



June 17, 2021

United States Senate
Washington, DC 20510

Dear Senators:

Amid calls to eliminate the filibuster entirely or to preserve it as is, I write to you today on behalf of the Project On Government Oversight (POGO) to propose and explain reforms to the filibuster that would promote bipartisan compromise and encourage the timely passage of legislation while still protecting the rights of members in the minority party.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

The filibuster no longer fosters the consensus necessary to enact critical reforms to address the challenges of the day and instead often stands in the way of compromise. It has become a method for the minority to easily block legislation rather than force the dissenting lawmakers to work with the majority on a path forward. A rule that ensures almost nothing ever gets done is not worth preserving in its current form.

The Senate was once known as the greatest deliberative body in the world, a phrase that no longer characterizes the chamber. In describing the need for the Senate, George Washington famously spoke to Thomas Jefferson of the “senatorial saucer.” Washington is said to have told Jefferson that the framers created the Senate to “cool” legislation from the House of Representatives much like a saucer cools hot tea.¹ Key to cooling pieces of legislation is the opportunity to carefully and thoughtfully consider relevant issues and incorporate viewpoints from as many perspectives as possible. This is sometimes accomplished by using the filibuster to slow consideration of legislation. However, the filibuster has become an instrument of frequent and casual obstruction through which lawmakers can avoid taking difficult votes and grind the gears of government to a halt.

Regardless of where one stands on any given piece of legislation among those under consideration in the Senate, it has become undeniable that the chamber is not working particularly well or as it was intended to work. Not only is it difficult to pass significant legislative packages, Congress has repeatedly struggled to keep the federal government funded

¹ “The Senate Created,” United States Senate, https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm. (Accessed June 3, 2021)

and argues over spending bills until the final hour, sometimes resulting in a shutdown of the federal government.²

Some lawmakers have declared that the filibuster should remain essentially untouchable, claiming that it promotes necessary compromise and prevents highly divisive legislative plans from coming to fruition.³ On the other hand, many lawmakers have openly called for eliminating the filibuster entirely, arguing that it stands in the way of passing important legislation.⁴ This is a false choice.

The filibuster is no doubt a powerful tool that over time has forced parties to work together to forge bipartisan consensus. However, the modern-day filibuster no longer reliably fosters compromise. The filibuster and other anti-majoritarian rules and procedures were not designed to replace “tyranny of the majority” with a tyranny of the minority. Rather than stand by a parliamentary procedure that no longer promotes bipartisan proposals, we should find solutions to adjust the concept of the filibuster.

The filibuster does have some merit as a tool that can keep a small majority from unilaterally enacting far-reaching legislation with no support from lawmakers on the other side of the aisle, which is why POGO does not advocate for eliminating it entirely. But the filibuster is not sacred. Indeed, it has been reformed several times in the recent past, and it is again necessary to reform it in a way that encourages robust debate.⁵

Below, we discuss several options to reform the filibuster that strike a balance between protecting the rights of the minority and ensuring the minority cannot abuse the tool as a de facto veto on all legislation.

Inverted Filibuster

Under the current framework, 60 votes are needed to invoke cloture and end debate on a bill and move to final consideration, placing the burden on the majority to whip support for the bill.⁶ Inverting the filibuster would instead place the burden on the dissenting minority to actively come up with the votes to block it. Under this procedure, 41 votes would be required to continue debating, or filibustering and preventing advancement of, the bill.

² “Government Shutdown 2019: Latest Updates and Reaction,” *Politico*, 2019-2021, <https://www.politico.com/latest-news-updates/government-shutdown-2019>. (Accessed June 14, 2021)

³ Joe Manchin III, “Joe Manchin: I Will Not Vote to Eliminate or Weaken the Filibuster,” *Washington Post*, April 7, 2021, https://www.washingtonpost.com/opinions/joe-manchin-filibuster-vote/2021/04/07/cdbd53c6-97da-11eb-a6d0-13d207aadb78_story.html.

⁴ Matthew Brown, “Filibuster Fight Heats Up As Senators Clash Over Voting Rights,” *USA Today*, March 28, 2021, <https://www.usatoday.com/story/news/politics/2021/03/28/filibuster-fights-heats-up-senators-clash-over-voting-rights-bill/7036418002/>.

⁵ Tim Lau, “The Filibuster, Explained,” Brennan Center for Justice. April 26, 2021. <https://www.brennancenter.org/our-work/research-reports/filibuster-explained>

⁶ Christopher M. Davis, Congressional Research Service, *How Measures Are Brought to the Senate Floor: A Brief Introduction*, RS20668, (updated October 16, 2019), <https://fas.org/sgp/crs/misc/RS20668.pdf>.

