Spiro Agnew that would have allowed them to proceed by majority vote. However, Agnew would not accommodate them. Several cloture votes failed, even though they secured support from a majority of Senators voting. When President Pro Tempore Allen Ellender (D-LA) ruled that cloture had not been invoked, Senator Jacob Javits (R-NY) appealed. However, the Senate tabled the appeal.¹²⁹

¹²⁷ Senators who would vote to end debate on the 1964 civil rights bill but who opposed cloture on the satellite bill included Bob Bartlett (D-AK), Quentin Burdick (D-ND), Howard Cannon (D-NV), Paul Douglas, Ernest Gruening (D-AK), Pat McNamara (D-MI), Wayne Morse, Maurine Neuberger (D-OR), Ralph Yarborough (D-TX), and Stephen Young (D-OH).

¹²⁸ United States Senate, *Filibusters and Cloture*, “Turning Point: August 14, 1962,” www.senate.gov.

¹²⁹ Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 131.

Seeking to reduce the impact of filibusters on the Senate’s capacity to do its business, in 1972, Majority Leader Mansfield and his Whip, Senator Byrd, designed a “tracking system,” which would allow non-controversial legislation to proceed even while another measure was being blocked.¹³⁰ Measures not being filibustered would be cleared through communications from party leaders to their Member offices, seeking to determine whether there were objections to moving things through. If there is an objection to proceeding, measures cannot go by consent. If none, then cleared items pass, usually by voice vote.

Rules reformers broke through in 1975. Led by Senators Walter Mondale (D-MN) and Pearson, they advanced S. Res. 4, a rules change resolution at the start of the 93rd Congress. It would reduce the cloture voting threshold from two-thirds voting to three-fifths voting. Seeking to circumvent the need for cloture, they offered several motions during protracted deliberations that would have limited debate by majority vote on a motion to proceed.¹³¹

On three occasions, Majority Leader Mansfield made points of order against Mondale’s and Pearson’ approach, but each time the Senate tabled the point of order.¹³² Vice President Nelson Rockefeller stated that if the point of order were tabled, it would validate what Mondale and Pearson were seeking to do. An immediate vote did not occur, however, because, in response to a point of order from Senator James Allen (D-AL), Rockefeller ruled that Pearson’s motion was divisible and that each of the parts could be separately debated. Allen then demanded a division.

¹³⁰ Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), pp. 209-212.

¹³¹ Pearson’s original motion provided that the Presiding Officer put to the Senate for an immediate vote the question of ending debate on his motion to proceed to S. Res. 4, and that if a majority of Senators voted in favor, there be an immediate vote on the motion to proceed itself. See Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 132.

¹³² In a response to a Question for the Record from Senate Rules Committee member Tom Udall (D-NM), former Vice President Walter Mondale wrote, “We first established the precedent that the Senate could change its rules by majority vote, and we did that three separate times—each time tabling a point of order that, in effect, said we needed as many as 67 votes to change the rules. Once that precedent had been established, both sides in the rules debate recognized that a compromise made sense. Under the agreement, the Senate changed Rule 22 to require 60 votes for cloture. And, in the spirit of compromise, we agreed to revisit the series of tabling motions that had defeated the point of order. On that last occasion, a majority voted against the motion to table. The proponents of change in 1975 repeatedly made the point that reconsideration of the point of order did not change the three prior majority votes. Indeed, because the Constitution permits the Senate to change its rules by majority vote, the reconsideration could not change the fundamental principle we had established.” Walter F. Mondale, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, May 19, 2010, p. 313.

Senator Byrd cautioned his colleagues about the implications of their tactics: “If we go down this road, and I sought a unanimous consent agreement and got one objection, do Senators know what I could do if I had the backing of 51 Senators? I would just say ‘OK, I will send the motion to the desk. And if my 51 Members would back me up, I do not need the unanimous consent of anyone. Put this power in the hands of a tyrannical leadership and a tyrannical majority of 51 Senators and we are going to be sorry on both sides of the aisle.’”¹³³

With the Senate apparently on the brink of changing the rules in this fashion, the Democratic Leadership proposed a compromise. The cloture threshold would be reduced to three-fifths of Senators chosen and sworn, except for rules changes, where it would remain two-thirds. This proved satisfactory to the Senate, which agreed 56-27 to a rules amendment through regular order. It passed on March 7, 1975. Four days earlier, to erase the precedent it had established in tabling Mansfield’s last point of order, the Senate reconsidered the vote and reversed itself.¹³⁴

Turmoil over the cloture rule was not over, however. Now that the voting threshold had been reduced, Senator Allen educated the Senate on how loopholes in the rule could be exploited to extend debate anyway, mostly by offering amendments, motions, and quorum calls.¹³⁵ Although debate after cloture was

¹³³ *Congressional Record*, February 20, 1975, pp. 3743-3744.

¹³⁴ As Professor Gregory J. Wawro has testified, “An essential part of the solution to the impasse involved a reversal of the February 20 vote to table Mansfield’s point of order, thereby eliminating the precedent that had presumably been established for majority cloture. The opponents of the original proposal forced its supporters to follow the existing procedures under Rule XXII and invoke cloture by a 2/3 vote on the compromise proposal, which they did on a set of two votes with identical 73-21 tallies. The opponents of cloture reform clearly thought it important to attempt to prevent a precedent for majority cloture from remaining on the books.... Some reformers denied that the February 20 precedent for majority cloture had been reversed, implying that they might employ this tactic in future reform efforts.” Statement of Professor Gregory J. Wawro, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 57. In debate on March 5, 1975, Senator Alan Cranston (D-CA) insisted that the vote to overturn the precedent was meaningless. “Upholding the Mansfield point of order only adds one tree to the jungle of precedents we reside in. But above and beyond that jungle stands the Constitution. And no precedent can reverse the fact that the Constitution supersedes the rules of the Senate and that the constitutional right to make its rules cannot be challenged.” *Congressional Record*, March 5, 1975, p. 5251.

¹³⁵ In his history of the Senate, Robert Byrd described how the post-cloture filibuster worked. “The technique enabled a single senator, by husbanding the one hour to which he was entitled under the cloture rule, to tie up the Senate for days while he called up amendment after amendment, requested the reading thereof, asked for a roll call vote thereon, and demanded a quorum call in advance of the vote. Following the vote on an amendment (or

limited, other proceedings were quite open-ended.¹³⁶ The 1975 amendment to Rule XXII did not change this. Early in 1977, Senator Byrd, the new Majority Leader, proposed changes to counter this obstruction but did not proceed in the face of Republican opposition.¹³⁷ Shortly, the issue would come into stark relief due to a filibuster by two of the Senate's most outspoken progressives.

Two of the most observant Senators of Allen's tactics were Howard Metzenbaum (D-OH) and James Abourezk (D-SD), who conducted a major filibuster in 1977 after cloture had been invoked on a natural gas deregulation bill. Their dilatory tactics went on for 13 days post-cloture. Metzenbaum and Abourezk had filed 508 amendments. The Senate suffered through 111 roll call votes and 34 live quorum calls after cloture was invoked.¹³⁸ Putting the Senate through its paces, the two Senators used very little of the debate time available to them under the cloture rule.¹³⁹ Attrition tactics did not work. Their

point of order or appeal), a roll call would be demanded on tabling the motion to reconsider the vote. Because the time consumed by roll calls, quorum calls, and reading of amendments was free time and not chargeable to the senator, this process, though mostly dilatory, could last indefinitely." Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 154.

¹³⁶ In 1964, cloture on the civil rights bill was agreed to on June 10, but the bill did not pass until June 19. In the interim, the Senate considered 118 amendments, mostly proposed by Southerners. After the 1975 change, Allen periodically replicated these tactics and expanded upon them with the use of dilatory motions and quorum calls.

¹³⁷ Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, (Chicago: University of Chicago Press, 2010), p. 177.

¹³⁸ The Senate operates on a presumptive quorum. If a Senator suggests the absence of a quorum, the clerk calls the roll. Two bells ring throughout the Senate complex. The quorum call is customarily terminated when a Senator asks unanimous consent to terminate it. However, in the absence of such consent, the clerk will go through the entire roll. If the call indicates that a quorum is not present, the Senate cannot conduct business. It must either adjourn/recess or produce a quorum. Three bells ring. This is a live quorum. Customarily, a quorum is produced when Senators vote on a motion to instruct the Senate Sergeant at Arms to request (or compel) the attendance of absentees.

¹³⁹ "After a week of either voting or quorum calls, they had used about 3 minutes of their one hour and it was clear that post cloture, filibuster could go on for months." Statement of Robert B. Dove, Parliamentarian Emeritus, United States Senate, "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 27. "Subsequent to the 1975 revisions, opponents of measures increasingly relied upon post-cloture filibusters in an attempt to delay Senate action. By calling up amendments offered before cloture was invoked, by demanding frequent roll call votes and repeated quorum calls, and by calling for the reading of amendments, conference reports and the *Journal*, filibusters could continue to prevent the Senate from taking final action." "Senate Cloture Rule," Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, p. 31.

post-cloture filibuster was finally broken after Majority Leader Robert C. Byrd commandeered the floor and used his right of preferential recognition¹⁴⁰ to call up 33 of their amendments, which Vice President Mondale ruled out of order as dilatory after a precedent was established allowing him to do so without need for a point of order from the floor.¹⁴¹ Metzenbaum and Abourezk could not appeal, because Mondale recognized Byrd to call up another amendment before they could do so. In the face of the Leader's tactics, the filibuster collapsed.¹⁴²

The purpose of cloture was to bring finality to proceedings, but the post-cloture filibuster exposed a massive flaw in the rule.¹⁴³ The next year, as the 96th Congress opened, Byrd offered a remedy. He proposed a rules amendment designed to curtail post-cloture filibusters by establishing a 100-hour cap on proceedings after cloture was invoked. All session time counted against the cap, not just time spent in debate. Thus, all proceedings, such as voting on amendments or assembling a quorum, ran the clock and drew the Senate closer to an absolute end point. Filing deadlines were established for amendments. Missing them meant disqualifying an amendment. At the end of the

¹⁴⁰ By longstanding precedent, the Senate Majority Leader is accorded preferential recognition over all other Senators. "As long as Mondale recognized only Byrd, no one else could call for a vote or register a protest on the Senate record." Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, (Chicago: University of Chicago Press, 2010), p. 178.

¹⁴¹ "During the course of that filibuster, the Senate set a series of precedents that limited the effectiveness of post-cloture filibusters by increasing the powers and discretion of the Presiding Officer when the Senate is proceeding under cloture. Perhaps the most important of these decisions required the Presiding Officer to take the initiative under cloture to rule out of order, or even decline to entertain, amendments that were out of order on their face—for example, amendments that were non-germane or dilatory—without Senators first having made points of order to that effect from the floor." Testimony of Stanley J. Bach, "Examining the Filibuster," Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 73. The effect was to obviate the possibility of roll call votes on appeals.

¹⁴² Byrd writes, "Pandemonium broke loose as Senators were denied recognition to appeal the chair's rulings declaring the amendments disqualified, and both the vice president and I were severely criticized for the extraordinary actions we had taken to break the post-cloture filibuster." Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 155.

¹⁴³ When Senators wrote the 1917 rule, the problem they were attempting to solve was the use of endless debate to block bill passage. Thus, they limited each Senator to one hour of speech after cloture was invoked. They weren't thinking about filibusters to block motions to proceed, which remained uncovered in the original rule. When that question emerged in 1948 on anti-lynching legislation, a 1949 amendment followed to close the loophole. The 1917 drafters also weren't thinking about filibuster by amendment, which began in the 1970s and spotlighted a reason for further change in the rule.

100 hours, only amendments that had been called up and were pending could receive a vote. Any amendment that had been filed but not made pending was ineligible. The old system was open-ended and invited the dilatory tactic of writing hundreds of amendments, offering endless motions, and instigating numerous quorum calls. Byrd's proposal put an end to these strategies.

Endeavoring to pressure the minority, he kept the Senate in the first legislative day for five weeks until the resolution, slightly modified, was agreed to.¹⁴⁴ In 1986, the Senate reduced the 100-hour cap to 30 hours.

