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FORUM

Tyranny of the Minority: The Unconstitutionality of the Filibuster

Madeleine Polubinski

In recent years, congressional gridlock has focused national attention on the Senate's filibuster. The filibuster is the process by which a minority of senators delay or prevent a vote on legislation by speaking as long as possible on the Senate floor, until three-fifths of the Senate invoke cloture, which moves the chamber to a vote. While the debate over the filibuster typically centers on its impact on governance, a different debate has been simmering among legal scholars for years: is the filibuster even constitutional? After all, the filibuster is not authorized in the Constitution, nor is it expressly prohibited. I argue that the filibuster in its original, purest sense is constitutional, but that is not the filibuster we have today. In its current form, the filibuster is unconstitutional because it disrupts the Senate's legislative process as outlined in the Constitution and has feeble historical support.

The text of the Constitution and the history of Congress suggest that the filibuster as a debate-enhancing mechanism is constitutional. As legal scholar Michael Gerhardt argues, "the filibuster derives its principle authority from the Senate's express power to design its own procedural rules to govern its internal affairs." At its core, the filibuster regulates internal procedure, and thus the supermajority requirement for cloture is well within the Senate's power.

Many scholars argue that cloture requirements reflect many of the principles underlying the Senate. Despite its potential for abuse, the filibuster, fundamentally a mechanism to continue debate, embodies the Senate's deliberative nature. Although the Constitution makes no mention of a filibuster, the process has a long

history dating back to 1806, which some argue proves its legitimacy. Furthermore, the filibuster may enhance protections of minority interests and promote consensus, producing more agreeable and thorough legislation.

However, the filibusters' debate-promoting potential is inextricable from, and ultimately overshadowed by, its obstructionist implementation. For more than a century, senators have exploited cloture rules to stall Congress or block legislation altogether. Filibusters have become less about debate and more about grandstanding for media attention or simply killing time to stall a bill. After exhausting relevant topics, which are rarely genuine efforts for further deliberation, speeches often devolve into unrelated topics that range from discussions of salad dressing recipes to recitations of each states' voting laws.

At best, today's filibuster sees senators belaboring well-known objections to bills. At worst, it shuts down debate and stalls the Senate, delaying or blocking legislation. In an even more flagrant deviation from the filibusters' supposed deliberative function, filibustering today usually does not even require debate. "Silent filibusters" allow senators to block legislation without debate by merely voicing their intent to filibuster. Silent filibusters are a complete perversion of the filibusters' deliberative potential and prove that the process functions as nothing more than a three-fifths majority requirement for regular legislation.

When considering the filibuster as a supermajority requirement for regular legislation, it is clearly unconstitutional.2 As a textual matter, the Constitution appoints the Vice President as the tie-breaking vote in the Senate, providing that they "shall have no Vote unless [the Senators] be equally divided." This provision implies that the Senate must pass regular legislation by a majority vote. The Framers of the Constitution, while concerned with tyranny of the majority, generally favored majority rule except for certain cases. In fact, the specification of supermajority requirements in the Senate elsewhere in the Constitution, like for the ratification of treaties, indicates that the Framers never envisioned a supermajority rule for regular legislation.1

The Framers, famously wary of tyranny of the majority, devised a system of governance to protect minority rights and promote deliberation *without* a filibuster. The Federalist Papers outline how checks and balances, federalism, and other structural mechanisms prevent abuses of power, suppression of minority interests, and rash government action. The Framers clearly feared tyrannical majorities and an overly powerful legislature. However, even they deemed a supermajority cloture requirement unnecessary, undermining the argument that the filibuster enhances the Senate's intended function.

Furthermore, the filibuster lacks a firm historical foundation to support its constitutionality.3 A high-minded commitment to debate did not motivate the filibuster. Rather, the Senate accidentally opened the door for it in 1806 because they deemed the original debate-ending mechanism unnecessary. Even then, no Senator exploited this mistake until 1837, when rising partisanship fostered more obstructionist tactics.

Proponents of the filibuster claim that the Senate effectively affirmed the constitutionality of its cloture rules during every filibuster or cloture motion since the 1800s. However, the persistence of a practice does not legitimize it. This is especially true for a practice like the filibuster, which inherently impedes revision, violating "anti-entrenchment," a principle that forbids a past legislature from binding a current legislature to a rule or practice it would otherwise reject.4 Because a supermajority is necessary to eliminate the supermajority requirement for cloture, a formal change to Senate rules is virtually impossible because minority senators have no incentive to cede their power.

While the filibuster is theoretically constitutional, its current usage violates the Constitution because its obstructionist function has overtaken its debate-enhancing potential. Rather than promoting debate, it effectively imposes an unconstitutional supermajority requirement on the Senate to pass virtually any piece of legislation. Ultimately, the filibuster's problems have arisen out of its implementation. As political parties solidified and polarization increased, so did the incentives for politically motivated obstruction. If senators genuinely used the filibuster to continue productive debate and moved to a vote after sufficient discussion, it may pass constitutional muster. However, today's divisive political climate and the long-standing violation of those standards make it impossible to return to old norms. Unless the Senate reforms the filibuster to curb its obstructionist implementation and restore its deliberative function, it must be abandoned on constitutional grounds.