

Supplemental Notes to Lecture 12: Tyranny of the Minority? The Senate Filibuster. Part II



A month before exhorting Republican senators to abolish the filibuster in a 2017 speech delivered in Phoenix (an excerpt of which appeared in Lecture 12), Trump made the same appeal in a series of tweets in late July. “The very outdated filibuster rule must go . . . IT’S TIME!” read one; “Republicans in the Senate will NEVER win if they don’t go to a 51 vote majority NOW. They look like fools and are just wasting time,” Trump declared in another.

We concluded Lecture 12 with a question: since the Republicans held a 52-48 Senate majority at the time, why didn’t they answer Trump’s call and scrap the filibuster? Consider also that McConnell not only kept the filibuster; today, the stance he took has evidently become a point of pride for him: “In 2017 and 2018, I was lobbied to do exactly what Democrats want to do now [i.e., abolish the filibuster]. A sitting president leaned on me to do it. I said no.”

McConnell claims that decision reflected a matter of principle. In the 2019 op-ed published in the *New York Times* that was quoted from in Lectures 11 and 12, he offers an interpretation of recent senate history:

“You’ll regret this, and you may regret this a lot sooner than you think.”

That was my warning to Senate Democrats in November 2013. Their [Senate Majority] leader, Harry Reid [of Nevada], had just persuaded them to trample longstanding Senate rules and precedents. Now that some Democrats [are proposing](#) further radical changes to the Senate's functioning, it is instructive to recall what happened next.

To confirm more of President Barack Obama's controversial nominees, Democrats took two radical steps. First, since the nominees had proved unable to earn the 60 votes necessary to overcome a filibuster, Democrats sought to change Senate rules so that ending debate on most nominations would require only a simple majority . . . Republicans opposed . . . this move . . . on principle. Strong minority rights have always been the Senate's distinguishing feature. But when appeals to principle fell on deaf ears, I tried a practical argument. The political winds shift often, I reminded my Democratic friends. I doubted they'd like their new rules when the shoe was on the other foot.

Unfortunately, Senate Democrats bought what Senator Reid was selling — but buyer's remorse arrived with lightning speed. Just one year later, Republicans retook the majority. Two years after that, Americans elected President Trump. In 2017, we took the Reid precedent to its logical conclusion, covering all nominations up to and including the Supreme Court. So this is the legacy of the procedural avalanche Democrats set off: Justice Neil Gorsuch, Justice Brett Kavanaugh and [43 new lifetime circuit judges](#) — the most ever at this point in a presidency. The consequences of taking Senator Reid's advice will haunt liberals for decades.

McConnell's recounting is in the main accurate, though it's important to draw attention to one central point that he quickly passes over. That is, he asserts that "to confirm more of President Barack Obama's controversial nominees, Democrats took two radical steps." That statement makes it sound as though Obama had willfully defied tradition by somehow nominating judicial and executive branch nominees who were "controversial," a term that in this context is highly subjective and misleading, insofar as Obama's nominees were qualified, in no way ethically compromised (by current political standards), and, for the most part, conventionally centrist, in terms of their ideologies.

If anything was controversial and unprecedented about the nomination process, it was the degree to which Senate Republicans obstructed it. As reported by *Politifact* on April 9, 2017, while *all other presidents combined* faced 82 filibusters against their judicial nominees, from 2009 to 2013 alone, Obama faced 86. That was the context within which Democrats "trample[d] longstanding Senate rules and precedents" by preventing senators from filibustering judicial appointments (with the exception of those to the US Supreme Court, which is something McConnell then did in 2017). In other words, the Republicans trampled longstanding Senate precedents by blocking nominees, and Democrats responded to that provocation by changing the rules to the filibuster, a process that, as we have seen in the last two lectures, has its own peculiar history.

Above all, this cycle of provocation and retaliation provides us with another example of how the political process has been affected by intensifying polarization. (There have been [over 2,000 filibusters since 1917, but half of these have occurred in the last 12 years alone](#).) And given that political climate, it's easy to imagine that McConnell would have eliminated the filibuster for

Supreme Court nominees regardless of how Democrats changed the rules in 2013; alternatively, as a master politician and tactician, McConnell may have baited Democrats into eliminating the filibuster in 2013 (by engaging in unprecedented obstruction), knowing that Republicans would soon have the opportunity to take advantage of that rule change for most judicial nominees when they took back the White House.

Given this context, let's take another look at our original question: why did McConnell, in 2017, thwart Trump's desire to get rid of the filibuster for all legislation?

In "Why Mitch McConnell Didn't Kill the Filibuster," published this past March for the *Democracy Docket*, former Obama speechwriter David Litt argues that the then Senate Majority leader thought the existence of the filibuster ultimately serves Senate Republican interests—no matter whether they are in the majority or the minority.