Writing in 1989, Senator Byrd summarized his view of the evolution of Rule XXII: "The current cloture rule is the product of decades of trial and experience aimed at curbing the extremes in the use of filibusters to block Senate action. It has discouraged—though not eliminated—post-cloture filibusters and has also provided a more effective tool in overcoming all but the most determined filibusters carried on by a sizable minority. Its effectiveness is aided greatly by the strengthening precedents that have been established over the past century, some of which antedate the first cloture rule in 1917."¹⁴⁵

Cloture is the fulcrum on which the Senate balances minority rights against the capacity of a majority to work its will. Much of the debate over the cloture rule centers on whether that fulcrum is in the proper place. Senator Byrd's conclusion was that an appropriate balance has been struck.

¹⁴⁴ A legislative day begins when the Senate convenes after an adjournment and ends when the Senate next adjourns. In 1979, the Senate convened on January 15. That day was calendar January 15 and legislative day January 15. Each session day thereafter, the Senate recessed rather than adjourned. Therefore, on February 22, when the Senate voted on the resolution, it was still legislative day January 15. By keeping the Senate in the first legislative day, Byrd preserved the option to proceed via extraordinary means, even though he had cautioned against such tactics when Mondale and Pearson used them four years earlier. As matters turned out, Byrd's resolution passed by regular order. After it did, the Senate adjourned, putting to rest for that Congress the question of whether rules changes could be made by extraordinary means on the first legislative day.

¹⁴⁵ Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, pp. 161-162.

Part IV:
Filibustering Judicial
Nominations

In May 2005, the Senate was embroiled in debate about the potential use of the so-called “nuclear option” to end filibusters on judicial appointments. The Republican Majority Leader, Bill Frist, threatened to secure a ruling from the Presiding Officer that would set in motion a process by which an end to debate could be had by a simple majority vote. Ultimately, a bipartisan agreement allowed the Senate to step back from the brink.

Feeling threatened, Democrats roundly denounced the tactic and its effect of eroding minority rights. Senator Carl Levin stated, “The enduring strength and beauty of the U.S. Senate is that we not only operate by the rules, but that those rules provide protections for the minority. More than 200 years of Senate rulings have affirmed that this body stands against the ‘tyranny of the majority’ that our Founding Fathers cautioned us about.”¹⁴⁶

Senator Chris Dodd (D-CT) added, “What were the Framers thinking about 218 years ago? They understood the possibility of tyranny of the majority.... The House of Representatives was created to guarantee that the rights of the majority would prevail. But they also understood there were dangers inherent in that, and that there ought to be as part of that legislative process another institution that would serve as a cooling environment for the passions of the day.”

Dodd went on, “There is a danger if we don’t adopt a separate institution as part of the Legislative Branch where the rights of the minority will also prevail, where you must listen to the other side in a democracy, pay attention to the other side.” The filibuster is essential to achieving this balance. As Dodd recounted, “One of the reasons the extended debate rule is so important is because it forces us to sit down and negotiate with one another, not because we want to but because we have to.... We need to sit down and work with each other. The rules of this institution have required that. That is why we exist.”¹⁴⁷

Senator Biden added, “Put simply, the nuclear option would transform the Senate from the so-called cooling saucer our Founding Fathers talked about to cool the passions of the day to a pure majoritarian body like a Parliament. We have heard a lot in recent weeks about the rights of the majority and obstructionism. But the Senate is not meant to be a place of pure majoritarianism.”¹⁴⁸

¹⁴⁶ *Congressional Record*, May 20, 2005, p. S5560.

¹⁴⁷ *Congressional Record*, May 20, 2005, pp. S5553-S5557.

¹⁴⁸ *Congressional Record*, May 23, 2005, p. S5736.

Senator Max Baucus (D-MT) emphasized the centrality of the filibuster to the Senate’s constitutional purposes: “Unlimited debate allows Senators to protect minority freedoms. Unlimited debate helps to ensure that no one party has absolute power. Unlimited debate helps to give effect to the Founders’ conception of checks and balances.”¹⁴⁹

Expanding on this point, Senator Charles Schumer said: It is the Senate where the Founding Fathers established a repository of checks and balances. It is not like the House of Representatives, where the Majority Leader or the Speaker can snap his fingers and get what he wants.... The reason we don’t work by majority rule is very simple. On important issues, the Founding Fathers wanted—and they were correct in my judgment—that the slimmest majority should not always govern.... The Senate is not a majoritarian body.”¹⁵⁰

Many times, Democratic Senators agreed that their chamber should not emulate the House. “Over there is the majoritarian body, the House of Representatives,” exclaimed Senator Robert C. Byrd. “There is where the majority rules. This is the forum of the States. It is a forum for minorities, where we can have dissent on the part of a minority.” Byrd implored the Senate, “let’s protect the rights of the minority to filibuster.”¹⁵¹

Senator Edward M. Kennedy (D-MA) spoke movingly of the Framers’ “compact of comity” that led to the creation of the Senate and influenced how the institution would operate: “Comity among the Framers—their overriding ‘agreement to agree’ despite their deep differences—informed and nourished their efforts. They worked especially hard to design the Senate.” “Comity,” explained the Senator, “may be an unused word today, but for 200 years it has been the lifeblood of daily life in the Senate.... Comity is the glue that binds us to one another and that small but brilliant group of Framers who met over two centuries ago and designed this institution.”

Hollowing out minority rights would upend the compact, Kennedy concluded, and generate grave problems. “It is not an exaggeration to say that if the ‘compact of comity’ is not preserved, the Senate and the Government will suffer mightily. Our vital role in the machinery of checks and balances will fade, and the nation will be left diminished.” Kennedy conceived of incumbent Senators as “trustees” of the institution. “We must preserve what makes it work well, like extended debate and the super-majority cloture rule.”¹⁵²

¹⁴⁹ *Congressional Record*, May 19, 2005, p. S5504.

¹⁵⁰ *Congressional Record*, May 10, 2005, p. S4802.

¹⁵¹ *Congressional Record*, May 12, 2005, p. S5035.

¹⁵² *Congressional Record*, May 19, 2005, p. S5481.

Thus, Senator Reid summed up key reasons why the filibuster must be preserved: “It encourages moderation and consensus, gives voice to the minority so cooler heads may prevail. It also separates us from the House of Representatives, where the majority rules through the Speaker appointing the Rules Committee. It is very much in keeping with the spirit of the Government established by the Framers of our Constitution, limited government, separation of powers, and checks and balances. The filibuster is a critical tool in keeping the majority in check.”¹⁵³

Nominations and Legislation Are Treated Distinctly

Until the dawn of the twenty-first Century, filibusters were essentially confined to legislation. Nominations were rarely, if ever, filibustered. Indeed, nominations were not even subject to the cloture rule until 1949, and were not the reason for the rules change that brought them under its purview. Until early in this century, cloture motions had pretty much been confined to legislative measures.

Cloture applied to nominations is somewhat similar to cloture on legislation. Nominations (but not motions to proceed to their consideration) are debatable. As with legislation, a cloture motion filed to end debate on a nomination will take two days to ripen. Otherwise, the process is different because of five precedents.

In 1980, the Senate adopted a precedent that essentially rendered non-debatable a motion to proceed to a nomination. Under paragraph 1 of Rule XXII, a motion to proceed to Executive Business is non-debatable. The precedent allowed the motion to specify which piece of Executive Business would be considered. Thus, a motion might be, “I move to proceed to Executive Business for the purpose of considering the nomination of John Doe to be Secretary of State.” Framed that way, the nomination can come before the Senate without debate. Once pending, the nomination is debatable.

The second precedent occurred in 2013, when the voting threshold for cloture on all nominations except for the Supreme Court was lowered to a simple majority of Senators voting.

The third precedent occurred in 2017, when the cloture threshold for Supreme Court nominations was lowered to a simple majority of Senators voting.

¹⁵³ *Congressional Record*, May 18, 2005, p. S5377. The most important function of the House Rules Committee is to propose House resolutions (known as special rules) that set out the terms and conditions under which measures will be considered on the House floor. The House adopts such resolutions by simple majority vote, providing the procedural framework for the related legislation. The House Speaker appoints the majority party members of the Rules Committee.

The fourth precedent occurred in 2019, when the 30-hour post-cloture period was reduced to two hours for district court judges.

The fifth precedent also occurred in 2019, when the 30-hour post-cloture period was reduced to two hours for all Executive Branch nominees except those at level 1 of the Executive Schedule under section 5312 of title 5 of the United States Code. These are cabinet secretaries and several other cabinet-level officials.

A Brief Account of the Judicial Nominations Controversy

In 2003, controversy erupted over filibusters of judicial nominations. Throughout the history of the United States prior to that time, only one judicial appointment had been successfully blocked by filibuster—that being President Lyndon Johnson’s 1968 nomination of Associate Justice Abe Fortas to be Chief Justice of the United States. Instigated by Senator Robert P. Griffin (R-MI), the filibuster was strongly bipartisan. On October 1, 1968, the cloture vote on the motion to proceed to Fortas’ nomination was 45-43, far short of the two-thirds of Senators voting that Fortas would have needed to move forward.¹⁵⁴

The Fortas case broke the norm that legislation was filibustered but not nominations. Prior practice did not mean that every nominee got an up or down decision; some, for example, were blocked in committee. However, even controversial nominations brought to the floor received a confirmation vote.

Accordingly, and notwithstanding what the rules allowed, Everett Dirksen-led Republicans did not filibuster Kennedy and Johnson nominees. Howard Baker-led Republicans did not filibuster Carter nominees. Robert Byrd-led Democrats did not filibuster Reagan nominees. George Mitchell-led Democrats did not filibuster George H.W. Bush nominees.¹⁵⁵ And Robert Dole-led Republicans never filibustered Clinton nominees. As Senator Tom Cotton (R-AR) has explained, “At any point in our history the Senate minority could have attempted to filibuster a Supreme Court nominee. They had tools. The rules permitted it. It would have taken only one

¹⁵⁴ In 1968, a motion to proceed to executive business was non-debatable. Once agreed to, a motion to proceed to a nomination pending on the Executive Calendar was debatable. The Fortas filibuster occurred on such a motion. Under a precedent established in 1980, the non-debatable motion to proceed to executive business can also specify the business to be considered. Accordingly, motions to proceed to nominations are effectively no longer debatable. A nomination itself can be filibustered. For discussion of that 1980 precedent, see the statement of Senator Mitch McConnell, *Congressional Record*, May 23, 2005, p. S5750.

¹⁵⁵ In the most notable case, the Senate in 1991 confirmed the Clarence Thomas Supreme Court nomination by a vote of 52-48. No filibuster was attempted to block the Thomas nomination.

senator, just one. Yet it never happened for a simple reason: self-restraint. While written rules are important, sometimes the unwritten rules are even more so. Habits, customs, mores, standards, traditions, practices. These are the things that make the world go round, in the U.S. Senate no less than in the game of life.”¹⁵⁶

For 35 years after Fortas, there were few attempted filibusters on other judicial nominees. Cloture was successful on either the first or second try, and the nominee was confirmed.¹⁵⁷ In 2003, during the 108th Congress, this pattern would change.¹⁵⁸ Democrats filibustered the nomination of Miguel Estrada to be a judge on the U.S. Court of Appeals for the District of Columbia Circuit. They objected to proposed unanimous consent orders for expansive debate time. On March 6, cloture failed 55-44. Renewed efforts to invoke cloture were also unsuccessful. On September 4, after seven negative cloture votes, Estrada asked President George W. Bush to withdraw his nomination. Estrada was one of ten appellate nominees to be filibustered successfully in the 108th Congress. In conducting these filibusters, Democrats were fully within their rights. They neither changed Senate rules nor disobeyed

¹⁵⁶ *Congressional Record*, April 4, 2017, p. S2202.

