



Senator Thomas Daschle (D-SD)



Vice-President Richard Cheney



Senator Trent Lott (R-MS)

Willful Men *The Filibuster and the 107th Congress*



Senator Strom Thurmond (R-SC)



Senator Edward Kennedy (D-MA)



Senator Jessie Helms (R-NC)

Samuel Lawrence Brenner
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PS 110 - Congress and Public Policy
Professor Wendy Schiller

Half of official Washington is here to see democracy's finest show, the filibuster, the right to talk your head off, the American privilege of free speech in its most dramatic form. The least man in that chamber, once he gets and holds that floor by the rules, can hold it and talk as long as he can stand on his feet providing always, first, that he does not sit down, second, that he does not leave the chamber or stop talking. The galleries are packed. In the diplomatic gallery are the envoys of two dictator powers. They have come here to see what they can't see at home. DEMOCRACY IN ACTION!

-CBS Radio Commentator H. V. Kaltenborn, playing himself, broadcasting from the Senate in *Mr. Smith Goes to Washington* (1939)

The Senate of the United States is the only legislative body in the world that cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, has rendered the great Government of the United States helpless and contemptible.

-United States President Woodrow Wilson, speaking in 1917 of senators who sought to prevent the arming of U.S. merchant vessels

A disheveled yet distinguished-looking man stands at the podium, glances at the clock on the wall, adjusts the paper he holds in his hands, and continues to read in a dry monotone the vital statistics of every individual in a small mid-Western town. As he speaks, others in the domed chamber shift in their seats, in many cases anxious for him to finish so that they can leave to return to their homes and to their families. The speaker does not falter, however, but continues reading for hour after endless hour. He is not there to make an argument, but rather to make a point; he is not there to convince his fellows of their mistakes, but rather to obstruct their actions. When they leave he has failed. As long as he can hold out, as long as he can persevere, as long as he can physically stand – then he has triumphed.

Such is a common and popular view of one of the most interesting and intriguing – and yet little-understood – tools of the United States’ legislative process: the filibuster. Primed by memories of Jimmy Stewart’s acting in Frank Capra’s 1939 classic, *Mr. Smith Goes to Washington*, Americans tend to think of filibusterers as persecuted individuals who find themselves in the minority, yet who cannot help but fight for the rights of those they represent by doing everything in their power to prevent unfriendly and unfair legislation from being enacted. Filibusterers in this view are the chivalrous knights of the United States senate, sacrificing their health and, on occasion, their careers in order to prevent their constituents from being oppressed by an unthinking or uncaring majority.

Such views of the filibuster and of filibusterers are common, yet are hardly correct. Rather than taking center stage on the floor of a captive senate, modern filibusters simply exist in theory – for because of a process known as “tracking” there is no longer any need for filibustering senators to hold the floor by verbally entering recipes for Roquefort cheese salad dressing into the *Congressional Record*, as Senator Huey P. Long (D-Louisiana) did during his

attempt to reduce the size of the proposed National Recovery Administration (NRA) in 1935.¹ Rather than ideologically pure legislative knights, today filibustering senators tend to be obstructionists seeking concessions from their fellows, party leaders seeking advantages within the senate, or publicity seekers hoping to improve their public images. The modern filibuster, at least as it has been employed in the previous decade, is not an instrument of minority power, but rather the instrument of individual power. As this role for the filibuster has developed, its use has become more common and important in the senate chambers.

The members of the 107th Congress have barely finished moving into their Washington, D.C. offices, and so it is in some sense unreasonable to ask how the use of the filibuster as a tool of legislative action or obstructionism has developed in the current Senate – which, after all, has been in session for less than four months. Both the unique makeup of the current senate and the events of the past several months, however, demonstrate clearly that individual senators will wield enormous power in the current government. “It did not take long – day one of week one,” agrees Andrew Taylor in *Congressional Quarterly Weekly*, “for the 50-50 Senate to be reminded of the power a single senator may yield . . .”² The filibuster, it follows, which is the tool of individuals seeking power in the senate chamber, should clearly be of increased importance as well. An examination of actual and threatened filibusters over the past three months will answer several important questions about how the current senate is functioning and how it may continue to function in the coming years. At first glance it seems that the 107th Congress is not using the filibuster, or perhaps even the threat of filibuster, nearly so much as recent experience would lead observers to expect. How has the current senate used the filibuster during the first months of its first session? How does that use compare with the use of the filibuster in previous terms?

¹ Cited in Franklin L. Burdette (*Filibustering in the Senate* (New York: Russell & Russell, Inc., 1965) p. 4.

² Andrew Taylor, “A Senate of Singular Personalities and Possibilities,” *CQ Weekly*, January 27, 2001, p. 212.

Has the filibuster been an effective tool of legislating, or is it still the tool of power seekers, obstructionists and opportunists? What can the use of the filibuster to date reveal about how the senate and Congress will function in the coming months and years?

