Eliminating the Senate filibuster would sharpen polarization

By Orrin G. Hatch | Wednesday, May 12, 2021

─────────

Tired of the whipsaw nature of American politics? Eliminating the Senate filibuster would only make it worse.

For generations, the filibuster has been a thorn in the side of the Senate majority. It enables a minority of senators to delay, and sometimes block, legislation that has the support of a majority of members. During President Donald Trump's time in office, frustration with these tactics led him repeatedly to urge then-Senate Majority Leader Mitch McConnell to eliminate the legislative filibuster. McConnell steadfastly refused, arguing that the filibuster promotes bipartisanship and compromise and that Republicans would regret not having its protections in place the next time they were in the minority.

With President Joe Biden's victory last November, the shoe has now shifted to the other foot. An increasing number of senators have come out in support of abolishing the filibuster to enact a number of controversial priorities, such as increasing the size of the Supreme Court, making the District of Columbia a state and federalizing our nation's voting laws.

As part of this effort, filibuster critics have sought to rebrand it as a "relic" of Jim Crow that has been used to halt the advancement of civil rights. In reality, however, the filibuster long predates the Jim Crow era and has been used throughout our nation's history by both parties when they have been in the minority to shape legislation on virtually every topic imaginable. The filibuster requires the majority party to work with the minority to secure enough votes to overcome the cloture threshold (currently 60 votes). This, in turn, gives the minority party a seat at the table, on nearly every piece of legislation. Significantly, the filibuster does not require the majority to obtain the support of all members of the minority party, but rather only enough members to meet the 60-vote threshold.

A recent example of how the Senate minority can use the filibuster to shape legislation occurred last year with the Coronavirus Aid, Relief and Economic Security, or CARES, Act. After Senate Democrats filibustered a motion to proceed to consideration of the bill, the Republican majority agreed to numerous changes in order to obtain Democratic support. Among the changes were a number of progressive priorities, including additional funding for hospitals, increased unemployment benefits and additional conditions on loans for businesses impacted by the pandemic. The revised bill passed with unanimous support. Senate Democrats thus were able to use the filibuster to win significant concessions from Republicans that — from the perspective of Democrats — substantially improved the final bill.

Even the threat of a filibuster by the minority party can lead to substantial changes to a bill. In 2015, after both chambers of Congress passed, by wide margins, the Every Student Succeeds

Act to replace No Child Left Behind, Democrats were able to secure inclusion in the final version of the bill a provision requiring states to work to correct achievement gaps in low-performing schools [by threatening to filibuster the final version](#) unless it included the provision. Even though the bill had already passed both chambers with broad bipartisan support, Democrats were able to use the threat of a filibuster to obtain additional changes in the final bill that helped move the legislation in a direction they favored.

Far from being a "relic" of Jim Crow, then, the legislative filibuster empowers the minority party — be it Republican or Democratic. It acts as an indispensable check on majority power and has had an impact on the broadest possible range of legislation, up to and including the present day. Members and their staff draft and negotiate bills under the shadow of the 60-vote threshold, knowing that a purely partisan bill will not pass. This is good for democracy, as it both promotes compromise and prevents partisan power grabs.

The filibuster also enables Senate leadership and committee chairmen to push back on overly aggressive proposals advanced by members from the outer wing of the party. Every Senate committee chairman has had the experience of telling a committee member that the chairman is unable to add a particularly controversial provision to a bill under consideration because the provision would prevent the bill from obtaining 60 votes. In this way, the filibuster helps temper legislation throughout the lawmaking process. Again, this is good for democracy, as it helps prevent the loudest voices in the outer wings of the parties from driving legislation.

Some have suggested that the Senate majority should "work around" the filibuster by creating subject-matter carve-outs or expanding the use of budget reconciliation, a parliamentary procedure that is not subject to the filibuster and requires only a simple majority for passage.

The former approach is no different from eliminating the filibuster altogether. There is no principled basis for eliminating it for certain subjects of legislation but not others, and as surely as night follows day, starting down that path would soon lead to the abolition of the filibuster for all legislation.

The latter approach, in turn, would provide at best a limited workaround, as reconciliation is confined to measures that directly affect the federal budget and excludes measures whose budgetary impacts are merely "incidental" to nonbudgetary effects. Efforts to expand the Supreme Court, add new states or overhaul voting laws would not qualify.

Although the filibuster undoubtedly has its drawbacks, it has played an essential role throughout our nation's history in giving the Senate minority a seat at the table in negotiating and shaping legislation. The result has been a culture of compromise and bipartisanship in the Senate that has helped increase input from all sides, leading to better representation for all Americans.

Eliminate the filibuster, and the Senate will inevitably turn into yet one more institution where party politics become everything and those in the majority run roughshod over everyone else. Surely we already have enough of those.

———————

Orrin G. Hatch is a Republican who represented Utah in the Senate from 1977 to 2019. He is a former chairman of the Senate Judiciary Committee and is currently chairman emeritus of the [Orrin G. Hatch Foundation](#).