

Democrats' One Hope Left After 2016 Results: The Filibuster? Maybe Not.

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In the midst of a Republican sweep of the Presidency, House of Representatives and the Senate, Democrats have turned to the filibuster as their final barrier against what they see as regressive Republican policies. As [John Rackey](#) of the University of Oklahoma argues, however, the Democrats' turn to the obstructionist tool could backfire and lead to further diminished minority party powers in Congress, leading to an unchecked Republican party passing the very laws the Democrats seek to obstruct.



With Republicans retaining control of the House of Representatives as well as the Senate, and gaining control of the White House, many Democratic supporters are turning to what they see as their last hope against an onslaught of the Republican agenda: the filibuster. This immediate turn to the filibuster as a line of defense for Democrats, only minutes after election results were announced, speaks to a fundamental misunderstanding about the culture of the Senate. This also affects recent changes in the cloture rule have had in the modern U.S. Senate.

The cloture rule

The filibuster is often mischaracterized as a rule that allows unlimited debate on measures pending on the floor of the Senate. However, as Senate scholars note, it is also a loophole in Senate rules which prevents debate being cut off. The one tool at a majority's disposal to end filibusters has been Rule XXII, the cloture rule. The original rule, instituted in 1917 after urging from President Wilson, required a two-thirds majority to invoke cloture. Since 1975, invoking cloture has required 60 votes, a three-fifths majority. After cloture is invoked, there are currently thirty hours of post-cloture debate before the measure can be voted on; this post-cloture debate is usually waived through use of unanimous consent agreements between the majority and minority, which do not require a vote.

In November 2013, Majority Leader Harry Reid (D-NV) led his majority in a reinterpretation of Senate Rule XXII to lower the threshold for cloture to 51 votes, a simple majority, for non-Supreme Court level judges. The [results](#) of this change in precedent have been widely analyzed Senate watchers of all stripes. The consensus has been that each time reforms to the cloture rule have occurred to make it easier for the majority to overcome minority obstruction, the number of filibusters that have taken place has increased. These new filibusters are easily ended; however, post-cloture debate is rarely waived because the minority no longer has incentive to agree to the unanimous consent agreement. They insist on usage of all thirty hours of post-cloture debate as a form of protest for their decreased ability to filibuster; thus [slowing the speed](#) at which the Senate can act. It should be noted that post-cloture debate rarely is executed on the floor, the measure is usually just tabled until the thirty hours have expired.

Prior to election night, polls were predicting that Democrats would take back the Senate and retain control of the White House. Under that scenario, Democrats would have had to overcome minority party Republican filibusters on many things, most notably, confirmation of Supreme Court justices. Retiring Minority Leader Harry Reid [hinted](#) that there was precedent, after 2013, for Democrats to change cloture precedent again to lower the threshold from 60 votes to 51 votes for Supreme Court justices as they had previously done for lower court judges. This same option is still on the table for Senate Republicans who now have the support of the executive branch. Previously, some Senate Republicans, as part of a cloture reform taskforce assembled by Majority Leader Mitch McConnell (R-KY), [have suggested](#) going beyond lowering the threshold not just for Supreme Court nominees, but also for legislation.

All of this is contingent upon a united Republican majority, which is far from a guarantee, though certainly more

probable in the Senate than in the House. Should these changes be enacted, Senate Democrats would no longer have any real way to stop, or even slow, a policy agenda set forth by Congressional Republicans and the Trump White House. While the number of filibusters will surely increase should these changes to Rule XXII be rammed through, their effectiveness will surely be diminished with cloture so readily invoked. The only way for Democrats to avoid this scenario is by not immediately putting up a strong defense, centered around filibuster use, at the onset of the 115th Congress. If they attempt to be pure obstructionists, as Republicans have been during much of the Obama presidency, the stage is set for drastic changes to the cloture rule and a decrease in minority party rights in the Senate. A decrease in minority party rights in the Senate on this scale will lead it to be all but indistinguishable from the House of Representatives from a procedural standpoint, forever changing the nature of Congressional politics.

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