

Sources: Harry Reid Sleeping With Mitch McConnell's Wife In 1986 At Core Of Senate Gridlock

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“Senate: Origins and Development”

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 Lecture #21
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Evolution of Senate Rules

I. The Nuclear Option in the Senate

- Gorsuch and the Nuclear Option
- The Nuclear Option in 2013

II. Procedure Basics

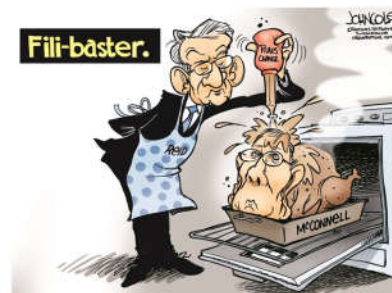
- Why rules?
- Always a limit to rules
- Everyone is a hypocrite

III. Understanding the Senate

- The filibuster is not a rule
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The Nuclear Option in the Senate



- On April 6, 2017, Senate Republicans created a new precedent that formally ended the prospect of “filibusters” on Supreme Court nominations.
- Claimed it was a necessary response to an unprecedented use of obstruction on a Supreme Court nominee.
- Democrats argued it violated the intent of the founders in establishing the Senate and damaged one of the “pillars of Democracy.”

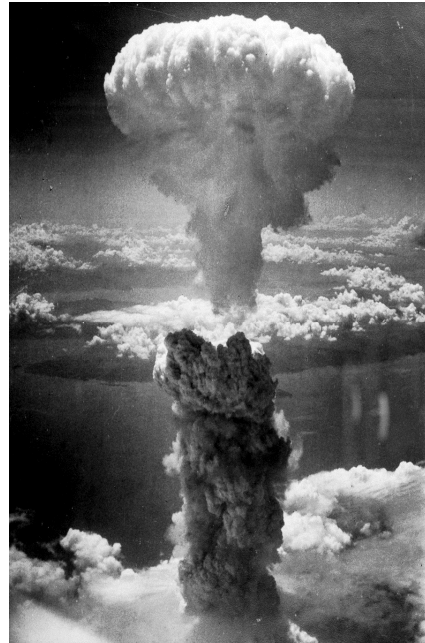
The Nuclear Option in the Senate



- Republicans cited a precedent created on November 20, 2013, by Senate Democrats under Harry Reid (D-NV). That decision established that executive and lower court nominations no longer needed to clear a supermajority cloture threshold.
- “More than half of the Nation's population lives in parts of the country that have been declared a `judicial emergency.’” – Majority Leader Harry Reid (D-NV)
- “Just sit down, shut up, and rubber stamp everything, everyone the president sends up here.” Minority Leader Mitch McConnell (R-KY)

The Nuclear Option in the Senate

- The *Washington Post* argued it “change[d] how the nation is governed in a significant way.”
- The *New York Times* dubbed it “the most fundamental alteration of its rules in more than a generation”
- Steven S. Smith listed it as “among the three or four most important events in the procedural history of the Senate.”
- Why? How does the Senate operate and how has it changed?



The Nuclear Option in the Senate

The “Nuclear Option” action was controversial in part because the Senate accomplished it not by amending its rules, but instead by overturning, on appeal, a decision of the chair. The decision held that Senate rules required a super-majority of three fifths of the full chamber to impose limits on consideration.



By its vote on the appeal, the Senate established a parliamentary precedent under which the vote of a simple majority can limit consideration of any nomination except one to the Supreme Court. Formally, this action represented a re-interpretation by the Senate of its existing rules, determining that those rules empower a simple majority to limit consideration of the specified nominations.



The Nuclear Option in the Senate

Sources: Harry Reid Sleeping With Mitch McConnell's Wife In 1986 At Core Of Senate Gridlock

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Senate Majority Leader Harry Reid (D-NV) argued there was ample precedent for the maneuver. Reid, citing to a memo circulated by Senator Jeff Merkley (D-OR), noted “the Senate has changed its rules 18 times, by sustaining or overturning the ruling of the Presiding Officer, in the last 36 years...”

Minority Party Republicans disagreed. Senator Chuck Grassley (R-IA) dubbed it a “naked power grab and nothing more than a power grab”. Senator John McCain (R-AZ) argued that “if only a majority can change the rules, then there are no rules.” And Minority Leader Mitch McConnell (R-KY) accused Reid and Senate Democrats of “break[ing] the rules of the Senate in order to change the rules of the Senate.”

