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To: Honorable Steve Daines
Attention: Darin Thacker

From: Elizabeth Rybicki, Specialist on Congress and the Legislative Process, 7-0644
Richard S. Beth, Specialist on Congress and the Legislative Process, 7-8667
Mark J. Oleszek, Analyst on Congress and the Legislative Process, 7-7084

Subject: **The Original Design of the Senate and the Filibuster: Recent Scholarship and Historical Information**

This memorandum responds to your request for information about whether the Senate filibuster was intended by the Framers of the Constitution. It summarizes the divergent claims on the subject, focusing largely on recent scholarship and commentary, but also citing prominent historical works to document the longevity of some of the claims.

Public discourse on this question, in the media and sometimes on the Senate floor, is often reduced to brief, passing statements in direct contradiction to one another.[1] The seemingly contradictory claims regarding the Framers' intent persist, even in the face of academic research on the topic. The lack of resolution on the question is partially due to the scarcity of primary resource materials. Contemporaneous documents and writings by the Framers themselves make little direct reference to the matter. Most of the observations that can be offered on this topic must be developed by inference from the records of and references to the Constitutional Convention of 1787 and from information about procedure in the earliest sessions of the Senate. Furthermore, the Senate met in secret until 1795, leaving the *Senate Journal* as a record only of procedural steps taken, with no record of words spoken in debate. Historians studying Senate debate in that early era must rely on the news coverage that existed, which was scant, and surviving correspondence, which mentions procedure infrequently.

It also true, however, that the straightforward assertions of intent, which seem to be in direct contradiction with each other, are sometimes simplified summaries of more nuanced positions taken by scholars and knowledgeable Senate observers. The divergent positions of Senate scholars regarding the Framers and the filibuster are generally not due to reliance on different historical evidence from the Constitutional Convention or the early Senate. Instead, these contrasting positions appear to arise from different scholarly claims. Those who have studied the question generally agree that there is little evidence that the Framers or early Senators expected the filibuster to be a defining feature of the institution. Those arguing for Senate reform sometimes point to this historical research. But some scholars and others close to the Senate argue that, nevertheless, the filibuster, as it has emerged over time, now serves to make the Senate what the Framers intended: a legislative body, in which each state is equally represented, that can

[1] See, for example, Ezra Klein, "Is the Filibuster Unconstitutional," *Washington Post*, May 15, 2010, and Norman Ornstein, "Frist's Recent Problems Rooted in Senate Rules," *Roll Call*, April 30, 2003.

moderate the policy proposals of the popularly-elected House of Representatives. Those seeking to preserve the filibuster sometimes argue that it reflects original intent, or at least is consistent with it, and they point to evidence regarding the purposes the Framers intended the Senate to serve.

This memorandum presents the different scholarly claims regarding the filibuster and the Framers, and it summarizes the historical evidence that has been brought to bear on the various arguments. Although the scholarly literature is not divided this way, for ease of exposition we separate the claims into three categories: those regarding the intent of the Framers at the Constitutional Convention; those regarding the early Senate; and finally, those concerning the elimination of the "previous question motion" from Senate rules in 1806. As will be explained, not all of the claims regarding the Framers and the filibuster are hypotheses that can be tested through empirical methods; therefore, some disagreements will likely remain unresolved.

Claims Regarding the Filibuster and the Intent of the Framers

The Framers neither intended nor anticipated the development of the filibuster

Scholars generally agree that there is little evidence that the Framers or early Senators expected the filibuster to be a defining feature of the institution. In a prominent 1997 book on the filibuster, Sarah A. Binder and Steven S. Smith argue that while the Framers sought to distinguish the Senate from the House, they did not do so by addressing the internal procedures of the chambers.[2] Binder and Smith acknowledge that it is well known that the Senate was to be the more deliberative and reasoning of the two chambers. But this was achieved by populating the House and Senate in different ways—direct (popular) election to the House, appointments made by state legislatures in the Senate. Two-year terms for Representatives were intended to make those Members responsive to public opinion, while six-year appointments for Senators were designed to insulate those Members from the public and provide a conservative counterbalance to popular passions expressed in the House. Only one-third of the Senate stands for reelection every two years, which was thought to safeguard the Senate from dramatic shifts in public opinion. Senators were also required to attain 30 years of age in order to serve, while House members could be elected at age 25.

These differences, Binder and Smith explain, were intended to ensure more measured consideration of legislation in the Senate and also to limit the power of the legislative branch and the government. But Binder and Smith report there is no evidence that the Framers intended to distinguish the House and Senate procedurally. They point out that James Madison's records of the Convention contain mention of only two discussions of chamber procedure, having to do with the number of Members required to demand the yeas and nays and the number required to expel a member. These authors state that the Framers were willing to leave procedural matters to Congress, quoting Article I, section 5 of the Constitution: "Each House may determine the Rules of its Proceedings ...."