History of the Filibuster

Although the filibuster has captured the imagination of many politically minded Americans (it remains to this day the only Senate rule about which an entire feature movie was based), dedicated examinations of the filibuster are scarce.³ The two premier works, *Filibustering in the Senate* and *Politics or Principle?* do, however, reveal a great deal about the history of filibustering, how the filibuster has been used in the past, and even the etymology of the term “filibuster” itself.⁴

According to the anecdote related by Richard F. Fenno, Jr. in *The United States Senate: A Bicameral Perspective*, the United States Senate was intended by the founders to function as a brake on the immediate passions of the majority.⁵ Fenno recounts how George Washington responded to Thomas Jefferson’s questioning about the purpose of the new senate. “Why,”

³ Among the hundreds and thousands of works on the structure and rules of the United States government, there are very few that focus specifically and closely on the filibuster. In 1940, long before the rules changes that would govern cloture during the critical Civil Rights filibusters of the 1960s, Burdette (*Filibustering in the Senate*) published a book on the history of the filibuster as it had developed during the lifetime of the United States. In 1997, Sarah A. Binder and Steven Smith (*Politics or Principle?: Filibustering in the United States Senate* (Brookings Institute Press, Washington, D.C., 1997)), two researchers at the Brookings Institute in Washington, D.C., followed up Burdette’s work with an analysis of how the filibuster had evolved in the last two decades of the twentieth century. With the exception of these two books, there are no authoritative works on the history and development of the filibuster as a tool of legislative action.

⁴ The word “filibuster” appears to have developed from the Dutch term “vrijbouter,” which literally translates into English as “freebooter,” or pirate. This Dutch word initially referred to anyone who lived off of goods, or “booty,” taken from others by force or guile. The original Dutch word was adopted and corrupted by both the French (“flibustier”) and the Spanish (“filibustero”), who used it to refer to the pirates and adventurers who plundered the Spanish West Indies in the seventeenth century. After the mid-1850s “filibustero” was adopted into English, and became common in the United States after the publication of a popular book titled *Filibusters and Financiers*, which was about an American named William Walker who in the 1850s unsuccessfully tried to foment an insurrection in Nicaragua. The term “filibuster” was soon thereafter adopted by the Senate to refer to senators who employed piratical or rebellious techniques for obstructing legislation and the normal business of the Senate. (Binder and Smith, p. 3; “Filibuster” in the Oxford English Dictionary, online at <http://dictionary.oed.com/entrance.dtl>

⁵ Fenno, Richard F. Jr., *The United States Senate: A Bicameral Perspective*, (Washington, D.C.: American Enterprise Institute, 1982) cited in Binder and Smith, p. 4.

Washington asked in turn, “did you pour that coffee into your saucer to cool it?” When Jefferson replied that he had done so in order to cool his coffee, which was too hot, Washington responded “Even so we pour legislation into the senatorial saucer to cool it.”⁶ The United States Senate, argue Fenno and numerous political scientists and political historians, was specifically designed to function as the “brick wall” of legislating. This upper house of Congress was not designed to streamline the passage of bills, but rather to impede that passage, and so limit the harm that majority government could do to the public.

Although the term “filibuster” was not adopted until the middle of the nineteenth century, obstructionism was well known in the early United States.⁷ The first true filibuster of the United States Senate probably occurred during the 1st Congress, in 1790. During that year a dispute arose over whether the Congress, then sitting in New York, would move to Philadelphia. The House passed the bill, but found the move blocked in the Senate by one vote. The senator who cast that vote, however, was quite ill, and so had to be carried to the chamber on his bed whenever his vote was called for. Representatives eager for the move to Philadelphia thus conspired to bring the matter to a vote on a cold, rainy day when it was known that the ill senator could not be brought outside. Desperate, Senators Gerry of Massachusetts and Smith of South Carolina began making lengthy speeches and introducing extraneous motions in an effort to block the vote. “Every endeavor,” groused Senator William Maclay of Pennsylvania, “was made to waste time.”⁸ Although Congress did eventually move to Philadelphia, Gerry and Smith were successful in the short term; obstructionism, it seemed, was a valuable tactic in the early Republic.

⁶ Fenno, cited in Binder and Smith, p. 4.

⁷ Burdette, p. 13.

⁸ Burdette, p. 14.

The filibuster remained an important though unsystematically applied tactic throughout the nineteenth century. Senators would occasionally talk to prevent legislative action, but in an era of general senatorial collegiality and little interaction with the public, they did not find it necessary to exploit the Senate's rule for political gain. After the Civil War, however, as politicians were increasingly thrust into the public eye, senators began filibustering any bill they disagreed with and proclaiming their actions to their constituents. Filibustering was out of control, and was ceding full power in the upper house of the United States Senate to small partisan coalitions. "By the early twentieth century," remark Binder and Smith, "unrestrained filibustering had wreaked havoc on the Senate as the framers intended it to function."⁹ It was quite clear to the majority of legislators in Washington that a device for cutting off debate was both necessary and desirable.

