

Read the following articles.. Now answer these questions:

1. Identify what the filibuster is, when it was created, and why it was created.
2. What are two arguments against keeping the filibuster?
3. What are two arguments for keeping the filibuster?
4. How could the filibuster be amended without eliminating it?
5. Complete the following sentence stem with because, but, and so. The filibuster could be eliminated . . .
6. Write a paragraph with a proper topic sentence stating what you think is the proper course of action with regard to the filibuster (eliminating it, keeping it, or amending it).

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What is the Senate filibuster, and what would it take to eliminate it?

Molly E. Reynolds

The Vitals

The Senate cloture rule—which requires 60 members to end debate on most topics and move to a vote—could pose a steep barrier to any incoming president’s policy agenda. Voices on both sides have called for reform in the face of partisan gridlock, and while change may be possible now that Democrats control Congress and the White House, complicated dynamics in the Senate would make it an uphill battle.

The Senate has a number of options for curtailing the use of the filibuster, including by setting a new precedent, changing the rule itself, or placing restrictions on its use.

President Joe Biden has expressed some openness to the idea, depending on how obstructive congressional Republicans become, but it’s ultimately up to the Senate to set the process in motion.

Use of the Senate cloture rule has become far more common in the 21st century. More cloture motions have been filed in the last two decades than in the 80 years prior.

A Closer Look

The Senate cloture rule requires 60 votes to cut off debate on most measures. While Democrats have some procedural options for circumventing the filibuster—discussed in greater detail below—the debate over whether to retain the procedure is likely to remain center stage as legislators work to address the range of challenges facing the country.

Where did the filibuster come from?

While our understanding of the Senate as a slower-moving, more deliberative body than the House of Representatives dates to the Constitutional Convention, the filibuster was not part of the founders' original vision of the Senate. Rather, its emergence was made possible in 1806 when the Senate—at the advice of Vice President Aaron Burr—removed from its rules a provision (formally known as the previous question motion) allowing a simple majority to force a vote on the underlying question being debated. This decision was not a strategic or political one—it was a simple housekeeping matter, as the Senate was using the motion infrequently and had other motions available to it that did the same thing.

Filibusters then became a regular feature of Senate activity, both in the run-up to and aftermath of the Civil War. Senate leaders from both parties sought, but failed, to ban the filibuster throughout the 19th century. Opponents would simply filibuster the motion to ban the filibuster. In 1917, as part of a debate over a proposal to arm American merchant ships as the U.S. prepared to enter World War I, the chamber adopted the first version of its cloture rule: It allowed two-thirds of all senators present and voting to end debate on “any pending measure.” Several changes to the rule followed in the coming decades. More recently, in 1975, the number of votes needed to invoke cloture on legislative matters was reduced to three-fifths (or 60, if the Senate is at full strength). In 1979 and 1986, the Senate further limited debate once the Senate had imposed cloture on the pending business.

Consequently, for many matters in the Senate, debate can only be cut off if at least 60 senators support doing so. (This is not universally true, however, and we will see several consequential counterexamples below.) While Senate rules still require just a simple majority to actually pass a bill, several procedural steps along the way require a supermajority of 60 votes to end debate on bills.

How has the use of the filibuster changed over time?

There's no perfect way to measure the frequency with which the filibuster has been used over time. If Senate leaders know that at least 41 senators plan to oppose a cloture motion on a given measure or motion, they often choose not to schedule it for floor consideration. But the number of cloture motions filed is a useful proxy for measuring filibusters, and as we see below, the number of such motions has increased significantly during the 20th and 21st centuries.

How does the Senate get around the filibuster now?

Senators have two options when they seek to vote on a measure or motion. Most often, the majority leader (or another senator) seeks “unanimous consent,” asking if any of the 100 senators objects to ending debate and moving to a vote. If no objection is heard, the Senate proceeds to a vote. If the majority leader can't secure the consent of all 100 senators, the leader (or another senator) typically files a cloture motion, which then requires 60 votes to adopt. If fewer than 60 senators—a supermajority of the chamber—support cloture, that's when we often say that a measure has been filibustered.

While much of the Senate's business now requires the filing of cloture motions, there are some important exceptions. One involves nominations to executive branch positions and federal judgeships on which, thanks to two procedural changes adopted in 2013 and 2017, only a simple majority is required to end debate. A second includes certain types of legislation for which Congress has previously written into law special procedures that limit the amount time for debate. Perhaps the best known and most consequential example of these are special budget rules, known as the budget reconciliation process, that allow a simple majority to adopt certain bills addressing entitlement spending and revenue provisions, thereby prohibiting a filibuster.

How would eliminating the filibuster actually work?

The most straightforward way to eliminate the filibuster would be to formally change the text of Senate Rule 22, the cloture rule that requires 60 votes to end debate on legislation. Here's the catch: Ending debate on a resolution to change the Senate's standing rules requires the support of two-thirds of the members present and voting. Absent a large, bipartisan Senate majority that favors curtailing the right to debate, a formal change in Rule 22 is extremely unlikely.