Binder and Smith also present evidence from *The Federalist Papers*, the essays written by Alexander Hamilton, James Madison, and John Jay to advocate the ratification of the Constitution, that the Framers favored majority rule within both the House and Senate. This is relevant to their argument because the right to debate a measure at length, and prevent the chamber from reaching a vote, is contrary to majority rule. At the extreme, the right to filibuster could be seen as a requirement for unanimity, since in theory any one member of a legislature opposed might be able to prevent a vote. In the modern Senate, with the current cloture rule, the Senate is often described as needing to operate on a supermajority basis, since the

[2] Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, DC: Brookings Institution Press, 1997), pp. 30-33.

support of at least three-fifths of the Senate is often necessary to bring the chamber to a vote on a question.

The Framers, Binder and Smith argue, were in favor of majority rule. They quote James Madison, in *Federalist 58*, justifying the Constitutional requirement that a majority of Members be present to conduct business in both the House and Senate:

> 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 new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.[3]

Binder and Smith also remind readers that Convention delegates were familiar with supermajority requirements in the existing national government. Under the Articles of Confederation, the nation's first governing arrangement, all 13 states had equal voting power in Congress and agreement from at least 9 of the 13 was required for the national government to act on matters of any significance. Amending the Articles, such as to allow the national government to impose taxes, raise an army, or coin money, required unanimous approval from all 13 states. These thresholds were difficult to achieve, and even when they were, the national government had no effective means by which to compel the various states to abide by the nation's laws. Efforts by the states to act collectively as a nation were significantly hamstrung by these arrangements. Binder and Smith also quote Alexander Hamilton, in *Federalist 22,* reflecting on the defects of the federal government under the Confederation:

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) 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 founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of 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.[4]

Binder, in her 2003 book *Stalemate,* develops further the argument that the Framers did not intend to create a Senate that required a supermajority to act. She grants that one possible explanation that the Framers left internal rulemaking to the Congress was because they felt they had designed enough restraints on the legislature in other forms. But another explanation, she posits, "is that the framers wanted to create a stronger and more efficient national legislature, and thus they purposely avoided hamstringing the new Congress with the types of rules that encumbered the Continental Congress under the Articles of Confederation."[5] Binder acknowledges, however, that "we can never be sure why something did *not* happen."[6]

Binder and Smith undertook their research to address the frequent claim that the Framers intended that the Senate allow extended debate. This claim is rarely made by students of the Senate. Prior to Binder and Smith, the only book-length work on the filibuster was the classic 1940 book by Franklin L. Burdette,

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[3] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 361.

[4] Hamilton, et al., *The Federalist Papers*, pp. 147-148.

[5] Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, D.C.: Brookings Institution Press, 2010), pp. 9-10.

[6] Ibid, p. 9.

Filibustering in the Senate. From this book, it is apparent Binder and Smith were not the first to assert that the filibuster was not part of the original design of the Senate. Burdette describes the arguments for and against the filibuster in the mid-20th century, and states that those opposed to the filibuster cited the Constitutional provision allowing one-fifth of a quorum to order a roll call vote as proof that the Framers believed that number could demand an immediate vote.[7]

Most political scientists writing since 1997 have agreed with Binder and Smith that the Framers did not intend extended debate in the Senate to be a feature that distinguished it from the House.[8] Even those who have challenged some of the other conclusions drawn by Binder and Smith have generally conceded this narrow point. Gregory J. Wawro and Eric Schickler, in their 2006 book *Filibuster*, state: "The Senate's rules that protect unlimited debate and effectively require supermajorities for the passage of legislation were not part of the Framers' blueprint for the Senate."[9] Richard A. Arenberg and Robert B. Dove wrote in their 2012 book, *Defending the Filibuster:* "The right of unlimited debate in the Senate is not contained in the Constitution, nor is any prescription for cloture (the ending of debate)."[10] Gregory Koger, in his own study of the Constitutional Convention, likewise agreed in his 2010 book, *Filibustering,* that the right to filibuster is not explicitly granted in the Constitution.[11]

The existence of the filibuster, and its effects on policy outcomes, is consistent with the Framers' conception of the Senate

The contrasting claim offered by most scholars and other recent knowledgeable commentators differs from a straightforward assertion that the Framers intended that the Senate allow extended debate. Instead, proponents of this viewpoint believe that the filibuster, and the role it plays in preventing absolute majority rule in the Senate, allows the upper chamber to fulfill several functions the Framers intended: that the Senate would be more deliberate in decision-making and less responsive to popular passions than the House; that the legislature would serve as a check on the power of the executive; and that the Senate would protect the less populous states from the more populous states. While Binder and Smith point to Article I, section 5, of the Constitution, which allows each chamber to make its own rules, as evidence that the Framers did not intend to prescribe any internal procedures for the House or Senate, others have pointed to the same provision of the Constitution as evidence that the Constitution allows the filibuster.[12]

Some Senate observers and scholars have long claimed a connection between the goals of the Framers and the filibuster. In 1938, George B. Haynes, in his two volume study of the Senate, argued against creating a rule that would allow a majority to close debate in the Senate. He feared such a change would destroy the deliberative nature of the Senate and pointed out that: "It was the intent of the framers of the Constitution to secure from the Senate a different point of view, a more matured judgment than that of the House. To those ends the longer term, the more advanced age, the smaller numbers, the equal

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[7] Franklin L. Burdette, *Filibustering in the Senate* (Princeton, NJ: Princeton University Press, 1940), p. 230.