This approach has several benefits. First, if 41 or more senators were required to be physically present to proactively vote to block a bill, the casual use of the tool for purely obstructive purposes would likely decrease. Senators would likely not be pleased that they would be forced to remain in town and be so direct in their opposition to critical pieces of legislation. Second, this new approach would force the majority to better explain to the minority and the American people why a piece of legislation is necessary when the minority filibusters. Finally, with this approach, it would be unlikely that senators would filibuster appropriations bills, since the majority in both caucuses typically does not support shutting down the government.

Inverting the filibuster would, in essence, eliminate the 60-vote threshold for legislation. In other words, legislation could pass with a simple majority vote. But the inversion reform would still strike the necessary balance by giving the minority the opportunity to slow or halt legislation for as long as its members are willing to expend the energy to hold the floor with a filibuster. In situations where opposition to a bill is truly rooted in substantive disagreement or deeply held principles, this kind of effort would be worthwhile. On the other hand, senators may not deem such effort to be worth the cost if they were using the filibuster simply because it is an easy way to derail the majority's agenda.

In short, inverting the filibuster could help get the gears of the Senate moving more smoothly again and reserve it as a measure to be used only in extraordinary circumstances.

Duly Chosen vs. Present and Voting

Currently, three-fifths of the senators “duly chosen and sworn” must vote to end debate, or invoke cloture, in the Senate.⁷ This means that 60 votes are necessary to defeat a filibuster even when fewer than 100 senators vote on a measure. We saw this happen recently when, by a vote of 54-35, the Senate on May 28 rejected a House-passed bill establishing a commission.⁸ We suggest that the Senate consider a modification to this system. To encourage debate and active participation, bill supporters should have to get three-fifths of senators “present and voting” to pass a bill, rather than three-fifths of the entire Senate. For example, if there are only 95 senators present, cloture could be invoked with 57 votes.

This reform would force members to show up for debates and votes on bills. It would also prevent members from avoiding tough or unpopular votes. If senators wish to block a bill, they should have to go on the record to do so, but the current rules allow them to kill legislation without even voting.

⁷ “About Filibusters and Cloture,” United States Senate, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm>. (Accessed June 14, 2021)

⁸ United States Senate, “Vote Summary: On the Cloture Motion” (Motion to Invoke Cloture Re: Motion to Proceed to H.R. 3233), Roll Call Vote 117th Cong., 1st Session, May, 28, 2021), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00218.

It's important to note that before changes to the rule in 1975, showing up and voting on measures was the practice, though the cloture threshold was higher, requiring two-thirds of the Senators present and voting to end debate on all matters.⁹

Simple Majority for Motion to Proceed

Another reform worth considering is eliminating the filibuster on motions to proceed, while leaving it in place on the actual bill vote.¹⁰ Under current Senate rules, unless there is unanimous consent of all senators to begin debate on a bill, the majority leader must make a motion that the Senate proceed to its consideration.¹¹ This motion to proceed is debatable and subject to a vote and is often what is actually filibustered, rather than the underlying bill. It is likely that most of the public is not aware that all too frequently, their elected representatives in the Senate aren't even debating the critical issues of the day on the Senate floor because of the filibuster.

Under this proposal, a motion to proceed would still be debatable, but it would only take a simple majority vote to pass and for the Senate to take up the bill. Final passage would still be subject to a 60-vote threshold. While the minority could still block final passage, the Senate could at least have a rigorous public debate and make the case to the public for why the bill should or shouldn't pass.

Conclusion

There has been much discussion in recent months about the future of the legislative filibuster in the Senate. The kinds of reforms detailed above would not instantly clear the way for the Senate majority to pass its legislative agenda. Nor would they prevent a unified minority from blocking a bill its caucus opposes. What these reforms would do, either on their own or with one or more reforms enacted in conjunction with one another, is facilitate rigorous debate about significant legislation, setting the stage for bipartisan compromise where possible.

The Senate has the opportunity to bring about long-needed filibuster reform and reestablish the Senate as our preeminent national deliberative body. To that end, I urge you to consider these critical and achievable recommendations—not just so that you can pass a particular piece of legislation, but to help ensure the Senate can once again deliver for the American people.

If you have any questions or need additional information, please contact me at danielle@pogo.org.

Sincerely,

Danielle Brian
Executive Director

⁹ Valerie Heitshusen and Richard S. Beth, Congressional Research Service, *Filibusters and Cloture in the Senate*, RL30360 (April 7, 2017), 9, <https://fas.org/sgp/crs/misc/RL30360.pdf>.

¹⁰ “Glossary Term: Motion to Proceed to Consider,” United States Senate, https://www.senate.gov/reference/glossary_term/motion_to_proceed.htm. (Accessed June 14, 2021)

¹¹ Christopher M. Davis, *How Measures Are Brought to the Senate Floor* [see note 6].