



To: Interested Parties
From: Battle Born Collective
Re: The Filibuster Question
Date: March 23, 2021

Background

Too often, the question on the filibuster gets asked in the abstract, but it's not an abstract question. Key elements of the Biden agenda will fail if the filibuster remains in place.

Moving forward, it will be important to frame the filibuster question in concrete terms, since this is how senators will face it. In addition, it is also important to challenge mythical historical narratives and underscore the limited time that a period of unified Democratic control of Washington has to implement *any* legislative victories.

Frame the Question in Concrete Terms

It is now clear that Republicans will almost uniformly oppose things like the For the People Act. This presents senators with a clear choice: they can pass H.R. 1 or they can preserve the filibuster, but they cannot do both. As historian Julian Zelizer put it, "Protect the filibuster or protect the right to vote." Or as MSNBC anchor Mehdi Hasan put the question to White House Chief of Staff Ron Klain, "The choice facing the Biden administration is: do you support the filibuster or do you support The For The People Act?"

The question can also be framed with senators' specific priorities. The FAMILY Act, a proposal to create a permanent paid family leave program, is a good example. It's been recently reintroduced in the Senate and is cosponsored by the majority of the Senate Democratic caucus¹—including several moderate Democratic senators.

- *Senator, if Republicans filibuster [HR1, or the FAMILY Act, or the Manchin-Toomey background checks bill], would you support efforts to reform or abolish the filibuster in order to pass it?*

Press on Timing

Senator McConnell prevented the Senate from formally organizing for over two weeks after the Democratic majority was officially in place. This is traditionally a time when a new president's Cabinet officials would've been given a glide path to confirmation. The delay has meant that much of this spring's business on the Senate's calendar will be filling more top posts and subcabinet posts in the executive branch. Leader Schumer and other Senate Democrats have said that they'd like to take up voting rights legislation, gun violence prevention legislation, and legislation aimed at curbing the influence of China soon. Taken together with the imminent work on the president's infrastructure priorities and the Senate's work schedule, the question becomes

¹[https://www.congress.gov/bill/117th-congress/senate-bill/248/cosponsors?q={%22search%22:\[%22FAMILY+Act%22\]}&r=1&s=2&searchResultViewType=expanded](https://www.congress.gov/bill/117th-congress/senate-bill/248/cosponsors?q={%22search%22:[%22FAMILY+Act%22]}&r=1&s=2&searchResultViewType=expanded)

one of timing. If passed, the For the People Act, especially, would require time to implement and bring states into compliance—and that’s before the likely legal challenges from Republican Attorneys General emerge.

The Senate moves slowly. Leader Schumer has made a point to press the need for a “big, bold agenda²” many times. The logical question must be how Senate Democrats plan to accomplish this while operating under the constraints of the filibuster, especially given that there are procedural guidelines for Senate debate, and they can be time-consuming.

Potential Questions:

- *How many times will Leader Schumer be willing to allow legislation to be blocked by the filibuster before mounting an effort to reform the rules?*
- *Will there be a point this year where the Senate Democratic caucus sets a deadline for feeling out Republican obstruction? If so, when?*
- *Is there a specific number of bills that Senate Democrats are willing to see fall prey to the filibuster before acting on reform?*

Challenge Historical Myths

Senators of both parties have attempted to place an inaccurate historical value on the filibuster. Senator McConnell recently said that the filibuster on legislation is the “essence of the Senate³.” This notion went mostly unchallenged. The Constitution does not establish a legislative filibuster, and the routine forcing of cloture votes by a Senate minority party is a fairly recent development⁴.

The Senate was designed to be a majority-rule deliberative body, but deliberation has turned to obstruction. The filibuster—itsself a product of a 1917 effort to *end* extended debate⁵—has now become the tool to, in effect, permanently *extend* debate on a bill pending before the Senate (thus killing it), or prevent *any* consideration of a matter by threatening a filibuster (a process known as placing a “hold”). The Senate’s “dual-track” system of allowing for senators to merely threaten a filibuster without actually holding the floor has only been around since 1973⁶. These 20th century developments are not “essential.” They were reforms made to Senate procedure in order to keep up with the times and, in the case of the dual-track reform, ensure that Senate business didn’t grind to a halt.

Moreover, the Framers specifically explained that they opposed a supermajority threshold. This all underscores a problem with the gauzy history individual senators apply to the filibuster: It’s often not rooted in fact. Senators of both parties who attempt to connect the filibuster to

²https://www.democrats.senate.gov/newsroom/press-releases/icymi-transcript_in-interview-with-msnbcs-rachel-mad-dow-majority-leader-schumer-outlines-big-bold-agenda-to-deliver-help-to-the-american-people

³<https://www.nbcnews.com/politics/congress/tremendous-sea-change-democrats-see-path-remaking-senate-filibuster-n1261000>

⁴ <https://www.brookings.edu/wp-content/uploads/2020/09/Reynolds-ENG-Chart-01.jpg>

⁵ <https://www.brookings.edu/testimonies/the-history-of-the-filibuster/>

⁶ <https://www.theatlantic.com/politics/archive/2012/04/how-the-modern-faux-filibuster-came-to-be/255374/>

some grand principle surrounding the very nature of the Senate should be challenged on the merits of their arguments.

