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The Filibuster: Impeding Democracy

Although considered by many to be both a tool for minority parties to build a platform as well as an essential component of the debates that occur in the United States Senate, the filibuster is actually an archaic accident that has been exploited for political gain. In 1789, the rules for the House of Representatives and the Senate were identical. However, that changed in 1805 when Vice President Aaron Burr recommended that the Senate remove the previous question motion, though this rule would remain in place in the House of Representatives. The previous question motion was used to end debate and bring a proposal to an immediate vote; even while the previous question motion was in place, various political actors were still experimenting with it, so senators agreed to remove it at the recommendation of the Vice President. Although removing the previous question motion produced a cleaner rule book, the Senate deliberation process was altered significantly, effectively creating the filibuster. While the filibuster was unused for many years, striking the previous question motion meant senators now had unlimited time to debate any issue—a change that would eventually have lasting ramifications on the functioning of the United States Senate.

Leading up to the 1840s, the filibuster was not used very often due to a combination of factors. During this period, the Senate generally operated under majority rule, and most legislation that was introduced was able to come to a vote and pass with a simple majority. Also, during the early 1800s, the legislative issues being considered were generally less pressing and the agendas of senators had fewer items of business than they would have in current times. Thus, senators were able to wait out opposing forces and could bring their issue to a vote at a later time in the event someone attempted to debate an issue at length. Essentially, the Senate operated under the condition that if an item was brought up, debate and an eventual vote would occur—unlike the practices of today where senators can halt a vote through use of the filibuster.

After decades of disuse, the filibuster was first used in 1837 when Whig senators utilized their unlimited debate time to prevent the opposition party from expunging President Andrew Jackson's censure. This moment marked the beginning of a period in which the filibuster was utilized in the Senate to stall, and even prevent, legislation from being enacted. By the 1880s, the filibuster was being used more regularly in order to obstruct election law, judicial nominations, and the appointment of Senate officers (Binder).

Due to its use by senators as a tool for obstruction, a growing sense of frustration emerged surrounding the filibuster and, for over a century, senators have attempted to change the rules concerning it. Although many of these attempts have themselves been filibustered by the opposition party, some changes have been successfully implemented along with a handful of informal rules that have served as back-up methods to working around the filibuster. The first change made to the Senate rules regarding the filibuster happened in 1917 when senators formulated Rule 22 at the insistence of President Woodrow Wilson. Rule 22 created the ability for senators to invoke cloture, meaning that if two-thirds of Senators agreed to do so, all debate on an issue would cease after another final thirty hours of debate. The implementation of Rule 22 meant that, in 1919, the filibuster over the Treaty of Versailles was ended, therefore allowing the First World War to come to an end (History.com Editors). Should Rule 22 not have been in place, this crucial agreement may not have been enacted, which would have prolonged the war and likely caused even more war casualties.

Between 1940 and 1960, cloture was only invoked five times (U.S. Senate, June 3, 2021), which senators eventually came to view as a serious issue. Most notably, senators were able to

override a filibuster that opposed the 1964 Civil Rights Act by invoking cloture, but only after the debate first went on for 60 working days (Zier and Witt). Throughout the 1960s, the filibuster was used frequently to stall civil rights legislation, and these practices carried on through the 1970s. By 1975, senators had grown frustrated with the filibuster and amended the number of senators necessary to invoke cloture; now, instead of needing 67 senators (or two-thirds of the Senate), only 60 (or three-fifths of the Senate) are needed to move any legislation to a vote (Snell). However, just as it became easier to end a debate, a second change to the filibuster was made that allowed senators to stall legislation more easily. This new rule no longer required senators to verbally filibuster an issue; rather, senators could pull an issue from the agenda, arguing that it would be theoretically debated instead (History.com Editors). While the entire Senate would no longer have to come to a halt as a consequence of a filibuster, this change also meant that legislation was not actually being discussed and that no real compromises were being made through debate.