Adoption of the Cloture Rule and Tracking

"[If there as] At any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate," reads Rule 22 of the standing United States Senate procedures, "[the Presiding Officer] shall lay the motion before the Senate and . . . shall, without debate, submit to the Senate by a yea-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?'"¹⁰ The development of Rule 22, which allows a supermajority of senators to invoke "cloture," thus putting an end to debate, stopping a filibuster, and forcing a vote, ranks as one of the most important changes ever made in senate procedure.

Up until 1919 cloture did not exist. The "question motion" which had been in place in the early Senate was dropped by senators in 1806, and so for over a century there was literally no

⁹ Binder and Smith, p. 6.

¹⁰ Senate rules at http://www.senate.gov/learning/learn_rules.html#22.

way for senators to prevent their fellows from filibustering until the end of the session itself. If senators could prevent the Senate from voting on a bill until after March 4 of odd-numbered years (the Constitutionally mandated date by which the Senate must recess), they could prevent the motion from ever making to the floor at all in that Congress. While many senators found this process cumbersome and ridiculous, bills that would have modified the right to filibuster were simply filibustered in turn by men such as Senator Long who had made their reputations through the use of obstructionist tactics.¹¹

Unlimited debate remained in effect until immediately before the United States became involved in the First World War. In 1917, the senate debated a bill that was designed to allow the arming of United States merchant vessels in order to ensure their safety from German submarines. Alarmed, a small group of senators who opposed United States intervention in the war in Europe banded together to filibuster the bill, although so-called “Armed Neutrality” was supported by a large majority of senators (only 11 senators were counted among the filibusterers) and by most of the American public. President Woodrow Wilson was furious with these senators, whom he perceived as directly violating the will of their constituents and of the majority of Americans. “The Senate of the United States,” he wrote, “is the only legislative body in the world that cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, has rendered the great Government of the United States helpless and contemptible.”¹²

At Wilson’s urging, and finally under serious public pressure to reform its rules, in 1917 the Senate adopted Rule 22, which called for the cessation of debate on any bill once a two-thirds

¹¹ Binder and Smith, p. 5; United States Senate at http://www.senate.gov/learning/brief_13.html.

¹² President Woodrow Wilson cited in Burdette, p. 121.

majority of the entire Senate voted for “cloture.”¹³ Over time the exact provisions of cloture votes have changed: for several years after the adoption of Rule 22, two-thirds of the Senate present and voting was generally required to invoke cloture.¹⁴ In 1949, Rule 22 was amended to require a two-thirds vote of the full Senate in order for cloture to be invoked, but senators soon found that on important bills every one of their fellows would be present anyway. The 1949 amendment was therefore reversed ten years later, so as to avoid confusion, , and in 1975 the Senate finally settled on the requirement of three-fifths of the Senate to invoke cloture – sixty votes.¹⁵

The adoption of Rule 22 fundamentally transformed the Senate, though the fundamental nature of that transformation was hidden for many years. After it was invoked to break a filibuster over the Versailles Treaty in 1919, cloture routinely failed until the middle of the twentieth century. In the early years of the 1960s, conservatives attempted to utilize the filibuster to block Civil Rights legislation, with Senator Strom Thurmond (R-N.C.) setting a twenty-four-hour record for holding the senate floor. Senator Thurmond’s actions ushered in a new age of filibustering in the Senate, and forced senators to resort to and vote for cloture more frequently.

In the 1970s the Democratic leadership of the Senate attempted to reform the Senate’s rules so as to enable the chamber to function more efficiently. Under Majority Leader Mike Mansfield (D-Montana) the Senate adopted a “tracking” system, which was designed to guide the consideration of legislation on the Senate floor. The tracking system allows the majority leader, with unanimous consent or the agreement of the minority leader, to have more than one

¹³ Information on cloture from the United States Senate at http://www.senate.gov/learning/brief_13.html.

¹⁴ Binder and Smith, p. 7; United States Senate at <http://www.senate.gov>.

¹⁵ While three-fifths of the Senate are required in order to invoke cloture normally, two-thirds of senators present and voting must decide whether to alter Senate rules.

bill pending on the floor as unfinished business. While before tracking a filibuster literally paralyzed the Senate, with tracking senators can filibuster individual bills and then move on to consider other legislation. “Ironically,” Binder and Smith note, “[these efforts] may have further fueled filibustering.”¹⁶ Even though the tracking system was designed to enable the senate to move through legislation more quickly and effectively and to prevent a single senator from holding the Senate hostage with a filibuster, the system now makes filibustering a bill less costly in terms of political capital, and makes it less necessary for other senators to support a cloture vote. “The increase in legislative business,” conclude Binder and Smith, “has made filibuster more successful and less costly – and hence more common – despite the tactical adjustment of party leaders.”¹⁷

The Senate of the 107th Congress

Americans watching their televisions on November 7, 2000 quickly realized (or were told by political commentators) that they were following a very unusual election. Control of the House of Representatives was, as always, up for grabs, and both the death of Missouri Governor Mel Carnahan, who was running against incumbent Republican Senator John Ashcroft, and the large number of close Senate races confused the issue, preventing an accurate forecast of who would control the Congress’s upper chamber. During the following days, while the country grappled with the reality of an undecided presidential election, it slowly became clear that the Senate of the 107th Congress would truly be unique in United States history.