¹⁵⁷ During the filibuster of Supreme Court nominee Neil Gorsuch, Senator Tom Cotton discussed President George H.W. Bush’s controversial 1991 nomination of Clarence Thomas. The Justice was confirmed with 52 votes. There was no filibuster. As Cotton explained, “Any one Senator could have demanded a cloture vote, could have insisted on the so-called 60-vote standard and, perhaps, defeated Justice Thomas’ nomination, but they did not because they respected two centuries of Senate tradition and custom.” He also mentioned President George W. Bush’s 2005 nomination of Samuel Alito to the Supreme Court. The Senate confirmed him 58-42 on January 21, 2006, after an attempted filibuster was curtailed by a cloture motion that received 72 affirmative votes. As Cotton expressed, there was either no filibuster or no successful filibuster in these and other cases because of unwritten rules and self-restraint. *Congressional Record*, April 4, 2022, p. S2202.

¹⁵⁸ The new direction was previewed in a retreat of Democratic Senators held on the weekend of April 28, 2001. As reported in the *New York Times* several days thereafter, progressive activists such as Professors Laurence Tribe, Cass Sunstein, and others proposed how to treat President George W. Bush’s judicial appointments. “Forty-two of the Senate’s 50 Democrats attended a private retreat this weekend in Farmington, Pa., where a principal topic was forging a unified party strategy to combat the White House on judicial nominees,” the *Times* reported. “They said it was important for the Senate to change the ground rules and there was no obligation to confirm someone just because they are scholarly or erudite,” a person who attended said. Neil A. Lewis, “Washington Talk; Democrats Ready for Judicial Fight,” *New York Times*, May 1, 2001, p. A19. With the May 2001 switch of Senator James Jeffords (VT) from Republican to Independent (caucusing with the Democrats), Bush’s party lost control of the Senate. However, in the 2002 midterm elections, the Republicans regained control. In the minority as of January 2003, Democrats launched the filibuster strategy to continue their fight against Bush’s appointments.

them. However, they did alter Senate norms, where judicial appointees were not filibustered on the floor.¹⁵⁹

On June 26, 2003, the Senate Rules Committee unanimously reported S. Res. 138, which Majority Leader Frist introduced. The resolution would have amended Rule XXII to provide a new cloture process for consideration of appellate-level judicial nominations. Frist's resolution would have stepped down voting threshold requirements from 60 to 57 to 54 to 51 in successive votes.¹⁶⁰ However, the unanimous committee vote was misleading because Democrats boycotted the markup. There was no chance Frist's resolution would get past a filibuster in the Senate, so no further action on it transpired.

In the 2004 election, the Republican majority grew from 51-49 to 55-45. The Senate Democratic Leader, Tom Daschle (D-SD), lost re-election. In that campaign, the filibuster against judges was an issue. Senator Harry Reid replaced Daschle as Democratic Leader. As the 109th Congress dawned in 2005, Reid commented that use of the filibuster against Bush appellate appointments would continue and that it would be futile for the President to resubmit nominees who had previously been blocked by filibuster.¹⁶¹

Concluding that mechanisms such as extended time agreements, cloture motions, and regular order rules changes were inadequate to address the blockade, that the 2004 election outcome had not served to recalibrate the filibuster strategy, and that the Administration and the Republican grassroots were restless, Frist contemplated acting. As he said in 2005, "Due to the current filibusters, two great Senate traditions that used to coexist now collide. If matters are left in this posture, either the power of advice and consent will yield to the filibuster or the filibuster will yield to advice and consent."¹⁶²

¹⁵⁹ Occasionally, the Senate rejected a judicial nominee, as in the examples of Clement Haynsworth (1969), G. Harrold Carswell (1970), and Robert Bork (1987). Far more routine was stopping judicial nominees in committee. For example, in the Republican-controlled Senate Judiciary Committee in 1999-2000, over 60 Clinton judicial nominees never received a vote in committee. See statement of Senator Patrick Leahy, *Congressional Record*, May 23, 2005, p. S5745. In his final two years, Clinton's confirmation percentage on appellate and district judges was 61.5 percent, seven points lower than President George H.W. Bush's final two years with a Democratic-controlled Senate, and 18 points lower than President Ronald Reagan's final two years with a Democratic-controlled Senate. Four Clinton nominees were filibustered but were confirmed after successful cloture votes.

¹⁶⁰ Majority Leader Frist borrowed from a 1995 proposal from Senator Tom Harkin that would have provided a similar voting arrangement for all filibusters, not just nominations. The Harkin resolution got 19 votes, all from Democrats.

¹⁶¹ David Welna, "New Senate Meets Under Nuclear Cloud," January 27, 2005, www.npr.org.

¹⁶² *Congressional Record*, May 23, 2005, p. S5753.

In May 2005, Frist prepared to establish a precedent to achieve majority cloture on judicial nominees. However, Frist publicly insisted he would not change the legislative filibuster.¹⁶³ Frist called his tactic the “constitutional option,” because it was rooted in the Senate’s constitutional power to govern itself. The precedent would be later in time than Rule XXII and, to the degree there was any inconsistency, would override the rule. Democrats derided the strategy as the “nuclear option,” because executing it would undermine Senate rules and damage the comity necessary for Senate operations. Reid denounced it as destructive of the Senate itself and said it would transform the Senate into a version of the House of Representatives.¹⁶⁴

The precedent was to be made on the nomination of Priscilla Owen to serve on the U.S. Court of Appeals for the Fifth Circuit. Owen was one of the Bush appointees filibustered in the 108th Congress, and Bush had renominated her, notwithstanding Reid’s warning.

¹⁶³ “I will repeat what I have said in a series of public statements both on this floor and to the press: the Republican majority will oppose any effort to restrict filibusters on legislation.” *Congressional Record*, May 23, 2005, p. S5755. Senator Richard Durbin (D-IL) did not take solace in this pledge, believing that eviscerating the filibuster on judicial nominees could lead to ending it on legislation. “The next majority leader, Republican or Democrat is not obliged to take any promise Senator Frist might make. The truth is, if this Senate, for the first time in history, rejects the principle of extended debate, there is no guarantee that the damage of the nuclear option will not spread.... Supporters of the nuclear option say they only want to eliminate the filibuster for judicial nominees. It doesn’t take much imagination to consider the possibility of a majority leader in the future saying, with gas prices at an all-time high, America just cannot afford an extended debate on an energy bill. If we eliminate extended debate for judges who serve for life, why would we preserve unlimited debate on the nominations of cabinet secretaries who leave office with the president who appoints them? Or on laws that can be reversed by the next Congress? The truth is, this line in the sand will disappear with the next wave. This is not about principle. It is about politics.” *Congressional Record*, May 19, 2005, p. S5520.

¹⁶⁴ “Once you opened that Pandora’s Box, it was just a matter of time before a Senate leader who couldn’t get his way on something moved to eliminate the filibuster for regular business as well. And that, simply put, would be the end of the United States Senate. It is the genius of the Founders that they conceived the Senate as a solution to the small state/big state problem. And central to that solution was the protection of the rights of the minority. A filibuster is the minority’s way of not allowing the majority to shut off debate, and without robust debate the Senate is crippled. Such a move would transform the body into an institution that looked just like the House of Representatives, where everything passes with a simple majority. And it would tamper dangerously with the Senate’s advice and consent function as enshrined in the Constitution.” Senator Harry Reid, *The Good Fight*, (New York: Penguin Group, 2008), pp. 195-196.

Before Frist could move ahead, 14 Senators preempted him. Seven were Republicans and seven were Democrats. Dubbed the Gang of Fourteen, the seven Democrats promised not to support filibusters as an instrument of party policy, but to assess nominees on a case-by-case basis and to filibuster only in extraordinary circumstances. In exchange, the seven Republicans promised not to support the constitutional option. As part of the agreement, several of the previously filibustered nominees were greenlighted for confirmation votes, including Owen. Several others who had been filibustered were not so fortunate. The agreement stopped Frist from acting, but also diminished his reason to act.¹⁶⁵ It may be said that Frist's tactic was an action-forcing mechanism that provoked the agreement and that, without the looming threat, the judicial filibusters would have continued unabated.

The Gang of Fourteen agreement was binding only for the 109th Congress, but its spirit generally carried on for several years thereafter. Filibusters of nominations picked up again during Barack Obama's presidency.

Confronting slowdowns of appointments to the courts and the Executive Branch, Reid opened the door to extraordinary tactics to amend Senate rules. In January 2013, he threatened to reprise the approach of Clinton Anderson and other cloture reformers to secure a rules change at the start of the 113th Congress. Bipartisan negotiations followed, which had the effect of deflecting the nuclear option. Instead, the Senate agreed to a minor amendment to the cloture rule and imposed a Standing Order, in effect only for the 113th Congress, that reduced post-cloture time to eight hours for sub-Cabinet Executive Branch nominees and two hours for district court nominees.

Immediately prior to the vote, the two leaders engaged in a colloquy in which Majority Leader Reid stated that any further adjustments to Senate rules in that Congress would only come through regular order and would involve consideration by the Senate Rules Committee. In turn, Republican Leader McConnell promised that "Senate Republicans will continue to work with the

¹⁶⁵ When the Gang of Fourteen agreement was announced, Frist responded that he was, for the most part, pleased, but that he would carefully monitor its implementation and did not foreclose any tactical options. "This arrangement makes it much less likely—indeed, nearly impossible—for such mindless filibusters to erupt on this floor over the next 18 months. For that I am thankful. Circuit court and Supreme Court nominees face a return to normalcy in the Senate where nominees are considered on their merits. The records are carefully examined. They offer testimony. They are questioned by the Senate Judiciary Committee. The committee acts, and then the Senate discharges its constitutional duty to vote up or down on a nominee. Given this disarmament on the filibuster and the assurance of fair up-or-down votes on nominees, there is no need at present for the constitutional option. With this agreement, all options remain on the table, including the constitutional option." *Congressional Record*, May 23, 2005, p. S5769.

majority to process nominations consistent with the norms and traditions of the Senate.” Reid expressed his understanding that “the two leaders will continue to work together to schedule votes on nominees in a timely manner by unanimous consent, except in extraordinary circumstances.”¹⁶⁶

An uneasy truce held through most of 2013.¹⁶⁷ However, it was not to prove durable. On July 11, 2013, tensions broke into the open. Objecting to Republican filibusters of Obama appointments to the National Labor Relations Board, Reid emphasized that it was in the majority’s power to recast the rules and implied that doing so was a common practice.¹⁶⁸ He threatened using the so-called “nuclear option” to create a precedent that would override the cloture rule’s supermajority threshold.

On what basis could a precedent override a rule? Article I, section 5 of the Constitution empowers the Senate and the House with the power of self-governance.¹⁶⁹ The Standing Rules of the Senate are a manifestation of this power. So are precedents, unanimous consent orders, and expedited procedure laws. All stand on equal footing, with the latest in time superseding earlier exercises.¹⁷⁰ The precedent would come later than the rule.

¹⁶⁶ For the colloquy between Reid and McConnell, see *Congressional Record*, January 24, 2013, p. S272.

¹⁶⁷ Assessing that Reid might be preparing to reverse course, McConnell made five floor statements during June 2013, imploring his counterpart not to do so. See, for example, *Congressional Record*, June 4, 2013, p. S3916. Reid finally responded on July 11, 2013, in which he claimed that the Republicans had not kept their part of the January bargain. “I agree without any question that Senators and everyone else should keep their word. I also believe a deal is a deal, a contract is a contract, an arrangement is an arrangement, a bargain is a bargain. As long as each party to such agreement holds up his end of the bargain, Senators should stick to their word. But an agreement is a two-way street. If one party fails to uphold their end, the agreement, of course, is null and void.” *Congressional Record*, July 11, 2013, p. S5625. McConnell responded, “He gave his word without equivocation back in January of this year that we had settled the issue of rules for the Senate for this Congress. That was in the wake of a bipartisan agreement to pass two rule challenges and to pass two standing orders. So, at the core of this is the Majority Leader’s word to his colleagues and the Senate as to what the rules would be for this Congress. He gave his word, and now he appears to be on the verge of breaking his word.”

Congressional Record, July 11, 2013, p. S5630.

