

# The Filibuster and Filibuster Reform in the U.S. Senate, 1917–1975

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## Filibusters from 1917 to 1975

From 1917 to 1975, the use and perception of filibusters in the Senate changed significantly. Prior to this period, parliamentary obstruction was viewed as less than legitimate and senators rarely resorted to it. During this period, the filibuster became deeply embedded in the fabric of the institution and—for better or worse—became accepted by senators as a legitimate tactic for shaping the course of lawmaking. Toward the end of the period, filibusters expanded in scope and number, and were employed by a broad range of senators to an ever-widening array of legislation.

While numerous intense filibusters were conducted during this period, they were relatively few in number when compared to today's Senate. Although numbers of filibusters only tell part of the story, they are helpful for understanding the evolution of parliamentary obstruction. Figure 1 displays data on the numbers of filibusters that occurred in the 27th to the 102nd Congress.<sup>1</sup>

Statistically, filibusters occurred in the immediate post-cloture period at the same rate as in the years preceding the reform. The 60th–64th Congresses (1907–1917) averaged 2.4 filibusters per congress, while the 65th–69th Congresses (1917–1927) averaged 4.6 filibusters per congress, but this is not a statistically significant difference. It was not until the 1960s that the number of filibusters began to trend sharply upward. Matthews (1960) argues that norms of reciprocity and institutional loyalty helped to prevent senators from engaging in widespread filibustering through the mid-20th century. However, as the Senate moved into the late 1960s, these norms seemed to be losing their effectiveness in preventing senators from exploiting their prerogatives more fully, setting the Senate on a course where filibusters against legislation of any significance would become routine.

While the quantitative changes in the number of filibusters during most of the period are not particularly noteworthy, several important qualitative changes in their use occurred. One of the most important innovations in the use of the filibuster was its repeated and systematic application to inhibit the passage of a specific class of legislation—namely civil rights reform. In 1922, the first filibuster of a civil rights measure in the post-cloture period occurred when the Dyer Anti-Lynching Bill was obstructed and eventually pulled from consideration. It would not be until the mid-20th century, however, that civil rights legislation would become the main target of filibusters and, consequently, that the filibuster would become so closely associated with the obstruction of civil rights reform. While it is difficult to know with certainty whether civil rights reforms considered prior to the 1960s had committed majorities in favor of them, it is undeniable that such reforms became the first type of legislation where filibusters were perennially anticipated.

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<sup>1</sup> The data on filibusters discussed here are taken from a Congressional Research Service memorandum written by Richard Beth (1994). It is generally accepted as the most reliable data set containing measures of filibusters over the Senate's history. Determining what is and is not a filibuster is a difficult task, especially for earlier congresses where senators were often reluctant to admit when they were engaging in parliamentary obstruction. Although instances of obstruction can be found as far back as the early years of the Senate, the first notable filibuster in the chamber did not occur until the 27th Congress. The series ends with the 102nd because data for more recent congresses have yet to be systematically gathered.

A second important innovation concerned the development of the use of the filibuster to block efforts to reform rules concerning filibusters. While obstruction had been used prior to 1917 to inhibit proposed rules changes, filibusters of rules changes—whether actual or threatened—became a central part of the strategy to obstruct civil rights legislation in the mid-20th century. When frustrated proponents of civil rights reform tried to make it easier to change the rules to invoke cloture, these efforts themselves were often frustrated by filibusters.

A third important innovation concerned the extension of filibusters to Supreme Court nominations. The first widely acknowledged filibuster of a nominee to the high court occurred in 1968, when Lyndon Johnson attempted to elevate Abe Fortas to the position of chief justice. Three other filibusters followed quickly on the heels of the Fortas filibuster, as the nominations of Clement Haynsworth and G. Harold Carswell went down to defeat in 1969 and 1970, and William Rehnquist's nomination for the position of associate justice was filibustered briefly but unsuccessfully in 1971. Although it does not appear that the nominations of Fortas, Haynsworth, and Carswell would have succeeded had they not been filibustered, this marked an important expansion in the scope of the use of the filibuster by helping to establish the legitimacy of the obstruction of judicial nominations.

