

The Filibuster: A Means to Preserve the Voice of “We the People”

Anna M. Cox¹

¹M.A. in Political Science in American Government with graduate certificate in Ancient/Classical History from American Public University, United States

Correspondence: Anna M. Cox, M.A. in Political Science in American Government with graduate certificate in Ancient/Classical History from American Public University, United States.

Received: January 5, 2018

Accepted: February 11, 2018

Available online: February 12, 2018

doi:10.11114/ijsss.v6i3.3026

URL: <https://doi.org/10.11114/ijsss.v6i3.3026>

Abstract

The Senatorial practice of the filibuster has a long history of being an established fixture in the U.S. Senate. The filibuster, a senatorial tool and tactic of extended or unlimited debate has a constitutional basis, reason and purpose. The filibuster when implemented in accordance with its constitutional basis can maintain the checks and balance of governmental institutions, preserve true representation of “We the People”, protect the individual liberties of the American citizen and the rights of the minority. Thus without the preservation of the filibuster the Senate’s ability to conduct their legislative and representative responsibilities on the behalf of their constituents they represent would be in severe jeopardy. Consequently, the Senate must take the position of doing its due diligence to preserve and sustain the fundamental practice of the filibuster for the American citizenry for whom they represent.

Keywords: article 1: sec 5, senate, filibuster, cloture, Rule XXII, checks and balances, popular sovereignty, “We the People”

1. Introduction

The American system of government has an inherent governmental and structural design which was created by the founding architects. The architects’ intent of their design was for America to have a foundation built upon a constitution. The U.S. Constitution provides a blueprint that presents a unique interwoven proposal for representative government to govern the citizenry. America’s unique structure of government is evident in every aspect in American government but in no other area is this more evident than in the governmental institution of Congress, more precisely the Senate. In the system of American government the legislative and representative business transpires through Congress comprising of the House of Representatives and the Senate. The structural uniqueness of the American government is emphasized the greatest in the Senate. The Senate’s unique nature derives from the Senate’s constitutionally intended purpose, granted authority, and explicit and implicit delegated duties. These unique aspects of the Senate generates a political environment that creates and incorporates diverse, significant and at times controversial practices or techniques encompassing the cloture, holds and filibusters in the legislative process.

The Senate’s unique nature involves the critical constitutional ability of creating it’s own rules. Thus with the Senate’s diverse procedural rules there are ample matters of concern for political observers to turn their attention to for extensive consideration. Unique as the Senate’s nature is equally unique is the very controversial senatorial practice of the filibuster. In evaluation of the practice of the filibuster, the filibuster provides political observers with an abundance of political issues and questions to consider assisting in gaining comprehensive knowledge of the filibuster. One of the fundamentally central question or issue involves the nature of the filibuster and the potential constitutional basis of the filibuster. Also, further political facets of the filibuster must be given consideration these involve the terminology, the constitutional doctrines of the government and “We the People”, democratic representation, the filibuster’s role, influence and historical context, arguments for or against the filibuster and reform for the filibuster.

1.1 About the Research

Conducting the research and writing on the filibuster one finds vast material on the diverse elements involving the filibuster. Also an individual finds that there is great conflict over the filibuster and there are numerous questions surrounding the filibuster. In this research the focus will be on the specific question of the potential constitutional basis of the filibuster. Also, this research will consider the scholarly data that contains a diverse multitude of texts regarding

the filibuster. Furthermore, the research question will be examined under the lens of the evidence that was presented and collected from the material obtained during the conducting of this research on the filibuster.

1.2 Problem Description

In considering the practice of the filibuster one can find this tool to be divisive and problematic. Correspondingly, the research indicates this to be the case for an eclectic multitude of reasons. These reasons involve the perception of the filibuster as being problematic and the question of the filibuster's intended purpose. Also involved is the reason that the filibuster is implemented and at the evident increased rate and instances the filibuster is being employed in modern legislative politics. Another significantly relevant reason of concern is the research question itself for the research

question *pertains* to the potential constitutional basis of the filibuster and equally the endeavor of proving the constitutional foundation of the filibuster which is the very crux of this research.

