

The real danger of Harry Reid's "nuclear" rules change in the U.S. Senate may be the fallout.

On Thursday, Democratic Senate Majority Leader, Harry Reid, invoked the long-awaited 'nuclear option' to effectively eliminate the threat of filibusters on most presidential nominations. [Lauren C. Bell](#) looks at the history of the filibuster in the U.S. Senate, finding that its occurrence greatly increased after the last change to Senate rules in 1975. She argues that despite the appearance that this new rule change will help the Senate to operate more efficiently, past experience has shown that obstructions in the chamber are likely to increase. Given the already polarized nature of Congress, bipartisanship and cooperation are likely to suffer even further.



Among the most important words in the U.S. Senate are "I ask unanimous consent." In the absence of an objection, it is possible for any member of the Senate to do just about anything he or she wishes. [Research](#) demonstrates that the Senate relies on its precedents and on chamber norms of collegiality, comity, reciprocity, and apprenticeship to prosecute its agenda and keep its members in check.

On Thursday, the Senate Majority Leader Harry Reid went to the floor of the Senate and used an arcane procedural move colloquially known as "the nuclear option" to undermine the chamber's Standing Rules and effectively eliminate filibusters on most presidential nominations. He did not use the Senate's regular procedures to change the rules—indeed, he could not do so, since the Senate's formal rules can only be changed at the start of a two-year Congress.

To understand what happened, it is necessary both to understand filibustering in the Senate as well as to understand the particular mechanism that Senator Reid

used to change future uses of the tactic. The word "filibuster" does not appear anywhere in the U.S. Constitution; it is instead a negative right, deriving from the lack of mechanisms in Senate rules to force debate to a close and from the [rule in the Senate](#) that permit a senator to hold the floor free from interruption until voluntarily relinquishing it.

For most of its history, the Senate's relatively small size and its members' acceptance of chamber norms kept most of its members from abusing the privilege of the floor. Senators had incentives to work together and they recognized that it generally was not in their interest to obstruct on a colleague's legislative priority, lest that colleague later respond in kind.

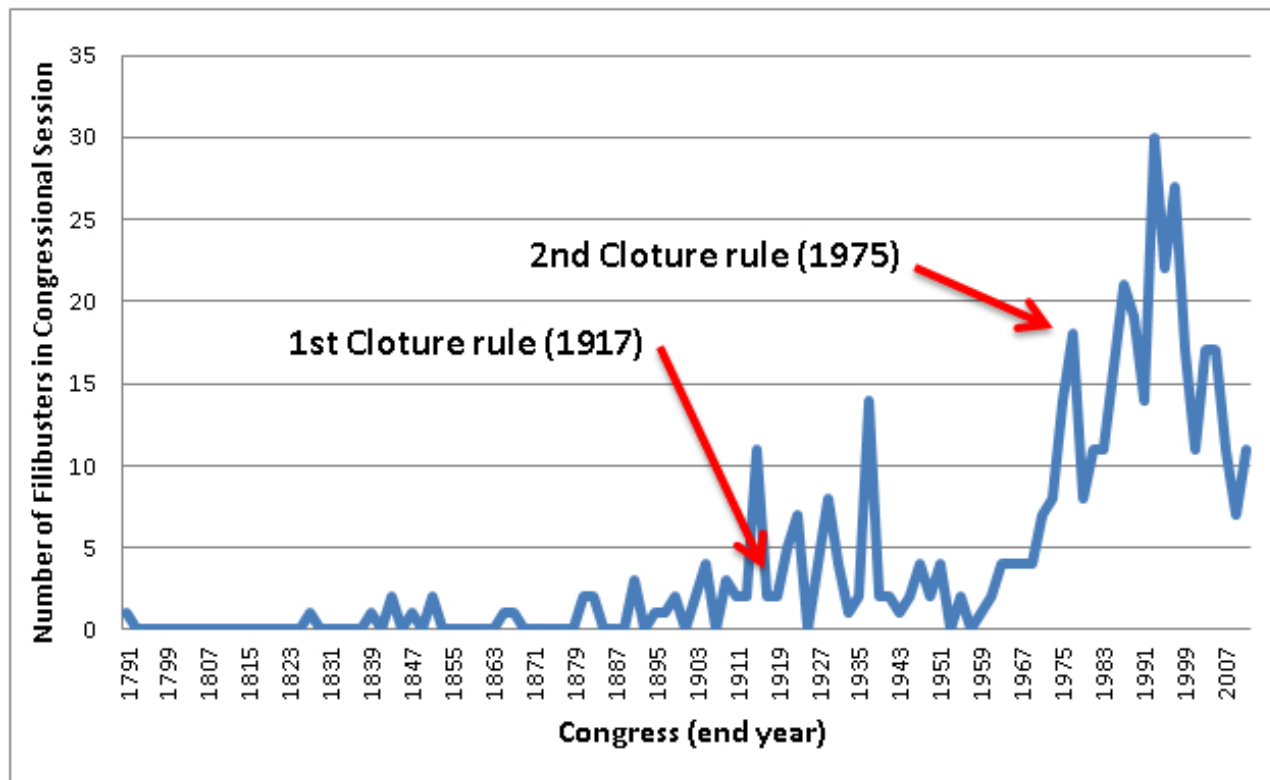
As the Senate grew due to the addition of new states to the union, and as the issues facing the country became more complicated, the number of filibusters in the chamber increased, as Figure 1 illustrates. By the early 20th century, opposition to American participation in World War I led to then-unprecedented efforts to prevent passage of legislation. Senators' good will toward their colleagues frayed; President Wilson and his pro-war allies called



Senate Majority Leader, Harry Reid. Credit: Ralph Alswang, Center for American Progress Action Fund (Creative Commons BY SA)

for [reform](#) to the Senate's unfettered debate structure.