A more complicated, but more likely, way to ban the filibuster would be to create a new Senate precedent. Importantly, this approach to curtailing the filibuster—colloquially known as the “nuclear option” and more formally as “reform by ruling”—can, in certain circumstances, be employed with support from only a simple majority of senators.

The nuclear option leverages the fact that a new precedent can be created by a senator raising a point of order, or claiming that a Senate rule is being violated.. If a majority of the Senate votes to reverse the decision of the chair, then the opposite of the chair's ruling becomes the new precedent.

In both 2013 and 2017, the Senate used this approach to reduce the number of votes needed to end debate on nominations. In sum, by following the right steps in a particular parliamentary circumstance, a simple majority of senators can establish a new interpretation of a Senate rule.

What are some ways to modify the filibuster without eliminating it entirely?

The Senate could also move to weaken the filibuster without eliminating it entirely. A Senate majority could detonate a “mini-nuke” that bans filibusters on particular motions but otherwise leaves the 60-vote rule intact. For example, a Senate majority could prevent senators from filibustering the motion used to call up a bill to start (known as the motion to proceed). This would preserve senators' rights to obstruct the bill or amendment at hand, but would eliminate the supermajority hurdle for starting debate on a legislative measure.

A second option targets the so-called Byrd Rule, a feature of the budget reconciliation process. These bills have been critical to the enactment of major policy changes including, recently, the Affordable Care Act in 2010 and the Tax Cuts and Jobs Act in 2017. To guard against a majority

stuffing a reconciliation measure with non-budgetary provisions, the Byrd Rule limits the contents of the bill and requires 60 votes to set aside. Because the Senate's non-partisan parliamentarian plays a significant role in advising whether provisions comply with the Byrd Rule, some senators have proposed diluting the power of the Byrd Rule by targeting the parliamentarian. This approach would weaken the filibuster by making it easier for a majority party to squeeze more of its priorities into a reconciliation bill (which then only requires a simple majority to pass). For instance, the majority party could select a parliamentarian who is more willing to advise weaker enforcement of the Byrd Rule, and, indeed, there is some history of the parliamentarian's application of the Byrd Rule affecting his or her appointment.

In addition, discussions among Democratic senators, led by Senator Jeff Merkley (D-Ore.), have surfaced other ideas that aim to reduce the frequency of filibusters by making it more difficult for senators to use the tactic, including requiring senators who oppose a measure to be physically present in the chamber to prevent an end to debate.

How likely are we to see a change to the filibuster in 2021?

By winning majorities in both houses of Congress and the White House, Democrats have achieved one necessary condition for filibuster reform: unified party control of Washington. Under divided party government, a Senate majority gains little from banning the filibuster if the House or president of the other party will just block a bill's progress.

But the filibuster could still survive unified party control. There would likely need to be a specific measure that majority party senators both agreed upon and cared enough about to make banning the filibuster worth it.

In addition, individual senators may find the filibuster useful to their own personal power and policy goals, as it allows them to take measures hostage with the hopes of securing concessions. For majority party leaders, meanwhile, the need to secure 60 votes to end debate helps them to shift blame to the minority party for inaction on issues that are popular with some, but not all, elements of their own party (Senator Manchin used this in modifying parts of infrastructure bill and build back better). Finally, senators may be concerned about the future; in an era of frequent shifts in control of the chamber, legislators may worry that a rule change now will put them at a disadvantage in the near future.

Read this article on how to reform filibuster

<https://www.vox.com/22260164/filibuster-senate-fix-reform-joe-manchin-kyrsten-sinema-cloture-mitch-mcconnell>

Filibuster reform: Do we really need a second House of Representatives?

In the long term, it is not a good idea to get rid of the filibuster and thus enfeeble minorities and empower very slim majorities.

Ross K. Baker Opinion columnist

The empowerment of the minority party lies at the very heart of the difference between the House and the Senate. Speaker Nancy Pelosi with the barest majority was able to pass the \$1.86 trillion American Rescue Act but with an even smaller majority Senate Democrats needed to invoke an exotic budget rule coupled with a parliamentarian's ruling to get all 50 of their number behind the bill and to pass it but only with the tie-breaking vote of the vice-president.

It's harder to pass bills in the Senate. It has always been harder to pass bills in the Senate. A determined and cohesive majority in the House can usually accomplish pretty much whatever the Speaker, as leader of the majority, wishes. Foremost among those barriers has been the filibuster.

History of the filibuster

President Woodrow Wilson proposed arming the ships with deck guns crewed by navy gunners. Stymied by unlimited debate President Wilson's bill died with the expiration of the 64th Congress.

The new Congress established a rule that debate could be terminated by a vote by a supermajority of members of the Senate. Wilson got his armed ships and the Senate got the filibuster which was seen as a reform.

U.S. Capitol Building on March 22, 2021, in Washington, D.C.

But the filibuster became the notorious tool of Southern senators determined to kill civil rights and anti-lynching legislation which they were able to do to even under the relaxed rule which required the assent of 2/3 of the Senate. It was, however, used infrequently but ostentatiously such as when segregationist Strom Thurmond held the floor for almost 24 hours in an attempt to block the relatively innocuous Civil Rights Act of 1957.

