JURISPRUDENCE

How To End the Filibuster Forever

The Senate can kill the rule any time! And with only 51 votes.

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Does the Senate have only a small, magical window for rule-making?

Is the Senate like Cinderella—does it have the power to transform itself in only one limited moment, at the opening of the new Congress? That is one of the two big questions in the filibuster-reform debate that is now taking center stage in the United States Senate. The other is whether the Senate can change the filibuster rule by a simple majority vote, regardless of what the rule itself seems to say. The short answers to these questions are that there are no magic moments in the Senate and no need to muster 60 votes to repeal the filibuster rule. The upper house has the clear constitutional authority to end the filibuster by simple majority vote on any day it chooses.

Let's address the timing question first. Magical things happen to Cinderella when the clock strikes 12. According to the editorial board of the *New York Times* and other commentators, the moment every other year in January when the old Congress ends and a new one begins is similarly special. The idea is that only at this moment may a simple majority of the Senate lawfully modify the filibuster rules that in recent years have effectively required 60 votes for any important action in the upper house.

The *Times* and others are right about the power of the simple majority—more about why in a minute—but wrong about the Cinderella power of the Senate's opening day. A simple majority of determined senators may lawfully change the filibuster rules, even if the existing Senate rules say otherwise, *at any time*.

The confusion arises from missing the basic difference between the House and the Senate. Constitutionally, the House is indeed an entirely new body at the beginning of every odd year. The old House legally dies and a wholly new House springs to life. A 30-year veteran who has been speaker for the last decade is no more already a member of the new House than a freshman.

Thus, Day One of a new House is indeed a special moment. Who organizes the lower House on Day One? Who sits in the chair and who guards the doors? Who decides who decides? All of this and more is up for grabs, and the new House must quickly adopt various procedural and parliamentary rules in its opening moments—which is why John Boehner can needle the Democrats by tweaking a lot of rules that applied in the previous House but do not automatically carry over into the new one.

But ever since the Founding, the Senate has been very different from the House on almost everything related to Day One (which, in a separate piece of magic, Senate Majority Leader Harry Reid extended Wednesday until the end of the month). Indeed, the Constitution carefully structured the Senate precisely to ensure that the upper house, unlike the lower house, would never turn over all at once. Thus two-thirds of the Senate's members remain in their seats after an election and at any single moment the vast majority of senators are typically duly seated holdovers.

Unlike the House, the Senate need not begin its session by approving procedural rules. The internal Senate rule allowing filibusters—Senate Rule 22—is not approved biennially at the outset of each new congressional term. Rather, this old rule, initially adopted by the Senate in the 1910s and significantly revised in the 1970s, simply carries over from one Congress to the next by inertia, since the Senate is a continuing body. Similarly, on Day One in the Senate, no leadership elections need occur. The old Senate's leaders simply continue in place, and the Senate can oust the old leaders at any time—by a simple majority vote. The same goes for old rules, including the filibuster rule. It's that simple.

OK, on to the simple majority question: Why can the Senate change the 60-vote rule with only 51 votes? On its face, Rule 22 says otherwise. It provides that any motion to change it cannot be voted on unless a supermajority of senators agrees to end debate. ; Thus, the rule seems to block a simple Senate majority from first amending Rule 22 itself and then proceeding to pass a given bill. That's some catch, that catch-22, as Joseph Heller would say.

But the catch-22 makes Rule 22 unconstitutional, which means a simple majority of the Senate may at any time choose to ignore it. This big idea is what's now making the rounds in Washington, D.C.

The principle that each chamber of Congress acts by majority rule unless the Constitution otherwise specifies was a self-evident truth for the Founders. As John Locke had explained in his canonical *Second Treatise of Government*, majority rule was the natural default principle of all assemblies: "In assemblies impowered to act by positive laws, where no number is set by that positive law which impowers them, the act of the majority passes for the act of the whole and, of course, determines, as having by the law of nature and reason the power of the whole." Building on Locke, Thomas Jefferson's mid-1780s booklet, *Notes on the State of Virginia*, declared that rule by simple majority "is the natural law of every assembly of men, whose numbers are not fixed by any other law." In written remarks read aloud to the Philadelphia Convention in 1787, Benjamin Franklin described majority rule as "the Common Practice of Assemblies in all Countries and Ages." None of his fellow delegates said otherwise. When state ratification conventions decided whether to adopt the Constitution in 1787-88, nothing in the text specified that they should act by simple majority rule, but this is what every convention did, and in a manner that suggested that this was self-evident.