¹⁶⁸ Reid noted, “The fact is that it has been done many times. Since 1977, it has been done 18 times—about twice every year.” After citing instances, Reid continued, “Those are times that the rules have been changed, overruling precedents, as my friend Senator McConnell said, with a majority vote.” *Congressional Record*, July 11, 2013, pp. S5629-S5630.

¹⁶⁹ Article I, section 5, states, “Each House may determine the rules of its proceedings....”

¹⁷⁰ For example, Rule XXII, the cloture rule, states that there will be a quorum call before

Senator Orrin Hatch (R-UT) noted that Reid’s referenced cases were not dispositive because they involved interpretation of a rule rather than overriding it: “It makes a difference between issues where the chair has been overruled rather than the nuclear option which changes the rule, which breaks the rule and changes it. That is a significant difference.”¹⁷¹

Senator Lamar Alexander pointed out that the magnitude of the change exceeded what was done in the precedents Reid cited: “The Majority Leader said: ‘Well, we have changed the rules 18 times.’ Never like this. What he is proposing to do is to turn this place into a place where the majority can do whatever it wants to do. That is like the House of Representatives—so the majority can do whatever it wants to do. A freight train can run through the House of Representatives in one day. And it could run through here in one day if the Majority Leader does this.”¹⁷²

For the moment, Reid did not pull the nuclear trigger. However, after Republicans filibustered three Obama appointees to the U.S. Court of Appeals for the District of Columbia Circuit, he resolved to end the obstruction.¹⁷³ On November 21, 2013, Reid made a point of order that the voting threshold to end debate on all nominations other than for the Supreme Court was a simple majority.¹⁷⁴ President Pro Tempore Patrick Leahy (D-VT) ruled that the point

every cloture vote. By unanimous consent, the Senate routinely waives this requirement. If the consent order did not stand on equal footing with the rule, it could not waive the rule. Similarly, Rule XIX states that the Presiding Officer must recognize the first Senator who addresses the Chair. This provision first appeared in the original 1789 Standing Rules. However, a precedent with roots back to 1937 gives priority of recognition to the Majority Leader. The precedent prevails because it is later in time. In the 85 years since 1937, the rule has never been amended.

¹⁷¹ *Congressional Record*, July 11, 2013, p. S5659.

¹⁷² *Congressional Record*, July 11, 2013, p. S5633.

¹⁷³ If the three vacancies were not filled, the partisan balance on the court would have been 4-4. As the D.C. Circuit hears many of the legal challenges to Executive Branch actions, Republicans were not anxious to confirm the Obama appointees. As Senator Bob Corker (R-TN) noted, “We had a four-to-four balance on this Circuit Court. Senator Reid brought forth three more nominees, and they were not bad nominees.... But we did not want the balance on the D.C. Circuit to change. It was four to four. We know that a lot of administrative rulings that are relative to the administration take place in the D.C. Court, so we made the argument that there were already enough judges there and they did not have a very good case. It was the same argument, by the way, that Democrats made back in 2006 when Bush was also trying to make some nominations.” *Congressional Record*, March 28, 2017, p. S2030. By mirror image logic, Democrats wanted the appointments to go through and were willing to fight for them.

¹⁷⁴ Reid’s advisor, Adam Jentleson, writes, “When Democrats went nuclear in 2013, we had left the supermajority threshold in place for Supreme Court justices because a few Democrats

of order was not well taken. Reid appealed the ruling. The question for the Senate was whether the judgment of the Chair should be the judgment of the Senate. By a vote of 48-52, the Senate determined otherwise. Reid's point of order was thus affirmed, and majority cloture came to the Senate. It was applied to all nominations apart from those to the Supreme Court. It did not affect legislation or treaties.

After the vote, Senator Levin took to the floor to lament what had happened. Along with Senators Joe Manchin (D-WV) and Mark Pryor (D-AR), Levin had opposed Reid's maneuver. He saw peril in that day's deed and what it portended for the Senate: "Overruling the ruling of the Chair, as we have now done by a simple majority is not a one-time action. If the Senate Majority demonstrates that it can make such a change once, there are no rules which bind the majority, and all future majorities will feel free to exercise the same power, not just on judges and executive appointments, but on legislation."¹⁷⁵

Several years later Senator Schumer explained why Reid had executed the nuclear option: "The reason that Majority Leader Reid changed the rules was that Republicans had ramped up the use of the filibuster to historic proportions. They filibustered 79 nominees in the first four years of President Obama's presidency. To put that in perspective, prior to President Obama, there were 68 filibusters on nominations under all other Presidents from George Washington to George Bush.... They deliberately kept open the D.C. Court of Appeals because it has such influence over decisions that are made by the government."¹⁷⁶

Through the remainder of the Congress (2013-2014), Reid was able to take advantage of the two rules adjustments for which he had been responsible. One was the nuclear option, which neutralized Republicans' ability to block nominations by filibuster. The second was the truncated post-cloture time, in which the Republicans had acquiesced to forestall the nuclear option. That allowed Reid to accelerate the pace of confirmations. In the end, Republicans suffered the nuclear option anyway.

In 2014, Republicans won nine seats and regained the Senate majority. They made no effort to undo Reid's 2013 precedent. As Senator Biden predicted in 2005, once made, changes to the cloture rule are likely to be permanent. When Republicans retook the Senate after the 2014 elections, there was early conversation,

were nervous about giving away this last line of defense against anti-abortion nominees." Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 230.

¹⁷⁵ *Congressional Record*, November 21, 2013, p. S8422.

¹⁷⁶ *Congressional Record*, April 3, 2017, p. S2161.

principally staff-driven, about reversing the Reid nuclear option and reinstating the supermajority voting threshold. The discussion was unproductive because leading Republican Senators were unwilling to have one standard applied to Democratic nominees and another to Republican nominees. Moreover, some Senators believed that even if they approved the change, a future Democratic majority would adjust the rules again.¹⁷⁷

On February 13, 2016, Supreme Court Justice Antonin Scalia died. On March 16, President Obama nominated Judge Merrick Garland to succeed him. Citing the so-called “Biden Rule,” Majority Leader McConnell announced that the seat would not be filled prior to the 2016 election.¹⁷⁸ Speaking on February 23, the day of the New Hampshire primary, McConnell stated, “Presidents have a right to nominate just as the Senate has its constitutional right to provide or withhold consent. In this case, the Senate will withhold it. The Senate will appropriately revisit the matter after the American people finish making in November the decision they have already started making today.”¹⁷⁹

¹⁷⁷ Perhaps not surprisingly, the same logic works when roles are reversed. Democratic Senators who worked in early 2022 to weaken the filibuster for voting rights believed that there would not be value in self-restraint. They speculated that Republicans would change the rules anyway if given the chance, so why not preempt the question when a legislative priority was at issue.

¹⁷⁸ The “Biden Rule” is based on a quote from then-Senate Judiciary Committee Chairman Joe Biden from a floor speech on June 25, 1992: “If a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, President Bush should consider following the practice of a majority of his predecessors and not name a nominee until after the November election is completed. The Senate, too, Mr. President, must consider how it would respond to a Supreme Court vacancy that would occur in the full throes of an election year. It is my view that if the President goes the way of Presidents Fillmore and Johnson and presses an election-year nomination, the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after...campaign season is over. Others may fret that this approach would leave the Court with only eight members for some time, but as I see it the costs of such a result—the need to reargue three or four cases that will divide the Justices four to four—are quite minor compared to the cost that a nominee, the President, the Senate, and the Nation would have to pay for what would assuredly be a bitter fight, no matter how good a person is nominated by the President. *Congressional Record*, June 25, 1992, p. 16317. Senator Jeff Merkley disputed the notion that the so-called Biden Rule actually represented a longstanding Senate tradition. In an extensive historical review, he concluded that Senate’s practice had been to act on election-year nominations, not to defer them, even though such was not common. “We can look to the fact that the Senate acted on all 15 of the 15 election-year vacancies.” *Congressional Record*, April 4, 2017, p. S2238. When Biden made his speech, there was no pending vacancy on the Court, but there were rumors one would occur. Biden sought to head off an election-year nomination by making his preemptive announcement. McConnell followed Biden’s new standard rather than the earlier practice that Merkley cited.

¹⁷⁹ *Congressional Record*, February 23, 2016, p. S926.

Senate Judiciary Committee Chairman Charles Grassley concurred.¹⁸⁰ He refused to hold hearings on the Garland nomination.¹⁸¹ Democrats were outraged, but the Republicans held firm. When he took office on January 20, 2017, President Donald Trump inherited a Supreme Court vacancy.

He acted promptly to fill it. On January 31, 2017, Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to succeed Scalia. Between March 20 and 23, the Senate Judiciary Committee held hearings on the nomination. The Committee favorably reported it on April 3. The following day, the Senate agreed to proceed to consider the nomination. While the Democrats could not block that motion, a filibuster broke out once the nomination was pending. Within that filibuster, Senator Jeff Merkley spoke for 15 hours, justifying the filibuster based on Republicans' refusal to process the Garland nomination. "The goal was to steal a seat and deliver it to a Republican President who would nominate someone from the extreme right and pack the Court," he charged. Merkley continued, "This seat is stolen, and we should not vote to close debate. We must filibuster...to stop the theft of Supreme Court seat stealing."¹⁸²

On the same day, Senator Schumer justified the filibuster as payback for Republican refusal to move the Garland nomination: "The Republican majority conducted the first partisan filibuster of a Supreme Court pick when their members refused to have hearings for Merrick Garland. In fact, what the Republicans did was worse than a filibuster. The fact is, the Republicans blocked Merrick Garland using the most unprecedented of maneuvers. Now we are likely to block Judge Gorsuch because we are insisting on a bar of 60 votes. We think a 60-vote bar is far more in keeping with the tradition than what the Republicans did to Merrick Garland." Schumer quoted Representative Adam Schiff (D-CA), who said, "When McConnell deprived President Obama of a

¹⁸⁰ Chairman Grassley stated, "When they structured our nation, the Founders placed trust in three separate but equal branches of government. Co-equal authorities are throughout the Constitution, including Article II, Section 2, where the power to nominate an individual to the Supreme Court is granted to the President and authority is given to the Senate to provide advice and consent. Nowhere in the Constitution does it describe how the Senate should either provide its consent or withhold its consent. Today the President has exercised his constitutional authority. A majority of the Senate has decided to fulfill its constitutional role of advice and consent by withholding support for the nomination during a Presidential election year, with millions of votes having been cast in highly charged contests." "Grassley Statement on the President's Nomination of Merrick Garland to the U.S. Supreme Court," March 16, 2016, www.grassley.senate.gov.

¹⁸¹ Richard Cowen, "Senate Judiciary Committee Chairman Grassley tells Garland no Hearings," April 12, 2016, www.reuters.com.

¹⁸² *Congressional Record*, April 4, 2017, pp. S2232, S2241.

vote on Garland, it was a nuclear option. The rest is fallout.”¹⁸³ Retribution was explicit. As Schumer pointed out, “We didn’t get Merrick Garland; they are not getting 60 votes on Judge Gorsuch.”¹⁸⁴

Majority Leader McConnell responded by offering the Republican perspective on the partisan divisions that had reached the point of crisis. Speaking of Minority Leader Schumer, he stated, “He and his party decided to change the ground rules for handling judicial nominations. He and his party pioneered the practice of filibustering lower court judicial nominees. He and his party launched the first partisan filibuster of a Supreme Court nominee. He and his party deployed the nuclear option in 2013.”¹⁸⁵

McConnell filed a cloture motion to end the debate on the Gorsuch nomination. The motion ripened for a vote on April 6. By a vote of 55-45, the Senate did not invoke cloture.

McConnell successfully moved to reconsider the vote. With the question of cloture again pending, McConnell executed a variant of Reid’s nuclear script. He made a point of order that under the precedent of November 21, 2013, the cloture threshold for all nominees was a majority vote. The Presiding Officer rebuffed the point of order, stating that the November 21, 2013, precedent expressly excluded the Supreme Court. McConnell appealed the ruling of the Chair.

