



December 6, 2021

United States Senate
Washington, DC 20510

Dear Senators:

As the Senate reconvenes for its final work period of the first session of the 117th Congress, we at the Project On Government Oversight (POGO) urge you to reform the legislative filibuster. We know this can be done in a way that fosters bipartisan compromise and encourages the timely passage of legislation while still providing members in the minority party an opportunity to express their concerns and improve the underlying bill.

We specifically request the Senate implement a package of modifications that restores the filibuster to its original purpose by

- reinstating the speaking requirement;
- returning to the pre-1975 voting threshold of “present and voting”; and
- inverting the existing procedure to shift the burden from the majority overcoming the filibuster to the minority upholding it.

By implementing these modifications, the Senate can once again begin legislating, debating bills, and ensuring our government is accountable to the people.

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. POGO has an extensive record of working to ensure Congress has the capacity and powers it needs to conduct its oversight mission. And we believe that the current use of the filibuster renders it nearly impossible to achieve a government that works for the people.

In recent months, it has become clear that the Senate is no longer serving as the greatest deliberative body in the world. This was shamefully demonstrated last month when the Senate failed to even *begin* debate on a critical voting rights bill. The right to vote is a sacred, foundational right for Americans. Protecting that right should be a nonpartisan issue: Fifteen years ago, the last reauthorization of the Voting Rights Act was passed by an overwhelming vote

in the House of Representatives and by a unanimous vote in the Senate.¹ The recent refusal to even begin debate on targeted voting rights legislation — legislation with popular support² — proves that the stakes are too high not to act on filibuster reform.

Despite changes the Senate made in 1975 to make it easier to invoke cloture to overcome filibusters, data show that filibusters have actually increased, making it even more difficult to legislate. Between 1917 and 1974, the Senate failed to invoke cloture 79 times.³ Since 1975, the Senate has failed to invoke cloture 612 times, a nearly 675% increase. Legislation is now filibustered by default, and it quietly dies outside of public view without so much as sixty seconds of debate on the Senate floor.

When the Senate can't legislate, or even begin debate on a bill, it fails at one of Congress's primary responsibilities: governing to be responsive to the needs of constituents. Debate allows Members of Congress the ability to openly discuss systemic problems and potential reforms. Routine abuse of the current filibuster thwarts meaningful oversight and accountability.

To be clear, POGO is not urging the outright repeal of the filibuster. The filibuster is a powerful tool that in the past has forced parties to work together to forge bipartisan consensus. However, the current filibuster rule is too often abused and has become a tool of easy obstruction. That is why POGO supports vital modifications that will help restore the filibuster to its intended purpose.

Reinstate the Talking Filibuster

First, the Senate should reinstate the talking filibuster, the procedure made famous in the 1939 movie *Mr. Smith Goes to Washington*. Requiring Senators who wish to filibuster to hold the floor and continue to speak would enrich policy debates by mandating those Senators raise and articulate their objections to a particular piece of legislation. As POGO board member Norm Ornstein said at a POGO briefing on filibuster reform, a talking filibuster allows the opposition “to make their case and try and turn around the majority.”⁴

Too often, the mere threat of filibustering is enough to prevent debate on bills altogether. The talking filibuster would still provide each senator the power to slow down the legislative process to encourage comprehensive debate, but it would require senators to invest significant time and energy for a cause they believe to be right rather than use the filibuster as a tool of casual obstruction.

¹ “Political Participation Case: Voting Rights Act Reauthorization 2006,” NAACP Legal Defense and Education Fund, February 16, 2018, <https://www.naacpldf.org/case-issue/voting-rights-act-reauthorization-2006/>.

² Jane C. Timm, “New polls suggest broad support for Democrats' voting rights bills,” *NBC News*, August 30, 2021, <https://www.nbcnews.com/politics/elections/new-polls-suggest-broad-support-democrats-voting-rights-bills-n1277837>.

³ Out of a total of 100 cloture votes between 1917 and 1975, the Senate invoked cloture 21 times and failed to invoke cloture 79 times. Out of a total of 1,830 cloture votes between 1975 and 2021, the Senate invoked cloture 1,218 times and failed to invoke cloture 612 times. See “Cloture Motions,” “Senate Action on Cloture Motions,” United States Senate, <https://www.senate.gov/legislative/cloture/clotureCounts.htm> (accessed November 12, 2021).

⁴ Norm Ornstein, “A Conversation with Norm Ornstein on the Filibuster,” (presentation, Project On Government Oversight, Washington, DC, July 29, 2021), <https://www.youtube.com/watch?v=JC5bmeTe240>.

POGO strongly believes that if a senator wishes to hold up a bill from being debated on the Senate floor, then they have a duty to explain their objections to their colleagues. More importantly, they have a duty to explain their objections to their constituents.

Reduce the Voting Threshold

Second, the Senate should end the loophole that allows members to filibuster by not showing up for work. In 1975, the Senate reduced the number of votes required for cloture from two-thirds of senators “present and voting” to three-fifths of all senators “duly chosen and sworn.”⁵ The effect of this change is that senators can essentially filibuster a bill by simply not showing up for votes. This should not be the case. If a senator fundamentally disagrees with a bill, they should be present and either actively working to improve the bill or going on record and voting no.

POGO urges the Senate to restore the pre-1975 filibuster rule of requiring a supermajority of senators *present and voting* rather than *duly chosen and sworn* to uphold a filibuster. Since the Senate’s own history shows that getting two-thirds of senators present and voting yes is in itself a high bar to meet, the Senate should keep the current supermajority proportion of three-fifths, but it should require a supermajority only of those senators *present and voting* to invoke cloture. The absence of a handful of senators could have a considerable impact. Earlier this year, due to just 11 absences, the Senate rejected a House-passed bill creating a commission to investigate the January 6 attack on Congress — despite three-fifths of senators present voting yes.⁶ Adjusting the voting threshold to account for attendance would incentivize the physical presence of senators for each filibuster vote, ensure that senators go on the record when blocking legislation, and reduce the likelihood that senators skip difficult votes.

Invert the Filibuster

While the filibuster is meant to help protect the rights of the minority party in the Senate, it has too often been used as a tool of obstruction. When the minority party wishes to filibuster, the onus is then on the majority to muster up enough votes to overcome the filibuster. Therefore, POGO finally recommends that the Senate invert the filibuster to shift the burden from the majority overcoming the filibuster to the minority upholding it.

Inverting the filibuster would require two-fifths of senators present and voting plus one to block cloture and halt Senate business. If the minority failed to reach this threshold, Senate business would move forward. Under this proposal, the minority would need to remain present to stop legislation because the majority could call for a cloture vote at any time.

⁵ “About Filibusters and Cloture,” United States Senate, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> (accessed November 10, 2021).

⁶ “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, United States Senate, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00218 (accessed November 10, 2021).

Conclusion

Returning to a speaking filibuster, reducing the voting threshold, and inverting the filibuster would allow senators to return to their duty to fully consider and debate legislation. These are not the only solutions to correct filibuster abuses, but they are practical, commonsense measures the Senate could adopt immediately.

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.⁷ Others have openly called for eliminating the filibuster entirely, arguing that it stands in the way of passing important legislation.⁸ This is a false choice. These modest reforms could accomplish our goal of getting the Senate back to legislating on behalf of the American people — and returning the institution to its status as the greatest deliberative body in the world.

Sincerely,

A handwritten signature in black ink that reads "Danielle Brian". The signature is written in a cursive, flowing style.

Danielle Brian
Executive Director

⁷ 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.

⁸ Matthew Brown, “Fight over filibuster heats up as Democrats and Republicans 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/>.