In addition to how the filibuster was used, several changes were also made to allow for exceptions as to what can and cannot be filibustered by the Senate. In 1974, the budget reconciliation process was established (Snell); this exception allowed senators to bypass the filibuster when legislation was relevant to revenue or government spending. Budget reconciliation has allowed for 21 pieces of legislation to be passed since 1980 (Kogan and Reich). A notable use of budget reconciliation occurred in 2010 when it was used to make amendments to the Affordable Care Act.

Then, in 2013, Senate Democrats eliminated the need for cloture on executive branch and lower court judge nominees; now, just 50 votes (or half of the Senate) are needed to confirm these individuals. Just four years later, Senate Republicans followed the Democrats' lead and eliminate the 60-vote minimum for Supreme Court nominations, thus reducing the required numbers of votes to 50 (Snell). These exceptions have allowed presidents from both parties to have their nominees confirmed more efficiently as the opposition cannot stall the nomination process, but in recent years has also caused controversy as recent nominees Brett Kavanaugh and Amy Coney Barrett were confirmed despite strong opposition.

Some have argued that the filibuster is useful because it allows for minority opinions to be voiced and thoroughly heard, allowing senators who disagree with the majority to halt the passage of legislation. The American governmental system was created with a heavy dose of fear about the tyranny of the majority; various philosophers including Alexis de Tocqueville and John Stuart Mill as well as American founders such as John Adams and James Madison were concerned that a majority faction could seize ultimate power and prevent minority opinions from being voiced. In the U.S. Constitution, these fears were addressed elsewhere through governmental checks and balances, the separation of the three branches of government, and the Electoral College. It can be argued, therefore, that the filibuster was grounded in this same spirit.

At one point, the framers of the Constitution considered requiring more than a simple majority to enact legislation; however, they eventually concluded that doing so would create an ineffective system of government. Even James Madison, who was notably fearful of the tyranny of the majority, argued against requiring more a simple majority of votes. In Federalist 58, Madison considered the positive effects that may come with requiring a supermajority vote, but ultimately decided that "these considerations are outweighed by the inconveniences in the opposite scale" (Madison). Choosing to operate on a system governed by supermajorities would mean the decision making "power would be transferred to the minority" (Madison). Allowing the Senate to be ruled by the minority would not be without consequences, and Madison warned of

these consequences; governments dominated by the minority would be “subversive of all the principles of order and regular government” and would lead to “public convulsions, and the ruin of popular governments” (Madison).

While the filibuster can provide a voice to the minority party in Congress, and therefore to those supporting the minority party across America, it ultimately halts the democratic process of passing legislation in Congress. With the filibuster firmly in place and cloture required for most debates, virtually all legislation needs 60 votes to pass since the filibuster is seemingly inevitable and cloture will have to be invoked despite needing only 50 votes to be voted into law. Because of the filibuster, the Senate does not actually operate on majority rule, even though majority rule is inherent to democratic voting processes. The filibuster prevents meaningful legislation from being enacted in a timely manner; removing it from the Senate’s rules would allow for a more democratic governing process.

Those who believe that the filibuster is an effective tool argue that, in addition to preventing majority factions from overrunning the government, the filibuster also encourages opposing parties to formulate compromise. To help prevent one party from dictating the activities of the Senate, the filibuster allows senators who disagree with aspects of a piece of legislation to prolong discussion on it. Then, to gain the votes needed to invoke cloture, senators in the majority have to seek compromises with those in the minority party—even if it is just ten opposition senators. Supporters of the filibuster argue that it encourages senators to reach across the aisle and come to a collective decision as to what method is the best to solve the problem at hand. For example, in the case of the Civil Rights Act of 1964, a small faction of Southern Democrats was responsible for stalling the efforts of the Democratic majority and, because of this obstruction, Democratic leaders needed to form a coalition with the opposition party. Democrats had to amend the act to gain Republican support in addition to having to approve a vote on three additional amendments in exchange for the three Republican votes needed to invoke cloture and bring the act to a vote (U.S. Senate, May 14, 2021). While opponents of the filibuster point to all of the losses and changes that were made to gain Republican support, the 1964 effort to extend civil rights to African Americans, along with other minority groups, still serves as an example of bipartisan cooperation.