By 48-52, the Senate voted not to uphold the Chair’s ruling. As in 2013, that had the effect of validating the point of order. The Supreme Court loophole Reid left open was now closed. Upon reconsideration, but under a new voting threshold, the Senate invoked cloture 55-45. The following day, April 7, the Senate confirmed Gorsuch 54-45.

¹⁸³ *Congressional Record*, April 4, 2017, p. S2183. Majority Leader McConnell argued that the Senate met its constitutional obligation on the Garland nomination by deciding to withhold consent, without obligation to bring the nomination to a vote. “The Senate exercised its constitutional advice and consent role by withholding its consent until after the election so that the next president, regardless of party, could select the nominee.” *Congressional Record*, April 4, 2017, p. S2385.

¹⁸⁴ *Congressional Record*, April 4, 2017, p. S2183.

¹⁸⁵ *Congressional Record*, April 6, 2017, p. S2385. In response, Schumer did not affix blame but noted the cycle of retaliatory moves that had brought the Senate to the nuclear moment on the Supreme Court. “I am pretty sure we could argue endlessly about where, and with whom, this all started. Was it the Bork nomination or the obstruction of judges under President Clinton? Was it when Democrats blocked judges under President Bush or when Republicans blocked them under President Obama? Was it Judge Garland or Judge Gorsuch? Wherever we place the starting point of this long twilight battle over the judiciary, we are now at its end point.” *Congressional Record*, April 6, 2017, p. S2387.

Responding to their lost opportunity to block nominations by filibuster, Democrats fought back by insisting on a drawn-out cloture process for even minimally controversial nominees. Reid's Standing Order reducing post-cloture time for most nominees had expired at the end of 2014. After the Gorsuch confirmation, Republicans sought to revive the Standing Order, or some version of it. Democrats refused. Considering that when the 2013 Standing Order was agreed to, the minority still had access to the filibuster, it was not unreasonable for them to take account of changed circumstances and reject reciprocity.

On February 6, 2019, Senator James Lankford (R-OK) countered by introducing S. Res. 50, an amendment to Rule XXII. It would permanently limit post-cloture proceedings for district court and Court of Claims judges to two hours and do the same for all sub-Cabinet Executive Branch nominees, except for appointments to 13 designated regulatory agencies. The Senate Rules Committee reported out the resolution on February 13.

On March 28, Majority Leader McConnell moved to proceed to S. Res. 50 and filed a cloture motion. Cloture failed by a vote of 51-48 on April 2. McConnell moved immediately and successfully to reconsider the vote. On April 3, he addressed the Presiding Officer: "Mr. President, I raise a point of order that post-cloture time under rule XXII for all executive branch nominations other than a position at Level 1 of the Executive Schedule under section 5312 of title 5 of the United States Code is 2 hours."¹⁸⁶ The Presiding Officer ruled against the point of order. McConnell appealed, and by 48-51, the decision of the Chair was not sustained.

Later that day, McConnell made a similar point of order about post-cloture proceedings for judicial nominations. Senator Dianne Feinstein (D-CA), ranking Democrat on the Senate Judiciary Committee, complained, "Despite bipartisan opposition to the Lankford resolution, the majority is now considering limiting debate time by breaking longstanding rules of the Senate. Changing the rules is not only unnecessary, but also is dangerous, especially when we are talking about lifetime appointments. Further, given this administration's failure to properly vet its own nominees, the Senate should not restrict critical vetting and due diligence."¹⁸⁷

Thus, Majority Leader McConnell declared, "I raise a point of order that the post-cloture time under rule XXII for all judicial nominations, other than circuit courts or Supreme Court of the United States, is 2 hours." Again, the Presiding Officer ruled against the point of order and McConnell appealed. On appeal, the vote was 48-51 not to sustain the ruling.¹⁸⁸

¹⁸⁶ *Congressional Record*, April 3, 2019, p. S2220.

¹⁸⁷ *Congressional Record*, April 3, 2019, p. S2225.

¹⁸⁸ *Ibid.*

Strongly cautioning against this tactic, Senator Levin quoted one of the Senate’s twentieth-century giants, Arthur Vandenberg. As previously noted, speaking in 1949, Vandenberg insisted, “The rules of the Senate as they exist at any given time, and as they are clinched by precedents, should not be changed by the interpretive action of the Senate’s Presiding Officer, even with the transient sanction of an equally transient Senate majority.” Acting outside the rules to amend them amounted to “an argument that the end justifies the means,” Vandenberg said. In that case, continued Vandenberg, “no rule in the Senate is worth the paper it is written on, and this so-called ‘greatest deliberative body in the world’ is at the mercy of every change in parliamentary authority.”¹⁸⁹

A Damage Assessment

To summarize how these five uses of the nuclear option eroded minority rights on nominations,¹⁹⁰ consider Senate procedure as it existed on January 1, 2013:

The voting threshold for cloture on all nominations was then 60 votes. This empowered the minority to stop nominations from coming to vote, which could potentially influence who got nominated in the first place, much less who was confirmed.

After the nuclear option was exercised, the minority, no longer able to block a vote, often insisted on stretching out post-cloture consideration to the maximum of 30 hours Rule XXII allowed. Doing so would affect how much other business the Senate could accomplish, complicating the Majority Leader’s decisions on what to prioritize. Both parties used these tactics. However, by the middle of 2019, not only was the minority’s 60-vote leverage gone, so was its ability to monopolize the floor with extended post-cloture proceedings.

As to nominations, the nuclear option precedents had converted the Senate into a majority-dominant institution.

¹⁸⁹ Senator Levin’s speech quoting Vandenberg appears at *Congressional Record*, May 20, 2005, pp. S5560-S5563.

¹⁹⁰ Again, these were eliminating debate on the motion to proceed to a nomination, simple majority cloture on all nominations other than to the Supreme Court, simple majority cloture on Supreme Court nominations, reducing post-cloture time on judicial nominations, and reducing post-cloture time on executive branch nominations.

When the filibuster on Presidential appointments was eliminated, the Senate abandoned a moderating role on who would be nominated. As Democrats who blocked the Bush judges would say, the availability of the filibuster forced a President to avoid nominating hard-edged ideologues and instead choose people who could command sufficient bipartisan support. If a President refused to do that, an opposition minority could credibly threaten obstruction.¹⁹¹ Now, the threat no longer exists, and this influence is gone.¹⁹² If the President's party controls the Senate, and he does not suffer meaningful defections, he can safely make less centrist appointments, satisfying ideologues on the left or right. If the legislative filibuster is eliminated, no one should imagine avoiding the same dynamic.¹⁹³

¹⁹¹ For example, in the Gang of Fourteen Agreement, five Bush nominees who were filibustered up to that point were cleared to get confirmation votes. Two others were explicitly not cleared. Three others by that time had withdrawn from consideration.

¹⁹² As Senator Lindsay Graham (R-SC), one of the members of the Gang of Fourteen, has predicted, "The effect on the judiciary, I think, is going to be detrimental over time. The most ideological elements of each conference will have a large say about what kind of judges we put on the Court, and you will see a change over time from the right and the left because you no longer have to reach across the aisle to put a judge on the court." *Congressional Record*, January 11, 2022, p. S126.

¹⁹³ In his 15-hour filibuster on the Neil Gorsuch nomination, Senator Jeff Merkley made this exact point. He remarked, "Sixty Senators have to be supportive of someone to be on the Supreme Court. That is to protect the integrity of the Court, so you don't have nominees from the extreme edges. The President, knowing that the Senate might not have 60 votes for someone from the extremes, is thereby encouraged to produce a nominee that is someone from the mainstream. That is the power of the supermajority. And having people from the mainstream of judicial thought sustains the integrity of the court in the eyes of the citizens." *Congressional Record*, April 4, 2016, p. S2241. Merkley argued that this problem was especially acute for Supreme Court nominations because there is little practical check on the Court. However, the Senator's statement could readily have been made about nominations to lower courts, too, especially Circuit Courts of Appeals. The Supreme Court accepts only a tiny percentage of appeals, leaving the judgment of Courts of Appeals as final in most cases. In any case, Merkley didn't talk about lower courts because by the time of his speech, all nominations other than for the Supreme Court were subject to cloture by a simple majority of Senators voting. He appeared to justify why he voted in 2013 for the nuclear option to make that so, while continuing to support a 60-vote threshold so the Gorsuch filibuster he was advocating could succeed.

Part V:
Eliminating or
Weakening the
Legislative Filibuster

Although the Senate has circumscribed minority rights on nominations, filibusters on legislation have not yet been curtailed. Indeed, only a few years ago, a substantial majority of Senators tried to seal the wound and openly defended the principle of the legislative filibuster.¹⁹⁴

Here is the context. On April 7, 2017, after the Senate neutralized the filibuster against Gorsuch, many Senators were alarmed. They understood that no rule can constrain a willful majority of the Senate.¹⁹⁵ They knew that the same nuclear option tactic could be used against the legislative filibuster and they wanted to erect a barrier to further erosion of minority rights. Led by Senators Susan Collins (R-ME) and Chris Coons (D-DE), 61 of them signed a letter to Leaders McConnell and Schumer urging that the Senators' rights on legislative measures be preserved. The letter used the words "extended debate," a frequently used euphemism for filibustering.¹⁹⁶ Signers included 31 Republicans and 30 Democrats.

¹⁹⁴ In the 108th Congress (2003-2004), Democrats successfully filibustered ten Bush appellate appointments. In 2005, confronting the promise that these filibusters would be repeated, and even expanded, Majority Leader Bill Frist strongly considered using the nuclear option to reduce cloture on nominations to a majority vote. In May 2005, a collection of seven Republicans and seven Democrats preempted his effort. The Democrats pledged not to oppose cloture except in extraordinary circumstances, and the Republicans promised not to support curtailing filibuster rights. This is known as the Gang of Fourteen Agreement. It brought peace to the Senate for about a half-decade, until Republican filibusters emerged on Obama nominees. As this transpired, the parties simply exchanged playbooks. In 2005, Democrats strongly defended the right to filibuster nominees and decried remedial steps, particularly ones imposed via nuclear option. In 2013, roles were reversed. Republicans defended the filibusters, Democrats sought a remedy, and Republicans denounced both the remedy and the method. It was a classic illustration of the axiom that where one stands depends on where one sits.

¹⁹⁵ As Senator Byrd stated in 1975, "At any time that 51 Members of the Senate are determined to change the rule and if they have a friendly Presiding Officer, and if the leadership of the Senate joins them—especially if it is the joint leadership—that rule will be changed, and Senators can be faced with majority cloture." *Congressional Record*, March 5, 1975, p. 5249.

¹⁹⁶ Some Senators will say that what they advocated was guaranteeing lengthy debate rights under a version of the "talking filibuster," rather than support for filibuster rights more broadly.

It stated:

We are writing to urge you to support our efforts to preserve existing rules, practices, and traditions as they pertain to the right of Members to engage in extended debate on legislation before the United States Senate. Senators have expressed a variety of opinions about the appropriateness of limiting debate when we are considering judicial and executive branch nominations. Regardless of our past disagreements on that issue, we are united in our determination to preserve the ability of Members to engage in extended debate when bills are on the Senate floor.

We are mindful of the unique role the Senate plays in the legislative process, and we are steadfastly committed to ensuring that this great American institution continues to serve as the world's greatest deliberative body. Therefore, we are asking you to join us in opposing any effort to curtail the existing rights and prerogatives of Senators to engage in full, robust, and extended debate as we consider legislation before this body in the future.¹⁹⁷

At the time, Minority Leader Schumer appeared highly receptive to the argument. As debate was closing on the Gorsuch nomination, he stated, "I hope we can get together to do more in the future months to ensure that the 60-vote threshold for legislation remains, but just as it seemed unthinkable only a few decades ago that we would change the rules for nominees, today's vote is a cautionary tale about how unbridled partisan escalation can ultimately overwhelm our basic inclination to work together and frustrate our efforts to pull back, blocking us from steering the ship of the Senate away from the rocks." Schumer continued, "Let us go no further on this path."¹⁹⁸

A Change of Heart?

