

THE Nation.

Published on *The Nation* (<http://www.thenation.com>)

The Filibuster FAQ: Fact, Fiction, and Why We Need Reform

John Nichols | January 4, 2011

Cato the Younger, who inspired the 18th-century proponents of a free society who in turn inspired the libertarian [Cato Institute](#) [1], employed the filibuster to slow Julius Caesar's consolidation of authority over the Rome Senate. Caesar jailed [Cato](#) [2] at one point and then thought better of it; the consul released Cato, learned a few legislative tricks of his own and succeeded in circumventing the delaying tactic.

So let's accept that the filibuster has a history.

Let's also accept that the history is one of constant evolution that has always erred on the side of constraining rather than empowering the outliers who would use it to impose the will of the minority on the majority.

As Senate Democrats [maneuver this week to implement a relatively minor reform](#) [3] of the current filibuster rule—beginning [a process that could take weeks, even months](#) [4]—what should we know about Cato's tool?

1. It All Goes Back to Pirates.

Derived from a Spanish word for pirates ("[filibustero](#)," or [freebooter](#) [5]), the term "filibuster" was first used in a legislative context to describe those who hijacked the legislative process. Specifically, it refers to the tactic of grabbing control of the schedule for debating and voting on bills—which is traditionally set by the leadership—for the purpose of achieving an end not favored by the majority.

2. Which Foolish Founder Including a Hijacking Provision in the Constitution?

Don't blame James Madison, or George Mason, or Alexander Hamilton for this one. There is [no provision for the filibuster in the US Constitution](#) [6]. Nor were there any filibusters in the first fifty years of the US Senate. It was not until 1841, during the debate on the bill to charter the Second Bank of the United States, that [something akin to a filibuster was used](#) [7]. Even then, the tactic was so rarely and gingerly adopted that it has been said "sightings of comets were more common than filibusters in the 19th century."

Only in the past decade has the filibuster become a common tactic [8], but what passes for a filibuster today does not resemble what most Americans think of when they hear the term. Today, senators threaten to filibuster and on the basis of the threat, the Senate Majority Leader does not schedule a vote until a super-majority, two-fifths of sworn senators (60 members), are ready to force action. The fake filibuster tactic has become exceptionally common in recent years, as the Senate has adopted a two-track system that allows consideration of controversial legislation to be delayed while other measures advance. The effect has been dramatic. Where in the 1950s, years might go by without a single cloture vote to end debate, more than 130 cloture motions were filed [9] in both the 110th and 111th congresses.

3. The Filibuster is a Parliamentary Procedure, Not a Speech

"Mr. Smith Goes to Washington" [10] provided us with all with an image of what a filibuster looks like—a long exhausting speech by a member determined to block a bad bill. But Senator Jefferson Smith was really just buying time in which to address the flaws in the bill—and to defend himself against trumped-up charges of wrongdoing. By hijacking the legislative process, he bought the time, raised the right concerns and beat the bad guys.

Smith's speech [11] was a rhetorical mishap, ending with the senator's collapse. But the delay worked. And that's the key thing to recognize about filibusters as they have historically been understood; whatever form filibusters take, the point is to free up deliberations, to slow the legislative process, not to prevent it from functioning.

4. Most Famous Filibusters Weren't Filibusters At All

Everyone knows that former South Carolina Senator Strom Thurmond conducted the longest filibuster in Senate history. Thurmond did speak for the better part of 24 hours—the official time was 24 hours and 18 minutes, but the segregationist was allowed to take 90 minutes worth of breaks. But he was actually taking advantage of time allotted [12] for debate by the Senate leadership, not filibustering.

Thurmond was trying to block action on the Civil Rights Act of 1957. The bill, the first major civil rights legislation enacted in the modern era, passed pretty much on schedule after Thurmond blathered on through a long night to a mostly empty chamber. That's because Thurmond acted on his own, without the support of the two-fifths of the Senate needed to extend debate; Thurmond's fellow southerners actually condemned him as a silly grandstander and refused to back his effort.