Basics of Legislative Procedure



“...it is always in the power of the majority, by their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts from those in power, are the forms and rules of proceeding...” – Thomas Jefferson, Jefferson’s Manual of Parliamentary Practice

- Why rules? Protect minority rights.
- They can temper passions from factions.
- Lawmaking is often dependent on continuity.
- Protect majorities from themselves.

Basics of Legislative Procedure

- There are always limits to rules and precedents.
- On one extreme these limits can be imposed by violence.
- Less extreme limits can come from altering endogenous rules by majority vote.
- Regardless, such changes do impose costs on majority and individuals within majority coalitions.

Basics of Legislative Procedure



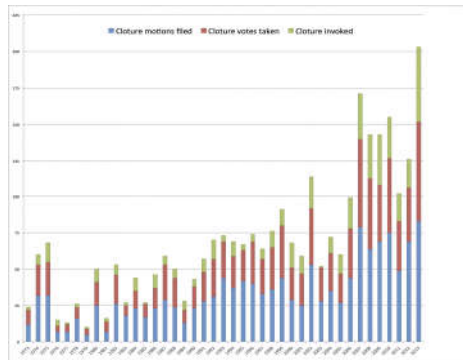
- Everyone is a hypocrite when it comes to legislative procedure.
- Politicians do not get elected because they care about the motion to recommit, or the filibuster, or congressional debate rules. And these issues do not resonant with voters.

Understanding the Senate

- The Senate and the House evolved in two drastically different ways. Since the 1890s, the House has been a majoritarian body dominated by the Speaker and Rules Committee.
- The Senate never granted its leadership the same strong, formal powers the House did.
- Its governed by both formal rules and precedents, which have been remarkably stable since its creation.
- With the ability to offer non-germane amendments, the ability of senators to “filibuster” is one of the most recognizable features of the chamber.



Understanding the Senate



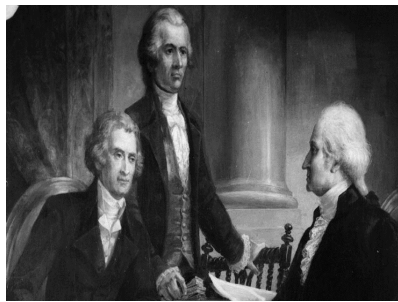
- The Senate “filibuster” is not a rule in the Senate. It owes its existence to the absence of a rule allowing a simple majority to end a debate.
- Rule XXII, or cloture, established in 1917, provides for a supermajority to end debate.
- However, historically, floor time is so valuable in the Senate that measures subject to filibusters are not brought to the floor and cloture votes are not taken.
- Because of this, determining when a filibuster has taken place—or providing a count of filibusters—is almost completely arbitrary.

Understanding the Senate

- Often times, obstruction through long speeches on the Senate floor are for “show.” See recent speeches by Senators Paul (R-KY), Cruz (R-TX) and Merkley (D-OR).
- Even when cloture is not invoked, the Senate’s debate rules have an effect on policy output. See Senator Tom Coburn (R-OK) and the Zadroga Health Compensation Act of 2010.
- Because of workload and time demands, the modern U.S. Senate is largely run by unanimous consent.



How Did We Get Here?



"Why," asked Washington, "did you just now pour that coffee into your saucer, before drinking?"

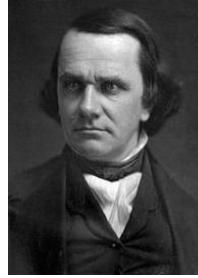
"To cool it," answered Jefferson, "my throat is not made of brass."

"Even so," rejoined Washington, "we pour our legislation into the senatorial saucer to cool it."

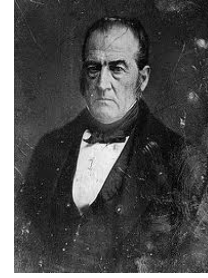
- Several alternative hypotheses: Majority will, path dependency, deference to the founders.
- Easy to reject “deference to the founders.”
- Little evidence suggesting the founder support supermajority rule in the chamber. Several wrote pieces explicitly opposed.
- Constitution says very little about congressional rules. Article 1, Section 5, Clause 2 states that “Each House may determine the Rules of its Proceedings.”

How Did We Get Here?

- Majority will: Minorities have reined in their dilatory behavior in the face of threats of “going nuclear” by majorities and norms of restraint.
- Weaker support for this claim as well.
- Senate majorities are not fixed and rarely enjoy universally high levels of support across issues.
- While successful minority obstruction was rare in the 19th and early 20th century, this was likely due to a product of low workload and high environmental costs.
- Sidenote: You might be asking: Is that the creepiest photo of Vice President John C. Breckinridge?