The Founders wove the majoritarian default rule into the fabric of the Constitution. Whenever the document authorized a federal institution to make a certain decision using some principle *other* than simple majority rule, the exception was specified in the document itself. Several of the Constitution's provisions prescribing supermajorities make little sense unless we assume that majority rule was the self-evident default rule. Thus, Article I presupposed that each house would pass bills by majority vote—except when trying to override presidential vetoes, which would require a special supermajority. The supermajorities for constitutional amendments likewise were designed to be *more demanding* than the simple majorities for ordinary statutes, and the Senate supermajority for treaty ratification was meant to erect a higher bar than Senate agreement to ordinary legislation (a higher bar meant to offset the absence of the House in the formal treaty-making process). Similarly, the *exceptional* supermajority rule that applied when a chamber sought to expel properly elected and eligible members is distinct from the simple majority required to exclude improperly elected or constitutionally ineligible candidates.

In an effort to parry this basic argument, some scholars have asked why if majority rule truly went without saying, the framers felt the need to specify, as they did in Article I, that a majority of each house would constitute a quorum. The obvious answer is that state constitutions and British practice varied widely on the quorum question, and thus there was no obvious default rule from universal usage.

The same basic majority-rule principle has always governed the House of Representatives and the Supreme Court. Five votes trump four on the high court, and in the House, 218 beats 217. There is nothing in the Constitution that suggests the Senate is any different. And throughout the Founding era the Senate practiced and preached majority rule. Senate history prior to the 1830s offers no notable examples of organized and obstructionist filibustering—and absolutely nothing like a pattern of systematic, self-perpetuating, entrenched frustration of Senate-majority rule. As Jefferson wrote as vice president and the Senate's presiding officer: "No one is to speak impertinently or beside the question, superfluously or tediously ... The voice of the majority decides."

Even as Senate minorities began to develop stalling tactics by mid-19th century, they typically did so with the indulgence of the Senate majority. Long-winded speechifying occasionally delayed the Senate's business without preventing majorities from ending debate at some point and taking a vote. The Senate was smaller and had less business to transact in those days, and it often indulged individual senators as a matter of courtesy. In turn, the indulged senators did not routinely try to press their privileges so as to prevent Senate majorities from governing. According to one expert treatise, before the 1880s "almost every obstructed measure was eventually passed despite filibustering opposition."

Only in the late 20th and early 21st centuries has the filibuster metastasized into a rule requiring a 60-vote supermajority for every important piece of Senate business. Over the years, the Senate has flirted with getting rid of Rule 22, the root of the trouble, but never pulled it off. Perhaps the most noteworthy attempt occurred in 1975, when a majority of the Senate upheld a constitutional ruling of the vice president—sitting in the presiding chair—that a simple majority could end debate on filibuster reform and scrap the old rule. Shortly thereafter, however, the Senate voted to reconsider its earlier action. In 2005, Republican senators frustrated by the success of the Democratic minority in blocking votes on various judicial nominations loudly threatened to revise the old filibuster rule by a simple majority vote—the so-called "nuclear option." But this never came to a conclusive floor vote. Instead, Democrats moderated their obstructionism and Republicans stowed their nukes.

So where does all this leave us today? Here is one clean way of pulling together the basic argument: It is obvious that the Senate must use some specific voting rule for setting its own rules for proceeding—a rule for how to vote on how to vote. If majority rule is not that implicit rule, what is? Especially since that is the rule the Senate used at the start, in 1789. Just as the first House and the first Senate each used majority rule to decide its procedures, every subsequent House and Senate may and must do the same, for nothing in the Constitution made the Congress of 1789 king over later Congresses. Our founding document makes all Congresses equal in this respect.

In fact, neither house has ever formally prescribed a supermajority rule for formal amendment of its rules. Not even Senate Rule 22 has the audacity to openly assert that it cannot be repealed by simple majority vote. Rather, the filibuster rule says that *debate* on its own repeal cannot be ended this way. If Rule 22 simply means that it should not be repealed without a fair opportunity to debate the repeal, then it is fully valid. But insofar as Rule 22 allows repeal opponents to stall interminably so as to prevent a majoritarian vote from ever being held, then Rule 22 unconstitutionally entrenches supermajority rule. It's a question for each senator to decide for him- or herself—and then to act on, by simple majority rule, just as the framers intended.

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Correction, Jan. 7, 2011*: This article originally stated that Rule 22 required the agreement of 60 senators to end debate. It requires a supermajority. (Return to the corrected sentence.)*