The Filibuster, the Constitution, and the Founding Fathers

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Perhaps the most memorable pop-culture image of the American political system is that of Jimmy Stewart staging a valiant, one-man filibuster against a corrupt Senate in the film Mr. Smith Goes to Washington. Stewart's character used the filibuster as the rock to slay the Goliath majority. Surprisingly, that image extends beyond motion pictures; very few political scientists have ever questioned the mythical powers of the filibuster. Most scholars simply assume that the Framers of the Constitution designed the filibuster as a way to further deliberation when used for noble causes, as Senator Smith did. But is that assumption correct? Unfortunately, the word filibuster did not exist in 1787. Therefore, one must piece together this puzzle using a variety of sources. The filibuster is inconsistent with the vision of the Senate expressed by the Framers in the Constitution, the *Federalist Papers*, and early congressional history.

It is first necessary to give some background information about the filibuster and the limitations thereupon. The term filibuster originated from a Dutch word, meaning "free booty."[1] Eventually, it became known as a pirate, robber, or someone who engages in unauthorized or irregular warfare. By the mid 19th century, the term adopted its modern legislative definition.

[1] Sarah A. Binder and Steven S. Smith, Politics or Principle? Filibustering in the United States Senate (Washington D.C.: Brookings Institution Press, 1997), 3.

Political scientist Franklin Burdette defines the filibuster as "dilatory tactics used upon the floor of a legislative body…in order to defeat legislation or force unwilling adoption as a price for time to consider other and perhaps much more important measures."[2] Dilatory tactics are not limited to holding the floor of the Senate for an extended period of time; other means of filibustering include offering numerous amendments and repeatedly making procedural motions and quorum calls.[3]

The original standing rules of the Senate placed no time limits upon debate. In fact, until 1917 no procedural safeguards existed to protect the Senate from a filibuster. In 1917, the Senate adopted the cloture rule (Rule 22), which allows a supermajority to close debate. After several amendments, today Rule 22 applies to motions to proceed to a bill, amendments, final passage of bills, and conference reports. The mechanics of the cloture rule are quite intricate. Any senator must collect 16 signatures on a cloture petition, which he or she files with the presiding officer. Two legislative days later, the motion for cloture is ripe for a vote. If three-fifths of the Senate support the cloture motion, debate may continue on the original bill, amendment, or motion for 30 hours. Each senator may speak for up to one hour until the 30 hours expire. In addition to limiting debate, Rule 22 also places limits on amendments. After a cloture petition is filed with the presiding officer, senators may only offer germane amendments. Senators

[2] Franklin Burdette, Filibustering in the Senate: The Fine Art of Obstruction (Princeton: Princeton University Press, 1940), 5.
[3] Binder, 6.

must file primary and secondary amendments in advance by a certain deadline.[4]

Defenders of the filibuster make several arguments that require refutation. The first argument is the notion that the Framers of the Constitution desired to protect the rights of the minority. The legendary senator Thomas Hart Benton asserted in 1851, "Senators have a constitutional right to speak to the subject before the House, there is no power anywhere to stop them."[5] However, the evidence from the Constitution does not support this claim. Article I does not make any procedural guarantees to minorities in the Senate, with the exception that a one-fifth majority may ask for votes to be recorded in the journal. Conversely, some senators even interpret this clause to hinder minority rights by cutting off debate and taking a recorded vote, effectively ending a filibuster with only a tiny majority. In 1915, Senator Robert Owen of Oklahoma argued that this "Yeas and Nays" provision means that one-fifth of the Senate has the right "to demand the immediate taking of the yeas and nays on any question pending and the record of that vote in the journal of the Senate."[6]

Overall, the Constitution is relatively silent on procedure. Article I Section 5 states in very simple terms, "Each House may determine the Rules of its Proceedings." Although this does not preclude the Framer's support of the filibuster, there is considerable evidence that points to the contrary. The

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[4] Binder, 8-9.
[5] Binder, 56.
[6] Burdette, 111.

Constitution contains six procedural references: the tie breaking vote of the vice president, a two-thirds vote for conviction on impeachment charges, a simple majority for a quorum, a two-thirds majority for expulsion of a member of Congress, the "Yeas and Nays" clause, and a two-thirds requirement to override a presidential veto.[7] The fact that half of these provisions deal with supermajorities shows that the Framers wanted to limit the number of cases in which majority rule should not prevail. Under this philosophy, if the Framers had considered the filibuster to be such an important right for minorities, it would be logical that a supermajority provision for cloture would exist in the Constitution as a fourth exception to majority rule.