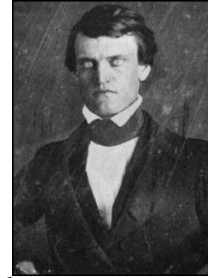
Senator Stephen A. Douglas (D-IL)



Former Senator John Bell (CU-TN)



Former Representative and vampire hunter, Abraham Lincoln (R-IL)



Vice President John C. Breckinridge (SD-KY)

How Did We Get Here?



No it is not.

How Did We Get Here?

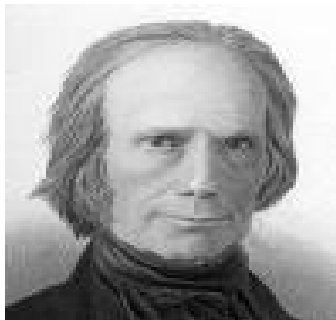
- Path dependency: Minorities have exploited existing rules to frustrate potential reforms. In this view, the modern Senate is not what majorities have wanted but what they have been forced to accept.

Inherited Rule	Source	Consequence
Elimination of the Previous Question Motion	1806 Rules Codification	The Senate no longer had a formal method of ending debate by a simple majority.
Staggered Senate Terms	U.S. Constitution	The Senate is a "continuing body" and does not adopt new rules at the start of each Congress.
The Vice President's Status as the President of the Senate	U.S. Constitution	Centralized chamber power could be wielded by a member that does not share the interests of the Senate majority

How Did We Get Here?



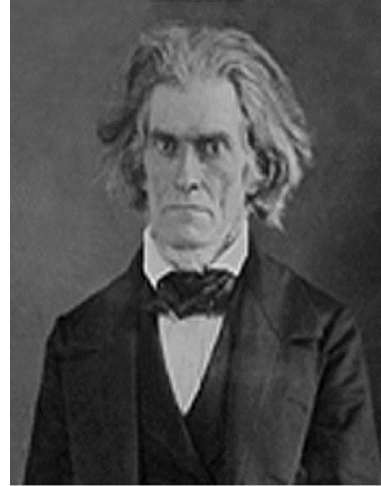
- Presidential election of 1824 (the "corrupt bargain").
- John Randolph (Jacksonian-Democrat) begins filibustering against the Adams administration.



- The President wants Vice President Calhoun to end the practice and call Randolph to order.

How Did We Get Here?

- Calhoun refused.
- “Mark the consequences! If the Vice-President should belong to the same party or interest which brought the President into power, or if he be dependent of him for his political standing or advancement, you will virtually place the control over the freedom of debate in the hands of the Executive.”- *Vice President John C. Calhoun, 1826.*



Obstruction in the Senate



- Alexis de Tocqueville characterized senators as “eloquent advocates, distinguished generals, wise magistrates, and statesmen of note whose arguments would do honor to see the most remarkable parliamentary debates of Europe.”
- Political scientists have demonstrated that laudatory praise of the Senate’s ‘Golden Age’ has largely overstated debate and behavior in the era.

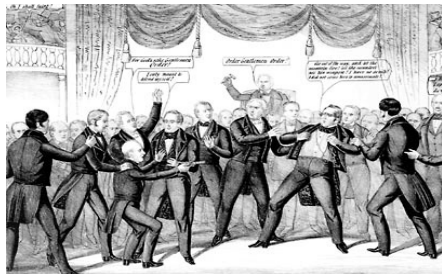
Obstruction in the Senate



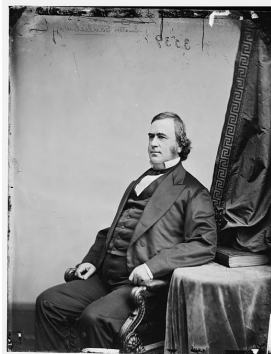
1856: Representative Preston Brooks (D-SC) beats Senator Charles Sumner (R-MA) into a coma on the Senate Floor.

- The early Senate was a miserable place to debate. Senators were frequently in bad health, which was exacerbated by a poorly ventilated building which made the air was difficult to breath.
- Travel conditions were equally onerous and members were usually forced to abandon families for lengthy periods of time.
- Whiskey was sold in the capitol and intoxication was tolerated on the floor of the Senate during this period. Duels and violence was relatively commonplace in the era.

Obstruction in the Senate



1850: Senator Henry Foote (D-MS) pulls a pistol on Senator Thomas Hart Benton (D-MO), who charges towards him.



1863: An intoxicated Senator Willard Saulsbury (D-DE) pulls a pistol on the Senate sergeant at arms after being called to order.