As the New York Times noted at the time [12]: "The Senate entered the dramatic phase of the debate after Senator Thurmond surrendered the floor. Mr. Thurmond's delaying action was the longest by a single member in the history of the Senate. It was widely but incorrectly described as a filibuster. It was never this, as pointed out by the assistant Democratic leader, Mike Mansfield of Montana, among others, because it was simply a one-man demonstration without the organized and collective characteristic that is indispensable to a filibuster."

5. "Organized and Collective"?

Filibusters are not one-man or one-woman initiatives. They are not even the initiatives of small blocs of senators. Since the rule allowing cloture [13] (the ending of a filibuster by a super-majority

of senators) in 1917—in a move designed to prevent anti-war senators led by Wisconsin's Robert M. La Follette from preventing the Wilson administration's rush to join World War I—a genuine filibuster has required the support of dozens of senators ^[14] to be maintained.

6. The Rules Regarding Filibusters Are Constantly Changing

The adoption of the cloture rule is just one example of the evolution in rules regarding the filibuster ^[15]. And it is a good illustration of how the changes occur. Initially, debate could only be ended if two-thirds of senators casting votes agreed. That was the rule from 1917 to 1949, when the wrangling over civil rights led to a toughening of the requirement so that the votes of two-thirds of the entire Senate membership was required. In 1975, senators elected in the "Watergate" election of 1974 joined with older reformers to significantly lower the required number of votes to end debate—from two-thirds of the entire Senate to three-fifths. Thus, instead of 67 senators, just 60 could invoke cloture. The reform Senate of 1975 also eliminated the "post-cloture filibuster," in which a minority of senators could use points of order to extend debate and delay a vote.

In the 1990s, Republican senators effectively established one of the most radical restrictions on the filibuster, a broadly-interpreted rule allowing budget bills to be brought to a vote with the support of a simple majority of senators.

7. So How Do Filibuster Rules Get Changed?

The general standard, adopted decades ago, is that each new Senate adopts its rules. Vice President Richard Nixon ^[16], in his constitutionally-defined role as the president of the Senate, did so in 1957. Vice President Hubert Humphrey ^[17] reinforced the point in January, 1969, when he held, as the *New York Times* noted, "that the Senate has the right to change its rules by a simple majority at the beginning of each new session."

8. What About the "Nuclear Option"?

In the 2005, Senate Majority Leader Bill Frist, R-Tennessee, and a group of GOP senators floated the idea of having Vice President Dick Cheney—as Senate President—rule that Democratic filibusters of then-President George Bush's judicial nominees were inconsistent with the Constitutional provision that nominees be approved with the "consent" of the Senate. The theory was that "consent" meant a simple majority—not the super-majority required to invoke cloture.

This was referred to as the "nuclear option" ^[18] by critics, as it would have allowed the vice president to rewrite the rules of the Senate. Supporters referred to it as the "constitutional option." In either case, Cheney did not make the move, in part because moderate senators of both parties acted (as the "Gang of 14") to block it. The option remains viable, however, as neither the Senate nor the Supreme Court has examined it.

9. The Senate is Being Rendered Dysfunctional By Filibuster Abuses.

Retiring Pennsylvania Senator Arlen Specter ^[19], who has served as both a Republican and a Democrat summed things up well in his valedictory address, when he decried the way in which abuses of the rules have rendered what was once referred to as "the world's greatest deliberative body" so dysfunctional that: "The days of lively debate, of many members on the floor, are all

gone."

The need for reform is obvious. As he came to the end of his long Senate tenure, Specter proposed a set of reforms that began with a plan to repair the filibuster rule by returning to traditional practices, such as a requirement that those engaging in filibusters actually speak on the floor of the Senate rather than threaten to do so. Specter also suggested that a simple majority vote of 51 senators be allowed to cut off filibusters on judicial and executive-branch nominees, rather than the current 60-vote requirement, and he proposed that the ability of senators to place secret "holds" on nominations be limited. Specter's right when he says that with "a requirement for debate, not just notice... filibusters could be effectively managed as they have in the past."