1.3 Purpose and Reason for the Research

Research on the filibuster has merit involving valid purposes for conducting this research for instance in doing so one can discover whether or not the filibuster is constitutionally based and why this is or not the case. It is always advantageous for American citizens to understand all aspects of the system of the government, the Constitution, how this will affect the lives and welfare of the citizens individually and collectively. If the average individual American citizen desires to understand the influencing forces' effect on the daily political events has on them and their lives and welfare they must comprehend the essential significance of Congress. Authors Smith, Roberts, Wiclen and Vader explain that the great power of the American legislature is like no other national legislature. The U.S. Congress day to day activities impacts all Americans lives and innumerable people around the world. Also encompassed in Congress's authority is the ability to check the exercise of power by the judiciary, the bureaucracy and the executive. (Smith, Roberts, Wiclen and Vader, 2011) Americans having an understanding of the practice of the filibuster employed by senators who represent American citizens would greatly expand the citizen's understanding of how he or she and their interests and rights are being or not being represented and protected by their senators who perform the business of legislating and representing their constituents.

Secondly, another creditable reason is that in modern American politics political observers are seeing an increase in the implementation of the filibuster. Observers of politics may wonder if this increase use of the filibuster is for better or worse. The answer to this question is likely yes or no depending on whether or not the individual political and or American observer finds the filibuster having a constitutional foundation. Also the answer could be found in how the filibuster is perceived by Americans and political observers in the context of the representation of Americans rights and interests. The increased implementation of the filibuster is evident in two ways the first part of the evidence is the amount of increase cloture vote and filibusters. The second piece of evidence is in alignment with the increased use of the filibuster and also pertains to the increased amount of examples of individual senators who are filibustering in recent years of the Senate. Arenberg and Dove provide one example of this by stating that Senator Jim Bunning (R-KY), during the 111th Congress (2009 – 2010), used the rules to avert the largely supported unemployment extension benefits. (Arenberg, Dove 2011) Moreover Sorches states that accordingly in 2010 Senator Bernie Sanders (I-VT) provided the second instance of a filibuster that was invoked for the purposes of asserting opposition of tax legislation. (Sorches, 2013) Mangu-Ward presents a third more recent case where Senator Rand Paul (R-KY) who for 13 hours filibustered regarding his concerns over President's Obama's proposed CIA Director nominee. Senator Paul started, "I will speak as long as it takes until the alarm is sounded from coast to coast that our Constitution is important, that your rights to trial by jury are precious, that no American should be killed by drone on American soil without first being charged with a crime, without first being found guilty by a court." (Mangu-Ward, 2013) A final example is presented by Sorcher who states that fellow Senators Mike Lee, (R-UT); Ted Cruz, (R-TX); John Barrasso, (R- WY); Jerry Moran, (R- KS); Marco Rubio, (R- FL); Saxby Chambliss, (R-GA); Pat Toomey, (R-PA); and even Ron Wyden (D-OR) and Senate Minority Leader Mitch McConnell, (R- KY) demonstrated their agreement with Senator Paul by supporting his filibuster. (Sorcher, 2013)

A third and significantly relevant reason that is connected to how American citizens are represented is how are the rights of the minority to be protected and represented in the Senate. There is concern voiced over the rights and interests of the minority in today's political climate of perpetually expanding reach of the government. Partly, the mounting uniformity of the majority party's affords them the ability to squash divergent opinions and increasingly create one-sided hearings. Devins address these issues by stating that party loyalists remaining united is something Committee chairs depend upon and as a result there is less reason to extend to a majority or minority party affiliates who do not agree with the chair's agenda necessarily. Party leaders asserting greater control over the agenda and membership of committees, committee chairs have both less interest in and autonomy to pursue matters that are varying with the interest of party leaders. Also it is most plausible that the minority party will present constitutional and policy

opposition to committee initiatives. Although the majority party may not permit committee hearings to be a facilitator for the expression of the minority party objections. (Devins 2012) If this is the case or is allowed to occur in the Senate the political consequences of this would be that the population represented by the senators in the minority would not be able to articulate and represent the interest and voices of their constituents. Consequently the voices of the minority of Americans will not have representation if their senators are not permitted to speak on the behalf of the American citizenry that are their constituents.