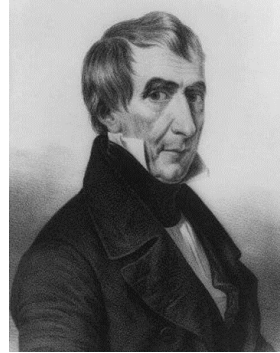
1902: Senator "Pitchfork" Ben Tillman (D-SC) coldcocks Senator John McLaurin (D-SC) on the chamber floor.



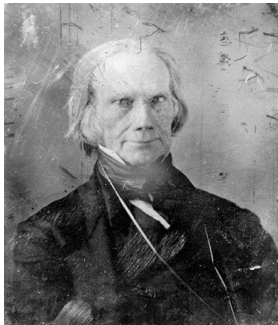
1859: Senator David Broderick (D-CA) is killed in a duel by an ally of Senator William Gwin (D-CA). He is the first and only senator to die this way.

Obstruction in the Senate

- An early example of effective obstruction in the Senate occurred during consideration of the Bank Bill of 1841.
- The United States was in the midst of a substantial economic depression in 1840. Since the financial panic of 1837, a substantial number of chartered banks failed, stock prices dropped dramatically and investment growth plummeted.
- The Whigs criticized the Democrats for not being aggressive enough in combating the depression. They ran on a platform that called for an increase in government intervention.
- The election of 1840 produced a resounding victory for the Whig party. But Harrison dies shortly after taking office.

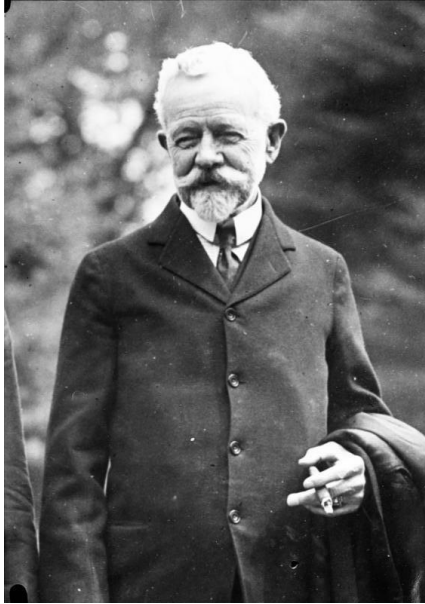


Obstruction in the Senate



- The bill passes the House, but is delayed in the Senate. Clay (W-KY) proposes a rules change to “give to the majority the control of the business of the Senate,” and facilitate the passage of the Bank Bill.
- William Rufus King (D-AL) replies that, “Senator [Clay] may make his arrangements at his boarding house for the winter.”
- Clay retreats from the rules change proposal. And the bill passes after nearly two months. The delay turned fatal, as during that period President Tyler turned against the measure and vetoed it.

Obstruction in the Senate



- Other measures include the Oregon Territory Bill of 1846; Nebraska Act of 1853; Kansas-Nebraska Act of 1854; Kansas Statehood Bill of 1856; Lecompton Act of 1858; Cuba Acquisition Act of 1858; Habeas Corpus Indemnification Act of 1862.
- The Federal Elections Bill, introduced in 1890, aimed to make federal circuit courts – rather than state governors - the final arbiter of congressional election procedures.
- The conventional wisdom is that it represented the earliest episode where major legislation was killed by Senate obstruction.

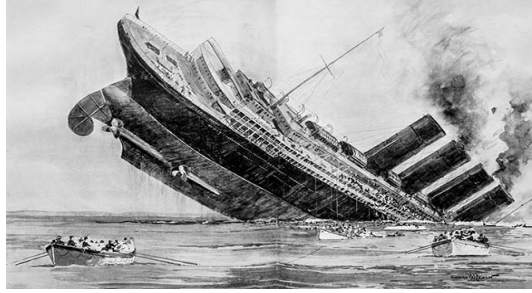
Obstruction in the Senate

- The filibuster forced an ambitious Republican Party to pick and choose between the Federal Elections Bill, the Tariff Bill, and other major legislation.
- It exasperated divisions within the Republican Party on these issues and forced bill managers to make compromises on legislation.
- Finally, by refusing to debate Senate Democrats and prolong the filibuster, the Republicans were forced to cede the filibusterers a monopoly in presenting their views against the bill.



“There is not a Republican Senator here who does not know that between now and December time enough can not be found to pass both the tariff bill and an election bill.”- William Pierce Frye (R-ME).