10. Senate Democrats Are Now Proposing a Classic Filibuster Rule Change.

Specter can't lead the charge for reform ^[19], but the remaining Democratic and independent senators can. No one is proposing to do away with the filibuster. Rather, the proposal is for a reasonable rule changes designed so that, in Specter's words, "filibusters could be effectively managed as they have in the past."

While all members of the Senate Democratic Caucus have indicated support for some sort of reform, the leaders of the push have for the most part been relatively junior senators elected in the 2006 and 2008 cycles. Their proposals, while varying to some extent, would generally leave in place the current 60/40 structure on cloture votes. It would still take 60 votes to end debate and bring a bill to a vote. A minority of 41 senators could keep a debate going but—and this is the core of all reform proposals currently in play—it would have to be a real debate, not merely a delaying tactic that defines the limits of legislative action.

Colorado Senator Mark Udall ^[20] is out front, explaining that:

"The Senate has been called the "world's most deliberative body." But what are we if we don't deliberate? I believe the problems are a two-way street – both parties deserve part of the blame. And if we're going to fix the process, both parties need to work together. To that end, I introduced a proposal to close some technical loopholes in Senate rules so that they can't be used to unfairly hold up business for days at a time. My bill would:

- * Level the playing field between the majority and the minority on cloture, which is the vote to break a filibuster.
- * Provide a way to amend a bill when the majority leader is blocking new amendments.
- * Shorten the timeframe required to stop a filibuster.
- * Reduce the number of votes required to end debate on a single bill.
- * End the reading of amendments when they are made available in advance.
- * End the requirement that Senate committees seek consent to hold meetings.

"My bill will help streamline the Senate's ability to begin substantive debate, while still respecting

the rights of the minority party. But it will limit the use of worn-out rules that only grind Senate business to a halt. Ultimately, I believe this will help us bridge the partisan divide so we can focus on doing the work we were elected to do."

New Mexico Senator [Tom Udall](#) ^[21], Mark's cousin and a former state Attorney General, explains that:

"There are more than 400 bills passed by the House that are waiting for Senate action. With secret holds on judges and administration officials, 50 courts have issued judicial emergencies and important government posts sit vacant. Blocking a vote with a filibuster used to be rare and reserved for extreme situations. Today every major bill faces one. There have been more filibusters since 2006 than the total between 1920 and 1980. Senate rules are supposed to allow for substantive debate and to protect the views of the minority—as our founders intended. Instead, they are abused to prevent the Senate from ever voting on critical legislation."

Tom Udall complains that "too much of the Senate's business is decided in backroom deals, behind closed doors. A single senator can anonymously put the brakes on a bill or nominee to score political points." To address the problem, he says: "The Senate should reform its rules so that senators are held accountable to them, and so that the public can judge their elected officials by the ideas they bring to the table, not on their ability to manipulate the Rules. Adopting the rules by a simple majority at the beginning of each Congress is a warning against extreme obstruction because senators know that abused rules can be changed."

That's a sound argument that makes sense. And Udalls are sound champions, as is Oregon Senator [Jeff Merkley](#) ^[22], a veteran state legislator, who was asked recently whether he was proposing to gut the filibuster. "Well, actually," he responded, "we're not planning to gut it, we're planning to make it do what we all think it does, that is if 41 folks say, debate should continue, then the debate should continue but you shouldn't be able to object, go home to dinner, take a vacation and never appear on the floor and explain to the American people what to stand for. So, if you say to be continued, you need to be ready to have continuous debate on the floor, make your stand, give the American people the ability to say, hey, you're a hero or you're a bum, but not to just simply leave the Senate paralyzed, unable to do anything."

