



To: Interested parties  
Fr: Adam Jentleson, Battle Born Collective  
Dt: May 24, 2021  
Re: MEMO: The filibuster is breaking the Senate

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This memo provides a brief overview of the filibuster. Far from being a foundational feature of the Senate, the filibuster was opposed by the Framers, and has been targeted for elimination or reform by moderates of both parties. The filibuster does not promote bipartisanship, it promotes gridlock, and it is breaking the Senate. Senators concerned for the institutional health of the Senate should favor reform.

**The Framers did not want the filibuster to exist because they knew it would create gridlock.**

- The Articles of Confederation contained a supermajority threshold in its version of Congress, which proved to be a disaster. Learning from this experience, the Framers created the Senate as a majority-rule body with firm rules and norms to limit debate.
- James Madison called majority rule “the republican principle,” explaining, “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.**” [*Federalist 10*]
- Madison explained that requiring “more than a majority” for decisions would mean that, “In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, **the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.**” Requiring a supermajority would mean “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 wrote. [*Federalist 58*]
- Alexander Hamilton wrote that a supermajority threshold, “is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory... **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.**” [*Federalist 22*]
- Hamilton rebutted the idea that supermajority thresholds promote compromise, writing: “**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. [*Federalist 22*]

- The original Senate rules included a “previous question” motion allowing a majority to vote to end debate.
- The Framers were clear that debate in the Senate should be limited, and never obstructionist. In addition to the previous question motion, Thomas Jefferson’s manual of Congressional procedure laid out several ways to end debate. As Martin Gold, former counsel to Republican Senate Leader Howard Baker and the author of a leading manual on Congressional procedure, has written, **“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.”**<sup>1</sup>
- **The Senate was designed to exert its “cooling” influence by other means – not the filibuster.** These other means included: the very existence of the Senate (a bicameral instead of a unicameral legislature); the longer, six-year terms of senators (as opposed to two years in the House); senators’ responsiveness to a statewide electorate (instead of a district); the older age requirement for senators (30 instead of 25 years old); its smaller size (even today, the Senate is small enough for senators to get to know each other, as opposed to the 435-member House); and its staggered elections, where only one-third of the Senate is up for election every two years (as opposed to the entire House).
- Without the filibuster, our system of government still has more checks and balances than any other modern democracy. The filibuster tilts our system from deliberation into dysfunction.

**When the filibuster began to emerge, it created gridlock – exactly as the Framers feared.**

- Obstruction was so rare in the early decades of the Senate that in 1806, acting on the advice of Vice President Aaron Burr, the Senate streamlined its rules and got rid of the “previous question” motion (the rule allowing a majority to end debate). This was not a conscious choice to allow unlimited debate. Rather, the Senate got rid of the rule because obstruction was so rare, no one ever used it. Decades later, this loophole would be exploited to create the filibuster.
- The Golden Age of the Senate, from the 1820s to the 1850s, occurred before the filibuster emerged as a major force, and all the great compromises of this era passed on a majority-rule basis. The Missouri Compromise, for instance, passed by a narrow margin of two votes.
- The filibuster began to emerge around the middle of the 19th century and was immediately seen as detrimental to the Senate. The term “filibuster” was derived from piracy.
- The leading innovator and practitioner of the filibuster was Senator John C. Calhoun of South Carolina, the godfather of the Confederacy. On behalf of southern slaveholders, Calhoun sought to increase the power of the minority far beyond what the Framers intended.

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<sup>1</sup> 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).

- The rise of obstruction during the second half of the 19th century was widely viewed as contributing to a decline in the Senate.

**The supermajority threshold we know today emerged in the Jim Crow era, and was initially used solely to block civil rights.**

- Humiliated by its own gridlock, the Senate created Rule 22 in 1917 as a tool to “terminate successful filibustering” by giving a supermajority of senators the power to cut off a filibuster.
- Instead, powerful southern senators repurposed Rule 22 into a de facto supermajority threshold for civil rights bills – and only civil rights bills. From the end of Reconstruction in 1877 until 1964, the only bills defeated in the Senate by this stronger filibuster – and its new supermajority threshold – were civil rights bills.
- Civil rights bills would have become law decades earlier if not for the filibuster. As early as 1891, bills to end poll taxes had majority support in the House and Senate, and presidents ready to sign them. The same is true of anti-lynching bills in the 1920s and 1930s, and anti-discrimination bills in the 1940s.
- Civil rights bills had broad public support decades before they finally passed. In 1937, Gallup found that 72 percent of the American people supported anti-lynching bills. In the 1940s, Gallup found that more than 60 percent of Americans supported anti-poll tax bills.
- While the supermajority threshold was used to block civil rights bills during the Jim Crow era, bills on all other topics continued to pass on a majority-rule basis.

**Today, the supermajority threshold imposes gridlock on all issues, just as it did to civil rights.**

- Until 1964, the only bills forced to clear a supermajority threshold were civil rights bills. (Medicare and Social Security, often held up as examples of bipartisan achievements, never faced filibusters.) Today, all bills are forced to clear a supermajority threshold – and they face the same gridlock once reserved for civil rights.
- A rule change in 1975 made it easier to filibuster, allowing senators to signal their intent to filibuster without having to hold the floor. Today, senators can “filibuster” with an email.
- As the frequency of the filibuster increased, Congressional gridlock has risen dramatically while bipartisanship has declined.
- This is exactly what the Framers predicted would happen if a supermajority threshold was imposed on the Senate. As Hamilton said, “what at first sight may seem a remedy, is, in reality, a poison.”

**Senators must decide whose side they are on: the Framers and moderate reformers like Henry Clay, or obstructionists like John Calhoun?**

- Throughout history, filibuster reformers have been represented by moderates of all ideological stripes.
  - Henry Clay, the Great Compromiser, tried to get rid of the filibuster when Calhoun pioneered it, because he saw how damaging the filibuster was to the Senate.
  - Senator Nelson Aldrich, a Republican and the creator of the Federal Reserve, tried to eliminate the filibuster in 1891. Senator Henry Cabot Lodge joined Aldrich's effort.
  - President Dwight Eisenhower led an effort to reform the filibuster in 1957.
  - Senate Democratic Leader Mike Mansfield reformed the filibuster in 1975. Senator Robert Byrd helped lead this effort.

**The filibuster is breaking the Senate.** It causes gridlock, not bipartisanship. The Framers predicted this and intended the Senate to be a majority-rule body. Today, paralyzed by gridlock, the Senate is becoming just another failed institution in American life. For the good of the Senate, it is time for reform.