The most unusual feature of the 107th Senate is, of course, its ideological makeup: Republicans and Democrats hold exactly equal numbers of senatorial seats (50-50). The Republicans nominally control the chamber because the Republican Vice President Richard

¹⁶ Binder and Smith, p. 15.

¹⁷ Binder and Smith, p. 15.

Cheney has the power to cast tie-breaking votes, and will presumably always side with his party in Congress. There are several other interesting features of the 107th Senate, two of which are perhaps of great importance: of the current senators, only about one-third have held elective office before their current senate terms, and only slightly more than half have served in the Senate itself for longer than six years.¹⁸

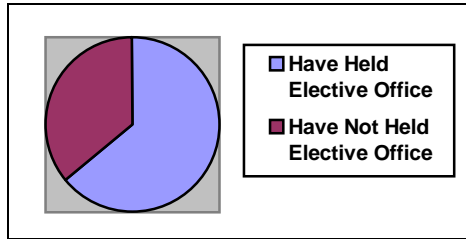


Figure 1: Senators and Legislative Experience

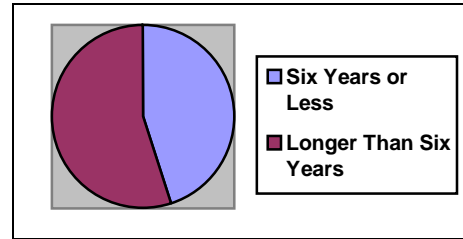


Figure 2: Senators and Experience in Senate

These numbers suggest several possibilities for the current Senate: first, that the Senate of the 107th Congress will clearly be split along party lines, and there will be great pressure on individual senators to remain loyal to their parties. This pressure will paradoxically increase enormously the potential payoffs for senators from split states of crossing party lines. Senators such as James Jeffords (R-VT) and Zell Miller (D-GA) will be able to win concessions from their colleagues across the aisle by promising to support Democratic and Republican legislation respectively, and can signal to their constituents that they are not tied to the party power structure. More importantly than even the ideological split, however, may well be the relatively large number of senators without previous electoral experience and without long backgrounds in the Senate. Such senators may be unfamiliar with the rules, unwilling to challenge party leadership early in the current Congress, and unsure of how or why to use the filibuster.

¹⁸ Statistical data on the Senate of the 107th Congress found in *CQ Weekly*, “Congress of Relative Newcomers Poses Challenge to Bush, Leadership,” January 20, 2001, Volume 59, number 3, p.178-182. See Figures 1 and 2.

Cloture Votes in the 1990s and in the 107th Congress

“Cloture,” concluded a committee chaired by then-Senator Dan Quayle in 1984, “is not only invoked too often, it is invoked too soon.”¹⁹ When Senator Quayle’s committee published its report, the number of cloture votes was still on the rise; the number of manifest filibusters, moreover, and the resultant need for cloture votes to break those filibusters, was about to explode.²⁰ Senators routinely complain that cloture motions are filed as soon as senators believe they can force a vote. Cloture is no longer solely used to bring an end to filibustering, but also to prevent senators in the opposing party from proposing amendments and to prevent any substantive debate on an issue at all. Despite these complicating factors, cloture votes nevertheless remain a strong indication of when a senator is threatening to filibuster a bill, when a filibuster is actually taking place, and when senators either feel they have enough power to break that filibuster or else feel a need to show their constituents that they are trying to move legislation on the Senate floor.

The number of cloture votes fluctuates from year to year and Senate to Senate. Over the course of the past decade the number of such votes has shown a trend towards climbing, although it routinely returns to hover at just above twenty per year.²¹ This trend toward cloture seems unremarkable, especially as it relates to the question of how the filibuster will be used in the 107th Congress, except when the number of cloture votes taken through May 1 of each year, or of the first year of each Senate session, is examined.²² This examination reveals two things:

¹⁹ Conclusions of the 1984 Select Committee on Procedure (Senator Dan Quayle, Chair) cited by Senator Russell Feingold (D-Wisconsin), *Congressional Record*, Thursday, May 18, 2000. (Found online at <http://feingold.senate.gov/speeches/senfloor/senate.html>).

²⁰ Binder and Smith, p. 9-11.

²¹ See figures 3 and 4. See also comparisons of cloture votes in figures 5 – 14. Information on cloture votes was developed by examining roll call votes of the Senate for the 103rd – 107th Congresses, and by comparing the numbers of cloture votes called, how many of those votes failed and how many passed, and what percentage those votes represented of the work of the upper chamber. Senate roll-call votes can be seen at the United States Senate website at www.senate.gov.