Below is some historical background to help inform approaches to this question.

The Framers designed the Senate to be a majority rule institution

The Framers believed majority rule was “the republican principle.”

The Framers saw majority rule as the defining feature of the nation they created. James Madison called majority rule “the republican principle.”⁷ James Wilson, the leading legal theorist among the Framers and one of the original Supreme Court justices, said that “the majority of the people wherever found ought in all questions to govern the minority.”⁸ Benjamin Franklin wrote that a system where “the minority overpowers the majority” would be “contrary to the Common Practice of Assemblies in all Countries and Ages.”⁹ Thomas Jefferson believed that majority rule was “founded in common law as well as common right,” and “is the natural law of every assembly of men.” Jefferson said, “It is my principle that the will of the majority should always prevail.”¹⁰ The Framers’ views reflected those of John Locke, who wrote in his *Second Treatise on Government*, “The act of the majority passes for the act of the whole, and of course determines, as having by the law of nature and reason the power of the whole.”¹¹

Majority rule created the Senate and saved the Constitutional Convention.

The Great Compromise created the Senate and resolved an impasse that threatened to sink the Constitutional Convention. The compromise passed by a single vote, 5 to 4.¹² If the Constitutional Convention had required a supermajority, it would have failed.

The Framers were familiar with the idea that supermajority thresholds promote cooperation - and they rejected it.

The Framers explained that while in theory, supermajorities seemed like they would promote cooperation, in reality, they gave the minority an irresistible temptation to manufacture gridlock. Hamilton wrote in *Federalist 22* that requiring a supermajority “is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory.” The idea that supermajorities promoted cooperation was “founded upon a supposition that it would contribute

⁷ Hamilton, Alexander; Madison, James; and Jay, John. *The Federalist Papers*. Mineola, NY: Dover Publications, 2014. 44.

⁸ Konkle, Burton Alva. James Wilson and the Constitution. Lecture delivered before the Law Academy of Philadelphia. November 14, 1906. 26.

⁹ Franklin, Benjamin; and Franklin, William Temple. *The Works of Dr. Benjamin Franklin: Autobiography*. Vol. 2. Philadelphia: W. Duane, 1808. 473.

¹⁰ Jefferson, Thomas. *Thomas Jefferson: Diplomatic Correspondence, Paris, 1784–1789*. Brett F. Woods, ed. New York: Algora Publishing, 2016. 230; Jefferson, Thomas. *Notes on the State of Virginia: A Compilation of Data About the State's Natural Resources, Economy and the Nature of the Good Society*.

¹¹ Locke, John. *The Second Treatise of Government and A Letter Concerning Toleration*. New York: Dover Publications, 2012. 44.

¹² Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Vol. 2. New Haven, CT: Yale University Press, 1911. 450–53.

to security,” he wrote. Instead, he explained, “its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority.” Hamilton further explained, “what at first sight may seem a remedy, is, in reality, a poison.” It would be wrong “to subject the sense of the greater number to that of the lesser,” because if “a pertinacious minority can control the opinion of a majority,” the result would be “tedious delays; continual negotiation and intrigue; contemptible compromises of the public good,” Hamilton wrote.

The Framers had seen supermajority thresholds cripple the federal government under the Articles of Confederation.

The Articles of Confederation had required a supermajority threshold for passage of most major legislation.¹³ The Framers believed, correctly, that this had been the cause of crippling gridlock. Roger Sherman of Connecticut, the only delegate to the Constitutional Convention to sign all four of America’s founding documents, said that under the Articles, “to require more than a majority to decide a question was always embarrassing.” James Wilson agreed that “great inconveniences” had “been experienced in Congress from the article of confederation requiring nine votes” out of thirteen.¹⁴

The Framers stated that when consensus was not forthcoming, the majority should “go forward” with the “public business” rather than yield to gridlock.

The Framers were realists who sought cooperation but realized it was not always possible. When cooperation was not forthcoming, they believed the majority should move forward. Hamilton wrote that some issues “will not admit of accommodation.” In such instances, the Framers argued, the majority should rule. If the minority were allowed to block the majority, Hamilton wrote, the government’s “situation must always savor of weakness, sometimes border upon anarchy.” When consensus and cooperation failed, the “public business” must “go forward,” he wrote. Allowing a minority faction to stop the majority invited nefarious behavior, Hamilton warned, explaining that such a system “gives greater scope to foreign corruption, as well as to domestic faction, than that which permits the sense of the majority to decide.”¹⁵

The Framers wanted the minority to have a voice, not a veto.