Contrary to arguments in support of the filibuster on the grounds that it encourages bipartisanship, a rule change made by Senators in the 1970s to allow filibustering through theoretical debate has virtually eliminated all discussions and compromises that may have come out of legitimate debate through a filibuster. Compromises necessary for invoking cloture can be made off the Senate floor, but theoretical debate results in a lack of grievances being heard publicly and allows government operations to occur behind closed doors. Theoretical debate also results in issues being tabled, despite senators claiming they are still deliberating an issue. While this approach stops the Senate from coming to a halt over a single piece of legislation, it also means issues can be pushed aside and never returned to the agenda. If this practice had been in place when Democrats were pursuing the Civil Rights Act, the compromises that were made may not have happened as the Senate could have resumed business as usual even with the legislation still pending. Theoretical debate also renders the argument that the filibuster promotes compromises flawed; historically, the pressure to continue to pass legislation has forced oppositional forces to unite and make a collective decision to keep the Senate running.

In recent years, rather than using it as a tool for compromise, the filibuster has been abused by senators to ensure that laws they disagree with are never enacted. Former President James Madison warned of the dangers that could follow should the government not operate on

the majority rule system; “were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences” (Madison). Madison’s concerns were actualized when various senators used the filibuster to force the majority party to make major concessions on legislation or even to entirely prevent crucial legislation from being passed. In both 1922 and 1934, Senate Democrats used the filibuster to kill anti-lynching legislation. The Dyer Anti-Lynching Bill was first filibustered in 1922 and then again in 1923 and 1924—the bill would never enter the chamber for an official vote (Zier and Witt). The Costigan-Wagner Anti-Lynching Bill was introduced in 1934 against President Franklin Roosevelt’s wishes and would be filibustered for thirty days in 1938 (Little). More recently, in 2010 oppositional forces prevented the DREAM Act from coming into law. Democrats were joined by some Republicans, but they lost members of their own party leaving the vote at 55-41 resulting in the legislation being tabled for the next year. Despite several reintroductions since 2010, the DREAM Act has never received the necessary support to invoke cloture and bring a formal vote. In all aforementioned cases, minority factions were able to prevent the bills from reaching a vote. These represent just a few of many instances in which important legislation was struck down by opposing forces via the use of the filibuster.

Ultimately, the filibuster prevents the democratic process of majority rule from occurring and subjects the entire nation to the will of the minority. While the filibuster is problematic overall, many senators, both Democrats and Republicans alike, have been vocal in their opposition of an all-out repeal of the filibuster, thus, altering how easily the filibuster can be used may be an alternative that would be more amenable. Reinstating the rule that prevents more than one piece of legislation from being pending may encourage senators to achieve a consensus in a reasonable timeframe as they would be subject to the public backlash that would likely come with stalling the entire legislative process. This change would also bring back the filibuster that consists of endless debate on an issue with senators arguing their case as theoretical debate would be eliminated. Facilitation of legitimate discussion may result in actual progress and the formulation of compromises on issues that would otherwise be brushed aside.

The House’s system is grounded in majority rule as there is no basis for filibustering, and there is no reason why this system would not function in the same effective manner in the Senate should the filibuster be eliminated, and the previous question motion be reinstated. A complete repeal of the filibuster would bring about a more democratic process in the Senate and while debate would still occur, the majority would not be subjected to minority’s obstructive measures. Allowing a minority faction to have the power in the Senate reverses the “fundamental principle of free government” (Madison) and has brought, and will continue to bring, disastrous consequences as important legislation is continuously prevented from becoming law.

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