## **The Impact of Filibusters**

Binder and Smith (1997, Ch. 5) present compelling evidence that filibusters had significant impact on policy outcomes between 1917 and 1975 (see also Burdette 1940). They uncovered 16 instances during this period where filibusters defeated legislation that appeared to have majority support in the Senate and House, as well as the support of the president. Although more difficult to gauge systematically, filibusters—either actual or threatened—undoubtedly forced substantial changes to legislation in order to bring it to a final vote.<sup>2</sup> In particular, Binder and Smith convincingly argue that meaningful civil rights reform would have occurred earlier were it not for the Senate's supermajority cloture requirements. Yet it cannot be said that the filibuster rendered the Senate dysfunctional during this period. The Senate still managed to enact significant legislation addressing some of the most pressing problems of the day. While the filibuster without question caused numerous headaches for proponents of particular bills and altered the course of lawmaking, generally senators were able to forge compromises that enabled the Senate to meet the legislative demands placed upon it by the polity.

While there was often great hue and cry over the use of filibusters in the period of 1917—1975, part of the reason for this was that filibusters remained a departure from the normal legislative routine. Because they were used so infrequently, they had yet to become fully accepted as part of the price that the Senate paid for permitting extended debate.

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<sup>2</sup> The Civil Rights Act of 1957 is a notable example (Caro 2002).

## The Use and Effectiveness of the Cloture Procedure

At the time of its adoption, the reform to Senate Rule XXII was widely perceived by both the press and politicians as an effective tool for dealing with filibusters. Since that time, however, close observers of the Senate are nearly unanimous in the assessment that the 1917 reform was largely symbolic and had only a marginal—if any—substantive impact on the way the Senate conducted its business in the decades that followed the reform. Some critics of Rule XXII have argued that the cloture procedure was too cumbersome (Byrd 1988, 124, Baker 1995, 46, White 1968, 60–61, 64, Rogers 1926, 177, Luce 1922, 295 Haynes 1938, v. 1, 420), while others noted the infrequency of its use as an indicator of its ineffectiveness (Oppenheimer 1985, 398; Baker 1995, 46). From the 66th to the 86th Congresses (1919–1960), only twenty-three cloture votes took place, and of those, only four were successful.<sup>3</sup> Between 1927 and 1962, the Senate had an unbroken string of fourteen unsuccessful cloture votes.

But therein lies a puzzle: if the 1917 reform did not arm senators with a practicable weapon against obstruction, why did senators not move more quickly to alter the cloture rule to make it easier to invoke? Why did the public outrage that served as a catalyst for the 1917 reform not reemerge in the years that followed if filibusters remained such a problem?

Wawro and Schickler (2006) argue that the 1917 reform was more than symbolic and did mark a change in the way that the Senate conducted its business. Their argument is that the cloture rule lent predictability to the legislative process in the sense that if a legislative entrepreneur built a supermajority coalition in favor of a bill, then he could convince would-be obstructionists to stand down, since he could credibly claim to have the votes to invoke cloture. Wawro and Schickler present evidence on variation in coalition sizes and improved efficiency in the appropriations process to support the view that legislative entrepreneurs used the two-thirds threshold as a target when building coalitions in support of significant legislation. This seems especially to be the case in lame-duck sessions of Congress, when the constitutionally-mandated adjournment date gave a particular advantage to filibustering senators. Thus, part of the reason that senators employed cloture so rarely was because they built larger coalitions that—in theory—could have invoked cloture if they felt they had to, thus preempting filibusters.

It is important to point out, however, that the 1917 rule did not make it necessary to legislate by supermajorities. Although the percentage of significant laws that were passed with fewer than two-thirds coalitions in favor declined, many pieces of significant legislation were enacted by fairly narrow majorities between 1917 and 1946. Opponents of a bill did not always resort to filibustering, nor was it assumed that cloture would have to be invoked routinely on significant and controversial legislation—with civil rights bills constituting the key exception. Even when minorities conducted filibusters, it was not always necessary to invoke cloture to pass obstructed legislation. Bill supporters could still engage the minority in a war of attrition—as they did in the pre-cloture era—

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<sup>3</sup> Cloture was invoked for the first time in the history of the rule on the Versailles Treaty in November 1919. However, the treaty ultimately was defeated in the Senate.

to wear them down and bring legislation to a final vote.<sup>4</sup> As such, majorities that fell short of two-thirds but felt more intensely about legislation than the relevant minority could generally still manage to change policy. This is the key difference between the impact of filibusters during the period in question and the impact of the filibuster in today's Senate.

Although senators rarely resorted to the procedure, an important change in senators' attitudes regarding their willingness to vote for cloture occurred between 1917 and 1975. In earlier congresses in this period, senators expressed a reluctance to vote for cloture, even when they were in favor of an obstructed item. Cloture presented a departure from the Senate's tradition of unlimited debate, and senators were clearly concerned about the implications of using cloture, both for the way the Senate conducted its business generally and for how it might limit their own influence in the legislative process. Toward the end of the period, these reservations gave way as senators viewed cloture as more essential to accomplishing their legislative goals.

