

# Filibuster Reform: When and Why

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# 1 Introduction

A Filibuster is when a Senator uses dilatory tactics to extend debate in order to prevent or delay a vote. Filibusters in the US Senate are most commonly associated with long floor speeches where the Senators hold the floor, sometimes in excess of 20 hours. The practice of long speeches is something of the Senate past. With the introduction of the two track system and secret holds, modern Filibusters often occur without the Senator so much as uttering a word. The modern Filibuster is often viewed as costless and one of the largest causes of gridlock in American politics (Mondale 2011). The majority party can change the rules of the Senate and remove the Filibuster on the very first day of a new session. There would seem to be an incentive for the majority party to replace the Filibuster with simple majority rule. Why does that not happen?

A Filibuster can only be ended by a cloture motion, which needs support of 3/5 Senators to pass (60 Senators). The Filibuster has become so common in the modern Senate bills often need the support of 60 Senators to pass. Majority parties in the Senate often cry foul when key legislation is defeated or nominations are held up due to the Filibuster. Often though these same Senators become the largest defender of Filibusters when they find themselves in the minority. It is easy to see why there is often talk of reducing the cloture motion to 50 Senator, but little action ever occurs.

Cloture reform has only occurred twice in the Senate history (1917 and 1975). So cloture reform is possible but rare. In 2005 cloture reform almost occurred when Republicans and Democrats came to stare down. Democrats were Filibustering the Republicans judicial nominees. The Republicans responded by threatening to reduce the cloture to 51 senators on judicial nominees. Republicans would attempt to do this using something referred to as a nuclear option. The nuclear option is where the Senator obtains a ruling from the chair (who is the Vice President). The ruling from the chair comes to a straight majority vote and Senate rules are changed. The reason

this option is controversial is that the Senate rules themselves state 67 Senators are needed to make changes to Senate procedure. The nuclear option is a way to circumvent the Senate rules. In response to the nuclear option, the Democrats threatened to Filibuster every bill on the agenda. In essence this would have caused the shutdown of the US Senate (this is how the nuclear option recieved its name). In the end, both sides found a compromise and cloture reform never occurred. Since then cloture reform has remained a hot topic to debate, but little substance has come from this. Recently the Democrat majority have declared a mission for cloture reform, but is this more cheap talk?

This paper attempts to answer a simple but under studied question: When will a majority party prefer a Senate without a Filibuster? While the obvious answer seems to be that the majority will always want to remove the Filibuster, this may not be the case. Uncertainty about future seat distributions and loss aversion to the opposition passing extreme legislation could dissuade the majority in pursuing cloture reform. In more simple terms a majorities fear of their status shifting to a minority could make them wary of removing the Filibuster. This paper finds that two key factors impact the majority parties decision to pursue legislation. They are the likelihood of maintaining the majority in future periods (incumbency effect) and the cost of an opposing party passing legislation (loss aversion).

Literature on the Filibuster is in no short supply, however little has been done to address the simple question of when a majority party would want reform. Most previous literature focuses on how the Filibuster effects lawmaking (Krehbial 1998, Wawro and Shickler 2004), the history of the filibuster (Binder, Wawro, Dove, and Bach 2010, Fisk and Chemerinsky 1997), or modeling how the Filibuster work (Fearon 1994). As mentioned this paper attempts to address the hole in research of when is a majority party better off without the Filibuster.

The paper proceeds in the following way, section 2 outlines a brief history of the

filibuster from 1806 to present day, section 3 covers some of the more important literature in greater detail, section 4 provides the simple mode, section 5 summarizes the models results, and finally section 6 applies the models results to past cloture reforms.

## **2 History of the Filibuster**

As the senate has changed in procedure and structure over time, the filibuster has also evolved to adapt to these changes. This section will outline a brief history of the Filibuster and its evolution in the US Senate. It will first start with 1806 where the Filibuster came into existence and lead up to 1917 where the first cloture motion for ending debate was introduced. Next will, it will investigate 1917 to 1975, a period bookended by two cloture reforms. During this period the filibuster grew in use, and was mainly focused on preventing civil rights reform. The growth in use of the Filibuster led to the introduction of the two track system in the US senate. Finally this section will end off with a look at the modern Senate, where the Filibuster is now viewed as costless, has expanded to all form of legislation, and use the nuclear option is now threatened.

### **2.1 1806-1917**

The Filibuster has not always been part of the Senate. Both the House and the Senate had a rule called "the previous question". The rule allowed the Senate to hold a vote which could end debate with majority favor. It was the only way to formally end debate in the Senate. Therefore as long as this rule existed the threat of the Filibuster was not credible. Previous to 1806 the rule was seldom used and with the urging of Vice President Aaron Burr the Senate removed the rule with the belief the it was redundant (Binder, Wawro, Dove, and Bach 2010). By removing the motion

for the previous question the Senate removed any formal way to end debate, therefore creating the possibility for a Senator to use extended debate to defeat a bill. This loophole created what we know today as the Filibuster. It was some time though before extended debate would actually be used in the senate and close to a century before the filibuster was considered a problem.

The senate during this time had a small number of senators and low workload (compared to modern senates). The ability for the majority to simply wait out a Filibuster was greater compared to the modern senate. As the senate grew in size (the senate expanded from 34 to 96 senators during this period) and the agenda became more demanding, not only did the number of Filibusters rise but also the cost to the majority of the Filibuster also increased. As the agenda for senators grew, willingness to sit out a Filibuster fell.