²² See Figures 10 and 11.

first, the number of such cloture votes (taken through May 1 of each Senate session) has dropped rather remarkably in the 107th Congress, and second, all of the cloture votes taken in the current Senate have succeeded.²³

Although the number of cloture votes taken before May 1 in any Congressional session is never large, there were only two cloture votes in the first four months of the current Senate – less than ever in the previous four Congresses.²⁴ This decline is even more remarkable because the number of cloture votes during the 106th Congress was unusually large (thirty-six) and made up over nine percent of the Senate’s business in that year. The fact that both cloture votes passed with wide margins of victory indicates one of three things: either cloture votes are not being forced unless senators are certain of victory, current filibusters are not contentious (and so senators feel no need to signal to their constituents how they feel on controversial issues by voting for cloture), or there are no current filibusters at all. Determining which of these scenarios is the true one will reveal how the filibuster is being used in the current Senate.

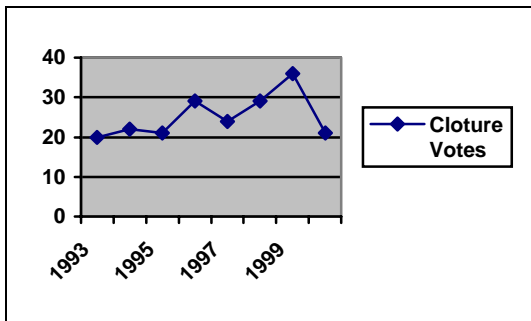


Figure 3: Number of Cloture Votes by Year

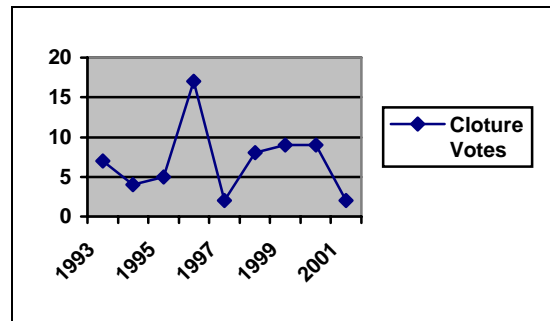


Figure 4: Number of Cloture Votes Through May 1 by Year

²³ See figure 13. There were only two cloture votes in the first four months of the 107th Congress, but both passed with large margins.

²⁴ See figure 11.