During the Constitutional Convention, very little debate involved discussions of procedural provisions. In fact, the Framers passed the provision allowing each chamber of Congress to pass its own procedural rules by voice vote, without any opposition.[8] The only remarkable debate over a procedural matter occurred over the "Yeas and Nays" clause. In contrast to Senator Owen's perspective (mentioned above), other scholars view this clause as a constitutionally sanctioned dilatory tactic – that is, a minority of senators can delay action on legislation by repeatedly forcing recorded votes on procedural questions. At the Constitutional Convention, delegate Gouverneur Morris introduced the "Yeas and Nays" clause, but he wanted a

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[7] "Constitution for the United States of America," Constitution Society, 7 June 2002 <http://www.constitution.org/constit_.htm>.
[8] Binder, pp. 31-32.

vote to be entered in the record at the demand of only one member. Many delegates objected because it gave an individual member of Congress too much power. Nathaniel Gorham stated that a similar and much-abused device in Massachusetts resulted "in stuffing the journals with them on frivolous occasions."[9] Instead, the Framers agreed on a compromise and set the vote requirement at a one-fifth level. This debate demonstrates the caution the Framers took in dealing with minority rights.

An examination of history further supports this philosophy. The Articles of Confederation mandated a two-thirds majority to perform the most important governmental functions such as: declaring war, entering treaties, coining money, or spending or borrowing funds. Furthermore, amendments to the Articles required unanimous consent from both the Congress and all 13 state legislatures.[10] These supermajoritarian requirements hampered the ability of the Congress to govern effectively, and ultimately led to the call for a new constitution. The Framers realized this problem, and came down hard upon supermajoritarian rule in the *Federalist Papers*. James Madison in *Federalist 58* writes,

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require

[9] Burdette, 238.
[10] "The Articles of Confederation," University of Oklahoma Law Center, 7 June 2002, <http://www.law.ou.edu/hist/artconf.html>.

> new laws to be passed, or active measures to be pursued, the fundamental principle of government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.[11]

Proponents of the filibuster point elsewhere in the *Federalist Papers* and argue that the filibuster is a useful check on majority tyranny. Although the Framers drastically feared the "violence of faction," the weapons to fight faction did not include strengthening minority rights. In the legendary *Federalist 10*, Madison argues that the representative system of government will yield wiser rulers who can truly discern the public good. Madison also argues that the size of the United States will minimize the number of representatives over which a faction may gain control. However, Madison hardly makes any mention of minority rights as a means of checking majority tyranny. The only time a Madison considers minorities, he simply states, "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables a majority to defeat its sinister views by regular vote."[12]

One can draw two conclusions from this statement. First, Madison believes in a "regular vote," the very thing that a filibuster prevents. This comment implies that obstructionist tactics that delay the possibility of voting, even if used against a majority faction, would be contrary to Madison's vision. Second, strengthening minority rights would increase the violence of faction because it gives more groups of representatives the

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[11] Clinton Rossiter, ed., The Federalist Papers (New York: Penguin Putnam Inc., 1961), p. 329.
[12] Rossiter, 48.

weapons to create “instability, injustice, and confusion.”[13] The modern American political system suffers from the effects of hyperpluralism, a theory that holds that there are so many groups with differing political beliefs that gridlock is the most likely consequence.[14] The 3,844 different political action committees currently in operation demonstrate this theory.[15] With the filibuster as a weapon, an interest group does not need to persuade 51 senators to favor their interest. Instead, interest groups need only to find one senator who is willing to filibuster. This scenario is exactly what Madison and Founding Fathers feared the most.

The next argument that the proponents of the filibuster offer in its defense is that the filibuster coincides with the Founding Fathers’ desire for the Senate to be a more deliberative body. In a famous (but historically dubious) anecdote, George Washington explains the design of the Senate to Thomas Jefferson. “Why,” asked Washington, “did you pour that coffee into a saucer?” “To cool it,” Jefferson replied. “Even so,” responded Washington, “we pour legislation into the senatorial saucer to cool it.”[16] It is true that the Framers designed the Senate to be a more deliberative body than the House. However, it does not follow that therefore they would approve of the filibuster. The Framers intended to achieve deliberation through institutional provisions in the Constitution, not through procedural ones.