One of the most famous Filibusters showed the length which a minority Senate would go to in order to defeat a bill. In 1908 Senator Robert LaFollette filibustered a currency bill of which he was in strong opposition. LaFollette held the floor in debate for 18 hours, powering himself on nothing more than turkey sandwiches and eggnog. The temperature rose past 90 degrees fahrenheit and caused the eggnog to spoil and develop dangerous amount of ptomaine. Realizing the eggnog had become poisoned LaFollette used a roll call to escape and receive treatment. Upon returning he continued his speech for another 8 hours. However in the end the Filibuster was stymied when a blind Senator accidentally yielded the floor to a Senator who had stepped out to the cloakroom.

As Filibusters became more frequent and the cost of waiting out a Filibuster increased, Senators became increasingly frustrated with the obstructions. Therefore attempts at reform occurred more frequently. However, attempts at Filibuster reform were unsuccessful because none of them gained enough support from the majority parties of the time. In 1917, all of that came to an end, when a group of 12 anti-war

senators successfully Filibustered President Woodrow Wilson's bill to arm merchant vessels in order to protect them against German U-boats. The bill had overwhelming support in the House, Senate, and from the public. This situation created a perfect storm of events. Dr. Sarah Binder described the events in her address to the US Senate on the history of the Filibuster as "A pivotal issue, a President at the bully pulpit, a very attentive press, a public engaged in that fight for reform" (Binder, Wawro, Dove, and Bach 2010), which created the perfect atmosphere for reform. After public urgings from the President the public demanded Filibuster reform. After this, reform became a priority and within days of the bill being Filibustered, a special session was held to change the Senate rules, in order to curb effectiveness of the Filibuster. A compromise was reached between senators who wanted a majority cloture and those who wanted no cloture motion at all. In the end Rule 22 was introduced which stated debate can be ended if a supermajority of 2/3 senators agree to do so. The cloture motion was feared to be too powerful and would in essence completely remove the Filibuster from the senate.

## **2.2 1917-1975**

Soon after the introduction of the cloture motion, fears that the Filibuster would be made ineffective were seen to be unfounded. The cloture motion was rarely used and when it was used, not often successful. From 1917 to 1927 it was voted on 10 times while only being successful in 4 occasions (Fisk, and Chemerinsky 1997). Where previously most legislation was pushed through with a simple majority, the new cloture motion created a necessary coalition size of 2/3 senators to push through controversial legislation (Wawro, and Schickler 2004). However even with the Filibuster growing in use, there was enough overlap in ideologies between the two parties that building coalitions of this size was not a major road block. Only on issues where the two sides had drastically different views was the Filibuster used.



The main area where there was a division in the senate was on civil right reform. The Filibuster was almost exclusively used to prevent civil right reform from occurring. Southern Senators were able to successfully Filibuster bills for over forty years. Some notable bills were the 1965 Voting Rights Act, 1968 Fair Housing Act, 1970 Voting Rights Act, and 1972 Title 7 extensions (Fisk, and Chemerinsky 1997). Therefore as civil right reform became a more pressing matter, so to did Filibuster reform since one could not occur without the other. By the 1950s Filibuster reform became front and centre. Small changes to procedure of the cloture were pushed through however the threshold remained untouched at 2/3. Every time a civil right bill was brought up for debate southern senators would Filibuster causing long delays. Day to day business of the senate was being brought to an almost stand still. In 1964 the level of obstruction hit a record high when Southern Senators filibustered the Civil Rights Act for an amazing 74 days, creating a massive gridlock in the senate. While the Civil Right Act eventually was successful, the cost in loss of time in the legislation calendar made it clear reform was necessary.

These Filibuster on civil rights reform led Majority Leader Mike Mansfield to develop a two-track system for the US senate in order to get around obstructions. Since reform attempts had been unsuccessful Mansfield developed a system where the Senate could in essence have two bills on the floor at the same time, thereby dampening the effects a Filibuster would have on other Senate business. The two track system worked by spending the morning portion of the floor debate on items which were Filibustered and the evening on regular items. This system benefited both the majority and the Filibustering minority. The majority now could perform their day to day business without fear of a Filibuster disrupting the agenda of the senate, while the minority no longer needed to hold the floor for an extended period of time. The two track system essentially removed the cost of performing or waiting out a Filibuster. This two track system was instrumental in allowing the Senate to

still function when controversial legislation came up for a vote. However this two track system did have unintended consequences that wouldnt be felt till later. In 1975 cloture reform was finally successful, the threshold was reduced to 3/5 of sitting senators, therefore reducing the necessary coalition size needed to pass controversial legislation.

## **2.3 Current Senate**

Even with the cloture reform the Filibuster continued to grow in use. In recent senate the cloture motion has hit record highs. In the 1960s, 28 cloture motions were filed, in the 1980s that number hit 207 and in the 2000s 430 cloture motions were filed (Binder, Wawro, Dove, and Bach 2010). Much of this can be attributed to two factors. One is the growing time demands of Senate. The time demands on the modern Senate are at their highest level, therefore any obstruction causing loss of legislation time is very costly. This makes the filibuster a very powerful tool for the minority, and even the threat of a filibuster can now be enough to kill a bill. The other reason for the increase in the Filibuster is the two track system which was introduced to allow the Senate to function during times of great obstruction, also created what is commonly called a costless Filibuster (Fisk, and Chemerinsky 1997). It is now possible to filibuster without ever uttering a word and the Filibuster itself has now been extended to all legislation. Now any objectionable legislation is Filibustered until the majority party can gather sixty votes in order to pass the cloture. On top of this public accountability for Filibustering has disappeared since most Filibusters now occur in secret due to the ability of a senator to place a hold on a bill for an indefinite time (Fisk, and Chemerinsky 1997). Placing a hold on a bill means it can not be brought to vote until the hold is taken off. A hold is meant to give the senator more time to study the bill, but has also become a new avenue to Filibuster bills. Therefore senators no longer face public scrutiny or outrage when Filibustering, since most times their

identity is not revealed due to the fact holds are anonymous. The combination of the two track system along with the large time demands has created an atmosphere where any bill which does not have 60 senators support will be filibustered.