Nevertheless, anticipating the possibility of success in the 2020 election, key Democrats appeared to reconsider their position. On July 18, 2019, *The Hill* carried the headline "Dems Open to Killing Filibuster in Next Congress." In the story, Minority Leader Chuck Schumer was quoted as saying, "Nothing is off the table." In the same article, Minority Whip Dick Durbin (D-IL) noted that he was revisiting his prior opposition to changing the cloture rule. Earlier, he insisted that Senate rules restricted the power of President Bush and must be preserved. "There are forces in the Senate that want to win at any cost, but the cost of the nuclear option is too high," exclaimed Durbin in 2005. "The cost of the nuclear option means we will turn our back on a 200-year-plus tradition."¹⁹⁹

¹⁹⁷ "Senators Collins, Coons Lead Effort to Preserve 60 Vote Threshold for Legislation," April 7, 2017, <https://www.collins.senate.gov/newsroom/senators-collins-coons-lead-effort-preserve-60-vote-threshold-legislation>.

¹⁹⁸ *Congressional Record*, April 6, 2017, p. S2388.

¹⁹⁹ "Dems Open to Killing Filibuster in Next Congress," *The Hill*, July 18, 2019.

Those serving in the majority can easily find filibusters to be a nuisance or a distraction—until roles are reversed and it is they who need to use the rules. As the *New York Times* pointed out when Republicans sought to curb judicial nomination filibusters, “The Republicans see the filibuster as an annoying obstacle, but it is actually one of the checks and balances that the Founders, who worried greatly about the concentration of power, built into our system of government. It is also, right now, the main means by which the 48 percent of Americans who voted for John Kerry can influence federal policy. People who call themselves conservatives should find a way of achieving their goals without declaring war on one of the oldest traditions in American democracy.”²⁰⁰

Since Ronald Reagan’s first election, Senate control switched in 1981, 1987, 1995, 2001, 2003, 2007, 2015, and 2021. Majorities are fleeting. Partisan rules changes can come back to haunt, as Majority Leader Reid’s 2013 nuclear option demonstrates.

Threats to the legislative filibuster have come principally from activists in the Democratic Party, but not exclusively so. Pressure tends to build from those who have a big agenda, are impatient to see it fulfilled, and fear that it will be stopped or diluted by filibuster. As previously noted, on multiple occasions, President Donald Trump publicly advocated scrapping the filibuster so that legislation could pass without impediment. When he did, Republicans held majorities in both Houses and had the White House, but Senator McConnell refused.²⁰¹ On August 22, 2019, he wrote in the *New York Times*, “My Republican colleagues and I have not and will not vandalize this core tradition for short-term gain. We recognize what everyone should recognize—there are no permanent victories in politics. No Republican has any trouble imagining the laundry list of socialist policies that 51 Senate Democrats would happily inflict on Middle America in a filibuster-free Senate”²⁰²

For that matter, no Democrat would have trouble imagining the harm that would follow on these same and other topics if the roles were reversed. To illustrate this, the vigorous fight Democrats waged in 2018 against the border wall would have been futile if such legislation could not have been filibustered.

Also at stake is the structure of American government. Only statutory changes are needed to add Senators for the District of Columbia and Puerto Rico by making them states, to enlarge the size of the House of Representatives and,

²⁰⁰ “Mr. Smith Goes Under the Gavel,” *New York Times*, November 28, 2004, section 4, p. 10.

²⁰¹ For example, see Nolan D. McCaskill, “Trump Renews Call to End Filibuster,” *Politico*, September 15, 2017, www.politico.com.

²⁰² Mitch McConnell, “Mitch McConnell: The Filibuster Plays a Crucial Role in our Constitutional Order,” *New York Times*, August 22, 2019, p. A23.

by doing so, affect the composition of the Electoral College.²⁰³ Amendments to law are all that is required to pack the Supreme Court and otherwise expand the federal judiciary. Such things are immensely consequential. If they are muscled through a Senate with a powerless minority, widespread dissension and anger will follow.

Recently there have been increased calls both on and off Capitol Hill for the filibuster to be abolished. A sizeable number of Senators have declared they would vote to do so, sometimes as a campaign pledge. But other Senators, believing that killing the filibuster would aggravate and accelerate polarization, are determined not to permit it.

In principle, the filibuster could be reformed by amending the text of the Standing Rules of the Senate. However, changes to rules text can be hard to achieve. Even though the actual amendment is adopted by a simple majority, affirmation by two-thirds of Senators voting is necessary to close debate. This extraordinary threshold for cloture protects the minority from being steamrolled on rules changes.²⁰⁴ When Senate rules amendments happen, as they were as recently as 2013, they are the product of bipartisanship.

The alternative is to create another nuclear option precedent that contradicts and overrides a rule. It is called the “nuclear option” because it dismantles Senate rules without needing to amend them. As the judicial nominations saga shows, both parties have bypassed regular order in this fashion when each has held the majority.²⁰⁵ The effect is a Senate with no rules, other than ones that a sitting majority wishes to obey.

²⁰³ Adding Senators for the District of Columbia and Puerto Rico would also affect the Electoral College.

²⁰⁴ This situation is quite opposite in the House, which adopts its rules at the beginning of every Congress. It is customary for the majority party to present a rules package on the opening day and for the House to adopt it on a strictly partisan basis. So long as it can secure a majority vote for its rules proposal, what the minority wants is of no consequence.

²⁰⁵ From 2003-2005, Republicans complained bitterly about Democratic filibusters of Bush judicial nominees, only to use the same tactics when it suited them to block Obama nominees. Democrats vigorously defended their filibustering of the Bush nominees, only to condemn Republicans when Obama nominees were blocked.

Pushing the Envelope

The most recent effort to undermine the filibuster came early in 2022. At issue was election reform legislation. A Democratic bill, with almost no Republican support, had already failed cloture. Many Democrats were determined to pass it anyway, overriding normal Senate rules if necessary.

On January 12, 2022, facing the possibility that the nuclear option would be used to weaken the legislative filibuster, Senator Collins addressed the Senate, describing why she and Senator Coons had organized the 2017 letter and the process for gathering signatures. “Just five short years ago, Senator Chris Coons and I wrote a letter urging Senate leaders to preserve the 60-vote threshold for legislation. That letter was signed by 61 Senators.... This total not only represented a majority of Senators, but also a majority of the Republican caucus, a majority of the Democratic caucus, and the current Vice President.

“How well I remember seeking signatures on the Senate floor for that letter. Holding a green folder with the letter inside, I approached Senators on both sides of the aisle to achieve my goal of a total of 60 Senators signing, representing a majority of each caucus.

“Mr. President, not a single Senator whom I approached said ‘No’ to signing the letter. Not one. Quite the contrary, each was eager to sign the letter, and many thanked me for leading the effort to make clear that whatever our disagreements on a supermajority vote for nominees, they were firmly committed to keeping the filibuster for legislation. They understood its importance to the Senate and to our country.”²⁰⁶

Nevertheless, on the evening of January 19, 2022, Majority Leader Schumer went forward. He sought to structure a nuclear option precedent that would override Senate rules and restrict minority rights. His mechanism was called a “talking filibuster.”

Under this proposal, if a majority of Senators, but fewer than 60, vote for cloture, the Majority Leader can file a motion to end debate. It will come to an immediate vote and pass by majority vote unless another Senator declares he wants additional debate. If so, the Presiding Officer declares that the Senate has entered a “period of extended debate.”

During that period, proceedings will continue, but under conditions of a legislative forced march, where opponents must hold the floor around the clock or be steamrolled. As Schumer proposed it, amendments and motions customarily available to all Senators, as well as quorum calls, would be out of

²⁰⁶ *Congressional Record*, January 12, 2022, pp. S184-S185.

order.²⁰⁷ If there is any break in the action, the Presiding Officer announces the period for extended debate is over. Thereafter, only a simple majority will be needed to invoke cloture.

Because Republicans would not support a rules amendment to this effect, House and Senate Democratic Leaders devised a nuclear workaround.

H.R. 5746 was a non-controversial bill dealing with the National Aeronautics and Space Administration. It passed the House by voice vote on December 8, 2021. The Senate amended the bill and passed it by unanimous consent on December 14, 2021. The Democratic tactic was for the House to amend the Senate amendment with comprehensive election provisions. Under Senate procedure, when H.R. 5746, as amended, went back for further disposition, the motion to proceed to the House message would be non-debatable. Having eliminated the possibility of a Republican filibuster on the motion to proceed, Schumer advanced an extraordinary maneuver to consider the substance of the House amendment.

Majority Leader Schumer addressed the Presiding Officer: “Mr. President, I make a point of order that for this message from the House, with respect to H.R. 5746, the only debate in order during consideration of the message be on the question of adoption of the motion to concur in the amendment of the House; further, that no further amendments, motions, or points of order be in order, and that any appeals be determined without debate.”²⁰⁸ Proposing an exception for that bill only, and contradicting Senate rules, the precedent would have barred amendments, points of order, or motions, and forced the Senate into a debate focused only on final passage of the legislation. However, Senate proceedings involve more than just speeches, as all Senators know.

Minority interests go well beyond the right to speak, important as that is. Amendments are also crucial. Without the leverage that supermajority cloture gives the minority, the right to amend cannot be meaningfully guaranteed. Essentially powerless, the minority can be foreclosed from amendments entirely or limited to only those amendments on which a majority leader is willing to vote. Beyond question, the right to debate and the right to amend are inseparable. Requiring a supermajority to end a filibuster protects both rights. And both were under assault on January 19, 2022.

It must be noted that the House amendment to the Senate amendment to H.R. 5746 was 719 pages long. The House considered it under a resolu-

²⁰⁷ The precedent Majority Leader Schumer tried to set in January 2022 for the voting rights legislation would have avoided the need for points of order that such tactics were dilatory because it would have declared them out of order *per se*.

²⁰⁸ *Congressional Record*, January 19, 2022, p. S347.

tion from the Rules Committee that allowed only one hour of debate and no amendments. When the message came to the Senate and Schumer offered his motion to concur in the House amendment, he also filled the amendment tree, to preclude other Senators from offering amendments. Then he made his point of order, which barred any action whatsoever, except a debate on final passage. If successful, it would have shielded far-reaching, contentious, and partisan legislation from amendment in the Senate, just as it had been in the House.

On advice of the Senate Parliamentarian, the Presiding Officer rejected the point of order. Schumer appealed the ruling. Forty-eight Democrats supported the appeal. Two Democrats, Senators Manchin and Kyrsten Sinema (D-AZ), joined 50 Republicans in rejecting it. Accordingly, the judgment of the Presiding Officer stood as the judgment of the Senate. But for Senators Manchin and Sinema, the strategy would have succeeded.

Reformers have touted the talking filibuster as a return to the attrition strategies of yesteryear, where Senators opposing legislation supposedly engaged in edifying debate to persuade colleagues and the American people.²⁰⁹ However, this narrative is oversimplified.²¹⁰ None of those debates was conducted under conditions as restrictive as Schumer proposed.

²⁰⁹ Without doubt, filibusters can mean lengthy speeches, where Senators hold the floor for extended time. For instance, in 1957, Strom Thurmond (R-SC) spoke for more than 24 hours to oppose a civil rights bill. In 1953, Wayne Morse addressed tidelands oil rights for more than 22 hours. In 2013, Ted Cruz (R-TX) talked for over 19 hours about the Affordable Care Act, and in 1908, Robert LaFollette (R-WI) held the floor for more than 18 hours to oppose a currency reform bill. Senator William Proxmire (D-WI) stopped action on a 1986 debt ceiling bill for over 16 hours. Senator Huey Long (D-LA) filibustered for more than 15 hours in 1935 against Roosevelt appointments to the National Recovery Administration, and Senator Alfonse D'Amato (R-NY) spoke almost as long against 1992 tax legislation.