The protections Madison sought for minority factions were much more modest than they are commonly portrayed by defenders of the filibuster. Madison stopped well short of advocating for supermajority thresholds, or giving the minority veto power over the will of the majority in any way. Instead, Madison favored a system of majority rule at every point where a decision was to be made, with the few exceptions enumerated in the Constitution, such as removal from office and Constitutional amendments. In *Federalist 10*, Madison explained “the republican principle” of majority rule: “If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”

¹³ Binder, Sarah; and Smith, Steven. *Politics or Principle? Filibustering in the United States Senate*. Washington, DC: Brookings Institution Press, 1997. 32.

¹⁴ Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Vol. 2. New Haven, CT: Yale University Press, 1911. 450–53.

¹⁵ Hamilton, Madison, and Jay, *Federalist Papers*. 102–3.

Calhoun, not Madison, sought to expand the power of the minority to give it a veto.

In his *Disquisition on Government*, Calhoun explained that his goal was to expand the minority protections created by Madison into a veto power for a numerical minority in the Senate. As he put it, he sought “to give to each interest or portion of the community a negative on the others.”¹⁶ Calhoun’s motivation was to preserve slavery and protect the planter class. By the time Calhoun wrote the *Disquisition*, it had become evident that the limited minority protections the Framers had built were proving too weak to hold off the march of the north’s superior economic model and abolition. While the South was overrepresented in the Senate in proportion to its population, Calhoun “did not consider this overrepresentation sufficient to guarantee the interests of slaveholders,” writes James H. Read, a leading Calhoun scholar.¹⁷ Madison’s system guaranteed the minority a voice, but that was not enough. To preserve slavery, Calhoun wanted a veto.

The Framers believed Senate debate should be limited

The original Senate placed firm limits on debate.

In the original Senate, debate was intended to be thoughtful but limited, and obstruction was deemed beneath the dignity of senators. A set of rules and norms gave senators tools to end debate if their colleagues became obstructive. As Vice President, Thomas Jefferson wrote a manual on procedure that included a section titled “Order in Debate,” which states, “no one is to speak impertinently or beside the question, superfluously or tediously.” Jefferson explained that if senators decide one of their colleagues has become tedious, and “by conversation or any other noise they endeavor to drown his voice,” then in deference to his colleagues, the tedious senator should “sit down.”¹⁸ Routinely, the presiding officer would cut off senators who became dilatory, ruling them out of order. Avoiding tedium and being respectful of each other’s time were points of senatorial pride. As Martin Gold, author of one of the foremost texts on Senate procedure and former counsel to Republican Senate Majority Leader Howard Baker, puts it, “The possibility that a minority of Senators could hold unlimited debate on a topic against the majority’s will was unknown to the first Senate.”¹⁹

The original Senate included a “previous question” rule allowing a majority to end debate.

One of the rules the original Senate included to limit debate was the “previous question” rule, which allowed a majority to impose cloture and end debate. Since obstruction was so rare in the early Senate, the rule was almost never used, and in 1806 was edited out of the rules. This was not, as filibuster defenders imply, a conscious decision to allow unlimited debate in the Senate. As Brookings Institution scholar Sarah Binder testified at a hearing on Senate rules reform, the

¹⁶ Calhoun, John C. *A Disquisition on Government*. Indianapolis: Hackett Publishing Company, Inc., 1953. 55.

¹⁷ Read, James H. *Majority Rule versus Consensus: The Political Thought of John C. Calhoun*. Lawrence: The University Press of Kansas, 2009. 203.

¹⁸ “Thomas Jefferson, 2nd Vice President (1797–1801).” U.S. Senate. Accessed April 18, 2020. www.senate.gov/about/officers-staff/vice-president/VP_Thomas_Jefferson.htm.

¹⁹ Gold, Martin B.; and Gupta, Dimple. “The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster.” *Harvard Journal of Law and Public Policy* 28, no. 205 (2004).

Senate got rid of the previous question rule “not because senators in 1806 sought to protect minority rights and extended debate. They got rid of the rule by mistake.”²⁰

The achievements of the Golden Age passed in a majority-rule Senate.

The first half of the 19th Century is often referred to as the Golden Age of the Senate, when its members included Henry Clay and Daniel Webster, along with Calhoun. The compromises that defined this era passed on a majority-rule basis. The Missouri Compromise, for example, passed by two votes.

Conclusion

These are fair and necessary questions given the scope of Senate Democrats' purported ambitions, and the Senate's window of work between now and the end of the year.

The filibuster question cannot be avoided for much longer. It will be the deciding factor for much of Democrats' legislative agenda moving forward. Senators who have not taken firm stances should be more regularly asked their perspective in connection to an issue they prioritize, and not just in the abstract. Additionally, the narrative surrounding the filibuster must reflect a more accurate history, and not one that senators have crafted to benefit their own preferred outcomes on the matter.

²⁰ Binder, Sarah A. "The History of the Filibuster." Testimony before the U.S. Senate Committee on Rules and Administration. *Brookings Institution*. April 22, 2010.