[8] Barbara Sinclair, "The '60-Vote Senate': Strategies, Process, and Outcomes," in *U.S. Senate Exceptionalism*, ed. Bruce L. Oppenheimer (Columbus, OH: The Ohio State University Press, 2002), p. 242; David Wirls and Stephen Wirls, *The Invention of the United States Senate* (Baltimore: The Johns Hopkins University Press, 2004), pp. 212-213.

[9] Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton, NJ: Princeton University Press, 2006), p. 10.

[10] Richard A. Arenberg and Robert B. Dove, *Defending the Filibuster: The Soul of the Senate* (Bloomington, IN: Indiana University Press, 2012), p. 4.

[11] Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010), p. 39.

[12] Arenberg and Dove, *Defending the Filibuster,* p. 4; Lauren C. Bell, *Filibustering in the U.S. Senate* (Amherst, NY: Cambria Press, 2011), p. 17.

representation were all expected to condone."[13] In Haynes' view, the inability of a majority to end debate quickly had prevented hasty decisions in the past, and given that legislative majorities can be transient, the ability of a single Senator to slow down a decision is not necessarily thwarting the will of a Senate majority. Notably, this claim did not originate with Haynes, as he cites a 1926 address before the National Education Association where the speaker claimed that allowing a majority to end debate in the Senate would "destroy the deliberative function of the Senate, annihilating the very reason for its existence, and making it automatically a mere annex of the House of Representatives."[14]

A similar view was expressed in an often-quoted speech delivered at an orientation for new Senators in 1996 by former Senator Robert C. Byrd (also the author of a four volume book on Senate history). In Senator Byrd's view:

> "The Constitution's Framers never intended for the Senate to function like the House of Representatives. That fact is immediately apparent when one considers the length of a Senate term and the staggered nature of Senate terms. The Senate was intended to be a continuing body. By subjecting only one-third of the Senate's membership to reelection every two years, the Constitution's framers ensured that two-thirds of the membership would always carry over from one Congress to the next to give the Senate an enduring stability.
>
> The Senate and, therefore, Senators were intended to take the long view and to be able to resist, if need be, the passions of the often intemperate House. Few, if any, upper chambers in the history of the western world have possessed the Senate's absolute right to unlimited debate and to amend or block legislation passed by the lower House."[15]

Political scientists Gregory J. Wawro and Eric Schickler, after agreeing that the Framers did not intend to protect unlimited debate, go on to state:

> Nevertheless, these rules are consistent, at least in principle, with [the Framers'] conception of the Senate as a bulwark protecting minorities and as a brake on precipitate action. Perhaps ironically, the rules remain as protections while other institutional safeguards the Framers put into place have become enervated or have disappeared with the passage of time. If anything, Senate rules and practices concerning unlimited debate have become *more* important as the Senate has evolved.[16]

In 2010, the Senate Committee on Rules and Administration held a hearing on "Examining the Filibuster: History of the Filibuster 1789-2008." On the claim that the filibuster now serves the Framers' goal of ensuring deliberation, former Senate Parliamentarian Robert Dove testified, "Nearly forgotten or simply dismissed is the role which extended debate has played in the moderating role of the Senate as 'saucer' intended by the framers in requiring minority participation…"[17] In the 2012 book co-authored by Dove and long-time Senate staffer Richard A. Arenberg, they also argue: "The Founders feared majorities that moved too quickly. The supermajority requirements imposed by the Senate rules for the most controversial issues provide a useful test of when a majority may be overzealous."[18]

The claim that the filibuster served the Framers' goal of separation of powers was also made at the 2010 Senate hearing. For example, one Senator, in his opening statement, made clear how his view diverges from the claim that the Framers did not intend the Senate to allow extended debate:

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[13] George H. Haynes, *The Senate of the United States: Its History and Practice*, vol. I (Boston: Houghton Mifflin Company, 1938), p. 419.

[14] Ibid.

[15] U.S. Congress, Senate Committee on Rules and Administration, *Examining the Filibuster*111th Cong., 2nd sess., April 20, 2010, S. Hrg. 111-706 (Washington: GPO, 2010), p. 104.

[16] Wawro and Schickler, *Filibuster*, p. 10.

[17] Committee on Rules and Administration, *Examining the Filibuster*, p. 65.

[18] Arenberg and Dove, *Defending the Filibuster*, p. 154.

> There are those that may argue that the creation of the filibuster is not so rooted in the framers' design of this institution but rather evolved over the early course of our history unintentionally.
>
> While some evidence may infer such an argument about the technical evolution of the filibuster and the Senate rules, the concept of a single legislative branch divided among the two houses in electoral duration, representative composition, and rule-making procedure could not have been more prevalent or purposefully on the minds of our founders and later historical giants of the Senate. These things the filibuster serves to protect.
>
> …legislative hurdles are the reason this body is regarded as a guardian of checks and balances, and separation of powers. Any reform effort which attempts to weaken the protection of minority rights... threatens not only the balance of our institutional design but also the separation of powers within a single party majority among executive and legislative branches.[19]

This claim regarding how the Senate could serve as a check on the executive is also not new. Lindsay Rogers wrote in *The American Senate* in 1926:

> What kind of a Senate majority has a "right" to act? If it has such a "right" quickly enforceable, do the checks and balances of the American Constitution remain unaffected? For the fact of the matter is, as I hope to show, that as the much vaunted separation of powers now exists, unrestricted debate in the Senate is the only check upon presidential and party autocracy. The devices that the framers of the Constitution so meticulously set up would be ineffective without the safeguard of senatorial minority action.[20]

The third and final claim is that the filibuster allows the Senate to serve its original function as a forum where each state is equal. Again in the words of Senator Byrd:

> The U.S. Senate is not the U.S. House of Representatives, and was never intended to function like the House. The Senate is a forum of the states, where regardless of size or population all states have an equal voice. One must also realize that a majority of states may not actually represent a majority of opinion in the country. In the Senate, states like West Virginia are equal to states like California, Texas, and New York. Yet, without the protection of unlimited debate, small states like West Virginia might be trampled underfoot.
>
> Take away the right of unlimited speech by the representatives of the people, and one tampers with the fundamental checks and balances forged by the framers.[21]

In the words of another Senator at the 2010 hearing, "The founding fathers had the foresight to create an institution that was based not on majority rule but where each state regardless of size or population had two Senators to speak out on their behalf. It is that power to speak, the right to unlimited debate that is the hallmark of this body."[22] Lindsay Rogers also argued against those seeking to reform the filibuster at the start of the 20th century because a "33 per cent minority" of the Senate "may nearly or even actually represent a majority of the population of the country."[23]

As discussed above, most political scientists and historians agree that there is no evidence that the Framers intended to create the filibuster. Few recent scholars have addressed the second claim—that the filibuster nevertheless now serves the goals of the Framers—because such a claim is challenging to assess

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[19] Senate Committee on Rules and Administration, *Examining the Filibuster*, p. 14.

[20] Lindsay Rogers, *The American Senate* (New York: Johnson Reprint Corporation, 1968), p. 164; original book published in 1926.

[21] Senate Committee on Rules and Administration, *Examining the Filibuster*, p. 43.

[22] Senate Committee on Rules and Administration, *Examining the Filibuster*, p. 12; see also Norris Cotton, *In the Senate Amidst the Conflict and the Turmoil* (New York: Dodd, Mead & Company, 1978), p. 124, and Arenberg and Dove, *Examining the Filibuster*, pp. 156-157.

[23] Rogers, *The American Senate*, p. 163.

with empirical evidence. Examining the claim requires not only ascertaining the goals of the Framers, but also demonstrating that the Framers would believe the filibuster now serves those goals. Political scientist Gregory Wawro was asked at the 2010 hearing, in a question for the record, if it was the intent of the Framers that the Senate be a supermajoritarian institution. Professor Wawro responded that the Framers did not intend the Senate to be a supermajoritarian institution, citing "ample evidence" that the Framers envisioned the Senate legislating by simple majority. He went on to say, however, that: "The framers do not provide clear guidance on the question of whether they would *object* to the supermajority Senate, and both sides of the debate can find support in the Constitution itself and in the Federalist papers."[24]

Indeed, that scholarship was focused more generally on the intent of the Framers in the creation of the Senate, and not on the question of the origins of the filibuster, attests to the challenge of divining intent. Political scientists Daniel and Stephen Wirls, in their 2004 book, *The Invention of the United States Senate,* urge caution in ascribing a single intent to the Framers in Philadelphia, arguing instead that different Framers had different goals, that goals changed over the course of the convention, and that early and unexpected political developments in the early Republic changed the Senate significantly. Proponents of the claim that the Senate serves the goals of the Framers might highlight Wirls and Wirls' statement that some scholars "pass over one of the purposes for a senate that is most commonly cited in the writings and debates surrounding the founding—the senate as a provision for more thorough practical wisdom in legislative matters."[25] Overall, however, the book is a testament to how complicated was the interplay of principles and philosophical ideas with conflicting material and political interests at the founding of the Senate.

While the Framers did not intentionally create the filibuster, they did anticipate that provisions of the Constitution could be used for obstruction

One political scientist who has examined the writings of the Framers and the records of the Constitutional Convention makes a slightly different argument than those explained above. Gregory Koger, in his 2010 book on the filibuster, argues that the Framers were aware of the possibility of obstruction and, further, that provisions of the Constitution do allow obstruction. Specifically, Koger cites discussions at the Constitutional Convention concerning the quorum requirement. In the 18th century, legislators occasionally obstructed consideration of a matter by not showing up; this could prevent the legislature from having the quorum required to conduct business. The U.S. Constitution states that the quorum requirement to conduct business is a majority, and some delegates at the Convention were concerned this high number would make it too easy for opponents of a matter to obstruct legislation by not attending sessions. Another delegate, however, reportedly argued that good had been produced by this form of obstruction, and favored the high quorum requirement.[26] Koger concludes that "the majority quorum requirement in article 1 can be understood as a balance between the delegates' fear of mischief by small numbers of legislators and their concern that a high threshold would paralyze Congress at critical moments."[27]

Koger also argues that allowing one-fifth of a quorum to demand a roll call vote, instead of a single Senator, shows an attempt to find a balance between obstruction that could be caused by forcing votes and

[24] U.S. Congress, Senate Committee on Rules and Administration, *Examining the Filibuster: History of the Filibuster 1789-2008*, 111th Cong., 2nd sess., April 20, 2010, S. Hrg. 111-706 (Washington: GPO, 2010), p. 133. See also Bell, pp. 15-19, who presents the two claims above as positions taken by critics and defenders of the filibuster, respectively, and takes no position herself.