²¹⁰ Robert Owen was one of Oklahoma's original Senators. He served from 1907 to 1925 and paints a different picture. "There is no real debate in the Senate. Occasionally a Senator makes a speech that is worth listening to—occasionally and only occasionally. The fact is that even speeches of greatest value which are delivered on the floor have little to no audience now because of this gross abuse of the patience of the Senate, which has been brought to a point where men are no longer willing to be abused by loudmouthed vociferation of robust-lunged partisans confessedly speaking against time in a filibuster, and are unwilling to keep their seats on this floor to listen to an endless tirade intended not to instruct the Senate, intended not to advise the Senate, intended not for legitimate debate, not for an honest exercise of freedom of speech, but for the sinister, ulterior, half concealed purpose of killing time in the Senate and thereby preventing the Senate from acting, thus establishing a minority veto under the pretense, the bald pretense, the imprudent and false pretense, of freedom of debate." *Congressional Record*, February 13, 1915, p. 3718.

The principal objective of the talking filibuster is ending debate by majority vote. If the goal were simply to have more debate, a Majority Leader could put a bill on the floor, keep the Senate in session, and wait for attrition strategies to work. Perhaps the public would be persuaded by those opposing the legislation or maybe it would be repulsed by delays and demand action. Nothing but available floor time prevents that approach from being attempted now, under existing Senate rules.²¹¹

However, getting to an end point could take a while, because Senate rules also allow for amendments and other motions. The talking filibuster does away with them. That is why it is not restorative. Instead, it overrides the Senate's rules, practices, and traditions. While not as abrupt as a precedent that would substitute majority cloture for the present 60-vote standard, it gets to the same place.

It is possible to read the Collins-Coons letter as simply endorsing something like the talking filibuster proposal, so that debate could be robust and extended before it ended by majority vote. However, considering that the letter was written in the immediate aftermath of a highly contentious vote for majority cloture on Supreme Court nominations, and that there was no context of a direct assault on the legislative filibuster, I believe that Senator Collins' interpretation reflects the intent of the letter, that being to preserve a supermajority voting threshold for cloture on legislation.²¹²

²¹¹ For instance, in 1960, Majority Leader Lyndon Johnson kept the Senate in for nine days of nearly continuous session. In 1988, Majority Leader Robert Byrd kept the Senate in session for 53 consecutive hours on campaign finance reform legislation.

²¹² During the 2022 debate on voting rights legislation, several Senators sought to interpret the letter as an endorsement of the talking filibuster. For example, Senator Tim Kaine stated, "For everyone on the Republican side who signed that letter saying we should have extended debate on the Senate floor, and it should not be curtailed, we are giving you a chance to do exactly what you pledged to do. For everyone in our own caucus who has expressed reticence about weakening or diminishing the filibuster, we are giving you exactly the thing you said you wanted—an opportunity to have full debate that could go on for a very long time and not be curtailed. And the only thing we will require is that that debate actually happen in view of the American people and your colleagues..." *Congressional Record*, January 17, 2022, p. S262. Senator Angus King (I-ME) offered similar remarks. He allowed that he would have left Senate procedure alone, but for the fact that the legislative question involved voting rights. "I am here today to talk about revising the rules—not blowing up the filibuster, but to get back to what the filibuster actually means, and that is extended debate." *Congressional Record*, January 19, 2022, p. S320.

The Myth of a Simple Carve-Out

Although the “talking filibuster” maneuver applied only to the election reform legislation, Majority Leader Schumer’s precedent could readily have been extended to other measures that a simple majority deemed sufficiently consequential. Some Senators justified their support on the basis that voting rights were of such fundamental importance they could make a one-time exception to the cloture rule.²¹³ But it was not realistic to assume that the exception would be so confined. It is easy to imagine other exceptions being made for abortion, immigration, guns, environmental policy, or any number of other hot-button, controversial issues where there are intense feelings, partisan fissures, and claims of urgency. The so-called “one time” use is a precedent, not an exception, and it invites retribution whenever there is a change in party control.

The Myth of a Broken Senate

Critics of the filibuster say reform is essential because the Senate is broken—wrapped in endless filibusters and cloture votes, in thrall to a recalcitrant minority, where nothing consequential happens unless through a filibuster work-around, like budget reconciliation. However, the record is to the contrary. The 117th Congress that just concluded was highly productive. As Majority Leader Schumer has claimed, “These two years in the Senate and House—in the Congress—were either the most productive in 50 years (since the) Great Society, or the most productive in 100 years since the New Deal.”²¹⁴ That Congress had an evenly divided Senate for the longest period in American history, meaning that the majority (the Democrats, with Vice President Harris’ tie-breaker) had the steepest possible hill to climb to secure 60 votes for cloture. While some Democratic successes involved use of budget reconciliation, much else was accomplished with meaningful minority engagement and support, and important legislation was

²¹³ Majority Leader Schumer contended that as to voting rights legislation, the Senate should be as majoritarian as state legislatures. “As we hold this debate, I ask my colleagues to consider this question. If the right to vote is the cornerstone of our democracy, then how can Democrats permit a situation in which Republicans can pass voter suppression laws at the state level with only a simple majority vote, but not allow the U.S. Senate to do the same? This asymmetry cannot hold.” *Congressional Record*, January 7, 2022, p. S94. Senator Chris Van Hollen (D-MD) argued that there was already a significant carve out from the filibuster within Senate rules for budget reconciliation bills, and that such should be extended to voting rights legislation. “Those laws contained major policy changes, but they could not be blocked by a vote of a minority of 41 Senators. Why is that? It is because in 1974 the Senate carved out a major exception to the supermajority filibuster rule for legislation connected to the annual budget process.... But our rules do not allow us to pass rules to protect our democracy. That is absurd.” *Congressional Record*, January 18, 2022, p. S241.

²¹⁴ Lisa Mascaro, “After Jan 6: Congress Born of Chaos Ends in Achievement,” Associated Press, December 23, 2022.

enacted. This included a major infrastructure bill, the CHIPS and Science Act, support for Ukraine in its war with Russia, marriage legislation, a debt ceiling agreement, the Juneteenth National Independence Day Act, Uyghur human rights sanctions legislation, support for veterans exposed to burn pits, lynching hate crimes legislation, a Covid-19 hate crimes measure, gun legislation, suspension of Normal Trade Relations with Russia and Belarus, NATO expansion for Sweden and Finland, a massive National Defense Authorization measure, and an omnibus appropriations bill that also carried provisions like reform of the Electoral Count Act and retirement savings provisions.²¹⁵ Again, none of these achievements involved use of reconciliation. Nor did they require breaking Senate rules through the nuclear option to override the filibuster.

Minority rights will survive in the Senate unless the nuclear option is detonated to end them. The damage will likely be irreparable. As Senator Joe Biden noted in 2005, “If there is one thing I have learned in my years here, once you change the rules and surrender the Senate’s institutional power, you never get it back.”²¹⁶

Those who agitate for this change and these tactics should heed this 2005 warning from Senator Daniel K. Inouye (D-HI): “To those who wish to alter radically the balance of power between a majority in the Senate and a minority, I say, you sow the wind, for minorities change and the time will surely come when you feel the hot breath of a righteous majority at the back of your own neck. Only then, perhaps, you will realize what you have destroyed.”²¹⁷

An Important Exception to the Right to Filibuster: Expedited Procedure Laws

Congress made an exception to the filibuster by passing the Reorganization Act of 1939, the first expedited procedure law, a statute that contains procedural provisions to govern consideration of subsequent legislation. As of November 2022, 36 such laws exist. Under them, motions to proceed to measures they affect are non-debatable. Debate on the substance of such measures is limited. Many of these laws bar amendments; those that permit them require that the amendments be germane and may have further limitations.²¹⁸

²¹⁵ See David Leonhardt, “A Functional Congress? Yes.” *New York Times*, August 16, 2022, www.nytimes.com. See also Christa Case Bryant, “What Has a Split Congress Accomplished? A Surprising Amount,” *Christian Science Monitor*, August 5, 2022, www.csmonitor.com; see also Azi Paybarah, “Congress Proved to be Productive as Democrats Navigated with a Slim Majority,” *Washington Post*, September 30, 2022, www.washingtonpost.com.

²¹⁶ *Congressional Record*, May 23, 2005, p. S5737.

²¹⁷ *Congressional Record*, May 12, 2005, p. 9749.

²¹⁸ In addition, there are restrictions on committee deliberations and, sometimes, on the text of the measure subject to an expedited procedure law.

By far, the most impactful expedited procedure law has been the Congressional Budget and Impoundment Control Act of 1974, which contains restrictive provisions for consideration of budget reconciliation legislation. Other important examples include the War Powers Resolution of 1974, the Nuclear Waste Policy Act of 1982, the Congressional Review Act of 1995, and versions of trade promotion authority (most recently enacted in 2015, although presently expired).²¹⁹

Reconciliation is a filibuster-proof mechanism. It is therefore extremely attractive and tempting to whoever is in the majority at a given moment.²²⁰ To prevent abuse, the Senate has controls on what can be included in a reconciliation bill. In the main, this involves applying the Byrd Rule.

Named for its author, Senator Robert C. Byrd, and codified into law in 1990, the rule restricts the content of committee-reported provisions, floor amendments, and the product of bicameral negotiations culminating in conference reports or Amendments between Houses, unless 60 votes can be found to waive application of the rule.

The Byrd Rule has been inconvenient for both Democratic and Republican majorities. For example, in 2001, it stopped Republicans from making Bush-era tax cuts permanent, including elimination of the estate tax. In 2021, the Rule prevented Democrats from including minimum wage provisions in a reconciliation bill. There are numerous additional examples, some of which appear in Senate floor proceedings and many more that arise from informal guidance from the Senate Parliamentarian. If the filibuster were eliminated, majorities would simply not have to trifle with such restrictions and reconciliation bills would be a thing of the past.

During floor debate prior to the January 2022 showdown on the “talking filibuster,” cloture reform advocates used the example of expedited procedure laws to demonstrate that the Senate has already agreed on many occasions to poke holes in Rule XXII. This is undoubtedly so, but it begs the question of whether it

²¹⁹ Senator Tom Harkin remarked, “There is nothing sacred about requiring 60 votes to end debate. The Senate has adopted rules and laws that prevent the filibuster in numerous circumstances. The budget cannot be filibustered, war powers cannot be filibustered, international trade acts cannot be filibustered, Congressional Review Act, disapproval of regulations cannot be filibustered. So, if the filibuster is so sacred, why have we carved out exceptions...?” *Congressional Record*, January 24, 2013, p. S253.

²²⁰ Twenty hours of debate are permitted by law on a budget reconciliation bill. When this time expires, amendments are still possible. In that circumstance, consent orders are entered to provide for two minutes of debate on each amendment. The reason these adjustments can happen without amending the expedited procedure statute is that the law contains language reciting that such procedures are an exercise of the rulemaking power afforded each House and can be modified pursuant to a later exercise of that power.

should make even more exceptions or even scrap supermajority cloture outright and, if so, whether change should come through regular order or via the nuclear option. Every one of those expedited procedure laws was enacted under the rules and not by extraordinary maneuvers. A recent example, and one well worth emulating: Enacted December 10, 2021, Section 8 of Public Law 117-71 contains expedited procedures for consideration of a one-time debt ceiling increase. That legislation passed via regular order. Under its expedited terms, the Senate passed S.J. Res. 33, the debt ceiling increase, on December 14, 2021.²²¹ No one broke the rules to put these procedures in place.

Exaggerating Inequities?

Opponents of the filibuster contend that it exaggerates inequities already built into the Constitution. For them, one such inequity is the equality of states within the Senate, rather than proportional representation. Caroline Frederickson at the Brennan Center has written, “The Senate is already minoritarian because of the overrepresentation of small and rural states in the body. For example, California, with 39 million people, gets two Senators in Washington, the same as Wyoming, Vermont, and Alaska, each of which is home to fewer than a million people. And by 2040, given projected population growth, two-thirds of Americans will be represented by just 30 percent of the Senate.”²²²

However, it must be noted that equality of representation of states does not favor either party. The 20 Senators who happen to represent the ten lowest-populated states as of November 2022 include ten Republicans and ten Democrats. These Senators do not vote as a bloc to frustrate the interests of larger states.²²³

Critics contend that the filibuster masks accountability of legislators and deprives voters of necessary information. In hearings before the Senate Rules Committee in 2010, Mimi Marziani and Diana Lee of the Brennan Center for Justice submitted testimony stating that “Filibusters blur who is responsible for the Senate’s failure to address problems. Voters are left to wonder: should we fault the majority for failing to override the filibuster, or should we hold the minority responsible for obstructing the majority’s will?” They went on to express, “A successful filibuster prevents Senators from engaging in genuine

²²¹ Jordain Carney, “Senate Democrats Raise Debt Ceiling After Filibuster Deal,” *The Hill*, December 9, 2021, www.thehill.com.