1.4 Argument of the Research and the Thesis Statement

In conducting the research and considering the purpose, reasons and problems involving the filibuster one must ask is the filibuster a senatorial procedure and rule just to be followed or a tool used for the preservation of constitutional doctrines? I argue that the practice of the filibuster, although not directly stated in the Constitution does have a strong and substantial constitutional foundation. Thus the filibuster is a procedural rule within the U.S. Senate to be used to guarantee the protection of the constitutional based doctrine of 'We the people' and preserve their voices and interests. Accordingly the purpose of this research is to present evidence of the constitutional foundation of the filibuster and how the filibuster protects the voice, rights and interest of "We the People".

1.5 Intended Audience/Limitations of the Research

In conducting and writing this research the members of the Political Science academic community combined with other political scientists and observers are considered as the potential and intended audience of this research. Certainly, as is the case with any research, this research has definite limitations in its scope that must be taken into account. First of all any problem or question in politics is not easily examined or solved. Secondly, similarly numerous factors at play surrounding the filibuster are complex and consequently not easily researched, qualified and quantified. Included in these problematic and hard to resolve aspects of the filibuster are partisanship, polarized politics, political ideologies, the perception of the filibuster, the use or abuse of the filibuster and potential constitutional or unconstitutional basis of the filibuster. Thirdly although there is infinite amount of knowledge to be gained through scholarly articles or books they are also very limiting as to how all of this may work in the implementation of the filibuster, in the Senate and in the political real world.

2. Background

2.1 Terminology

In the evaluation of any research to obtain comprehensive knowledge one must have a working understanding of the terms that shape the subject that one is researching. For the research involving the filibuster the terminology comprises of representation, "We the People", filibuster, cloture, senatorial rule XXII and gridlock among other including democracy, popular sovereignty, checks and balances, and ratification this jargon will be explained as this research progresses. The first term of relevance to this research is representation which is defined as the deed of representing or the state of being represented. Also to be represented is the action or speech on behalf of a person, group, business, state, or the like by an agent, deputy, or representative. This is the embodiment of the role, responsibilities and task of senators.

The second term of significance is related to representation which is "We the people". At the conception of America's system of government the scope of "We the people was rather exclusive and limited to white male property owners. Although throughout American history the scope of "We the People" has been vastly expanded and become more all-inclusive. The broadening of "We the People" has occurred throughout American history through the Amendment process. The political impact that came from the additional constitutional 13th, 14th, 15th, 19th and 26th Amendments was that an expanded and diverse multitude of Americans were and are afforded the right of expressing their political interest and voices through voting. This right to take part in the political process by voting is now been granted to African Americans, females and any American citizens over the age of 18. Each of these amendments was brought on by varying historical reasons and events. Considering the original scope of "We the People" and now the more modern expanded "We the people" it can be said that the definition of "We the People" has grown from meaning white, male, property owners only to any American citizen over the age of 18 is afforded the right to express his or her political voices and interests, to be represented and to be considered members of "We the People"