[25] Wirls and Wirls, *Invention of the Senate*, p. 4.

[26] For more information, see also Robert Luce, *Legislative Procedure: Parliamentary Practices and the Course of Business in the Framing of Statutes* (Boston: Houghton Mifflin Company, 1922), pp. 30-32.

[27] Koger, *Filibustering*, p. 40.

the harm to accountability of not recording votes. His final example of a Constitutional provision that allowed obstruction was the original congressional schedule that included a short session. The typical three-month second session under the original schedule was considered a time when filibustering would be most effective, as the workload was high and there was no possibility of extending the session to complete business. Congress did change the schedule in 1933 to address, in part, the obstruction that occurred in the short session; however, Koger does not present any evidence or argue that the Framers realized the short session could facilitate the filibuster.

Claims Regarding the Early Senate and the Filibuster

Early Senators neither intended nor anticipated the development of the filibuster

Binder and Smith argue that the evidence available from the early Congresses indicates that Senators did not expect extended debate to be an essential feature of the chamber. They observe that the first rules of the House and Senate were quite similar, suggesting that "early senators harbored no unique conception of Senate procedure."[28] The first rules of neither the House nor the Senate placed a limit on debate. The 20 Senate rules adopted in 1789 included two that imposed limits on what might be viewed as unnecessary debate. Senate Rule IV stated that "No member shall speak more than twice in any one debate on the same day, without leave of the Senate," and Rule VI stipulated that "No motion shall be debated until the same shall be seconded."[29] Historian Richard R. Beeman similarly argued that the first Senators "did not envision the development of filibustering tactics."[30] He cited, in addition to the first rules, a parliamentary manual prepared by Thomas Jefferson while serving as President of the Senate from 1797-1801: "No one is to speak impertinently or beside the question, superfluous, or tediously." (The same manual included this statement, attributed to British precedents: "The voice of the majority decides. For the *lex majoris partis* [law of the greater number] is the law of all councils, elections, etc. where not otherwise expressly provided."[31])

Binder and Smith also indicate that the early Senate exhibited little apparent difficulty reaching final votes even on highly controversial matters, and "no real filibusters took place until the 1830s."[32] They contend that the relatively limited workload of the early Senate and the lack of public attention on the chamber would have made filibustering less likely to succeed. Proponents of a measure could more easily wait out long speeches or other tactics, without incurring costs to many other pieces of legislation, and, thus, there would be little benefit in the late 18th and early 19th centuries in terms of public attention paid to a filibuster. Other scholars agree that there were few filibusters in the first half of the 19th century.[33] In his classic 1940 work, *Filibustering in the Senate,* Franklin Burdette attributes this to the "small membership of the early Senate and to the dignity and polished politeness with which its proceedings were conducted."[34]

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[28] Binder and Smith, *Politics or Principle*, p. 34.

[29] U.S. Congress, Senate Committee on Rules and Administration, *History of the Committee on Rules and Administration*, prepared by Floyd M. Riddick, Parliamentarian Emeritus of the Senate, 96th Cong., 1st sess., S.Doc. 96-27 (Washington: GPO, 1980), p. 5.

[30] Richard R. Beeman, "Unlimited Debate in the Senate," *Political Science Quarterly*, vol. 83, no. 3 (September 1968), pp. 419-420.

[31] U.S. Congress, *The Constitution of the United States of America: The Rules of the Senate, and of the House of Representatives: with Jefferson's Manual* (Washington: Duff Green, 1828), p. 181.

[32] Binder and Smith, *Politics or Principle*, p. 39.

[33] Bell, *Filibustering in the U.S. Senate*; Arenberg and Dove, *Defending the Filibuster*, p. 20; Burdette, *Filibustering in the Senate*, pp. 14-16.

[34] Burdette, *Filibustering in the Senate*, p. 14.

The possibility of a filibuster has existed since the first Congress

Two professors of law, Catherine Fisk and Erwin Chemerinsky, are less confident in the conclusions that can be drawn from the historical record. Their 1997 article notes that "the strategic use of delay in debate is as old as the Senate itself."[35] They cite an instance in 1790, as reported in Senator William Maclay's personal diary, when Senators spoke at length and offered various motions in order to prevent a vote on a bill establishing a location for the national capital. Maclay wrote that "[t]he design of the Virginians and the Carolina gentlemen was to talk away the time, so that we could not get the bill passed." Bell, in her 2010 book, examines actions on this bill, and concludes that if a filibuster is defined as "any action or set of actions taken by a senator or group of senators to intentionally delay or prevent" action on a matter, then "it is clear that the very first American filibuster took place during the first Congress."[36] (Binder and Smith acknowledge this instance, but argue that it "does not really constitute a conscious move to exploit procedural rights to prevent the passage of legislation."[37]) Franklin Burdette states as well that legislative obstruction was certainly known in colonial legislatures and the early federal Congress; however, as mentioned above, he found few early filibusters in the Senate and states that "tactics patently obstructive" were more common in the House than the Senate in the early Congresses.[38]