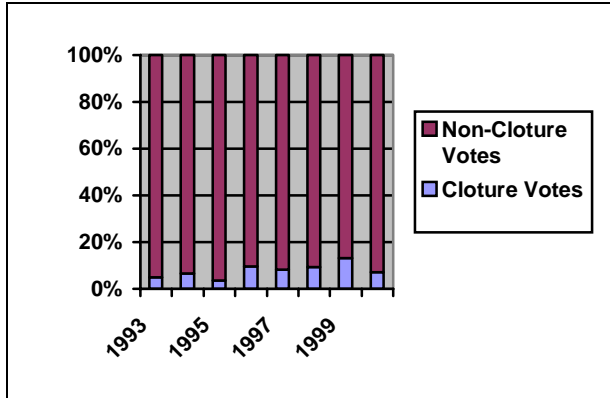


Figure 5: Cloture Votes as Percent of Senate Roll-Call Votes by Year

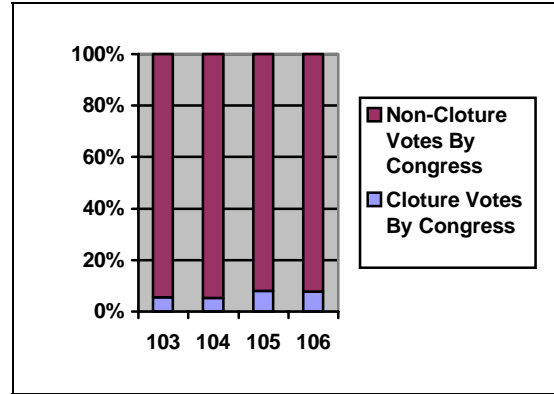


Figure 6: Cloture Votes as Percent of Senate Roll-Call Votes by Congress

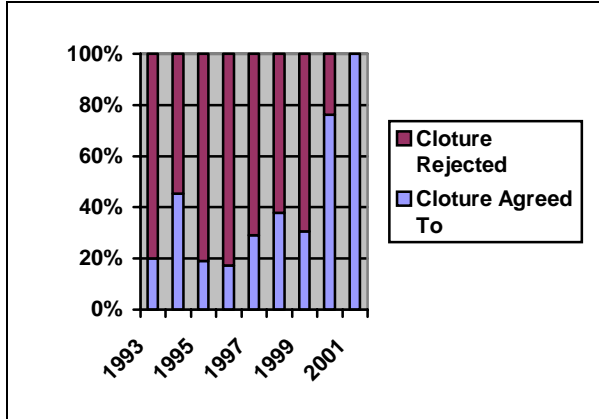


Figure 7: Success of Cloture Votes by Year

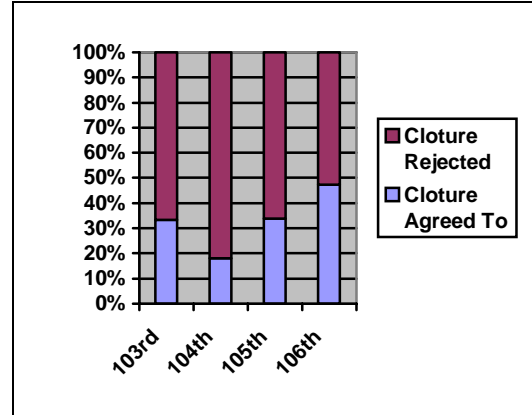


Figure 8: Success of Cloture Votes by Congress

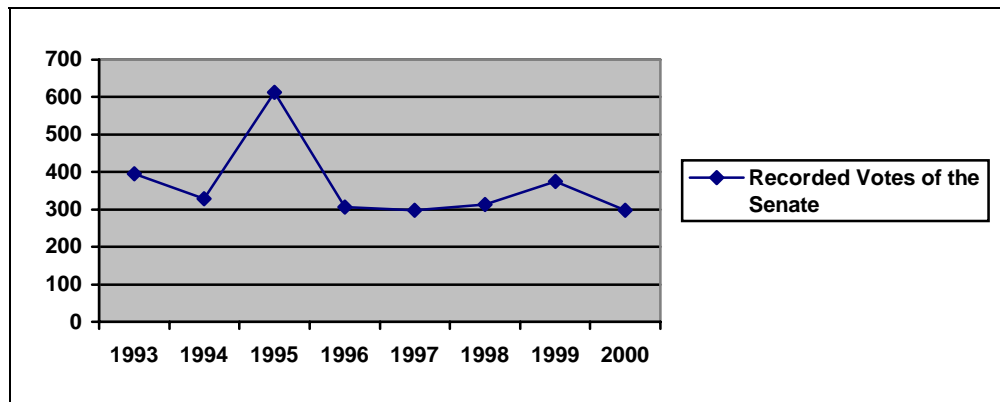


Figure 9: Recorded Votes of the Senate by Year (Senate Workload)

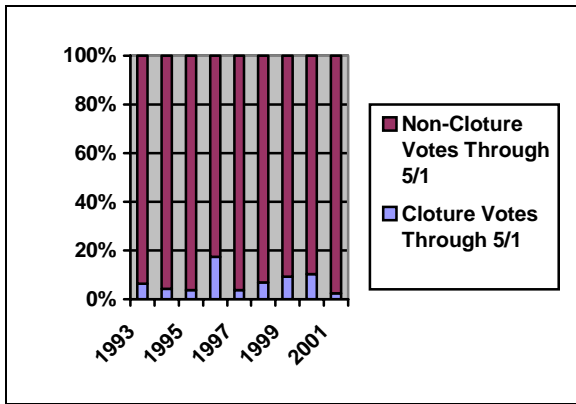


Figure 10: Cloture Votes as Percent of Senate Roll-Call Votes Through May 1 by Year

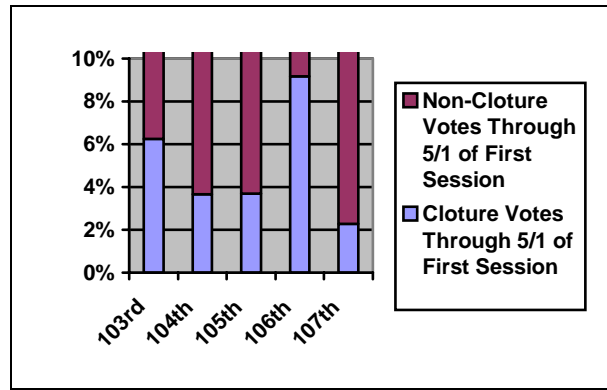


Figure 11: Cloture Votes Through May 1 of First Sessions in Close Contrast (y-axis shows only 10%)