## Reform of Rule XXII

In the decades that followed the 1917 reform of Rule XXII, numerous proposals to strengthen the cloture rule and to limit the use of filibustering tactics were introduced. These included proposals for majority cloture, for imposing time limits on debate, and for establishing germaneness requirements for amendments. None of these proposals made much headway in the Senate until the 81st Congress (1949–1951). By the late 1940s, it had become clear that civil rights legislation had become a particular target for filibusters, and thus cloture reform became closely entwined with civil rights reform. In the 80th Congress, President Pro Tem Arthur Vandenberg (R–MI) made explicit a key limit to the cloture rule as adopted in 1917 when he issued a ruling as presiding officer that cloture could be applied only to a “measure” and not to the motion to proceed to consideration of said measure (*Congressional Record* 1948, pp. 9602–9604). Bill opponents, therefore, could filibuster a motion to proceed to consideration, leaving supporters without a formal mechanism to end debate on the motion.

In 1949, the Senate reformed Rule XXII to make cloture applicable to a motion to proceed. Interestingly, a ruling from the chair played a role in enacting the reform. Senator Richard Russell (D–GA) raised a point of order against an attempt to apply cloture to the motion to take up the reform proposal. Vice President Alben Barkley rejected the point of order, arguing that the Senate would not have adopted the cloture rule in the first place if it did not intend the rule to apply to motions to proceed, since that would have rendered the rule completely ineffectual. However, 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. The Senate eventually adopted a compromise proposal that allowed for the application of

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<sup>4</sup> For example, both the Emergency Tariff Bill in 1921 and the Fordney-McCumber Tariff Bill in 1922 encountered filibusters yet both were passed without successful cloture votes and with fewer than two-thirds voting in favor. The former failed to become law because of a veto, however.

cloture to any measure, motion or other matter pending before the Senate—excepting motions to take up a rules change—in exchange for raising the threshold for invoking cloture to two-thirds of the entire membership.

In the years following the 1949 reform, senators continued to introduce proposals to reform Rule XXII to make it easier to invoke cloture and defeat filibusters. Starting in the early 1950s, reformers focused on a different strategy for changing the cloture rule, seeking to take advantage of the unique context surrounding the opening of a new congress and use rulings from the chair to make it possible to change existing rules without invoking cloture. This strategy involved challenging the notion that the Senate was a continuing body and asserting that senators should not be bound by existing rules at the beginning of a new congress, which would enable senators to adopt new rules by a simple majority.<sup>5</sup>

At the beginning of the 83rd Congress (1953–1954), a group of senators led by Clinton Anderson (D–NM) moved to consider the adoption of new rules. Their intention was to maintain the status quo for all rules save Rule XXII, which they sought to change to permit majority cloture. After several days of debate, the Anderson motion was decisively tabled on a vote of 70-21. Anderson made a similar motion at the beginning of the 85th Congress (1957–1958). Although the proposal had more support this time, winning a sympathetic advisory opinion from Vice President Richard Nixon regarding the constitutionality of Rule XXII, it did not have the votes to overcome a motion to table, which succeeded 55-38.

Anderson again offered his motion at the opening of the 86th Congress, although this time it was in competition with a reform proposal put forward by Majority Leader Lyndon Johnson (D–TX) that permitted cloture to apply to rules changes and lowered the threshold to two-thirds present and voting, while explicitly affirming in the rules the Senate’s status as a continuing body. Johnson’s proposal was co-sponsored with other leaders in both the Democratic and Republican parties and had broad appeal. Johnson succeeded in having Anderson’s motion tabled, 60-36, and his resolution survived amendments that would have reduced the cloture threshold further, would have eliminated the language regarding the continuing nature of the Senate, and would have required germaneness in debate. The Senate adopted Johnson’s resolution in its original form by a vote of 72-22 (see *CQ Almanac*, 1959, pp. 212–214).