In 2005 the Filibuster gained national attention when it almost brought the Senate to a stand still. The Democrats were Filibustering President Bush's judicial nominees, Republicans senators were threaten using something called nuclear option. The nuclear option is an argument that the Constitution only requires a majority vote, therefore the cloture motion which makes a supermajority required is unconstitutional. The nuclear option was meant to be applied to judicial nominees only. The reason this was referred to as the nuclear option is because if the option was used the Democrats would have fired back with filibustering anything the Republicans put on the table. The use of the nuclear option threanted to bring the US Senate to a stand still. With both sides unwilling to back down, 14 senators (7 democrats and 7 republicans) banded together and formed an agreement which would prevent Filibustering on the nominees and the republicans unable to go through with the nuclear option. Since that period of time filibuster reform has always been a topic of discussion for the Senate. Unlike in, previous Senates where the filibuster was tied to a single issue, the filibuster is now used on all issues and political parties have little room for agreement on any of them.

## **3 Previous Literature**

### **3.1 Legislative Entrepreneur Model**

Eric Schickler and Gregory Wawro created a model which explores the reasons behind the 1917 cloture reform in their paper "Cloture Reform Reconsidered". This model attempts to explain why the cloture motion was introduced even though it was rarely used. The model captures the trade off between creating large coalitions which ensure

success of a bill and the decrease in individual senators gains from creating large coalition.

Previous to the cloture it was possible to pass bills with only a slim majority, Wawro and Schickler note that one exception to this is when time was expiring in the Senate session which made legislation vulnerable to filibusters. The question is then, given that the Senate operated as a majority why would Senators have chosen a supermajority cloture rule? They argue that the cloture acts as a insurance policy to prevent Filibusters during end of session legislation.

The model revolves around a single actor called the Legislative Entrepreneur (LE). The LE is attempting to pass a bill, they can add Senators to their coalition and increase the chances the bill will pass. However increases in coalition size come at a cost. A bill delivers a fixed benefit which must be equally divided among senators in the coalition. This means as the coalition size increases the benefit to each individual senator decreases. Three variables must be defined to formalize the model:

1) $n$ : coalition size where  $n$  is between 0.5 and 1

2) $\pi$  : probability of bill passage

3) $B$ : benefit obtained from bill passage

The probability of a bill passing is defined as follows:

$$\pi(\alpha) = \left(\frac{n - 0.5}{0.5}\right)^\alpha \quad (1)$$

In this equation if a coalition has a size of 0.5 it has no chance of passing, on the other hand if the coalition size is 1 then the bill passing with certainty. The variable  $\alpha$  captures the marginal gain in bill passage by adding a senator to the coalition. The benefit obtained from passing a bill is defined as follow:

$$B = \frac{1 - n}{0.5} \quad (2)$$

If a bill does not pass the benefit is zero. This means that the expected utility to passing a bill is as follows:

$$EU = \pi B \tag{3}$$

This model does not attempt to look at Filibusters directly, instead the variable  $\alpha$  is what captures Filibuster. The higher  $\alpha$  the more successful Filibusters are. This means as  $\alpha$  changes the optimal coalition size will also change. At an  $\alpha$  of 0.1 optimal coalition size is 0.55, at an  $\alpha$  of 0.5 coalition size is 0.67, and with an  $\alpha$  of 0.75 the coalition size is 0.71. With a cloture motion what happens is that there is a jump in the probability of success once a coalition hits 0.67. Therefore expected utility with cloture is defined as:

$$EU_c = \pi(\alpha)B1[n < 0.67] + \pi(\alpha^*)B(1 - 1[n < 0.67]2) \tag{4}$$

Instead of looking at how the cloture motion changed Filibuster, it is just assumed that once you pass a coalition of .67 chances of success become more likely. The function  $1(\cdot)$  is an indicator variable for if the coalition size is above 0.67. It is assumed that  $\alpha^* < \alpha$ . With the cloture motion the incentives for coalition sizes change depending on  $\alpha$  and  $\alpha^*$ . If  $\alpha$  is 0.25 and  $\alpha^*$  is 0.1 there is an increase in the coalition size. If  $\alpha$  is 0.5 and  $\alpha^*$  is 0.25 then no change in behavior. With  $\alpha$  at 0.75 and  $\alpha^*$  at 0.5 then coalition size will decrease from 0.71 to 0.67.

The key in this model obviously is what was  $\alpha$  before the cloture was introduced? Based on historical data  $\alpha$  seems to have been 0.25. This model then makes two predictions. First the average coalition size should increase after the cloture and second the variance in the coalition sizes should decrease. Both of these predictions are supported by empirical observations.

While this model does show some of the reasons why cloture may have been

introduced it fails to acknowledge the historical surroundings of the 1917 cloture motion. Cloture was almost forced on the Senate by the public and US president. On top of that some Senators wanted majority cloture while others wanted no cloture at all and supermajority cloture was picked as a compromise. This model also fails at predicting cloture reform. It is always in the LE best interest to have a cloture motion as low as possible. This will cause the jump in probability sooner and let them create smaller coalitions. With the smaller coalitions the LE gains larger benefits from bill passage. If this was the case why is the cloture motion still at a supermajority level?

### **3.2 War of Attrition**

In James Fearon's paper "Political Audiences and the Escalation of International Disputes" he develops a model to explain states responses to international crisis. Fearon uses of a war of attrition model to explain why international crises happen and how they can turn into wars. While this paper does not deal with the Senate or US politics, it is often used to explain the role of the Filibuster in the pre-cloture era. Fearon defines an international crisis as when one state demands or threatens another, then a series of posturing and escalations follow with the conclusion being either one side backing down or war.

