

Rand Paul- One More Time

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Discussing the recent Rand Paul filibuster, [Sarah Binder](#) approvingly quotes [Ezra Klein](#) who argues, “When Senate institutionalists wax rhapsodic about the upper chamber, they talk about the filibuster’s cherished role in slowing down the majority and permitting passionate minorities to be heard. That is a valuable endeavor!”

I am one of those “Senate institutionalists.” I certainly wax rhapsodic. I love the Senate where I worked for more than 30 years for three U.S. Senators.

I agree with Binder, Klein and many other observers that the Paul filibuster was valuable no matter what one may think about the use of drones or the need for Paul to choose this particular tactic at this particular moment. I will return to the discussion of that value.

I also agree with Binder and [John Bernstein](#) that the “talking filibuster” has been oversold as a filibuster reform. Senator Merkley, the chief proponent of that proposed reform stated over and over in many venues, “We must put an end to the secret, silent filibuster that is haunting the Senate.” As other critics have argued, the “talking filibuster” would not likely work as anticipated by its proponents in the majority.

Also, the majority leader can force filibustering senators to talk under existing rules. As I’ve [argued](#) Byrd in 1988, Frist in 2003 and Reid in 2008 were examples where they forced all night sessions because they believed that the added attention would benefit the majority. Had he chosen to, Majority Leader Reid on the confirmation of the nomination of Caitlyn Halligan to fill Chief Justice Roberts’ seat on the D.C. Circuit Court of Appeals could have demonstrated this. He could have decided to require the minority to play by the existing rules even if it were inconvenient for both parties. Senator Reid could have come to the floor and simply announced that at any point that no senator sought recognition, the presiding officer would put the question, and in the event of dilatory quorum calls, that Reid would immediately move to instruct the sergeant at arms to request (or even compel) the presence of absent senators. This creates a roll call vote which all senators loathe to miss. Their presence is required by the Constitution under Article I Section 5.

Had the majority leader chosen this course, the Senate might still be debating the nomination. Unlike the view of those who see the “talking filibuster” as a cure, my experience is that it is almost never difficult to get those who filibuster to claim credit. We see few of these filibusters because they require value Senate floor time.

But such talking filibusters are somewhat different than what I have called the “lone wolf” filibuster. In these circumstances, like the Paul case, where a single senator or small group holds the floor, there is seldom any question but that the filibuster can be overcome by attrition and usually the votes for cloture exist. Again, it is the spectacle and the novelty which brings the glare of public attention which is after all the object. Rand Paul knew full well he could not block the confirmation of the Brennan nomination. He sought the platform to raise his issue with the potential use of drones in the U.S. Klein is correct when he [argues](#), “...Paul’s filibuster was a rare and unusual effort to [use] Senate time to draw attention to a senator’s very real concerns on a very serious issue. It wasn’t about obstruction of a nomination so much as it was about attention to a set of ideas and concerns that are often brushed aside.”

In addition to the reasons Binder, Klein and others have cited, the Paul filibuster showed the potential for the filibuster to empower the minority in the Senate to demand oversight of executive actions. In our book, “Defending the Filibuster: The Soul of the Senate,” former Senate parliamentarian Bob Dove and I quote Lindsay Rogers’ *The American Senate* which pointed out the key link between the Senate’s supermajority requirements and the separation of powers. Rogers wrote, “The Senate is the only American institution so organized and articulated as to exert any supervision over the executive, and this function would be impossible were the rules to provide for closure [majority cloture].” He goes on: “The undemocratic, usurping Senate is the indispensable check and balance in the American system, and only complete freedom of debate permits it to play this role . . . Adopt [majority cloture] in the Senate, and the character of the American government will be profoundly changed.”

To be fair, none of the single-party reformers to my knowledge was calling for an end to the filibuster. Senator [Tom Udall](#) repeatedly said, “Our proposal is simple, limited and fair. We make reasonable changes to nominations and conference committees and do away with the status quo of stealth and silent filibusters that prevents the Senate from getting its work done.”

I differ with Senators Udall and Merkley, on the “talking filibuster” proposal as did the bipartisan reformers who successfully changed the rules in January. But the heart of my objection focused on the way in which the single-party reformers proposed to carry out these changes- the so-called nuclear option. As Sarah Binder put it:

“...Senators at times have written laws that immunize particular policy areas (the budget, trade pacts, war powers act debates, and so on) from filibusters. Of course, as the fizzling of the nuclear option this winter suggests, even if a majority of the Senate were to agree on how to balance debate and action, they might still disagree on how to achieve it.”

As I have argued in [Politico](#), the [Washington Post](#), the [New York Times](#), the [Boston Globe](#), and elsewhere, if the Senate were to establish the precedent that on the first day (or any other day) debate on a change in the rules could be ended by a simple majority cloture vote, this would lead to a majoritarian Senate – a mere shadow of the House. Single-party reformers may intend to make only “simple, limited, and fair” adjustments to the filibuster rules, but before very long a Senate majority would do what majorities do- take control.