The adoption of reform in 1959 did not put an end to efforts to change the cloture rule. Indeed, it was becoming a biennial ritual for senators to attempt cloture reform when the Senate convened in a new congress. During the 1960s, numerous proposals were introduced to lower the cloture threshold and reformers continued to seek rulings from the chair that would enable adoption of their proposals by avoiding the supermajority constraints imposed by Rule XXII. Vice Presidents were intimately involved in these debates as presiding officers, but resisted attempts to persuade them to issue rulings on whether or not it was unconstitutional to require two-thirds to invoke cloture on proposals to change the rules at the beginning of a congress. The precedent of the Senate was for the presiding officer to submit constitutional questions to the full Senate for decision, rather than rule

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<sup>5</sup> Historically, the Senate has been accepted as a continuing body because only one-third of its membership is elected every two years. This means that, unlike the House of Representatives, the Senate does not organize itself anew and adopt a new set of rules each time a new congress convenes.

on such questions himself. At the end of the decade, however, Vice President Hubert Humphrey appeared to break with this precedent by issuing a ruling on the question as to whether Rule XXII violated the right of a majority, allegedly implied by the Constitution, to change the rules of the Senate. At the opening of the 91st Congress (1969–1971), Humphrey ruled that if only a majority—not two-thirds—of those present and voting agreed to limit debate on a proposal to change the rules at the beginning of a congress, then the chair would rule that cloture had been invoked (*Congressional Record*, January 15, 1969, p. 920). Humphrey followed through with his ruling after the Senate voted 51-47 to invoke cloture. However, Humphrey’s decision was appealed, and the Senate voted 53-45 to reverse it, maintaining the status quo that two-thirds was necessary to end debate on a proposed rule change (U.S. Congress. Senate. Committee on Rules and Administration 1985, 25–29).

Reform efforts continued into the 1970s, as proposals focused on reducing the cloture threshold to a three-fifths supermajority. During a prolonged debate over rules changes at the beginning of the 92nd Congress (1971–1972), Jacob Javits (R–NY) appealed the decision of the chair that a two-thirds majority was necessary to invoke cloture on a rules change, but the appeal was defeated 55-37 on a tabling motion.

Reformers finally succeeded in changing Rule XXII in 1975, but not without a prolonged and convoluted parliamentary battle. The debate centered on Senate Resolution 4, which proposed to lower the cloture threshold to three-fifths present and voting. The resolution drew a filibuster, prompting James Pearson (R–KS), a co-sponsor of the measure, to make a motion on February 20 stating that the rules change was a constitutional issue arising under Article I, Section 5 and “superseded the rules specifying that the Senate is a continuing body” as well as the existing cloture rule. He moved that if a majority voted in favor of his motion to end debate on the motion to proceed to the consideration of Senate Resolution 4, the chair would immediately move that question (i.e., the question on the motion to consider, not on the actual adoption of the resolution) (*Congressional Record*, February 20, 1975, p. 3835). Majority Leader Mike Mansfield (D–MT) raised a point of order against Pearson’s motion. However, Mansfield’s point of order was subject to a tabling motion that would have precluded debate, and if the tabling motion was approved, it would have indirectly established a precedent for majority cloture. Vice President Nelson Rockefeller submitted Pearson’s motion and Mansfield’s point of order to the Senate for decision, which had the effect of empowering the Senate to invoke cloture on Senate Resolution 4 by a majority vote. After some debate, the Senate voted to table Mansfield’s point of order against Pearson’s motion, 51-42. This was arguably the first instance in the chamber’s history in which a majority of the Senate voted to establish a precedent that would enable cloture by majority vote, although at the time senators disagreed about the impact of the vote on Senate procedure. Nevertheless, the vote did not translate immediately into a victory for the reformers. Senator James B. Allen (D–AL) raised a point of order that Pearson’s motion was complex and therefore, under Senate rules, should be divided into parts for debate and voting. The vice president ruled that the motion was divisible, and then Allen proceeded to filibuster the separate parts (“Reformers Lose Chance to Modify Filibuster,” *Congressional Quarterly Weekly Report*, February 22, 1975, p. 412). No appeal or vote took place on this ruling.

Several days later, a compromise was reached that would require three-fifths of the chamber to invoke cloture, rather than three-fifths of those present and voting as was originally proposed. Two-

thirds of the chamber would still be necessary to invoke cloture on a proposal to change the rules. 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 Senate voted to reconsider the tabling motion on February 26 by a vote of 53-38, rejected the motion itself 40-51, and then sustained the point of order by a 53-43 vote ("Senate Close to Accord on Filibuster Change," *Congressional Quarterly Weekly Report*, March 8, 1975, p. 502). The opponents of the original proposal forced its supporters to follow the existing procedures under Rule XXII and invoke cloture by a two-thirds 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. Reform supporters—who were divided on the question of majority cloture itself (as opposed to three-fifths cloture)—thought it better to accept this compromise than to attempt to defeat Allen's filibuster by pushing for ever-more restrictive precedents. 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. The compromise was adopted as part of the Senate rules by a vote of 56-27 on March 7.<sup>6</sup>