The main focus on the model is the role of audience costs and how they reveal a states willingness to attack. An audience cost is what a state faces when they back down once they have entered the crisis. This cost can be thought of as the humiliation the state feels for backdown. Since international crisis play out in the public sphere through troop mobilization, public speeches, and signals of hostility, backing down carries a cost to the public perception of the state. Fearon himself refers to this cost as "diplomatic humiliation".

The model his formalizes has 2 states with a dispute over some prize  $j$ . Time is continuous in this model and starts at  $t = 0$ . At every finite point of time where

$t \geq 0$ , the states have 3 choices:

- 1) Attack
- 2) Escalate
- 3) Back down

The game ends with one of the states chooses attack or quit. If a state choose attack then a war breaks out between the two and each receive their expect utility from war  $w_i$ . It is assumed that  $w_i < 0$ . If a state backs down their opponent gets the prize while they face a audience cost of  $a_i(t)$ , it is assumed the audience cost function is continuous and strictly increasing. As well  $a_i(0) = 0$ , meaning if a state concedes before any escalation beginnings they face no costs. Fearon makes a simplifying assumption that the audience cost function is  $a_i(t) = a_i \cdot t$ . States will only choose attack over backdown if  $a_i \cdot t > -w_i$ . Therefore in this model if escalation goes on for long enough war is a rational choice. States only chose attack if they believe the other side will no longer backdown.

Fearon first looks at this model with the assumption both sides have perfect information. The result are that no war or escalation should occur and once a crisis is entered one side concedes immediately. The reason this occurs is with perfect information both sides know which state will be the first to backdown. Since backing down carries a negative utility if escalation occurs, then the side which would have backed down first quits at the start of the game in order to avoid any costs. Also since war carries a negative utility it is always a worse choice then conceding at then start of the game.

Fearon uses the perfect information game to show that international conflicts arise for two reasons. First, states willingness to attack ( $w_i$ ) is unknown and private information. Second, states have incentive to misrepresent their incentives since if opposition believes they have higher resolve they can last longer in a war of attrition.

Fearon then moves on to develop a model with imperfect information.

The model with imperfect information has one key change in it. Both states know their own utility from war  $w_i$  and the distribution of their opposition  $w_i$ . States start of the game with their beliefs of the other sides willingness to attack. As the game proceeds each sides updates their belief since each round of escalation reveals more information about the true value of  $w_i$ . As escalation goes on each side is less likely to backdown, since only those with high resolve would still be in the game or the other side has past the critical value for backdown with war being their optimal choice.

Escalation in this model serve as signal to the states willingness to attack, this signal is costly in two ways. First, either the state updates their beliefs on their opposition after a few round and then backs down, they then feel the audience costs. The other way the cost is felt is if both states pass their critical point and war is now the optimal choice, however either side would have rather made an immediate concession then be forced into war.

Fearon then looks deeper into how audience costs can effect the game. He finds that the lower the audience costs the more likely that state is to back down. This occurs mainly due to the fact that high cost states give a credible threat whenever they enter into a dispute since each escalation turn reveals more information about their willingness to attack.

This model can easily be applied to the role Filibuster plays in the US Senate. Each senators preferences and intensity of those preferences are private information. Therefore when a bill comes up for a vote which the senator disagrees, he or she can threaten to filibuster in hopes that the bill will be removed. If filibustering is costly and preferences are private information, then when the bill is brought to a vote the Filibuster will help reveal which side has a stronger preference for the bill. As the Filibuster drags on costs will add up both to minority and majority. Therefore which ever side gives in first was the one with lower intensity. In this model Filibusters serve



two purposes. First they reveal information about senators preferences and second bills are not only passed just based on number of votes but also a weighting of the intensity of each side.

The model however is not very applicable to the modern day Senate. It is commonly believed that the modern Filibuster is costless thus there is no war of attrition. Simply a minority will threaten a Filibuster if they have over 40 senators and disapprove of a bill, the majority unwilling to lose legislation time will table the bill and move on. The large time constraint and the two track system, makes the majority unwilling to wait out long Filibusters when they can move on to other legislation. If this model was used to model the modern Filibuster then the audience cost,  $a_i = 0$ , meaning neither side would back down. Applying this model to the modern Senate will yield no real results.

### **3.3 Pivotal Politics Model**

Keith Krehibal develops theoretical model for explaining gridlock in the modern US politics in his book "Pivotal Politics: A theory of US lawmaking". The theory aims to explain two results often seen in US lawmaking. First, gridlock occurs often but it not constant. Second, coalition sizes are regularly larger than a simple majority. Gridlock in this model is defined as when a bill has majority support but fails to pass.

The theory starts off by defining the political spectrum. There exists a line where all policies and Senators can be placed. Liberal policies are located to the left, moderate in the centre, and conservative to the right. As well a status quo exists which is represented by the variable  $q$ , the status quo reflects the existing policy.

There are  $n$  legislators in Krehbiels model which he refers to as the lawmakers. Each player has an ideal point which is single peaked. This means each player has one policy they prefer to all other policies and as you move away from their ideal point, in either direction, their utility declines.

While it only takes a majority to pass a bill, the model does not operate as a simple majority due to the existence of two pivots. These pivots are the Presidential veto and the Filibuster pivot. The US President has the constitutional right to veto any bill which requires 2/3 majority from the House to override. As already discussed the cloture motion in the US Senate can stop a Filibuster which requires a 3/5 majority. The veto pivots ideal point is represented by  $v$ , while the Filibuster pivots ideal point is  $f$ .