Why Mitch McConnell Didn't Kill the Filibuster

By David Litt | March 24, 2021



"The reason [McConnell] . . . didn't end the filibuster," Litt maintains, "is that he could pass the bulk of his agenda without it."

Litt then elaborates upon that latter claim:

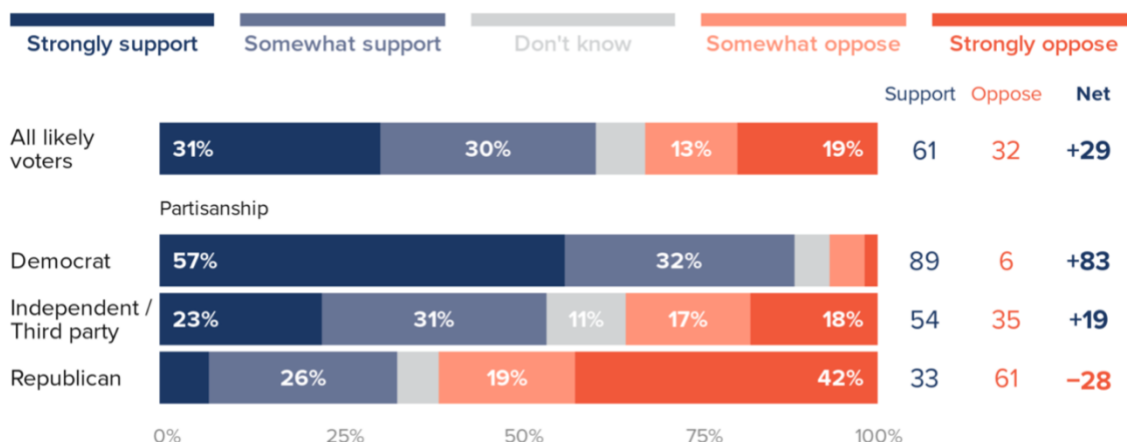
Once per year, the upper chamber can ignore the filibuster and advance a bill with a majority vote. But this bill must follow a strict set of rules. It must deal directly with taxes, spending or the debt ceiling . . . It can add to the deficit for a few years, but not indefinitely. As it happens, the Republican Party's top priorities, shrinking government

and cutting taxes . . . pass the [Budget] Reconciliation test . . . In the Trump era, Republican senators . . . used [Budget Reconciliation] to pass Trump’s \$2 trillion tax cut. There’s another way for McConnell to advance his agenda that didn’t require passing legislation at all: packing the courts. In fact, legislating from the bench is far more politically savvy for Republicans than legislating from Congress, because so much of their agenda is unpopular.

The Budget Reconciliation process to which Litt refers is discussed on the last paragraph of 402 of our text, a form of lawmaking that is once again very much in the news, as we saw in our Media Perspectives Series for Week 9 (which featured reports on the Build Back Better act, something that cannot possibly overcome a Republican filibuster and can only pass through Budget Reconciliation). Litt’s most contentious claim, likely not recognized as such by many Democrats, is that the Republican “agenda” is unpopular; by contrast, the Democrats want to pass socioeconomic policies that are widely supported by clear majorities of voters.

On the one hand, polling data (which, of course, should always be treated cautiously) corroborates that claim, if we go by a survey conducted last week by [Data For Progress](#) that asked respondents to weigh in on the Build Back Better Act.

Based on what you know now, do you support or oppose the Build Back Better plan?



However, support for such policies by no means translates into support for the Democratic Party, which takes us back to our discussion in the Supplemental Notes to Lecture 7 about what motivates voters to go to the polls (i.e., socioeconomic policies, party loyalty, cultural issues, extended family traditions, etc.). The failure to acknowledge these nuances has led to a great amount of infighting among members of the Democratic Party, to an extent much greater than what we have seen among Republicans, though there was an outcry raised against those Republicans who, in a rare move, voted for Biden’s Infrastructure bill last week, an event covered in this week’s Media Perspectives series).

The degree to which Democratic loyalists overvalue and simplify the apparent popularity of many Democratic proposals leads, in turn, for calls to abolish the filibuster, lest their inability to

deliver on campaign promises costs them voters, a calculation that assumes, falsely, that support for certain redistributive policies mirror support for the Democratic Party.

The debate over the future of the filibuster is illuminating in the sense that it reflects and magnifies current political ills that are sure to persist for the foreseeable future, regardless of whether it is abolished.

Quiz Question 5: According to David Litt, why did Mitch McConnell reject Trump's call to abolish the filibuster?

Quiz Question 6: Do you find Litt's explanation convincing? Briefly explain why or why not.