Thirdly, Wawro and Schickler defines the filibuster as a senatorial practice implemented by senators as a strategic tactic that is employed with the intent to avert the conduction of legislative business and the achievement of the legislative process. (Wawro, Schickler, 2006) Fourthly, related to the filibuster is the term cloture Monk defines this as the ability to stop deliberation on a bill through technical motion known as a cloture. (Monk 2003) A fifth related term to this research, is the senatorial rule XXII and the authors Smith, Roberts, Wicken, Vader explains that this currently involves cloture with the consent of three-fifths majority of all senators present. If all senators are present, at minimum

of 60 senators must approve a motion for cloture to end a filibuster and only the exemption from this is in the case for procedural changes in Senate rules in this case a vote of two-thirds of those senators present and voting is mandatory. (Smith, Roberts, Wicken, Vader 2011) A final term that frequently surrounds the matter of the filibuster is gridlock which Dewhirst defines as the culprit of policy or legislative stalemates in federal government. The term of "gridlock" has come to represent, by more modern academics, polarized national government highlighting one institution (either Congress or the Executive) controlled by one party and the rival party dominating the minority party. (Dewhirst 1998) The advantage in having examined some of the terminology connected with the filibuster is that the new information will provide a good background as this research progresses into further facets of the potential constitutional basis of the filibuster.

2.2 *Constitutional Basis of the Filibuster*

The cornerstone of America's system of government is the Constitution consequently any and everything without exception should always uphold and be measured by this supreme political ruler. This supreme political ruler must be used to measure the actions and business of the legislative branch, in particular the senate and the procedural practices of the Senate including the filibuster. Acknowledging that the filibuster is not explicitly stated in the constitution nonetheless there is ample evidence to support the filibuster having a profound and fundamental constitutional basis. The evidence of this is found in the constitutional instruction for Congress regarding their authority, powers and duties. Further evidence can be found in the constitutional doctrines pertaining to government and representation. Also Murphy speaks to the filibuster's protection, although is not overtly constitutional in nature, it is protected by the Constitution and it is protected by perhaps even more substantially powerful -the symbolic power of representing numerous of the constitutionally established doctrines upon which the republic of the United States was founded. (Murphy 1995) The Constitution and the constitutional doctrines comprising of checks and balances, popular sovereignty, form of representation and the political interest and voices of "We the People" is to be fundamental and paramount in all aspects in American government and politics.

2.2.1 Congressional Constitutional Instructions

Senatorial Purposes, Roles, Powers and Tools

An understanding of the composition and purpose of the Senate. An examination of the constitutional instructions of the Senate is advantageous in furthering one's knowledge of how the filibuster is utilized in and by the Senate and how the practice can be determined as having a constitutional basis. Wirls and Wirls states that the resolution to the problem of the rights and interest of the minority according to the framers was to be found in the various provisions for refining the justice and wisdom of the governments choices were intended to nurture a generalizing temperament that would cultivate deliberation. The influence of the Senate on policy and deliberation, its action and inaction, were to echo practical understanding guided by a national sense and personal obligation for the reputation of the body collectively. These facets would aid in protecting the minority interest by endorsing policies that served "the permanent and collective interest" of the country rather than the passions and interests of any specific portion. (Wirls, Wirls 2004)

The 1787 Constitutional Convention in Philadelphia adopted the 'Great Compromise' which produced a Senate, the composition of the Senate was built on the allocation of equal representation to each state, no matter how great or small and it was not constructed on population. Arenberg and Dove explain the purpose and intent of the Senate which holds to the political philosophy that a simple majority of the senators may not automatically represent a majority of the people. The Senate and the House were both granted by the Constitution the right to establish their own rules. Holding true to the founder's hopes for a Senate where greater deliberation would serve as a safeguard against tyrannical majorities the rules of the Senate permit this to occur and for the protection of the minority's interests and rights. (Arenberg, Dove 2012) According to Binder and Smith, similarly Senator Royal Copeland (D- NY) in 1926, argued that the Senate's purpose is completely different from the House of Representatives,". Also Senator Copeland stated that from the very foundation of the Senate it was purposed to be a deliberative forum where the disbursement of time and the interchange of opinions ought to decide conclusion in any pending matters. (Binder and Smith 1997) The founding fathers intentions for American government and the creation of the Senate offers ample evidence for the case of the filibuster having a constitutional basis.