The period 1917–1975 was book-ended by landmark reforms regarding filibusters. Although there were numerous attempts to reform the cloture rule after it was established in 1917, it was not until 1975 that reformers finally succeeded in reducing the size of the majority formally required to end debate. Toward the end of this period, reformers repeatedly challenged existing supermajority provisions in the Senate rules. Several attempts were made to alter precedents regarding the continuing nature of the Senate and the constitutionality of Rule XXII, but except for the precedent established and then reversed in 1975, floor majorities were not willing to embrace such an approach. The major reforms to the cloture rule in 1949 and 1975 followed a similar pattern: proponents of reform sought rulings from the chair to circumvent existing supermajority requirements, the opponents of reform signaled their intensity on the issue by filibustering but eventually relented when a compromise was reached that strengthened the cloture rule but fell short of majority cloture.

## The Tracking System

Any discussion of institutional changes relevant for the filibuster should include mention of the tracking system devised and implemented by Senators Mike Mansfield and Robert Byrd (D–WV) in the early 1970s. This system allows for obstructed bills to be placed on a separate legislative “track” for later consideration, enabling the Senate to move relatively quickly and smoothly to other matters

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<sup>6</sup> See Wawro and Schickler 2006, 266–268; Koger and Noel 2009; Gilmour 1995 for more detail. Although it did not involve a direct amendment to Rule XXII, the Budget and Impoundment Control Act of 1974 has relevance for the history of the filibuster and cloture rule reforms, since the Act afforded filibuster protection to budget measures that other kinds of measures do not enjoy. In particular, debate on budget measures is strictly limited and they are not subject to the supermajority provisions of Rule XXII.



(Binder and Smith 1997; Ornstein 2003). The advantage of this system is that it can reduce the collateral damage of filibusters, and thereby lessen the negative externalities associated with obstruction. But it also means that senators can filibuster an item without having to take and hold the floor in the traditional manner, enabling them to engage in the so-called “silent filibuster”.

Some have attributed the dramatic rise in the use of filibusters to the adoption of the tracking system. The argument here is that the tracking system, by enabling silent filibusters, has made obstruction costless in the sense that senators no longer have to forgo other activities while filibustering. But Wawro and Schickler (2006) argue that the tracking system is more of a symptom than a cause of the increase in filibusters that began during the 1970s. The Senate’s agenda has become so crowded and senators’ individual schedules have become so packed that it has become impractical to fight filibusters as wars of attrition. The slightest delay can wreak such havoc that the preferred strategy has become to build supermajority coalitions that have the ability to invoke cloture in anticipation of filibusters, or pull items from consideration that are unable to attract supermajority support.

## **Public Opinion on Filibusters and Cloture Reform**

During the attempts to change the cloture rule in the 1940s—1960s, polls sought to gauge public opinion regarding the filibuster and the Senate’s supermajority requirements. In surveys in 1947, 1949, 1950, 1963, and 1964, The Gallup Poll asked similar questions concerning knowledge of filibusters and support for reducing the cloture threshold. Although opinions on the topic must be interpreted with considerable caution given the potentially limited knowledge that survey respondents have of Senate procedure, the surveys consistently indicated that more respondents were in favor of reducing the cloture threshold to a simple majority than were in favor of keeping it at a two-thirds supermajority. This contrasts with similar polls conducted in the first decade of the 21st century, which indicate that a majority favors maintaining supermajority cloture requirements in the Senate (Wawro and Schickler 2010).

## **Conclusion**

The preponderance of evidence indicates that the contemporary Senate has for all intents and purposes become a supermajoritarian institution. That is, with rare exception, the Senate cannot act unless supermajorities can be formed to invoke cloture and thereby bring business to a final up-or-down vote. The seeds of the supermajority Senate were planted with the adoption of the cloture rule in 1917. However, from 1917–1975, the Senate did not have the supermajoritarian character that it has today. Neither the use of filibusters nor the use of the cloture rule was a part of the Senate’s day-to-day functions. However, toward the end of this period, the stage was set for filibusters and cloture votes to become routine in the Senate, marking a fundamental and profound change in the operation of the institution.

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Figure 1: Time Series Plot of Filibusters, 27th–102nd Congress