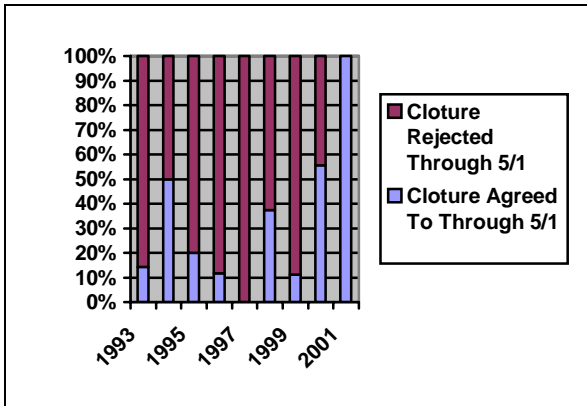


Figure 12: Success of Cloture Votes Through May 1 by Year

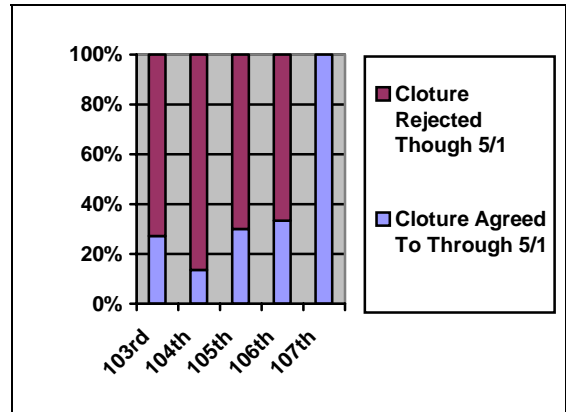


Figure 13: Success of Cloture Votes Through May 1 by Congress

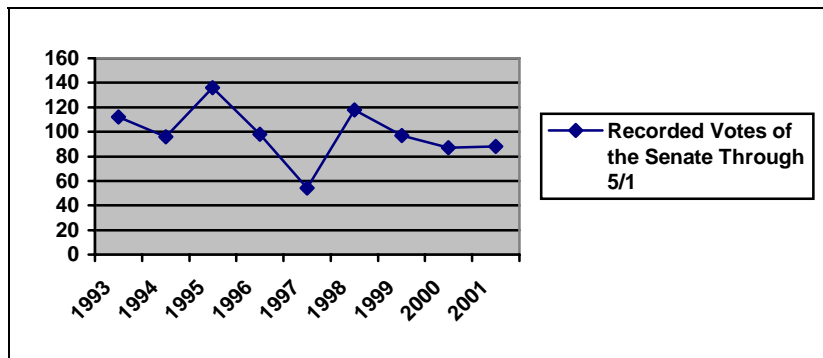


Figure 14: Recorded Votes of the Senate Through May 1 by Year (Senate Workload)

Filibusters in the Senate of the 107th Congress

Although it is very difficult to determine when a bill is being filibustered, it seems clear that there have been at most two actual filibusters in the current Congress – both broken by cloture votes.²⁵ Of far more importance than actual filibusters have been threatened filibusters, both because they allow individual senators to seize the limelight and because they represent clear partisan messages. In the current Senate senators have threatened to filibuster decisions on the Senate rules, the nomination of Attorney General John Ashcroft, and oil drilling in the Arctic National Wildlife Refuge. Filibusters have also been important in relation to the passage of campaign finance reform, health care reform, and the budget. An examination of two of these threatened filibusters, the threat to filibuster the Senate rules and the threat to filibuster a vote on the nomination of John Ashcroft as attorney general, is useful in revealing how the filibuster has been used and will continue to be used in the current Senate.

Power Sharing in the Senate

One of the two most important threatened filibusters of the current Senate was kept very quiet, and was related to the Senate's rules in the current Congress. The rules of the upper and lower chambers of Congress are almost entirely the province of the Senate and House of Representatives respectively, and the majority party in either chamber tends to seek a favorable organization of those rules and procedures. Usually, then, the majority party will award itself greater staff, more office space, and greater privileges. The current Senate, however, faces the unusual situation of being split evenly. While Vice President Cheney can break ties, if the Democrats remain united they can support a filibuster indefinitely. Faced with the prospect of

²⁵ Data on filibusters developed by searching *The New York Times* and *Congressional Quarterly Weekly* for any references to filibustering, on the assumption that the Washington press corps would be aware of when filibusters are occurring and why senators are choosing to take obstructionist roles.

being treated as inferiors in an equally divided Senate, the Democrats balked and demanded a number of rules provisions for power sharing.

In response to Democratic threats of a filibuster, Senators Lott and Daschle met in secret for several days to decide on a power sharing arrangement. When they emerged from their meeting, Lott announced to horrified Republicans that he had agreed to include equal numbers of Democrats and Republicans on committees, to provide equal staff and office space for both parties, and to prevent party leaders from invoking cloture simply to block amendments.²⁶ “This is a classic case of extending the hand of friendship,” Senator Lott said in his floor speech. “This resolution may haunt me – but it is fair.”²⁷

It is clear that the threat of a filibuster prompted Lott and Senate Republicans to make this deal with the Democratic leadership. The Republicans finally find themselves in a unified government, and they cannot afford to appear weak and indecisive before the American public. A Democratic filibuster of the Senate procedures would have prevented anything from being done in the Senate, would have delayed President Bush’s legislative agenda, and would have made it impossible for the Republicans to run an effective government. One senior GOP leadership aide summed up the Republican position perfectly: “The Republican animosity towards the notion of 50-50 committees weakened, frankly, as reality set in with these guys,” he explained. “You can demand a one-seat margin until you’re purple, but at some point you’ve got to organize the damn Senate.”²⁸

²⁶ This agreement may explain why the incidents of cloture are so much lower in the current Senate than they have been in the past.

²⁷ Senator Trent Lott (R-MS) cited in *CQ Weekly*, “Senate GOP to Share Power,” January 6, 2001, p. 21.

²⁸ *CQ Weekly*, “Senate GOP to Share Power,” January 6, 2001, p. 22.

