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Filibuster: A Step Back or A Step Forward for Democracy?

Long thought of as the epitome of free speech, and thus of American democracy, the filibuster has been a key aspect of the American political system ever since the very first session of Congress. While the House of Representatives banned unlimited debate not long after its inception, the Senate has retained this right in its proceedings for the entirety of its existence thus far. However, prolonging debate on the floor of Congress to delay, or prevent altogether, the passage of a bill that could benefit Americans is entirely antithetical to the notion of American democracy. Such actions inhibit the Senate's ability to effectively serve its purpose of passing legislation by strong-arming senators into backing out of their proposed bills or preventing them from going to a vote altogether. The contentious debate over whether the filibuster should be kept in the Senate has ensued ever since the first filibuster attempt but has only recently begun to reach prominence as an issue on the forefront of attacks against American democracy.

To examine the scope of the filibuster today, it is necessary to examine its evolution. In 1805, in an attempt to limit the number of procedural rules in the Senate, Vice President Aaron Burr proposed eliminating what was known as the "previous question" motion (Lau). This motion, still in use by the House of Representatives today, was used to end debate on the floor and bring the matter in contention to an immediate vote. Although this motion was rarely used, with its suspension came the realization by minority groups in the Senate that they would be able to prevent a matter from being voted on by debating the issue for as long as possible until discussion time ran out or the senators proposing the bill capitulated. The first example of this technique was by members of the Whig Party during Andrew Jackson's presidency to hinder his ability to enact legislation. In the following decades, the prevalence of the filibuster began to grow and it became more commonplace in Senate proceedings. Finally, in 1917, "with frustration mounting and at the urging of President Woodrow Wilson, senators adopted a rule (Senate Rule 22) that allowed the Senate to invoke cloture and limit debate with a two-thirds majority vote" (U.S. Senate, 2021). This rule permits a two-thirds supermajority of senators, should they agree, to stop a senator or group of senators from filibustering and bring the matter in contention to an immediate vote. The cloture rule was first successfully invoked two years later. However, despite the positive progress, cloture was still seldom achieved, as a two-thirds majority vote in the Senate was difficult to achieve. In 1975 this two-thirds requirement was reduced to a three-fifths requirement, meaning 60 senators would be sufficient to invoke cloture. In 2013, the Senate altered its rules surrounding the filibuster once again when it determined that they "will be able to cut off debate on executive and judicial nominees with a simple majority rather than rounding up a supermajority of 60 votes" (Peters). This change resulted after mounting frustration over attempts by the minority party in the Senate to block almost every action proposed by the majority party, resulting in years of gridlock. Interestingly, today a senator does not even have to be on the Senate floor to institute a filibuster. Such a "silent filibuster" can be constructively enacted if more than 40 senators simply agree to pursue one (Lau).

The filibuster was initially instituted to provide a fail-safe check against the majority party. The importance of assuring that the minority's position is taken into consideration cannot be understated. As James Madison wrote at the Constitutional Convention of 1787, "in all cases where a majority are united by a common interest or passion, the rights of the minority are in danger" (Madison). To Madison, it was essential to protect the rights of individuals in the

minority from the will of the majority. Although the filibuster is not mentioned in the Constitution, many view it as one of the essential checks against majority power that Madison envisioned. The filibuster prevents a motion proposed by a member of the majority party from immediately being granted without debate, allowing the minority party to voice its concerns about a matter and ensure that its views and the perspectives of constituents are taken into consideration. The goal of this debate time is to lead to negotiation over legislation that will ultimately spark a compromise that benefits as many people as possible.

The merits of the filibuster, however, do not outweigh its drawbacks. In theory, the idea of including the filibuster as a check against the majority just in case those in the majority attempt to abuse their power is valid. But in practice, the filibuster has often been used to block important civil rights legislation. The first illustration of how the filibuster was used to perpetuate discrimination was in 1922. In response to lynchings of African Americans in the South, a bill was proposed that would have “empowered the federal government to prosecute private actors who participated in lynchings and fine counties that failed to prevent the violence” (Zier and Witt). Southern Democrats in the Senate vehemently opposed this bill and organized filibusters to ensure that this bill never reached the floor for a vote. Despite the fact that the cloture rule was in effect, the majority of senators did not vote to invoke Rule 22, and the bill died on the Senate floor at the hands of the filibuster. As a result, lynchings continued for years in the South. According to *The Washington Post*, “in defeating the Dyer Bill, Southern Democrats honed the filibuster as a weapon against civil rights reform” (Zier and Witt).