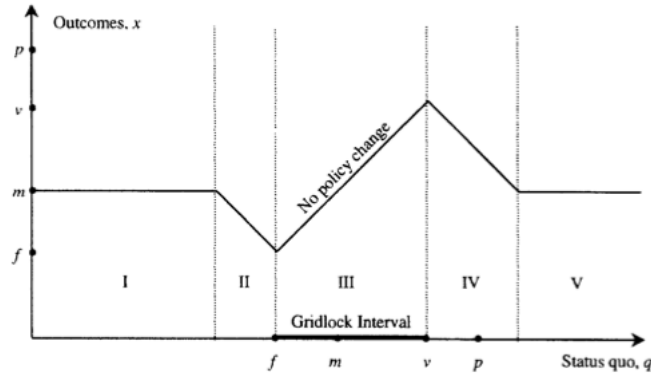
The positions of the pivots all depend on the president position relative to the median voter. If the president is located to the left of the median voter on the line then the veto pivot is whose ideal point and all those to the right make up two thirds of lawmakers. For the Filibuster pivot it is whose ideal point and all those to the left make up three fifths of lawmakers. If the president is to the right of the median voter then veto and filibuster pivot just flip sides as well.

The game follows a very simple procedure. First the median voter proposes some a bill,  $b$ . Filibuster pivot then must choose to either Filibuster and kill the bill or vote yes to the bill. The President then chooses to veto the bill or sign it into law. If the bill is vetoed then the veto pivot must either choose to override the veto or not. Gridlock in this model is whenever a bill proposed by the median voter fails.

This model assumes perfect information. This means all pivot are known and their ideal points as well are known. The only way a bill is defeated in this model is if the status quo is preferred to the bill by either of the pivots.

Three general outcomes can happen under this model. The bill is exactly the median voters ideal point, bill is a compromise between one of the pivots and the median voter, or gridlock occurs. The three outcomes are graphical shown below, which was taken from Krehbiel's book "Pivotal Politics" on page 35, on the y-axis bills proposed by median voter are shown while on the x-axis is the status quo:

For the bill to be exactly the median voters ideal point the status quo must lie



far to one of the extremes of the political spectrum. This occurs in intervals I and V. Under this case the median voters ideal point compared to the status quo is closer to the pivots ideal point. Then when the median voter proposes their point as a bill it will have support from the pivots and pass with near unanimous consent.

For a bill to be a compromise it must lie just outside either one of the pivots ideal point. This occurs in intervals II and IV. Under this case the median voter cannot receive their exact ideal point but there is room for negotiation between the median voter and the pivot on the bill. The median voter will propose a bill which makes the pivot indifferent between it and the status quo. Bills of this nature will pass with over a simple majority, since it has support from the median voter and the pivot.

For gridlock to occur the status quo must lie in between the pivot and the median voter. This occurs in interval III. Under this case what ever bill the median voter proposes one of the pivots will prefer the status quo to the bill. Since the pivot wishes to keep the status quo they will kill the bill and the game ends in gridlock.

This model does an excellent job of explaining how much support is needed for a bill to pass and why gridlock may occur in the US Senate, it fails to adequately explain when reform will occur. One could say that reform will occur when the status quo of the Filibuster lies to the extreme end of the political spectrum. However this answer seems unsatisfactory, since the political spectrum, pivots ideal points, and which senators are the pivots is unknown. This answer provides no real insight into

conditions necessary for cloture reform to occur. This model does an excellent job of providing insight in US lawmaking, but leaves room for explaining the conditions needed for cloture reform.

### **3.4 Legislative Obstructionism**

Eric Schickler and Gregory Wawro write a review of the debates on the impact and potential reform of the cloture motion for the US Senate, in their paper "Legislative Obstructionism". The paper looks at cloture reform of 1917, how rulings from the chair were used to keep the minority in line, Filibusters in the modern Senate, public opinion data on the Filibuster, and finally their own views on cloture reform

The first debate this paper tackles is whether the pivot voter before the 1917 cloture motion was the 100th percentile Senator or the median voter. It was the commonly held belief before the 1917 cloture motion that the Senate operated under unanimous consent, in other words the 100th percentile Senator was the pivot. The reason for this belief is since the Senate had no way to stop debate, it was technically possible for a single Senator to hold the floor in debate until the bill was pulled. Historically there were attempts at the single Senator Filibuster, however due to the required length of time to hold the floor and the large amount of effort required they were often unsuccessful.

Wawro and Schickler point to a previous paper of theirs Where's the Pivot? Obstruction and Lawmaking in the Pre-cloture Senate, where they show that median voter was the actual pivot in the Senate, while the rules allowed for a single Senator Filibuster. The authors say that not only was the effort cost high with such small majorities but the Senate during that time was governed by what they call "relational legislation". Relational legislation is based on work by Avinash K. Dixit work in relational contract. In essence the Filibusters were governed not by official rules but instead by informal threats and norms within the Senate.

If the Senate pivot was 100th percentile previous to the cloture motion and not the median then introducing the cloture should have reduced the average coalition size for passing legislation. Instead the opposite occurred: after the cloture motion was introduced the average coalition size increased. Wawro and Schickler argue this indicates the median voter being the pivot and not the 100th percentile senator.

Wawro and Schickler state the main way the majority was able to pass legislation before the cloture motion with slim majorities was with threats to use rulings from the chair. By threatening to remove the Filibuster entirely or put serious limits on it, they suggest that the majority in the pre-cloture era was able to control an obstructive minority.

