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## **Filibuster: Both sides support it, but never at the same time**

By Steve Bakke  May 25, 2021



Jimmy Stewart in "Mr. Smith Goes to Washington" (1939). Idealistic U.S. Senator wins a debate featuring a bedraggled Stewart pleading his case during a lengthy filibuster.

Republicans support the filibuster rule.....except when they don't. And democrats consider it a bastion of our form of government.....except when they don't. The filibuster is now in favor with republicans. With democrats, however, it's probably less popular than anything except a worldwide pandemic, or a favorable comment about Donald Trump.

Winds change direction quickly and dramatically on this issue. Consider this 2018 comment by democrat Senator Durbin: *"We have to acknowledge our respect for the minority, and that is what the Senate tries to do in its composition and in its procedure."* That came with his party in the minority.

Here's a 2021 comment by the senator, with democrat Vice-President Harris able to break any 50/50 Senate ties: *"today's filibuster throws a system out of balance.....it promotes gridlock not good governance.....it's become the death grip of democracy."*

Using the "filibuster" rule, any senator can force debate on any legislation on the floor. Originally, to "retain the floor," debate had to be maintained continuously. Eventually, the Senate took a practical approach by establishing "debate-less" filibuster and "cloture" rules.

Under this revision, debate can be "officially" conducted without constant "floor talk," permitting other business to be conducted. The majority must muster 60 votes for "cloture" after which the full Senate votes on it.

Democrats may be introducing several controversial laws that would likely have success passing in the House. For example: Immigration and border control, federal election reform (HR1), and "packing" the supreme court. However, with the "50/50" Senate, democrats will consider eliminating the rule using procedural maneuvering called "the nuclear option."

These "party-line" issues reflect vastly different worldviews about our form of government and the relative importance of our Founders' original intent. For me, originalism is important. If realities change, the Constitution should be clarified by amendment. Thomas Jefferson offered advice on Constitutional originalism and transformational legislation:

- *“.....instead of trying [to understand] what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed.”*
- *“Great innovations should not be forced on slender majorities.”*

The filibuster rule isn't in the Constitution but seems consistent with the Founders' intent. I've read many expressions of concern about creating a “tyranny of the majority,” and their desire for the Senate to be highly deliberative. I've studied correspondence, snippets of debate, and the Federalist Papers which defend and clarify what the Founders were up to.

In the House, the minority can be frozen out of debate. In the Senate, it's intended that the minority be heard and influence legislation. The Founders intended that any transformation of our country be difficult and even messy. The Senate is to be a deliberative body with sometimes excruciating effort necessary to debate, bring cloture, and eventually vote. The filibuster is a tool to force compromise. The Founders' intentions are clear, and still relevant.

Here are recent observations:

- Then democrat Senator Lyndon Johnson (1949): *“If I should have the opportunity to send into the countries behind the Iron Curtain one freedom and only one.....I would send.....the right of unlimited debate in the legislative chambers.....”*
- Then democrat Senator Obama (2005): *“The founders designed this system, as frustrating [as] it is, to make sure that there's a broad consensus before the country moves forward.”*
- Democrat Senator Schumer (2017): *“The legislative filibuster is the most important distinction between the Senate and the House. Without the 60-vote threshold for legislation, the Senate becomes a majoritarian institution, just like the House.....”*

In 2020, Senator Tim Scott proposed criminal justice reform legislation that would have had bipartisan support. Elizabeth Warren successfully denied a vote using the filibuster rule. Democrats also filibustered a large republican COVID relief bill. These were obvious political strategies that successfully denied Trump a bipartisan victory.

Perhaps there are improvements worthy of consideration, e.g., to ensure sincerity, revert to a talking filibuster, or require 41 votes to force a filibuster. We should encourage compromise while resisting impetuous legislation.

Democrats and republicans favor the filibuster as representing good commonsense, but never at the same time. It's now the republicans' turn. The fight over the filibuster's existence will keep returning until the Senate majority wants the minority to have its rightful say. That'll never happen.