Figure 1 – Filibusters by Congressional session, 1789-2010



Source: *Filibustering in the U.S. Senate* (Cambria Press: 2011) and additional data compiled by the author. Note that this chart shows only manifest filibusters, not cloture votes, which are not accurate measures of filibustering activity.

In 1917, the Senate adopted [Rule XXII](#), which allowed two-thirds of senators to end debate by invoking cloture. Cloture required 16 senators to petition for an end to debate and two-thirds of senators to agree. Over time, the Senate made minor changes to Rule XXII as circumstances required, and in 1975, the Senate reduced the number of senators necessary to approve a cloture motion from two-thirds to three-fifths.

Ironically, the easier it became to end debate in the Senate, the less incentive members had to cooperate and avoid filibusters in the first place. As the chart shows, nearly two thirds of all filibusters that have taken place in the Senate have occurred since 1975, when the Senate reduced the difficulty of ending debate, and nearly 90 percent of them have occurred since the Senate first created the cloture rule in 1917.

At the start of the current Congress, in January 2013, the Senate approved changes to the filibuster rules governing judicial and executive branch nominations that were designed to prevent the need for a “nuclear” strategy to move nominations to a vote. But within a matter of weeks into the new session, it became clear that the confirmation process was no more expedient than it had been prior to the nominal rules changes.

When he went to the floor on Thursday to set the nuclear option in motion, Senator Reid cited the January rules changes and the lack of concomitant substantive improvement to the confirmation process as justification for taking extreme measures. To many outsiders, Reid’s actions came without warning, but he had started down this path weeks earlier. On 31 October, [Reid had voted “No” to ending debate on Patricia Millett’s nomination](#) to the U.S. Court of Appeals for the District of Columbia Circuit. He knew that he did not have the votes to successfully invoke cloture on her nomination and he wanted to preserve his right to offer a motion to reconsider the vote, which can only be offered by a Senator who has voted on the winning side.

Now Reid addressed the presiding officer and moved to reconsider the vote to close debate on Millett’s

nomination. The vote failed to reach the required threshold—60 votes—to end debate, but when the presiding officer announced the result, Reid raised a point of order, claiming that on nominations not to the U.S. Supreme Court, only a majority vote was required to cut off debate. Pursuant to Rule XXII, the presiding officer ruled that Reid was incorrect and rejected the point of order.

Reid then appealed the decision, a parliamentary practice that requires a vote of the assembly to determine whether the membership agrees with the ruling just made. A majority vote would have sustained the ruling that 60 votes are required to invoke cloture; if fewer than 50 senators agreed with the chair, Reid’s claim of needing only 51 votes would be upheld. The result was 48-52; [the presiding officer declared](#): “Under the precedent set by the Senate today, November 21, 2013, the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority. That is the ruling of the Chair.”

Supporters of Thursday’s move hailed the change as necessary in the face of “unprecedented” Republican obstruction of President Obama’s judicial nominees. Many claimed that this change would ultimately pave the way for more expansive changes to the filibuster, leading to a more efficient Senate. Opponents, predictably, cried foul and lamented the “[naked power grab](#)” by Democrats. Some opponents accused Senator Reid of using the rules change to [divert attention from the “Obamacare” roll out debacle](#).

History and experience contravene [claims](#) that the Senate is likely to operate more efficiently as a result of Thursday’s change to the filibuster rule. Whenever the Senate has made it easier to end debate and reduce the impact of the filibuster, obstruction in the chamber has increased. The particular mechanism of the rules change, too, is unlikely to inspire an increase in bipartisanship or cooperation between and among senators.

There is real danger that the chamber’s tit-for-tat politics, particularly surrounding judicial nominations, will not only continue but worsen. To wit: as the fallout settled over the Senate Thursday afternoon, Iowa Senator Charles Grassley gained recognition and [spoke about his frustration with the maneuver](#): “But if there is one thing which will always be true, it is this: Majorities are fickle. Majorities are fleeting. Here today, gone tomorrow. That is a lesson that, sadly, most of my colleagues on the other side of the aisle haven’t learned for the simple reason that they have never served a single day in the minority. So the majority has chosen to take us down this path. The silver lining is that there will come a day when roles are reversed.”

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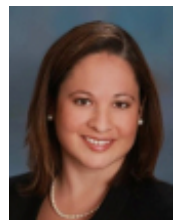
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