There is debate about whether a threat to use a ruling from the chair was truly credible. The problem is that since a ruling from the chair has never been performed in the Senate to reduce the cloture, the minority may not believe the majority will ever follow through on a threat. Wawro and Schickler say that the absence of successful ruling from the chair does not necessarily mean that the threat is not credible. To support their argument they point to the fact that between 1881 to 1917 48% of landmark bills passed with less than 2/3 senators and 20% passed with under 3/5 support. On top of this some notable bills opposed by a sizable minority passed without being Filibustered. It is their contention that the reason this occurred is because the majority would threaten to remove the Filibuster if the minority became too obstructive. They do concede it is hard to separate out how much influence threats of crackdown had compared to the norms Senate and effort costs of performing a Filibuster.

Wawro and Schickler move on to say that studying the Filibuster of the past offers limited insight into the modern Senate. The Filibuster of the 19th century was not only procedurally much different than the modern version, but also the perception of use is much different today than it was in the past. They state that it is generally

accepted that the modern Senate has a costless Filibuster, making the war of attrition model useless. On top of this the public, media, and Senators themselves view the Filibuster as part of the Senate workings, instead of an illegitimate tactic to stop the majority.

On top of the changes to the Filibuster itself, using a ruling from a chair to change Senate rules is now much harder than before they state. Wawro and Schickler state that removing the Filibuster now is much more costly and difficult compared to the early 20th century. Since the Filibuster has become so ingrained in the Senate attempts to remove it now are much harder than in the pre-cloture era.

From the 1940s-1960s cloture reform came front and center due to its role in preventing civil rights reform. Through this period rulings from the chair to reduce the effectiveness of the Filibuster were often threatened, but never successful. Instead most threats ended in compromises and changes to the procedure of the cloture motion. It wasn't until 1975 after a failed attempt at using a ruling from the chair that the cloture motion was reduced to its current level of 3/5 majority (60 senators).

Schickler and Wawro move on to review public opinion survey data on the Filibuster to see the change in trends in how it is viewed. The first survey was performed by Gallup in 1937, it showed that 27% favored the Filibuster, 31% opposed the Filibuster, and 32% did not understand the issue. Gallup performed follow up surveys where one of the questions tested the respondents' understanding of the Filibuster. The results are as follows:

1947: 48% correctly described a Filibuster

1949(January): 54% correctly described a Filibuster

1949(March): 62% correctly described a Filibuster

1960: 54% correctly described a Filibuster

1963: 53% correctly described a Filibuster

1964: 54% correctly described a Filibuster

They point out there seems to be a general misunderstanding of the Filibuster in the American public. For the 1947 and the 1949 surveys they again asked if people supported or opposed the Filibuster. Of the respondents who correctly described a Filibuster 56% opposed the in 1947, while 65% and 56% opposed in 1949 in January and March respectively. In general the public greatly opposed the Filibuster and preferred majority rule.

In 1972 Gallup performed another survey. The results show a change in public opinion, 40% approved majority rule, 38% disapproved majority rule, and 22% had no opinion. It is evident the public is split between supporting or opposing the use of the Filibuster in the Senate.

In 2005 and 2009 more surveys came out. In 2005 50% now approved the use of the Filibuster with 40% opposed to it. In 2009 56% approved the Filibuster with only 37% opposed to the use of the Filibuster. The public now seems to prefer the Filibuster and supermajority rule compared to majority rule. It seems that there would be little public support for attempts at cloture reform.

Wawro and Schickler perform a simple logit regression on recent survey data, where the question posed was whether you support cloture reform for federal judges nomination. The results from the regression are summarized below:

- 1) Republicans are more likely to support reform compared to independents
- 2) Democrats dummy variable is statistically insignificant
- 3) Liberals are less likely to support reform compared to moderates
- 4) Conservative dummy variable is statistically insignificant
- 5) Those without highschool education are less likely to support reform compared to those with highschool education or more

6) The older the respondent is the more likely they support reform

7) The race dummy variable was statistically insignificant

Waro and Schickler end off with their views on reform. As mentioned before, they believe that using rulings from the chair is possible however costly to attempt. As well reform can always occur with 67 senators support (2/3 support is what is needed to change rules by a straight vote). They offer three reasons they believe reform has yet to occur which are:

1) Senators may wish to use filibuster to gain publicity for themselves

2) Majority party believe they will be in the minority in near future

3) Given the polarization of political parties Filibuster helps reduce extreme legislation from being passed

Along with this the change in public opinion means there does not seem to be any public outcry for reform to occur. While this paper provides interesting case studies, statistical work on public opinion, and views into Filibuster reform, it never attempts to formalize a model for Filibuster reform. The model which will be presented in the following section will focus on the last two reasons for why a majority may not favor reform (likelihood of falling into the minority and cost to the party of extreme legislation from opposing party passing), therefore by formalizing a model on reform hopefully insight will be gained into when it may happen.

## 4 Reform Model

This model looks at the simple question of when a majority party is better off without the Filibuster. "Better off" in this model is defined as the ability to maximize the passage legislation the party supports and minimize the passage of legislation they oppose. In this model the Filibuster is always successful unless a cloture motion can



be passed. Therefore under the status quo, if the bill is Filibustered and has under 60% support from the Senate, it will be defeated. Reform in this model is costless. Further assumption are listed below:

- 1) Two parties, Republicans and Democrats where both parties have perfect discipline and no Senators break rank
- 2) One type of reform will be considered: Either reform occurs and cloture only requires 50% of the votes or the status quo remains with cloture requiring 60%.
- 3) Reform can only be changed at the beginning of period 1
- 4) There are N number of controversial bills proposed each period, controversial means majority party favors it while minority opposes it

Republicans know the share of seats they hold before they make their decision on cloture reform. Since Republicans are in the majority they can hold either 50% to 60% of the Senate in period one, or more than 60%.

Let  $\pi_{(t,40-50)}$  and  $\pi_{(t,50-60)}$  be the known probabilities that Republicans will hold 40 to 50 percent of the seats and 50 to 60 percent of the seats in period t respectively. Only these seat distribution matter for reform choice, since holding over 60% or under 40% of the seats will yield the same result regardless of cloture threshold.