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[13] Rossiter, 45.
[14] Jonathan Rauch, Government’s End: Why Washington Stopped Working (New York: Public Affairs, 1999).
[15] Thomas E. Patterson, The American Democracy (Boston: McGraw-Hill College, 1999), 283.
[16] Binder, 4.

The characteristics of the Senate that make it different from the House are: higher age and citizenship requirements, length of term, staggered elections, equal representation among the states, smaller size, original method of selection by state legislatures rather than direct election, and exclusive rights to consider nominations, treaties, and trial of impeachments.

Madison argues extensively about three of these characteristics in the *Federalist Papers*. First, senators must be at least 30 years old, and they are subject to a nine-year citizenship requirement, as compared to a 25-year age requirement and a seven-year citizenship requirement in the House.[17] Such provisions, Madison argued in *Federalist 62*, would ensure that senators had a "greater extent of information and stability of character."[18] Second, staggered six-year terms for senators – in contrast to the simultaneous two-year terms for the House – were designed to insulate the Senate from the "impulse of sudden and violent passions, and…factious leaders."[19] The resulting order and stability not only protects the Senate from corruption from the House, but it also serves "as a defence to the people against their own temporary errors and delusions."[20] Third, the Senate has equality of representation and originally featured appointment by the state legislatures, compared to popular representation and election in the House. These characteristics provide "a constitutional recognition of the portion of

[17] "Constitution."
[18] Rossiter, 344.
[19] Rossiter, 347.
[20] Rossiter, 352.

sovereignty remaining in the individual states," and made the Senate "an instrument for preserving that residual sovereignty."[21] Moreover, by equalizing representation, small states could check the ambitions of the larger states. The absence of a defense of unlimited debate in the *Federalist Papers* indicates that the Framers would not approve of a filibuster as a means of "cooling" legislation.

Finally, the vision of deliberation and extended debate envisioned by the Framers is not consistent with a correct portrayal of the filibuster. Filibustering senators rarely advance a discussion of the merits of legislation. In a 1935 filibuster, Senator Huey Long spoke for 15 hours, not just about the New Deal legislation under consideration, but also many other subjects, such as: the life of Frederick the Great, Roquefort cheese salad dressing, and any other topic requested by the exhausted and angry members of the Senate.[22] Sadly, this story represents the norm for a filibuster, even going back to its early history. Senator John Randolph of Virginia, regarded as the first filibusterer, gave a speech in 1826, which included discourses of Unitarianism, Shakespeare, William the Conqueror, and horses.[23] The record for the longest single speech in Senate history, a dubious honor, belongs to Senator Strom Thurmond, who spoke for 24 hours and 18 minutes

[21] Rossiter, 346.
[22] Burdette, 4.
[23] Burdette, pp. 18-19.

against the Civil Rights Act of 1957.[24] Such speeches plainly do not qualify as substantive discussion of the issues. In 1870, the Senate established the precedent that a senator "may read papers in debate that are irrelevant to the subject matter."[25] As a result, modern filibusterers had the advantage of being able to read from the phone book to pass the time.

In designing the Senate, the Framers wanted to differentiate it from the House so that it would be more difficult for one branch to accumulate supreme power. "As the improbability of sinister combinations [between the House and Senate] will be in proportion to the dissimilarity in the genius of the two bodies," Madison argues in *Federalist 62*, "[I]t must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures."[26]

However, an examination of early congressional history demonstrates that the Framers did not believe that different procedural rules were essential to this goal. In fact, early House and Senate rules were remarkably similar. The committees assigned to draft the first set of rules for each body intended to limit a member's right to speak on their respective chamber floors. The second standing rule in the House requires that a member may speak no more than twice on a question. Similarly, the fourth rule of the

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[24] "U.S. Senate History Briefings: Filibuster and Cloture," United States Senate, 7 June 2002, <http://www.senate.gov/learning/brief_13.html>.
[25] Binder, 9.
[26] Rossiter, 347.