2.2.2 The Senate's Constitutional Explicit and Implicit Instructions

The second part of the senate's constitutional instruction involves what is explicitly and implicitly constitutionally delegated to the Senate in authority, powers and duties that are stated or implied in Article I of the Constitution. Monk states that the first section of Article I establishes that all delegated legislative powers is to be bestowed in a Congress comprising of not just the House of Representatives but also the senate. (Monk 2003) Moreover Monk also explains that in section 3 of Article I is that the U.S. Senate shall have two senators from each state that are to be elected by state Legislatures and shall serve for a term of six years and each senator will only have one vote. Also the senate has sole

authority to try all impeachments. When the senate is convened for this reason they must be oath or affirmation. (Monk 2003)

Authors Davidson, Oleszek, Walter and Lee discusses that it is asserted in section 5 of Article I is that each House will have unfettered authority to establish the chambers as each chamber see appropriate do to so and are also afforded extensive latitude in conducting their responsibilities. (Davidson, Oleszek, Walter, Lee 2012) Authors Smith, Roberts, Wicken and Vander explain the intended reason for this provision in section 5 of Article I is that the framers of the Constitution anticipated the necessity for rules of procedure. Section 5 of Article I of the Constitution asserts that 'each house may govern the rules of its proceedings.' Consequently, the senate and the House both equally have formulated an intricate set of standing rules. Each set of rules of the chambers of Congress involve the processes for amending and voting on legislation, the committee system and the ethics regulations for members and staff, and numerous other issues. It is essential to keep three things in mind one being that each chamber has its own set of rules. Secondly, each chamber may alter its rules whenever it sees fit, and finally each member may relinquish its rules whenever it wants. (Smith, Roberts, Wicken 2011) This section of Article I subsequently is a significant piece of constitutional evidence for the establishment and implementation of the filibuster for if the Senate is permitted constitutionally to create their own rules then any rule they decide to create, implement or alter would be indeed constitutional.

Encompassed within the explicit constitutional instructions for the Senate there is also an implicit component to the instructions that pertains to the representative obligatory aspect of the Senate's role, task and work. A political observer's comprehension of this facet of the senate's work allows for clarification as to how a senator's representation and protection of his or her constituents' rights and interests is enhanced with the implementation of the filibuster. Authors Lee, Walters, Oleszek and Davidson state that the work of Congress including the Senate regularly involves a dual nature thus not all of the responsibilities of senators or representatives are limited to the narrow scope of just Washington, D. C. Legislative and senatorial work includes not only the creation and design policy for America's welfare collectively, but also they act as delegates from their respective individual home states and districts. (Davison, Oleszek, Walter, Lee, 2012) Davidson, Lee, Walters and Oleszek also statements by Max Baucus, local champion and national leader, speaks to this characterization of Congress's nature of duality. Each individual member of Congress either representatives or senators conducts his or her life and work in two worlds: one on back home in her or his local states and districts and then also on Capitol Hill. (Davidson, Oleszek, Walter, Lee 2012) Consequently the undertaking of representation and legislative work requires a choice between opposing alternatives and either explicitly or implicitly closer or end to debate is required. Sinclair also deliberates and expounds upon the reality of congressional, legislative and senatorial work by stating that the expected legislative work of Congress, by the constituents, to perform comprises of a delicate balancing act: hearing to the complete range of opinions in American society and then prudently expeditiously forge, derived from these eclectic preferences, a congressional consensus for legislation that is effective in improving the problems at which it is directed and responsive to majority sentiments, although is also not objectionable to any significant minority. (Sinclair,1996) Gaining this understanding of the explicit and implicit constitutional instructions for Congress's, specifically the senate's, authority, powers, duties and of the intended composition of the Senate observers now have the ability to recognize that the invention and with the employment of the filibuster does assists in fulfilling the constitutional legislative instructions. Correspondingly observers now have the capability to appreciate that by implementing the filibuster the voices and interests of a senator's constituents will be better served and represented.