Also, even if there were few filibusters, it does not necessarily follow that Senators could not have engaged in extended debate. Robert Luce claimed in his 1922 book on parliamentary procedure that in the early Senate "there developed conceptions of dignity and courtesy which led to the belief that unlimited freedom of speech would not be abused."[39] Similarly, Wawro and Schickler propose that "the Senate deemed it viable to rely on the informal constraints of 'dignity and courtesy' to prevent its members from abusing the absence of limits on debate and amendments."[40]

Arenberg and Dove are more assertive in their claim that the possibility of a filibuster has existed for most of Senate history:

> The Senate has for more than 200 years protected unlimited or extended debate. It is clear that the Founders feared overzealous majority rule and wanted the passage of legislation to be difficult. The House was designed to reflect the majority will, but the Senate in our bicameral legislative branch was formed to, in those words attributed to George Washington, 'cool the hot tea' coming to it from the House. The Senate has served the role intended by the Founders well. While those Founders never contemplated the debate rules within the Senate, in the Constitution they provided the Senate with the right and obligation to write its own rules. Those rules, informed by the design of the Framers of the Constitution, are no accident.[41]

Claims Regarding the Previous Question Motion and the Development of the Filibuster

In 1806, the Senate decided to drop from its rules the motion for the previous question. This rules change has been the subject of extensive study, because the previous question motion today is employed in the House of Representatives to end debate and bring the chamber to an immediate vote on the pending question. If the previous question motion had been used in the same way in the early Senate, then

[35] Catherine Fisk and Erwin Chemerinsky, "The Filibuster," *Stanford Law Review*, vol. 49, no. 2 (January 1997), p. 187.

[36] Bell, *Filibustering in the U.S. Senate*, p. 71.

[37] Binder and Smith, *Politics or Principle*, p. 39.

[38] Burdette, *Filibustering in the Senate*, p. 14.

[39] Luce, *Legislative Procedure*, p. 289.

[40] Wawro and Schickler, *Filibuster*, p. 14.

[41] Arenberg and Dove, *Defending the Filibuster*, p. 154.

inclusion of the previous question in the original 1789 rules could be evidence that the original Senate intended to allow a simple majority to end debate. Likewise, the elimination of the previous question motion in 1806 could be evidence of a deliberate decision by the early Senate to allow the filibuster.

The historical evidence does not appear to support either of these claims, however, because the previous question motion was quite different from the motion used in the House today. In 1962, the Senate ordered printed as a Senate Document an often cited study undertaken by political scientist Joseph Cooper. [42] Cooper had researched the previous question as it was understood in the 18th and 19th Centuries, as well as its actual use in both the House and Senate prior to 1806. At the time of his writing, Senate scholars disagreed over the use and purpose of the early previous question motion.[43] Senators, in turn, argued over the history of the motion when debating whether to create a form of majority cloture in the Senate.

Cooper demonstrates that the Senate did not, in practice, treat the previous question motion chiefly as a means of bringing consideration of a matter to a close. Instead, while the historical record is not entirely clear, it appears that, in practice, the purpose of the motion was to end or postpone consideration of an issue on account of its delicate or sensitive nature. Recent scholarship has largely accepted these conclusions, but confusion nevertheless remains.

One reason the previous question motion has been the cause of much confusion is that rejection of the motion had as much effect on pending business as did its adoption. Usually, when a legislative body votes on a motion, *approval* of the motion has an effect on proceedings, but its *disapproval* usually leaves proceedings just as they were before the motion was proposed. In contrast, as demonstrated by Cooper, the previous question motion affected proceedings in the early Senate whether it was agreed to or not. If the motion carried, then the Senate would proceed to an immediate vote on the question pending before the Senate (and in this way debate would cease). But if the motion was defeated, then the question pending would be postponed (and debate in this case would cease as well). Cooper, and before him Haynes, held that the chief use of the previous question before 1806 was to put off consideration of a matter by defeating the motion. According to *Jefferson's Manual*: "the proper occasion for the previous question is when a subject is brought forward of a delicate nature ... the discussion of which might be of injurious consequences."[44]

According to Cooper, the previous question was not an effective cloture mechanism prior to 1806 for two reasons. First, the motion itself was subject to debate. Second, it could not be employed without the risk that it would fail and consideration of the question would be postponed for at least a day. Cooper concluded, "the previous question was not understood functionally as a cloture mechanism … it was not

[42] U.S. Congress, Senate, *The Previous Question Motion: Its Standing as Precedent for Cloture in the United States Senate*, A Dissertation on the So-Called "Previous Question Rule" as Employed by the Senate in Its Early Days, prepared by Joseph Cooper, 87th Cong., 2nd sess., June 9, 1962, S.Doc. 104 (Washington: GPO, 1962).