Senate prohibits a senator from speaking more than twice on the same question on the same day.[27]

Both chambers initially possessed a procedural weapon to cut off debate immediately with a simple majority – the previous question motion. In modern parliamentary procedure, approval of this motion brings the chamber to an immediate vote on the underlying bill or amendment; its defeat allows for prolonged debate.[28] However, in the early Senate, a senator who wanted to delay discussion of sensitive and delicate topics would make the motion and hope it would fail. The second presiding officer of the Senate, then-Vice President Thomas Jefferson wrote this archaic interpretation of previous question into his manual of parliamentary procedure for the Senate in 1801. The motion eventually became abused as a dilatory tactic, which caused the Senate to remove it in 1806.[29] Nonetheless, this interpretation persists to this day in *Jefferson's Manual*.[30] It appears that the Senate embraced the principle of extended debate by eliminating previous question. However, the Senate almost never used previous question for its modern function. Instead, the Senate removed previous question because that motion itself had become a means of wasting time. It is ironic that early filibustering tactics included repeated use of the one motion that eventually became the means of ending a filibuster.

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[27] Binder, 34.
[28] Binder, pp. 222-23.
[29] Binder, pp. 35-36.
[30] Thomas Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States, 2nd ed., 7 June 2002, <http://www.constitution.org/tj/tj-mpp.htm>.

In 1811, the House revamped its motion to previous question in order to make it a weapon to cut off debate. That decision reflects the explosion of partisanship and the persistent obstructionism by the Federalist minority over the impending war with England.[31] In fact, obstructionist tactics were typical in the House long before they became common in the Senate,[32] thus the House needed this safeguard first. In the early Senate, filibusters and intense partisanship simply did not exist. In addition, there was no need to cut off debate when the chamber and the workload were relatively small. The early Senate was mainly a revisory body; senators did not initiate much legislation at all.[33] Because there was little rush to finish pressing business, the Senate could simply wait out any obstructionist senators.[34] By the end of the nineteenth century, however, the Senate's size, workload, and importance increased. Senators began taking advantage of parliamentary procedure to suit their political interests.

The filibuster is inconsistent with the vision of the Senate expressed by the Framers in the Constitution, the *Federalist Papers*, and early congressional history. Alexander Hamilton perhaps best summarizes the view of the Framers in *Federalist 22*, writing,

> To give a minority a negative upon the majority is in its tendency to subject the sense of the greater number to that of the lesser number…The necessity of unanimity in public bodies, or of something approaching towards it, has been formed upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of

[31] Binder, 39.
[32] Burdette, 14.
[33] Binder, 40.
[34] Binder, 42.

> government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority.[35]

Despite the Founding Fathers disdain for minority rule, I do not conclude that the filibuster should therefore be eliminated. It is possible to reform the filibuster so that it protects extended debate without legislative hijacking. Extended can contribute positively to the legislative process. It can further discussion of important issues, incorporate new perspectives into legislation, educate the public, and give time to build consensus and compromise.

The ideal goal of filibuster reform is to enact a simple majority cloture, similar to the previous question motion used in the House. Unfortunately, however, such an action simply will not occur in today's Senate. The last attempt at majority cloture in 1995 failed by a vote of 76 to 19, despite some very conciliatory language in the proposal.[36] Ironically, Rule 22 insulates itself against revision. Whereas cloture in normal situations requires a vote of 60 senators, cloture on a proposal to amend the rules of the Senate requires the support of 67 senators.[37] Thus, any attempt to eliminate the filibuster is itself subject to an unusually overwhelming filibuster.

Even if significant cloture reform were enacted, the underlying problem remains unresolved: senators are willing to endure the costs of a filibuster so that the practice still exists for them to utilize in the future for

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[35] Rossiter, pp. 115-116.
[36] Troy A. Murphy, "American Political Mythology and the Senate Filibuster," *Argumentation and Advocacy* 32 (Fall 1995): 91.
[37] Binder, pp. 8-9.

their agenda. Therefore, instead of making cloture easier, a better method of reform would be to make the filibuster tougher to endure. By making the filibuster a more grueling experience, senators hopefully would reserve it for extreme situations and noble purposes, such as those portrayed on screen by Senator Smith. The specifics of such a reform, however, are beyond the scope of this analysis. I firmly believe that a tamed filibuster would return the Senate to the balance of majoritarian rule and deliberation envisioned by the Founding Fathers.