In 1957, facing the potential introduction of the Civil Rights Act, senators who opposed civil rights progress once again employed the filibuster to deny African Americans their rights. At the time, a norm cascade was occurring as more and more people realized that racial discrimination could not be justified. The Civil Rights Act was proposed to recognize and protect the civil rights of millions of Americans. In what is perhaps the most well-known filibuster in American history, Strom Thurmond talked on the Senate floor for a record 24 hours and 18 minutes in order to prevent the introduction of the Civil Rights Act from making it to the floor for a vote. During his filibuster, Thurmond read from the Declaration of Independence, the U.S. Criminal Code, and the voting laws of 48 states simply to prolong his filibuster as long as possible. Even though the Republican Party did not collectively organize a filibuster to block this legislation, the Democratic Party did not have a two-thirds majority to invoke the cloture rule and end Thurmond’s debate. After his 24-hour record-breaking filibuster, Thurmond ceded the floor. The Civil Rights Act of 1957 passed shortly thereafter, but with major concessions that limited its scope and effectiveness in practice (National Constitution Center).

Additionally, the fact that a silent filibuster is now permissible runs counter to the stated purpose of the filibuster. If the true intent of senators pursuing a filibuster is to air their concerns about a bill in the hope of reaching a compromise, then not having to actually speak on the floor defeats this purpose, as the vehicle for debate has been removed. The absence of a requirement for a filibustering senator to stand up on the floor and talk makes blocking legislation easier. This facet of the filibuster emphasizes how, in reality, the filibuster functions simply to stymie legislation proposed by the party in power, based less on its merits and more on stubbornness and the desire to create partisan gridlock.

In the interest of fostering a functioning democracy, the filibuster, at least in its current form, cannot be kept in the Senate. It too often has been used to curtail advances in civil rights and civil liberties, which must always be at the forefront of American politics and democracy. But with adequate reform the filibuster might return to its intended function. The rules of the

filibuster should be amended so that senators are once again required to physically stand on the Senate floor and speak for the entirety of their declared filibuster. This would deter senators from pursuing filibusters in bad faith but would still allow for argument and debate to take place and prevent majority parties from taking undue advantage of their position. Alternatively, the Senate could alter the rules of the filibuster so that either more votes are needed to trigger a filibuster or fewer votes are needed to invoke cloture and bring debate to a close. Regardless of the chosen pathway, the Senate must act to remedy the adverse effects the filibuster has on the American democratic process.

References

- Lau, Tim. January 27, 2022. "The Filibuster, Explained." *Brennan Center for Justice*.
<https://www.brennancenter.org/our-work/research-reports/filibuster-explained>.
- Madison, J. 1787. James Madison. James Madison's Original Notes on Debates at the Federal Constitutional Convention. *Library of Congress*.
- National Constitution Center. June 19, 2021. "On This Day, Filibuster Fails to Block the Civil Rights Act." <https://constitutioncenter.org/interactive-constitution/blog/on-this-day-congress-passes-the-civil-rights-act>.
- Peters, Jeremy W. November 21, 2013. "In Landmark Vote, Senate Limits Use of the Filibuster." *The New York Times*. <https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>.
- U.S. Senate. June 3, 2021. "About Filibusters and Cloture: Historical Overview." <https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm>.
- Zier, Magdalene, and John Fabian Witt. March 18, 2021. "Perspective for 100 Years, the Filibuster Has Been Used to Deny Black Rights." *The Washington Post*. <https://www.washingtonpost.com/outlook/2021/03/18/100-years-filibuster-has-been-used-deny-black-rights/>.