

December 2, 2010

Dear Members of the Senate,

As you know, the Senate has debated the merits of the filibuster and related procedural rules for over two centuries. Recently, several senators who are advocating changes to Senate Rule XXII have renewed this discussion. We write this letter today to clarify some of the common historical and constitutional misperceptions about the filibuster and Rule XXII that all too often surface during debates about Senate rules.

First, many argue that senators have a constitutional right to extended debate. However, there is no explicit constitutional right to filibuster.¹ In fact, there is ample evidence that the framers preferred majority rather than supermajority voting rules. The framers knew full well the difficulties posed by supermajority rules, given their experiences in the Confederation Congress under the Articles of Confederation (which required a supermajority vote to pass measures on the most important matters). A common result was stalemate; legislators frequently found themselves unable to muster support from a supermajority of the states for essential matters of governing. In the Constitution, the framers specified that supermajority votes would be necessary in seven, extraordinary situations – which they specifically listed (including overriding a presidential veto, expelling a member of the Senate, and ratifying a treaty). These, of course, are all voting requirements for passing measures, rather than rules for bringing debate to a close.

Second, although historical lore says that the filibuster was part of the original design of the Senate, there is no empirical basis for that view. There is no question that the framers intended the Senate to be a deliberative body. But they sought to achieve that goal through structural features of the chamber intended to facilitate deliberation – such as the Senate’s smaller size, longer and staggered terms, and older members. There is no historical evidence that the framers anticipated that the Senate would adopt rules allowing for a filibuster. In fact, the first House and the first Senate had nearly identical rulebooks, both of which included a motion to move the previous question. The House converted that rule into a simple majority cloture rule early in its history. The Senate did not.

What happened to the Senate’s previous question motion? In 1805, as presiding officer of the Senate, Vice President Aaron Burr recommended a pruning of the Senate’s rules. He singled out the previous question motion as unnecessary (keeping in mind that the rule had not yet routinely been used in either chamber as a simple majority cloture motion). When senators met in 1806 to re-codify the rules, they deleted the previous question motion from the Senate rulebook. Senators did so not because they sought to create the opportunity to filibuster; they abandoned the motion as a matter of procedural housekeeping. Deletion of the motion took away one of the possible avenues for cutting off debate by majority vote, but did not constitute a deliberate choice to allow obstruction. The first documented filibusters did not occur until the 1830s, and for the next century they were rare (but often effective) occurrences in a chamber in which majorities generally reigned.

¹ In Article 1, Section 5, the Constitution empowers the Senate to write its own rules, but it does not stipulate the procedural requirements for ending debate and bringing the Senate to a vote.

Finally, the adoption of Rule XXII in 1917 did not reflect a broad-based Senate preference for a *supermajority* cloture rule. At that time, a substantial portion of the majority party favored a simple majority rule. But many minority party members preferred a supermajority cloture rule, while others preferred no cloture rule at all. A bargain was struck: Opponents of reform promised not to block the rule change and proponents of reform promised not to push for a simple majority cloture rule. The two-thirds threshold, in other words, was the product of bargaining and compromise with the minority. As has been typical of the Senate's past episodes of procedural change, pragmatic politics largely shaped reform of the Senate's rules.

We hope this historical perspective on the origins of the filibuster and Rule XXII will be helpful to you as matters of reform are raised and debated. Please do not hesitate to contact us if we can provide additional clarification.

Very truly yours,

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