Obstruction in the Senate



- A formal cloture rule was not established until 1917, after extreme circumstances.
- Southern Democrats and Progressive Republicans filibuster a measure providing for the arming of merchant ships considered in a lame duck Congress.
- President Wilson aggressively criticized the obstructing senators, labeling them a “little group of eleven willful men.”
- A rule providing for two-thirds cloture was then adopted 76-3.

Obstruction in the Senate



- Cloture was rarely employed in the early 20th century.
- Throughout the century, obstruction was rare and largely reserved to Civil Rights legislation. Played a role in defeating Anti-Lynching legislation in 1922, 1935 and 1938; Anti-poll tax legislation in 1946; Fair employment bills in 1946; 1950; a right to work measure and open housing legislation in 1966.
- Attempts to bypass the filibuster by reforming Senate rules were made in 1967, 1969 and 1971 but defeated by Southerners, led by Senator Richard Russell (D-GA).

Obstruction in the Senate

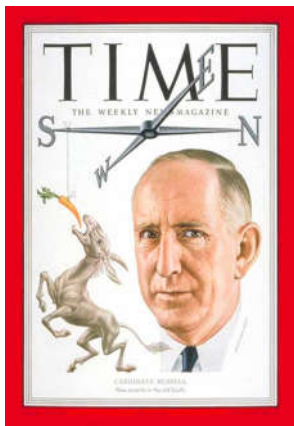


- Senator Richard Russell (R-GA) was generally viewed as the General of the Southern Senators. He served for nearly 40 years (1932-1971).
- Supported most New Deal programs—co-authored the National School Lunch Act of 1946.
- Aggressive opponent of Civil Rights.



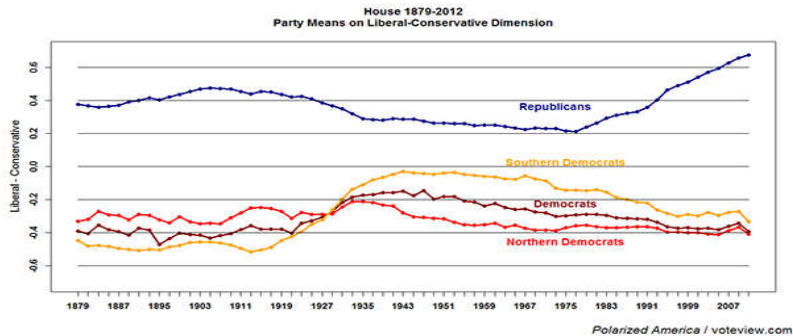
- Not an advocate of violence and refrained from using incendiary language. Highly respected and skilled legislator. Appreciated by supporters and opponents alike.
- Master of Senate procedure. When Russell died a reporter was to say, 'a thousand Senate secrets would die with him.'

Obstruction in the Senate



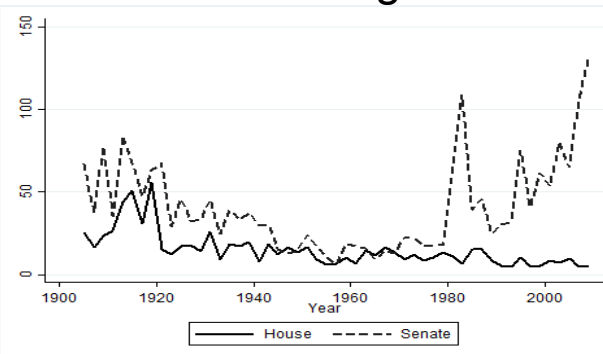
- 1949: Russell led the fight to change the cloture rule to require two-thirds of the whole Senate to cut-off debate, instead of present and voting.
- 1954: Drafted the Southern Manifesto declaring Brown v. the Board of Education "a clear abuse of judicial power."
- 1957: Denounced the Civil Rights Act even after it had been substantially weakened under his leadership.
- Worked to block changes to Senate filibuster rules in 1953 and 1959.
- "In the debate over the 1960 civil rights bill, he organized his three squads of southerners to break the back of the exhausted civil rights supporters, block cloture and gut the legislation." -- Purdum

Obstruction in the Historical Senate



- After the adopted of substantive civil rights legislation and Russell's death, obstruction in the chamber significantly increased.
- Coincided as well with an increase in workload, political polarization electoral competitiveness.
- Issues like nominations, which hadn't been political, are now tracked by interest groups.

Where are We Going?



- Legislative filibuster unlikely to be substantially altered. Doing so would involve substantial policy concessions by centrist majority party members.
- Carve-outs are a greater threat to its long-term existence.
- The increase in messaging amendments has further threatened the stability of Senate rules, though substantial reform in this area is also unlikely in the short-term.

Questions, Concerns, Angry Rants?

