

FILIBUSTER REFORM MADE SIMPLE⁷

ROLL CALL, TUESDAY, JANUARY 22, 2013

A simple question: Is the Senate a continuing body? It turns out the answer is not so simple. Getting the right answer matters for sensible filibuster reform in the weeks ahead.

Many who want an overhaul of the filibuster have assumed that changes can occur at the outset of a new Congress because a special constitutional window opens when the “old” Senate ends and a “new”—discontinuous—Senate begins. Filibuster supporters have cried foul. In their view, the Senate is a smoothly continuous body—it does not begin anew biennially—and thus no magic Senate window exists at the outset of a new Congress. Each side is partly right and partly wrong.

For some purposes, the Senate is surely a continuing body. Whereas the incoming House of Representatives had to affirmatively vote for John A. Boehner as its speaker, no similar drama unfolded in the Senate: Senators Harry Reid and Patrick J. Leahy continued in place as majority leader and president pro tempore purely by inertia, with no fuss or fanfare.

For other purposes, however, the Senate is not a continuing body. All the bills that passed the Senate before January 3 went poof as the clock chimed midnight. Most obviously, the \$60 billion Superstorm Sandy relief package approved by the Senate in late December turned to dust at the witching hour. Thus a new relief bill had to be affirmatively re-passed by the new Senate, alongside the new House.

So the correct answer to our simple yes-or-no question is yes *and* no. Law often works this way. For example, are corporations persons? Yes and no. Surely yes, for some purposes: Government cannot deprive a corporation of its property without due process. But for other purposes, corporations are properly not treated as persons. The axiom of one person, one vote applies only to flesh and blood.

The House is obviously not a continuing body. Every two years its entire membership comes before the voters, who are free to choose a completely new slate. Legally, no House member holds over from one House to the next. Because each House begins anew biennially, all House legislative bills legally expire when that House expires and a new House arises to replace it. In the spirit of bicameral symmetry and coordination, the same rules about legislative bills sensibly apply to the Senate: All Senate bills die when one

Congress ends and a new one begins. Such has been the practice since the Founding.

But on matters other than bicameral lawmaking, the Constitution generally allows each chamber to govern itself, and neither need mirror the other. The House must choose its leaders and its own internal rules of procedure at the outset of each new Congress because all its members have been freshly elected by the voters. By contrast, only a third of the Senate's membership comes before the voters in any given election, so this chamber can simply allow its internal procedures and its internal leadership to continue by inertia.

Which brings us to filibuster reform. The old Senate's rules permitting filibusters carry forward by inertia. Of course, they can be changed when a new Congress begins, but they can also be changed on any other day—just as the Senate leadership can be changed at any time.

But there is at least one basic constitutional principle that cannot be changed: majority rule. The Constitution makes no sense without this rule as the implicit backdrop. Constitutional amendments require supermajorities precisely because ordinary statutes do not; overruling a president's veto requires a two-thirds vote of each house precisely because passing an ordinary law requires something less, namely, a simple majority.

Notably, the Senate's existing filibuster rules do not themselves purport to require a supermajority vote to change them. But they do purport to require a supermajority vote to end debate on the question of a filibuster overhaul.

To counter this catch-22, the Senate must insist that its own rules of debate stay within their constitutional bounds and do not unconstitutionally morph into entrenched supermajority voting rules. Thus, the Senate on any future day may decide that filibuster overhaul opponents are actually preventing filibuster changes from ever coming to a vote and have thereby transformed a proper rule of debate into an unconstitutional supermajority rule of decision. In response, a simple majority of the Senate can rule any filibuster out of order, as a violation of constitutional first principles.

Those who want a filibuster overhaul should not concede (as many appear wont to) that whatever rule changes or reinterpretations they are able to accomplish this January are the only changes that may be made during the 113th Congress. And filibuster supporters, for their part, need to reacquaint themselves with the basic small-r republican principle of majority rule. Unless the Constitution itself explicitly specifies otherwise, as it does for veto overrides, impeachment trials, and so on, the Senate always—every day—

operates by ultimate majority rule. Every Senate rule and procedure must be amendable by a determined Senate majority, if that determined majority deems the old rule unsuitable. It's just that simple.

THE NUCLEAR-OPTION GENIE IS OUT OF THE BOTTLE

SLATE, THURSDAY, NOVEMBER 21, 2013, 5:38 P.M. (ET)

Today's vote to restore majority rule in the Senate is politically earth-shaking. The principle that a simple majority of truly determined Senators may properly modify filibuster rules on any day—and not just on one magic day at the beginning of a new congressional term—has now been firmly established in actual Senate practice, and there is no going back. The nuclear-option genie is now out of the bottle.

The filibuster-reform vote applies only to certain nominations—Supreme Court slots are not covered—but tomorrow (or any day thereafter) the Senate is free to sweep in the Supreme Court confirmation votes, or ordinary legislative votes, or anything else. When the Republicans next control the Senate—and of course one day, they will—they, too, will be free to insist on simple majority rule. What goes around comes around.

The current Democratic majority would thus be wise to allow minority Republicans very broad (but not endless) freedom of speech, as a matter of courtesy and comity; everyone should get to speak, and then all should get to vote. If the Democrats govern the Senate with a kinder, gentler version of majority rule than do the House Republicans, today will rightly be seen by future Americans as one of the great days in the history of the republic.

Oh, and by the way, you heard it here—first!—in *Slate*: the constitutional theory undergirding today's vote initially appeared way back in January 2011, in a piece that I co-wrote with former senator Gary Hart.