[43] Haynes, in 1938, had written, "To one familiar with the frequent present-day use of the previous question in the House of Representatives as an effective form of closure, this rule given an entirely erroneous impression of the Senate's original practice," *Senate of the United States*, p. 393. In contrast, William S. White had stated in his 1957 book, "in 1806, in order to be absolutely certain about it, the Senate went vigorously on record for no limitation [of debate] whatsoever." William S. White, *Citadel: The Story of the U.S. Senate* (Harper & Brothers, 1957), p. 60, quoted in Binder and Smith, *Politics or Principle*, p. 37.

[44] U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, 114th Congress*, H.Doc. 113-181, 113th Cong., 2nd sess. (Washington: GPO, 2015), sec. 463. Quoted by Haynes, *Senate of the United States*, p. 393 note 1. Adding to the confusion, those moving the previous question would sometimes be urging "no" votes, when the sponsor of a motion usually asks Senators to vote aye. Furthermore, when voting on the previous question, the early Senate sometimes voted, as provided in the early rules, "Shall the main question now be put," and sometimes voted, "Shall the main question *not* be put?"

designed to operate as a cloture mechanism … [and] it was not in practice used as a cloture mechanism."[45]

This explanation of the early previous question motion is further supported by an examination of the records relating to the 1806 rules change. The Senate eliminated the previous question motion in response to a suggestion from outgoing Vice President Aaron Burr that the rule had seen little recent use and was accordingly unnecessary. Scholars often refer to the report given by John Quincy Adams of Burr's farewell address to the Senate, stating that he

> recommended the abolition of [the rule] respecting the *previous question*, which he said had in the four years been only once taken, and that was upon an amendment. This was a proof that it could not be necessary, and all its purposes were certainly much better answered by the question of indefinite postponement.[46]

Inasmuch as a motion to postpone could hardly serve the purpose of bringing a matter to a vote, Burr's latter argument implies that the purpose of the previous question rule was not seen (at least by him) as a mechanism for bringing debate to a close. If the rule as it stood in 1806 did not afford an effective means of limiting debate, its inclusion in the Senate's original rules provides no definitive indication that the Senate was concerned with the establishment of such limits, and its abolition was no definitive indication that the Senate intended to institute the possibility of filibuster.

As mentioned above, recent scholarship has largely accepted the conclusion that the previous question motion was not used to end debate.[47] And scholars today generally agree that the 1806 decision of the Senate did not represent a deliberate intent to eliminate restrictions on debate in order to allow the possibility of filibustering.

Nevertheless, some scholars still claim that the 1806 decision was a key moment in the historical evolution of the Senate as a forum for extended debate. Binder and Smith, in their 1997 book, argue that in 1806 the Senate eliminated "its only *potential* means of permitting a majority to cut off debate and vote on pending measures."[48] After the rules change, the Senate no longer had a motion in its rules that could have evolved into an effective way to limit the right to debate and amend legislation, as the previous question motion did (over a period of fifty years) in the House. Again, these formulations take care to avoid an implication that in 1806 the previous question rule did, in fact, serve as a means of limiting debate; they assert only that if the Senate had retained a motion for the previous question, it might later have been more readily able to develop the rule into an effective means for that purpose.[49]

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[45] U.S. Congress, Senate, *The Previous Question Motion*, p. 26.

[46] John Quincy Adams, *Memoirs of John Quincy Adams: Comprising Portions of the Diary from 1795 to 1848*, ed. Charles F. Adams, vol. 1 (New York: Books for Libraries Press [1874-1877], 1969), p. 365; quoted in Binder and Smith, p. 38.

[47] Wawro and Schickler, *Filibuster*, p. 14; Arenberg and Dove, *Defending the Filibuster*, pp. 19 and 204 note 15; Binder and Smith, *Politics or Principle*, p. 35.

[48] Emphasis added. Binder and Smith, *Politics or Principle*, p. 5. On this argument, see also Jason M. Roberts and Steven S. Smith, "The Evolution of Agenda-Setting Institutions in Congress: Path Dependency in House and Senate Institutional Development," in *Party, Process, and Political Change in Congress: Further New Perspectives on the History of Congress*, ed. David W. Brady and Mathew D. McCubbins, vol. 2 (Stanford, CA: Stanford University Press, 2007), pp. 182-204.

[49] Adding to the confusion surrounding the previous question, these scholars sometimes, in the midst of an academic discussion, imply the previous question motion could have ended debate. See, for example, Sarah A. Binder, Anthony J. Madonna, and Steven S. Smith, "Going Nuclear, Senate Style," *Perspectives on Politics*, vol. 5, no. 4 (December 2007), p. 736. They state, as an explanation of Senate procedural development: "One view is that path dependency, initialized by a decision in 1806 to eliminate the previous question motion from the rules (thereby eliminating majority cloture), characterizes Senate—and other political institutions'—political development."