Mitch McConnell: The Senate's filibuster is Kentucky's veto. It stops radical agendas.

The following year, the Democrats won a smashing victory in the midterm elections and would hold the Senate by substantial majorities for the next 22 years. There were even periods in which Democratic senators outnumbered Republicans by as much as 68 to 32 and their numbers never fell below 54. It was during this period with the filibuster intact that the great civil rights, voting rights, and fair housing bills were enacted. This situation prevailed until the Reagan election of 1980 when the GOP regained the majority. During their period of numerical dominance the Democrats lowered the number of votes to shut down filibuster to 3/5 or 60 senators which is the present number.

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Not driving force on slim majorities

An enfeebled minority in the Senate has reason to cherish the filibuster and a solid majority every reason to scrap it. The situation becomes more complicated in the case of slender majorities such as the situation today because the paper-thin Democratic advantage of 2021 could vanish in the 2022 midterm elections. Democrats pushing their leader, Charles Schumer, to eliminate what remains of the filibuster after changes in 2013 and 2017 reduced it to the point where it can be used only on legislation, not judicial or administrative confirmations, have worthy goals in their desire to protect voting rights and promote infrastructure but if forced back into the minority after the next congressional elections they would view the filibuster differently.

A newly-emboldened GOP majority might well push for tax reductions that would cut the ground out from under the American Rescue Act or quash LGBT rights bills that have become GOP targets. A filibuster might come in very handy in those situations when the shoe is on the other foot. Then there is the question of whether all 50 of today's Democrats could even be corralled into eliminating the filibuster.

Why the Senate Should Abolish the Filibuster

Feb. 22, 2021, 2:01 AM

[Listen](#)

Northwestern Pritzker School of Law Professor Tonja Jacobi explains why the filibuster should be abolished and rebuts contrary arguments based on tradition and moderation.

The Senate just showed what Democrats can achieve with their new control of the House, the Senate, and the presidency. The Senate approved a measure Feb. 5 that will allow Democrats to pass a \$1.9 trillion Covid-19 relief plan without a single Republican vote.

There is much more for Democrats to do. Voting rights protection, an effective vaccine rollout, criminal justice reform, and presidential ethics and accountability reforms should all be on the agenda. But these programs, all of which have popular support, are being held hostage to an arbitrary rule of Senate procedure: the filibuster.

If the filibuster continues, every progressive policy will become more difficult to enact and key small-d democratic reforms will be impossible because the filibuster gives the minority Republican Party a veto on most legislation.

Those opposing filibuster reform tend use lofty rhetoric about the Madisonian ideal of counter-majoritarianism and the value of respecting Senate tradition. This is both offensive and misleading, however.

It is offensive because the main tradition of the filibuster was to prevent civil-rights protection for decades while African-Americans were being lynched for trying to exercise their basic civil rights. Still today, filibustering is used to oppose popular policy reform for the sake of allowing every senator to ensure their own state gets its pet projects and pork.

Not a Creation of the Founders

It is also misleading, as the filibuster does not come from the Founding Fathers. Unlike the rest of the separation-of-powers scheme, there is nothing in the U.S. Constitution that requires a super-majoritarian voting rule in Congress.

Some suggest reforming the filibuster, rather than abolishing it, but attempts to reform the filibuster have actually made the situation far worse. For instance, in 1972, a major reform was passed: To overcome obstructionism and a “do nothing” reputation, the Senate was allowed to go on with business while a filibuster was in progress. As a result, senators now do not even need to undertake the Herculean task of talking endlessly, they only need to threaten to do so. Consequently, filibustering is now entirely costless and thus routine.

Others say that the filibuster mitigates the problem of political polarization, but this is just not true: Polarization is empirically worse than ever. Sen. Mitch McConnell (R-Ky.) cried foul in 2013, when Democrats, led by Sen. Harry Reid (D-Nev.), abolished the filibuster for executive appointments and judicial nominees other than for the U.S. Supreme Court. Then in 2017, McConnell abolished the filibuster as applied to Supreme Court nominees. There is no political compromise anymore, and the filibuster is not above partisan division—rather, it is the entrenchment of minority party obstructionism.

Reconciliation Process

There is one important workaround to the filibuster that enabled the Senate to pass the pandemic relief bill. The reconciliation process, a once obscure budgetary procedure, has created a mechanism of avoiding filibusters, but only on some topics.

Initially an attempt to restrain budget deficits by forcing all of the spending that congressional committees proposed throughout the year to “reconcile” with the budget committees’ initial targets, reconciliation is now the primary means by which significant controversial legislation is passed through the Senate. The Bush tax cuts, the Trump tax cuts, and much of Obamacare were passed as budget measures using reconciliation. This is because a reconciliation bill cannot be filibustered—it only needs a simple majority to pass.

Aptly, the term filibuster is a word from the Spanish *filibustero*, meaning pirates. Just as the U.S. does not negotiate with terrorists, so it should not yield to the bullying of pirates, whose goal is to prevent progress and reform.