The Nomination of John Ashcroft

The nomination hearings for former Senator John Ashcroft, who was nominated by President Bush to be the attorney general, led to another threatened filibuster by Democrats. Many Democratic senators disagree strongly with Ashcroft's views, and stated publicly that they felt that he would not be objective as head of the Justice Department. Among the Democratic senators who was most publicly horrified was Senator Edward Kennedy, Democrat of Massachusetts. In response to what he argued was Bush's own abandonment of bipartisanship, Kennedy threatened to filibuster the nomination – an almost unheard of action. Republican responses to the threat were quick to follow, with Senator Orrin G. Hatch (R-UT) declaring that such a step would be “tantamount to outright warfare.”²⁹ In the end, Kennedy found that he had lukewarm support for a filibuster, and so withdrew the threat, “saying he wanted the debate over the next few days to focus on Mr. Ashcroft's position across the years on issues like abortion and civil rights, and not on his own parliamentary tactics.”³⁰ Although he did not succeed in blocking Ashcroft's nomination, Kennedy used the threat of a filibuster to make the national news and to bring increased attention to the prospective attorney general's legislative record.

Senator Kennedy's threat to filibuster Ashcroft's nomination was actually less important in the end than the Senate vote on that same nomination. Ultimately Democrats were able to round up 42 votes against Ashcroft – more than enough to sustain a filibuster if they so chose. They did lose the vote, in the words of *The New York Times*, “at the same time, the vote [of 58-to-42] was a show of strength by the Senate's Democrats, who demonstrated through their 42 votes against their former colleague that they would have the power to sustain a filibuster if Mr.

²⁹ *The New York Times*, Saturday, January 20, 2001 “As Hearings End, Republican Leaders Predict an Easy Confirmation for Ashcroft” by David Johnston, page A18.

³⁰ *The New York Times*, Wednesday, January 31, 2001 “By Resisting Ashcroft, Democrats Send a Signal” by Alison Mitchell, page A14.

Bush put forward a Supreme Court nominee whom they could not accept.”³¹ Democrats were clearly delighted with the outcome of the vote: not only had they retained the precedent of allowing the President to choose his cabinet officials and also shown the American public that they were not obstructionists, but they had signaled Bush strongly that he should not try to appoint an arch-conservative to the court. “That is not a threat,’ Senator Daschle said of his promise that Democrats would work to block controversial Supreme Court nominations, “[but] we retain our right to use those options available to us if somebody from the far, far right, the extreme right, would be nominated for an important and sensitive position.”³²

Conclusion

“The solution [to the problems posed by obstructionists],” wrote Franklin Burdette in 1940 “must rest in part upon the election of legislators with a keen sense of public responsibility, men who will never allow political strife to thwart a need for action.”³³ It is not yet clear whether Burdette’s envisioned publicly-responsible legislators are currently in firm control of the senate; it is in any case doubtful that those senators, like Jesse Helms (R-N.C.), who have amassed reputations as skilled obstructionists have suddenly undergone major philosophical transformations. It appears at first glance, however, that the senators of the current congress are hesitant to utilize the filibuster as it has been utilized in the past decade, and that they are instead working to solve their problems without *overtly* signaling their desire to play an obstructionist role. Is this understanding of the use of the filibuster in the Senate of the 107th Congress correct?

An examination of the Senate’s actions during the first four months of the 107th Congress reveals that the filibuster is still being utilized as a powerful tool to control Senate floor debates

³¹ *The New York Times*, Friday, February 2, 2001 “Senate Confirms Ashcroft As Attorney General, 58-42, Closing A Five Week Battle” by Alison Mitchell, page A1.

³² *The New York Times*, Friday, February 2, 2001 “Senate Confirms Ashcroft As Attorney General, 58-42, Closing A Five Week Battle” by Alison Mitchell, page A16, cont. from A1.

and legislative outcomes. There are indications, however, that a major shift has occurred in the identity and purpose of filibusterers themselves. No senator of the current Congress seems willing to filibuster legislation for personal gain, or to make a personal point. The Senate has in it members who should not be – who *have* not been – hesitant to use the filibuster to their own advantage, men such as Senators Kennedy, Thurmond, and Helms. Why have they not employed the filibuster already in this Senate? What is holding them (and especially Kennedy, who is in the minority party) back from filibustering bills with which they disagree?

One possible answer is that both the Democrats and the Republicans are afraid to appear as if they are obstructing the business of the Senate. The 2002 elections will clearly be vital, and senators might not want to “rock the boat,” and so somehow endanger their party’s control of the upper chamber in two years. Another, more power explanation is simply that the evenly divided senate has already given so much power to individual senators that they do not need to use the filibuster to make their points. When senators have talked about the filibuster over the past few months, they have not spoken of it as an instrument of individual power, but rather as a tool of minority party control. The Democrats utilized the threat of a filibuster to force power sharing in the Senate, and clearly demonstrated through the Ashcroft nomination process that they are able and willing to filibuster any Supreme Court nominees with whom they strongly disagree. The Republicans, meanwhile, find themselves in nominal control of the Senate in a unified government, and so cannot afford to filibuster as a party. Despite some evidence to the contrary, then, the filibuster remains a powerful tool in the current Senate, and will clearly be influential as willful men and women struggle for partisan control of Congress’s upper chamber.

³³ Burdette, 240.

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