

2010

# The Legal Debate Over the Senate's Rules: A Dialogue

Aaron-Andrew P. Bruhl

*William & Mary Law School*, [apbruhl@wm.edu](mailto:apbruhl@wm.edu)

---

## Repository Citation

Bruhl, Aaron-Andrew P., "The Legal Debate Over the Senate's Rules: A Dialogue" (2010). *Popular Media*. 379.  
[https://scholarship.law.wm.edu/popular\\_media/379](https://scholarship.law.wm.edu/popular_media/379)

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
[https://scholarship.law.wm.edu/popular\\_media](https://scholarship.law.wm.edu/popular_media)

**WEDNESDAY, FEBRUARY 03, 2010**

## **The legal debate over the Senate's rules: a dialogue**

There has been a lot of discussion lately about reforming the Senate's rules. This isn't especially surprising. The same party controls the presidency and has majorities in both houses of Congress, and the Senate minority has been using the veto powers it enjoys under the Senate rules to block some of the governing party's initiatives. We had a similar partisan configuration during some years of the Bush administration, and there were similar proposals for reform back then (recall Sen. Frist's "nuclear option" for judicial confirmations).

Many of the questions surrounding Senate reform do not really involve law but instead primarily implicate matters of policy, prudence, and political morality. But some part of the debate does present itself as law. That is the part in which I'm interested. Regarding that part, the argumentative moves go something like this:

Q: Why can a Senate minority filibuster?

A: Because the Senate rules permit it. The rules provide that ending debate (i.e., invoking cloture) on a bill or nomination requires sixty votes, not just a majority. So a minority can effectively block action.

Q: Why can't the Senate majority, if it wishes, change the cloture rule, so that debate is easier to cut off? The rules can be changed by a majority, correct?

A: It is true that an actual vote to amend the Senate rules requires only a majority to succeed. But getting a vote held is difficult, because the attempt to change the rules can *itself* be filibustered. Under current Senate rules, ending debate on a motion to change the rules requires the assent of two thirds of those present and voting.

Q: I see. The existing rules are hard to change, so long as they are in force. What about when the Senate has to adopt new rules at the beginning of the next two-year Congress, i.e. in January 2011? Couldn't it adopt more majoritarian rules then (if it wanted to)?

A: But the Senate, unlike the House of Representatives, does not adopt new rules at the beginning of each Congress.

Q: Why not?

A: Because Rule V of the Senate rules provides that the rules "shall continue from one Congress to the next unless they are changed as provided in these rules." Remember, that means debate can be closed only if a supermajority agrees.

Q [becoming exasperated]: But that is sheer bootstrapping. The Senate's rules cannot be the source of their own authority. If Rule V lacks force in the new Congress, then it cannot purport to make itself and the other rules carry over. And Rule V *does* lack force in the new Congress, for one Senate cannot purport to bind future Senates. Entrenchment is not allowed. The House of Representatives certainly recognizes that it cannot bind its successors to follow the rules of a previous House.

A: Ah, now we've come to the heart of the matter. There are not "past Senates" and "future Senates." There is just one Senate running in an unbroken thread for over two hundred years. The Senate can continue its rules indefinitely because it, unlike the House, is a continuing body. Only a third of its members stand for election every two years; two thirds carry over from one Congress to the next. The House expires every two years, but the Senate does not. It is a continuing body with continuing rules.

\* \* \*

This continuing body notion is probably regarded as the most powerful constitutional consideration in favor of the

permissibility of entrenched Senate rules. Its striking feature is the way it uses a seemingly bland structural fact about the Senate - that only a third of the body is up for election each term - to generate the powerful conclusion that the Senate's rules can violate what are often regarded as foundational principles of majority rule and non-entrenchment.

For quite a long time I've been puzzled by this continuing body idea. If you are as fascinated by this sort of thing as I am, perhaps you might enjoy reading more about it in this [paper](#). For those who like your law review articles without suspense, the conclusion is that I don't think this continuing body theory makes much sense. Of course, that doesn't tell us whether we *should* reform the Senate's rules; my argument just establishes, if it succeeds, that this particular justification for the status quo is faulty.

Posted by Aaron Bruhl on February 3, 2010 at 10:13 AM in [Constitutional thoughts](#), [Current Affairs](#), [Law and Politics](#) | [Permalink](#)

#### **TRACKBACK**

TrackBack URL for this entry:

<http://www.typepad.com/services/trackback/6a00d8341c6a7953ef0128774f9997970c>