Probabilities are based on parties expectations and are conditional on past periods. This means if a party is currently in the majority they will believe they have a higher chance of holding onto the majority in the following period. This is commonly referred to as the incumbency effect. Parties do realize this incumbency effect will disappear and seats distributions follow some long run equilibrium.

Each periods probability is conditional on the pasts period. Meaning if the party is currently the majority there is a higher chance of them maintaining the majority rather than falling into the minority. This is commonly referred to as the incumbency effect.

Probabilities converge to a long run equilibrium which follows a normal distribution with a mean of 50% and a known variance. So while  $\pi_{(2,40-50)} < \pi_{(2,50-60)}$  due to the incumbency effect, as time progress the parties share of the seat distribution will converge to the long run equilibrium. Since normal distributions are symmetric, there exists some  $t^*$  such that  $\pi_{(t^*,40-50)} = \pi_{(t^*,50-60)}$ . At this point the incumbency effect has dissipated and the party has an equal chance of being in the majority as in the minority.

With the Republicans as the majority party at the start of period one they must either pick to maintain the status quo of cloture at 60 Senator or reduce cloture to 50 Senators. They place a value of 1 on any bill they pass and a value of  $-V$  on passage of any Democrat bill. They discount future periods by a rate of  $r$ .

Three cases will be examined:

Case 1: Republicans only care about period 1

Case 2: Republicans care about period 1 and period 2

Case 3: Republicans care about all future years

Each of these cases will also be examined by looking at if Republicans hold between 50% to 60% of the seats and if they hold over 60% of the seats in period one. Let  $G(50)$  and  $G(60)$  be the gain of the Republicans (as present values) with cloture at 50 senators and cloture at 60 senators respectively. The Republicans will pursue reform if and only if:

$$G(50) > G(60) \tag{5}$$

#### **4.1 Case 1: Republicans only care about period 1**

If Republicans have over 60% of the seats they are indifferent between reform or status quo, given they only care about period one. Since they currently hold enough seats to

pass a cloture motion they are immune to the Filibuster, making reform redundant.

If Republicans hold between 50% to 60% of the seats they are made undoubtedly better off by pursuing reform. At their current amount of seats they are unable to pass the cloture motion and all controversial bills can and will be Filibustered. By reducing the cloture threshold Republicans will then be able to pass  $N$  controversial bills in period one.

## 4.2 Case 2: Republicans care about period 1 and period 2

If Republicans control over 60% they face the following choice:

$$G(50) - G(60) = \frac{\pi_{(2,50-60)} \cdot N - \pi_{(2,40-50)} \cdot N \cdot V}{1 + r} > 0 \quad (6)$$

Since they can pass cloture in period one reform offers no immediate benefit. Period 2 is what will determine if Republicans favour reform or not. As mentioned they only pursue reform if and only if  $G(50) - G(60) > 0$ , this occur when:

$$\pi_{(2,50-60)} > \pi_{(2,40-50)} \cdot V \quad (7)$$

The incumbency effect assumption guarantees that  $\pi_{(2,40-50)} < \pi_{(2,50-60)}$ . This means that if  $V$  is not sufficiently large cloture reform will yield a benefit to Republicans.

If Republicans control 50% to 60% of the Senate the analysis follows a similar pattern. The Republicans face the following:

$$G(50) - G(60) = N + \frac{\pi_{(2,50-60)} \cdot N - \pi_{(2,40-50)} \cdot N \cdot V}{1 + r} > 0 \quad (8)$$

Under this case the Republicans gain  $N$  bills in period one which makes reducing cloture more advantageous. However with holding a smaller majority the probability of falling into the minority in period 2 has risen, making cloture reform less desirable.

It is not obvious if pursuit of reform is more likely when Republicans hold a slim majority compared to a large majority.

### 4.3 Case 3: Republicans care about all future years

Case 3 is a simple extension of case 2. Again two cases will be looked at, first where Republicans control over 60% of the seats in period one and second where they control between 50 to 60 percent of the seats:

If Republicans hold over 60% of the seats they face the following:

$$G(50) - G(60) = \sum_{i=2}^{\infty} \frac{[\pi_{(t,50-60)} \cdot N - \pi_{(t,40-50)} \cdot N \cdot V]}{(1+r)^t} > 0 \quad (9)$$

This parallels the two periods models of the incumbency effect versus the loss aversion measure. What the indefinite period model shows us is not only does the size of the incumbency in the following period matter but also its speed of convergence to the long run equilibrium. The slower the speed of convergence the more desirable reform is. The slower the speed of convergence, the larger  $t^*$  is the bigger, the gain to pursuing reform.

If Republicans control 50% to 60% of the Senate in period one they face the following:

$$G(50) - G(60) = N + \sum_{i=2}^{\infty} \frac{[\pi_{(t,50-60)} \cdot N - \pi_{(t,40-50)} \cdot N \cdot V]}{(1+r)^t} > 0 \quad (10)$$

The result here is again very similar to the two period case. The major difference is now the immediate gain becomes less signifangent given the finality of reform. This might be a reason reform has not occurred with slim majorities. While they will see a gain from being able to pass N bill in period one. They are also closer to the long run equilibrium, which means that all else being equal  $t^*$  is smaller than with a large majority. When this is combined with the cost of opposing parties passing their bill

(V), it is no surprise reform is rare.

## 5 Results

The three cases examined all give insight into Senators actions about reform. First, the case where Senators look only one period forward explains why Senators change their opinion on reform depending on whether they are in the majority or minority. The one period model showed that Senators gain an immediate benefit or cost of passing  $N$  bills depending on if they are in majority or minority. However the one period model failed to capture the lasting impact of Filibuster reform. So while the one period model showed why Senators often change their opinion on reform, it fails to explain why Senators do not pursue reform. This is why the two and indefinite period models are needed to explain the true motivation for reform.