In this way, Binder and Smith argue, the development of the filibuster was unintended. In testimony submitted to the 2010 hearings of the Senate Committee on Rules and Administration, Binder summarized this position, relating it to the broader controversy about the origins of the filibuster:

> The most persistent myth is that the filibuster was part of the founding fathers' constitutional vision for the Senate. It is said that the upper chamber was designed to be a slow-moving, deliberative body that cherished minority rights. In this version of history, the filibuster was a critical part of the framers' Senate.
>
> However, ... it seems that the filibuster was created by mistake. ... When [the Senate] met in 1806, they dropped the motion from the Senate rule book. ... Not because Senators in 1806 sought to protect minority rights and extended debate. They got rid of the rule by mistake: because Aaron Burr told them to.
>
> Once the rule was gone, Senators still did not filibuster. Deletion of the rule *made possible* the filibuster because the Senate no longer had a rule that could have empowered a simple majority to cut off debate. It took several decades until the minority exploited the lax limits on debate, leading to the first real live filibuster in 1837.[50]

In her congressional testimony, Binder emphasized the elimination of the previous question motion. Others have argued that additional procedural decisions inadvertently led to the creation of the filibuster. For example, political scientist Anthony Madonna describes not just the elimination of the previous question, but also the fact that the Senate, with its staggered terms for Senators, always has a quorum and in this way is a "continuing body" that does not adopt new rules at the start of the Congress (the way the House does).[51] Madonna, as well as Steven S. Smith and Gerald Gamm, have also posited that the designation of the Vice President of the United States as president of the Senate served to constrain majorities from eliminating the filibuster.[52] Beeman also explored the development of rules and precedents after 1806 and concluded in his 1968 article that "the development of rules governing debate in the United States Senate was a result of previous tradition, political expediency, and pure accident."[53] What these accounts share is the conclusion that, far from being intended by the Framers or the early Senate, the ability to filibuster in the Senate is an unexpected consequence of other, unrelated decisions.

Other scholars agree that the previous question motion was never an effective means to end debate in the Senate, but disagree with the Binder and Smith conclusion that the filibuster evolved accidentally. Arenberg and Dove, as quoted in full above, argue the Senate rules were "informed by the design of the Framers of the Constitution" and "are no accident."[54] Wawro and Schickler observe that, from the abolition of the previous question until the adoption of the cloture rule in 1917, although several attempts were made reinstate such a motion, none ever succeeded. [55] They argue, in contrast to Binder and Smith, that it was not the lack of a previous question motion that prevented a majority from changing the rules

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[50] Emphasis in original. Senate Committee on Rules and Administration, *Examining the Filibuster*, pp. 46-47.

[51] The fact that most of the Senate's membership continues in office from one Senate to the next is often interpreted to mean that the rules of one Senate automatically carry-over into the next Senate. The implication of this perspective is that Senate rules are entrenched against their own amendment because a simple majority is rarely sufficient to bring a contemplated rules change to a final vote. For additional information on the "continuing body" doctrine and arguments surrounding the entrenchment of Senate rules, see CRS Report RL32843, "Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications," by Richard S. Beth.

[52] Anthony J. Madonna, "The Evolution of Frustration: Revisiting the Role of Inherited Institutions in the United States Senate," (Ph.D. diss, Washington University, 2008); Gerald Gamm and Steven S. Smith, "Last Among Equals: The Presiding Officer of the Senate," in *Esteemed Colleagues: Civility and Deliberation in the United States Senate*, ed. Burdette A. Loomis (Washington, DC: Brookings Institution, 2000), pp. 105-136.

[53] Beeman, "Unlimited Debate," p. 420.

[54] Arenberg and Dove, p. 154.

[55] Wawro and Schickler, p. 25.

when Senators began to filibuster in the 19th and early 20th Centuries. A central thesis of their book is that, at least under Senate procedures as they stood during that time period, it would have been possible for Senators to find a way to establish rules permitting a voting majority to limit debate. According to their thesis, Senators did not actually need to change the rules, because the minority was restrained in its obstruction by the threat that the majority *could* change the rules.

None of the sources examined appear to consider that the line of reasoning regarding the original previous question motion might be still further extended. If the Senate's previous question rule did not actually provide a means by which a majority could terminate debate and bring a matter to a vote, it could be argued that the abolition of this rule not only did not deliberately create the possibility of filibuster, but did not do so even by accident. If the purpose of the rule was not to overcome obstruction, the establishment or abolition of the rule could be considered irrelevant to determining whether the rules protected the right of extended debate or whether the Senate intended them to do so. This interpretation would support the argument of Senator Henry Cabot Lodge, in 1897, that

> There has never been in the Senate any rule which enabled the majority to close debate or compel a vote. The previous question, which existed in the earliest years, and was abandoned in 1806, was the previous question of England and not that with which everyone is familiar today in our House of Representatives. It was not in practice a form of closure, and it is, therefore, correct to say that the power of closing debate in the modern sense has never existed in the Senate.[56]

Nevertheless, the position that the elimination of the previous question motion is not a key moment in the evolution of the Senate would still leave open the question of whether the original Senate meant, from the beginning, to establish the possibility of unlimited debate, or instead simply did not focus on the question.

We trust this information is responsive to your interest. If we can be of further assistance on these matters, please contact us at x70644 (Rybicki), x78667 (Beth), or x77084 (M. Oleszek).

[56] Henry Cabot Lodge, "Obstruction in the Senate," *North American Review*, vol. 157, no. 444 (1893), p. 526. Partly quoted in Haynes, p. 393.