²²² Caroline Frederickson, “The Case Against the Filibuster,” Brennan Center for Justice, October 30, 2020.

²²³ It should also be noted that in the most recent elections—the 2022 midterms—3 million more Americans voted for Republican House candidates than Democratic candidates. Republicans won over 54 million votes to 51 million for the Democrats. See Cook Political Report, National House Vote Tracker, www.cookpolitical.com.

decision making. Rather than being forced to take a stand on a particular policy, Senators cast a procedural vote concerning whether to invoke cloture and end debate. When cloture fails, and a substantive vote is never taken, constituents are left to guess how their representatives would have voted on the underlying policy matter, thereby furthering the information deficits that already plague the electorate.”²²⁴

However, cloture votes are a matter of public record and do not provide much, if any, insulation from public scrutiny. Democrats pointed this out during the early judicial filibusters, when they insisted that nominations were not guaranteed a confirmation vote and argued the failure of cloture should be considered dispositive.

Some reform advocates, like the League of Women Voters, have endorsed the talking filibuster, so that sunlight can be shown on Senators who are obstructing: “As long as Senators can hide behind the filibuster, they are not beholden to the American people. Under current rules, Senators far too often abuse the filibuster to delay important legislation and conceal debate behind closed doors, out of the view of the American people. This does a disservice to our democracy. The American voters deserve to see which of their elected Senators are obstructing a vote on issues that matter to our communities, the nation, and the health of our republic. Those wishing to block action should be held accountable and required to hold the floor of the US Senate to explain themselves to the public.... The League has a decade-long history of supporting filibuster reform to ensure a functioning democracy.”

The League has also called for other reforms, such as stopping filibusters on motions to proceed, ending silent holds, burdening the minority to produce votes against cloture, and easing the cloture threshold. “The League supports reforming the filibuster to prohibit the minority party from blocking the opening debate of a bill. We support instituting a ‘talking filibuster,’ ending silent holds, putting the onus on the minority party to produce 40 votes, and lowering the cloture vote threshold to bring bills to a final up-or-down vote on the Senate floor.”²²⁵

²²⁴ Testimony of Mimi Marziani and Diana Lee, Brennan Center for Justice, “Examining the Filibuster,” Hearings before the Committee on Rules and Administration, United States Senate, 111th Congress, Second Session, April 22, 2010, p. 111. However, those who have conducted successful filibusters regard the failure of cloture as a decision of the Senate, rather than an evasion of decision. After Democrats blocked Bush judicial appointments in the 108th Congress (2003-2004), Senator Reid stated that the Senate had decided their fate and advised the President not to resubmit the names.

²²⁵ League of Women Voters, “LWV Supports Filibuster Reform for a Healthy Democracy,” March 30, 2021, www.lwv.org.

Author Adam Jentleson argues for guaranteeing a minimum amount of time before debate can be ended and also guaranteeing each side a minimum number of amendments. Thereafter, he proposes cloture at a simple majority threshold. He contends that if a minority loses its right to block legislation, it will have an increased incentive to participate in bill-writing.²²⁶

Increasingly, critics have veered from reforming the filibuster to abolishing it, with demands for majority cloture, tied or not to the talking filibuster. The Brennan Center is among them. In 2010, the Center launched a study of what it called the “procedural dysfunction” of the Senate. In testimony that year before the Senate Rules Committee and in the years that followed, the Center advocated incremental changes to the cloture rule. It has since abandoned incrementalism and called for the outright dismantling of the rule. On the cusp of the 2020 election, it stated, “In the past, the Brennan Center has suggested reforming the filibuster to address its most significant abuses and obstruction. In 2020, however, we are beyond the stage of tinkering. It is time to abolish the filibuster altogether.”²²⁷

Former Majority Leader Harry Reid, who made ample use of filibusters to protect Democrats during his long Senate tenure, and whose views about the topic are chronicled elsewhere in this paper, wholly reversed himself and called for majority-vote cloture. In a 2019 *New York Times* op-ed, he catalogued legislation he felt should pass but on which there was not a 60-vote consensus. Then he wrote, “Even routine Senate business is now subject to the filibuster and Republicans’ seeming obsession with gridlock and obstruction. The Senate is now a place where the most pressing issues facing our country are disregarded, along with the will of the American people overwhelmingly calling for action. The future of our country is sacrificed at the altar of the filibuster. Something must change. That is why I am now calling on the Senate to abolish the filibuster in all its forms.”²²⁸

²²⁶ “In a majority-rule Senate, if the minority decides to sit on its hands, the majority will be able to conduct the nation’s business while they pout.” Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*, (New York: Liveright Publishing Corporation, 2021), p. 230.

²²⁷ Caroline Frederickson, “The Case Against the Filibuster,” Brennan Center for Justice, October 30, 2020.

²²⁸ Harry Reid, “Harry Reid: The Filibuster is Suffocating the Will of the American People,” *New York Times*, August 12, 2019, p. A23.

Maintaining a Critical Guardrail

The Senate might be made more efficient without dismantling the filibuster entirely. For example, it used to take three motions to seek a conference with the House to resolve policy disagreements. The first was a motion to insist on the Senate's amendment to a House bill. The second was to request a conference with the House. The third was to authorize the Presiding Officer to appoint conferees.²²⁹ Before 2013, these were sequential motions, each subject to filibuster. The practical effect of having to traverse the cloture process three times was that conferences could not be arranged in the face of a filibuster threat.²³⁰ However, in 2013, the Senate agreed to S. Res. 16, which allowed the three steps to be collapsed into one non-divisible motion. A filibuster is still possible, but confronting it through the cloture process is more feasible.

Other steps could be tried, such as restricting debate on the motion to proceed to legislation. Doing that would eliminate the possibility of a double filibuster but would preserve minority rights to leverage legislation or block it outright. Another concept is to accelerate the time it takes for a cloture motion to ripen.²³¹ A further idea is putting the burden on cloture opponents to come up with 41 votes rather than making cloture advocates produce 60, or to split the burden by making the cloture threshold three-fifths of Senators voting.

In the mid-1980s, two Senate-generated reform groups offered proposals that would limit the use of the filibuster without eliminating supermajority cloture. The 1983 report of the Study Group on Senate Practices and Procedures, also known as the Pearson-Ribicoff Commission, named for its co-chairs, Senators James Pearson and Abraham Ribicoff (D-CT), recommended limiting debate on a motion to proceed, to prohibit any Senator, other than the Leaders or bill managers, from offering more than two amendments after cloture, to prohibit the division of amendments after cloture, and to permit the Senate by a three-fifths vote to impose a germaneness requirement

²²⁹ This pattern assumes that the Senate amended a House bill and sought a conference to resolve differences. If the facts were opposite, in which the House amended a Senate bill and sought a conference, the sequence would be to disagree to the House amendment, agree to the House's request for a conference, and to authorize the Presiding Officer to appoint conferees.

²³⁰ This meant that if conferences could not be arranged by unanimous consent, they did not occur.

²³¹ There is precedent for such a change, applicable in that case to motions to proceed. In 2013, S. Res. 16 amended Rule XXII to say that cloture motions filed on motions to proceed that had the signatures of both leaders and at least seven additional members of each party would ripen in one day instead of two and that the 30-hour post-cloture period would be waived. Since the rule came into effect, this motion has never been used.

on amendments.²³² In 1984, The Temporary Select Committee to Study the Senate Committee System (also known as the Quayle Committee, for its chairman, Senator Dan Quayle (R-IN)), also recommended limiting debate on the motion to proceed and allowing for a germaneness requirement to be imposed by a three-fifths vote.²³³

No matter what tinkering is done to modify the rule, if any, it is essential to preserve supermajority cloture on questions of passage—whether on amendments, debatable motions, bills and resolutions, Amendments between Houses, or conference reports.

²³² Invoking cloture triggers a requirement that all amendments be germane. Proposals like this would permit imposing a germaneness requirement without invoking cloture.

²³³ “Senate Cloture Rule,” Committee on Rules and Administration, United States Senate, 112th Congress, First Session, S. Prt. 112-31, pp. 34-35.

Conclusion

Robert C. Byrd was one of the Senate's greatest students and was the most profound shaper of its rules. Defending the filibuster, he spoke of its centrality to the Senate's constitutional purposes. "The most important argument supporting extensive debate in the Senate and even the right to filibuster is the system of checks and balances. The Senate operates as the balance wheel in that system." Byrd counseled against tampering with the 60-vote cloture threshold: "I believe that Rule XXII today strikes a fair and proper balance between the need to protect the minority against hasty and arbitrary action by a majority and the need for the Senate to be able to act on matters vital to the public interest. More drastic cloture than the rules now provide is neither necessary nor desirable."²³⁴

As former Vice President Walter Mondale, himself an advocate for streamlined cloture procedures, noted in 2002, "You need to be able to close off debate, but you also need to give an individual senator the power to stop everything in the country and to rip open an issue in a way that no other institution in America can. It can't happen in the House. The rules of debate are very different. It can't happen in news conferences. It can't happen on talk shows. That is entertainment, not debate. Only the Senate can stop the nation in its tracks, and it is the only body in the world that allows it."²³⁵

Senator Byrd concludes, "The occasional abuse of this right has been at times a painful side effect, but it never has been and never will be fatal to the overall public good in the long run. Without the right of unlimited debate, of course, there would be no filibusters. But there would also be no Senate as we know it. The good outweighs the bad. Filibusters are a necessary evil which must be tolerated lest the Senate lose its special strength and become a mere appendage of the House of Representatives."²³⁶

Senator Byrd is correct. While control of the Senate has shifted eight times in the last 42 years, the 60-vote cloture threshold for the legislative filibuster has remained constant. Under Republican majorities, this protected Democrats. Under Democratic majorities, it protected Republicans. Pent-up agendas, whether from the left or right, are moderated in the "cooling saucer" of the Senate, because minority rights are respected and useful.

It is up to sitting Senators and their successors, as stewards of the Senate, to safeguard these traditions and ensure that remains the case.

²³⁴ Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate*, Vol. II, pp. 161-162.

²³⁵ Quoted in Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster*, (Bloomington: Indiana University Press, 2012), p. 8.

²³⁶ Robert C. Byrd, *The Senate: 1789-1989: Addresses on the History of the United States Senate*, Vol. II, p. 162.

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APPENDIX

THE CLOTURE RULE: SENATE RULE XXII, PARAGRAPHS 2 AND 3

Paragraph 2. Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of 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 clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-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 three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, 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 measure, motion, or other matter pending before the Senate, or the unfinished business, 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 proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

If, for any reason, a measure or matter is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination.

No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise

Notwithstanding other provisions of this rule, a Senator may yield all or part of his one hour to the majority or minority floor managers of the measure, motion, or matter or to the Majority or Minority Leader, but each Senator specified shall not have more than two hours so yielded to him and may in turn yield such time to other Senators.

Notwithstanding any other provision of this rule, any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only.

Paragraph 3. After cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty-four hours.

If a cloture motion on a motion to proceed to a measure or matter is presented in accordance with this rule and is signed by 16 Senators, including the Majority Leader, the Minority Leader, 7 additional Senators not affiliated with the majority, and 7 additional Senators not affiliated with the minority, one hour after the Senate meets on the following calendar day, the Presiding Officer, or the clerk at the direction of the Presiding Officer, shall lay the motion before the Senate. If cloture is then invoked on the motion to proceed, the question shall be on the motion to proceed, without further debate.

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