Through the two period and the indefinite model it was found that a Senators willingness to pursue Filibuster reform grew with incumbency effect and shrinks with loss aversion. Incumbency effect is captured by three variables. First the likelihood the majority will maintain their status, which is the size of  $\pi_{(t+1,50-60)}$  relative  $\pi_{(t+1,40-50)}$ . Second, the length in which  $\pi_{(t,50-60)}$  is larger then  $\pi_{(t,40-50)}$ , which is  $t^*$ . This means incumbency effect is positively correlated with  $\pi_{(t+1,50-60)}$  and  $t^*$ , while it is negatively correlated with  $\pi_{(t+1,40-50)}$ . For reform to occur the incumbency effect must outweigh the Senators loss aversion, which is represented by  $V$ . As  $V$  increases a Senator faces a higher cost when the opposing party passes legislation Therefore for reform to be pursued the incumbency effect must be larger than the Senators loss aversion.

## 6 Past Reforms

In this section the Results from the multi period model are applied to past reforms to see if the model seems to line up with reality. Since loss aversion is private information

what will be looked at is if the majority party had strong reason to believe they would hold onto the Senate for the next period and future. For this to occur one would expect the majority party had a commanding hold on the Senate and had held the majority for an extended number of sessions.

## **6.1 1917**

As mentioned this reform occurred under a perfect storm of media attention, a president eager for reform, and a piece of legislation which had majority support had just been defeated by a Filibuster. On top of that the Senate during this period was much different than the modern Senate. The two track system didn't exist, Filibusters were still relatively rare and only focused on certain legislation and no cloture rule currently existed. Therefore the model developed does a poor job at explaining this reform. The model developed ignores outside influences such as media and the President. The model also assumes a cloture is currently on hand and one is looking to reduce it. The reform which was pushed through was by a Democrat majority of 54 Senators out of a possible 96, where the Democrats lost the majority in the next election. Models such as Wawro and Schilker's "Legislative Entrepreneur" were much better designed to explain cloture reform during this period of the Senate.

## **6.2 1975**

Democrats had currently held the majority for 7 consecutive Senate sessions. When reform occurred in 1975 Democrats had 61 out of a possible 100 seats, a staggering majority. It seems the Democrats had strong reason to believe they had a large incumbency effect. When a majority has strong reason to believe they will hold onto the majority they will fight to remove the Filibuster. The 7 consecutive majorities obviously gave the Democrats strong reason to think they could maintain a majority. As well with a majority of 61 senators the chances of them falling to a minority were

slim. Therefore as the model predicts, Democrats pursued Filibuster reform.

### **6.3 Current Senate**

Since 1975 no party has held the majority in the U.S Senate for more than 4 consecutive sessions, showing that a small incumbency effect has occurred since the last Reform. The current Senate has a party breakdown of 51 Democrats to 47 Republicans. Reform has been a topic of conversation for the Democrats for this session and the past session (where they had 57 senators). However the model developed says Democrats will only push forward if they believe their likelihood of maintaining a majority is high enough to outweigh their loss aversion. Given the fact they only have 51 Senators and it is only their second session in the majority, it seems the incumbency effect is small. Therefore even though cloture reform has been discussed, it's highly unlikely the Democrats will push through with it. Cloture reform will likely not be occurring any time soon.

## **7 Conclusion**

This paper provided a simple and intuitive answer to the question of when a majority will prefer a Senate with no Filibuster to one with a Filibuster. Two factors effected a parties pursuit of reform, they were incumbency effect and loss aversion. Pursuit becomes more likely with a growth in the incumbency effect, while the opposite holds true for loss aversion. Quite simply a party will wish to pursue reform if the likelihood they will hold onto the majority outweighs the possible cost they will face if they fall into the minority without the Filibuster. When the models results were applied to past reforms it seemed to explain the reform of 1975 reasonable well, since the Democrats appeared to have a large incumbency effect at the time. The model also seems to explain why no reform has occurred since 1975, since no party has had a large

incumbency effect since then.

The model seemed to generally explain past reforms. Outside the introduction of the cloture motion of 1917, both the 1975 reduction and 2005 nuclear option threat agreed for the most part that incumbency effect played a role. This model offers a simplistic view of the Senate and cloture reform, while many factor do effect reform choice which is evident in the 1917 reform, incumbency effect and loss aversion seem to be two of the major factors.

This model offers a starting place for empirical work to begin. If estimates of incumbency effect and loss aversion can be measured then indication about whether a party will truly pursue reform can identified. Also further extensions on the model which capture party cohesion and individual Senator preferences would reveal more insight into when reform pursuit will or wont be successful. This model simple offers a first step in providing an answer to when the Filibuster will become something of the Senate past.



## 8 Glossary

**Cloture:** Is a motion which brings debate to a quick end, currently 60 Senators are needed for the motion to pass.

**Costless Filibuster:** Due to time constraints in the modern Senate along with holds and the two track system, Senators only need to threaten to Filibuster to kill a bill. Therefore Senators no longer need to expend any effort on long floor speeches to Filibuster, making it costless.

**Filibuster:** The use of dilatory tactics to prevent or delay a vote. Most commonly associated with extended debate.

**Holds:** When a Senator requests extra time to study or review a bill before it is brought to a vote.

**Point of Order:** Is when a Senator asks for clarification about Senate rules.

**Ruling from the Chair:** A point of order is raised by a Senator and the presiding officer makes a ruling on the point of order.

**Two Track System:** A system which allows two bills to be debated on the floor.

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