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Dec. 1, 2010

The Filibuster – An Historical Accident

As the U.S. Senate debates changes to its rules, the filibuster is a frequent target. Yet confusion reigns over the filibuster’s history -- is it a cherished part of the Framers’ intentions? Has it evolved over the course of history?

In fact, the filibuster’s existence appears to be an unintended consequence of the elimination of an archaic Senate rule called the “previous question motion.” As noted congressional scholar Norman J. Ornstein recently told the Senate Rules Committee, “unlimited debate in the Senate was ... a historical accident, not an objective of the Framers.”ⁱ

Filibusters Absent from the Framers’ Intentions

The obstruction of the legislative process by extended debate, or “filibustering,” was unknown as a parliamentary tactic when the Constitution was adopted. Filibusters were prohibited in the English Parliament after 1604, and the first rules adopted by the Senate provided for debate to be cut off on the vote of a simple majority. That provision stood for 17 years, until 1806, but cloture was invoked only 10 times.

The rule changed after Vice President Aaron Burr observed that it had been invoked only once during his four years (1801-05) as the Senate’s presiding officer. Burr thought that proved no limit was needed, and senators agreed in 1806 to a new rule permitting any senator to extend debate indefinitely. The change was “not motivated by a desire to remove obstacles to free debate, but rather by the belief that the rule’s infrequent use made it unnecessary.”ⁱⁱ Thirty-five more years passed before a senator actually conducted a filibuster in 1841. And filibusters remained relatively rare through the 19th Century and the first part of the 20th.

The Rise of the Filibuster

“[I]n the second decade of the 20th century however, two lengthy and bitter filibusters – one in 1915 and one in 1917 – led to the adoption of the ‘cloture rule.’ Angered by the Senate’s inaction on a bill allowing him to arm U.S. merchant ships against the German Navy, President Woodrow Wilson refused to call “a special session of Congress to deal with the war emergency” until the Senate rules were amended to provide a method for ending filibusters.”ⁱⁱⁱ

The Senate ultimately adopted a rule allowing two-thirds of the senators present and voting (which then could have been as few as 33) to end debate on “a measure” by voting for a motion for cloture.^{iv} As Robert Caro wrote in his epic biography of Lyndon Johnson, *Master of the Senate*:

“The rule was drafted by a bipartisan committee ‘whose stated purpose was to terminate successful filibustering’ ... but the committee made a mistake, one omission, leaving a loophole” that allowed filibusters to continue. Still, Caro noted that “between 1917 and 1927, cloture was voted on only ten times and it was adopted only four times. Between 1931 and the enactment of the Civil Rights Act of 1964, cloture was seldom sought and only twice obtained.”^v

Changes to the Rules Governing Filibuster Use

The Senate filibuster rule has been amended only when its continued existence has been threatened.^{vi}

- **In 1949**, liberals attempted to amend the filibuster rule to prevent southern senators from filibustering President Truman’s civil rights bill. The filibuster succeeded in killing the bill however, and the Senate majority agreed to toughen the filibuster rule by specifying that cloture would now require a two-thirds vote by all senators, not just those who happened to be present when the vote was called.
- **In 1957**, Vice President Richard Nixon delivered an advisory opinion suggesting that the Senate filibuster rule might be amended by a majority vote. Nixon declared that, “the right of a current majority of the Senate at the beginning of a new Congress to adopt it [sic] own rules, 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.”^{vii}
- Worried that the Senate filibuster rule might be overturned by a simple majority vote, then-Senate majority leader Lyndon Johnson engineered a compromise to reduce the number of votes required for cloture from two-thirds of the Senate to two-thirds of a quorum, and to extend the cloture rule to include motions to amend the rules of the Senate. Another amendment declared that the rules of the Senate were “continuing” and could be amended only by a two-thirds majority.
- **In 1975**, the rule was amended to fix the *minimum* number of votes required to adopt a motion for cloture at three-fifths of the Senate (*i.e.*, 60), instead of two-thirds of a quorum (which could require as many as 67 or as few as 34 votes). Motions to amend the rules of the Senate were excluded from the 60 vote rule however and continue to require a 2/3rds vote of senators present and voting.^{viii}

ⁱ Senate Rules Committee Hearing, Examining the Filibuster: The Filibuster Today and its Consequences (May 19, 2010).

ⁱⁱ Beeman, *supra* at 412; see also, Remarks of Senator Byrd, *supra* at S5485; Gold & Gupta, *supra*, at 215-16. “In making the rule change in 1806 that made possible the filibuster – by eliminating the Senate’s previous question rule

... members of the original Senate expressed no commitment to a right of extended debate.” Binder & Smith, *supra* at 33-34 (citing the *Journal of the Senate*, p. 231 (1806)).

ⁱⁱⁱ Remarks of Senator Robert M. Byrd, 151 Cong. Rec. S5485 (daily ed. May 19, 2005). Public pressure forced the Senate to adopt the predecessor of the current cloture rule in March, 1917, a month before war was declared on Germany in April of 1917.

^{iv} S. Print 99-95, Senate Cloture Rule, pp. 105-112 (1985); Byrd, *supra*, at S5485.

^v Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 198-99 (1997).

^{vi} S. Print 99-95, Senate Cloture Rule – Part 2, p. 104 (Legislative History of Paragraph 2 of Rule XXII) (1985); Byrd, *supra* at S5485; Fisk & Chemerinsky, *supra*, at 209-10.

^{vii} 103 Cong. Rec. 178 (Jan. 4, 1957) (quoted in S. Print 99-95, Senate Cloture Rule at p. 114 (99th Cong. 1st Sess. 1985) (emphasis added); see Caro, *supra* at 854-58.

^{viii} S. Print 99-95, at pp. 119-21; Testimony of Walter F. Mondale, Senate Rules Committee Hearing on Examining the Filibuster: The Filibuster Today and its Consequences (May 19, 2010).