Merkley has been especially effective at putting the reform proposal in historical perspective, arguing on [MSNBC's Ed Schultz Show](#) ^[23] recently that the traditional conception of the filibuster was a good one. "This was all about making sure that every voice is heard before a decision is made but that courtesy has now been turned into a regular abusive practice. For example, on food safety, a bill we just completed. There was a filibuster on motion to proceed to the bill, on an amendment on the bill, and on final passage of the bill and each time and we think filibusters stand on the floor and talk, no, it's simply an objection that is filed and when that objection is filed... then they can walk away and we don't have debate on the floor. So, we're saying there must be debate on the floor that serves the people, that serves America."

Merkley says that what he and others are proposing is "really a minor change." He is right. The history of the filibuster is, in many senses, one of minor changes. But that does not diminish their necessity of those changes—and of this one—to the functioning of the Senate and to that prospect of forming the more perfect union that has always been the genesis of reform.

11. So What Happens Now?

When the 112th Congress convenes on Wednesday, the Senate will be called into session. It had been thought that one of the leading reformers, probably Tom Udall (although some have suggested the move should be made by a senior Democrat such as Michigan's Carl Levin), would object to maintaining the rules as they stood in the 111th Congress [24]. Then the fireworks were supposed to go off. The display is likely to be delayed [4], however. Senate Majority Leader Harry Reid, D-Nevada, has indicated that he wants to call the chamber into session only briefly and then delay wrangling over the filibuster until the first full day of deliberations, probably January 23 or 24.

Reid is trying to cut a deal with Republicans to avoid a fight.

If the majority leader fails to do so, Republicans will object to almost any reform proposal. Technically, that need not be a problem. The Democrats should be able to make the change, as the returning Democratic senators have signed a letter to Reid indicating support for reform of rule. With a signal from Vice President Joe Biden [24], a former senator who would likely echo the determinations of Richard Nixon and Hubert Humphrey that the chamber has the power to reform its rules at the opening of a new session, most structural barriers would be cleared.

But... how coherent the Democratic caucus really is remains to be seen. There are also questions about whether Reid will back the sort of changes proposed by Merkley and others or only a milder reform worked out as a compromise with Senate Minority Leader Mitch McConnell, R-Kentucky. The lesser reform might involve a limit on the range of issues that might be subject to filibusters, or perhaps a reduction in the amount of time devoted to debate after a cloture vote.

If Democrats don't stick together, if a compromise is proposed, if the Republicans offer a gambit of their own, the wrangling could go on for days, even weeks. Past attempts at filibuster reform—advanced in arguably less partisan times—have extended through several congresses. Then there is the matter of a potential court challenge.

That said, the filibuster has been reformed before. It can and will be reformed again. And, considering the fact of a divided Congress—with Democrats controlling the Senate and Republicans controlling the House—it is not like the 112th is shaping up as a particularly productive session. So why not wrestle with the question of reforming a dysfunctional Senate?

12. Who Says It's Time for Reform?

Not just Democrats, that's for sure. Republicans have backed filibuster reforms in recent years and some GOP senators still admit that it would be a good idea to address the worst abuses. Norm Ornstein [25], a congressional scholar at the conservative American Enterprise Institute, is a backer of reform, saying that: "The filibuster should be about a minority who feels so intensely about something of significant national importance that they're willing to bring everything else to a halt and show their intensity by sacrificing for it."

Reform groups such as Common Cause [26] and the Brennan Center [8] for Justice have outlined the case for reform.

The Alliance for Justice backs reform. So, too, does the Leadership Conference on Civil and Human Rights.

The Council on Foreign Relations [27] argues that filibuster abuses raise national security concerns.

Many of these groups have been working together in and around the Fix the Senate Now [28] coalition, which has pushed the campaign for reform with a smart, detailed online campaign [28].

Major newspapers from the Los Angeles Times [29] to the Minneapolis Star-Tribune [25] and the New York Times [30] back reform.

So, too, do former senators and vice presidents, including Walter Mondale [31], who argued this week that: "The filibuster need not be eliminated, but it must no longer be so easy to use.

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