



The Past and Future of the Senate Filibuster

Eric Schickler, University of California, Berkeley

Gregory Wawro, Columbia University

In the Senate of the United States, the filibuster has gone from dramatic to ho-hum in just a few years. Filibuster rules allow a minority of forty-one Senators to prevent even fifty-nine out of a hundred from cutting off endless debate and proceeding to an up or down majority vote. Filibusters used to happen infrequently and mainly on very controversial issues, but nowadays Senators and pundits take it for granted that bills cannot pass without a sixty vote supermajority.

Today's virtual gridlock is due to increasing polarization between the two major parties, coupled with the determination of the minority party to any block government actions supported by the majority. Debates rage about whether it is prudent for the minority to obstruct just because it can. But what about institutional rules? Defenders of the now frequently invoked filibuster claim that minority obstruction is a defining feature of the Senate, supposedly grounded in rules and practices that go back to the first Congresses and the constitutional design of the Founding Fathers.

But such arguments are false, as my colleague Gregory Wawro and I have discovered. For most of the Senate's history, a simple majority was sufficient to pass legislation. Routine obstruction using the filibuster is a recent development, not a timeless given. And if a simple majority of today's Senators wanted to modify filibuster practices enabling gridlock, they could do so.

How Things Used to Work

For most of the Senate's history, highly controversial and consequential legislation frequently passed by bare majorities. The two major parties once took different stands on tariffs, which were central to the functioning of the national economy. Yet tariff bills regularly passed with a slim majority voting yes. Of 19 major tariff bills enacted from 1828 to 1932, thirteen were approved with fewer than two-thirds voting in favor, and nine bills passed with less than 60% support. As senators built coalitions to pass legislation, their target was a floor majority – not unanimity or even a supermajority. Beyond tariffs alone, many landmark U.S. laws enacted in the nineteenth century would have failed had the current system requiring supermajority support been in place. From 1881 to 1917, almost half of the landmark laws passed with less than two-thirds of the Senate voting in favor; and a fifth of them passed with less than 60% support.

So how did minority foot-dragging work back then? Nineteenth century filibusters were similar to “wars of attrition.” The minority of Senators opposed to a bill would stay on the floor, using dilatory motions and long speeches to persuade the majority that it was spending too much valuable floor time on the legislation. If the majority was committed, it attempted to outwait the obstruction, forcing the minority to continue to occupy the floor for days on end. In this clash of wills, minority obstruction succeeded only when one of two

conditions remained:

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- when the minority cared substantially more about the issue, and thus was more willing to pay the costs of obstruction than the majority was willing to bear the costs of sitting out the filibuster.
- or when the minority won the public relations battle – persuading some Senators in the majority that the public did not want the legislation, causing them to defect.

In both of these scenarios, filibusters revealed important information. The war of attrition gave supporters a chance to display firm resolve – and at the same time showed just how strongly the minority felt about blocking action, while allowing them to try to sway the public.

The Rise of the Costless Filibuster

Filibusters reveal useful information only if they have significant costs for the obstructors – only if Senate practices force the minority to make its case on the floor over a sustained period. But gradually in the late 20th century, the costs shifted. The contemporary Senate's agenda is so crowded that the majority cannot afford to wait out a filibustering minority. Tellingly, Senate rules impose a much greater time burden on members of the majority, since they must keep fifty senators who support a bill near the floor to ward off quorum calls. The minority obstructionists, by contrast, can get by with only a few members present at any given hour. Twenty-first-century U.S. Senators have such packed schedules – including pressing needs to attend fundraisers to raise the money for their re-election efforts – that even highly motivated majorities cannot mobilize enough members to stay on the floor for the days and weeks it takes to wait out a filibuster. New customs have arisen reflecting the shifting balance of costs, so that modern Senators take it for granted that the filibuster holds as long as the majority cannot credibly claim to have 60 votes to cut it off. Obstruction has become easy and not very visible to the public. The information function is gone.

A Majority Could Change Things Tomorrow – But Do They Want To?

Is the Senate hopelessly hoist on its own petard, trapped in gridlock because of old rules it cannot change? In truth, a determined majority of Senators backed by the White House could change the rules. If a motion to change the filibuster rules were presented and obstructed, reformers could make a point of order that such dilatory tactics violate the Constitution's provision that each chamber makes its own rules. As long as the presiding officer, the Vice President, agrees with the majority and rules in their favor, a floor majority can establish this as a precedent and force an immediate vote on rule changes.

Senators themselves are the true obstacle. The filibuster makes each individual Senator a significant player even when he or she is in the minority, and many enjoy the extra visibility and clout. What is more, moderate members of both parties often prefer not to face a majority vote on controversial bills supported by most others in their party, and the filibuster gives them cover. They can just throw up their hands and claim that a majority vote was impossible.

Changing the current Senate's dysfunctional filibuster rule will require a party majority that has enough votes to do it, pushed into action by outside pressures. Only in that scenario will enough of today's Senators decide to forego personal advantages in favor of majority governance.

Read more in Eric Schickler and Gregory J. Wawro, **“What the Filibuster Tells Us About the Senate”**
The Forum 9, no. 4 (2011).