2.3 Constitutional Doctrines Regarding Government

Comprised with the evidence provided by the constitutional legislative and senatorial instruction, further constitutional evidence for the constitutional basis of the filibuster is found in the constitutional doctrines relevant to the government. These governmental constitutional doctrines include the doctrines of checks and balances, democratic form representation. Implementing the filibuster represents and protects the represented from unfair governing. Thus, Breyer contends that historical study can demonstrate that the Constitution is "centrally concentrated on active liberty." As evidence, he observes that America was born in a rejection of imperial authority and accentuates that "great post-revolutionary pre-constitutional American political thought was characterized by mistrust of government, antagonism to the Executive branch, and confidence in democracy as the best check upon government's tyrannical propensities."(Berkowitz,2006)

2.3.1 Checks and Balances

The principle of checks and balances is the first constitutional doctrine that proves to be vital to the validation of the practice of the filibuster. The constitutional doctrine of checks and balances Monk states that is defined as the constitutional principle where the governmental branches share some of the powers of the other branches intended to restrict the other governmental branches activities. (Monk 2003) Amar expands upon this definition and states the

purpose for this diction of checks and balances is Intended to mineralize the prospect that a debatably unconstitutional federal law would pass and take effect was the purpose for the constitutionally structured, an ingenious system of constitutional checks check points. (Amar 2005) Authors Davidson, Oleszek, Walter and Lee go on to discuss that In Federalist No. 51, Madison exemplifies this by justifying the Constitution as a structure to “divide and arrange the several offices in such a manner as that each may be a check and balance on the other.” The institutional development of Congress bears the permanent earmark of the constitutional doctrine of checks and balances. Continually Congress has transformed itself to meet challenges from the executive branch. (Davison, Oleszek, Walter, Lee, 2012)

The Constitutional doctrine of checks and balances can be illustrated by Congress having the authority to pass laws, but the executive has the ability to veto such laws. Another instance of how this constitutional doctrine is demonstrated is with the executive’s constitutional delegated ability to form treaties, although accordingly by the constitution, it is mandatory for the Senate to ratify them. Correspondingly certain Judges have life tenure to give them autonomy, but the senate and the president jointly choice judges. Monk presents what is described by James Madison in Federalist Paper 51 the doctrine of checks and balances as, “Ambition must be made to counter ambition. Connected must be the interest of man with the constitutional rights of the place.”(Monk 2003) Author Burdette discusses that in 1917 the Senate presented an historical example of this constitutional doctrine being applied in the Senate. The final filibuster unencumbered by any means of cloture occurred on March 2, 1917 which Initiated debate on a bill to sanction President Wilson’s provision of weapons to American merchant ship. Numerous senators, to include Senator Robert LaFollette of Wisconsin, a distinguished practitioners of the filibuster in senate history, who dreaded the legislation that would inevitably enter America into war without the authorization of Congress. (Burdette,1940) Murphy address this historical example by explaining the important value of this example by state that the senatorial opposition of this bill defended the senate’s use of the filibuster on traditional constitutional foundation: by the senate checking a tyrannical executive threatening to enter America into war. (Murphy 1995) Furthermore Murphy states, La Follette argued not only against the executive authority, but also against the treacherous and perilous “forces let lose in a democracy: that were necessary to be held in check by the power of the filibuster. (Murphy 1995)

2.3.2 Form of Representation a Democracy or Republic

The second constitutional principle that has relevance to the evidence for the case of the constitutional foundation of the filibuster is the form of representation in American government and of the American people. It is evident that there is ample confusion over which form of government that America implements and prescribes to. The system of government established and designed by America’s founders is a representative Republic that has a system of democratic representation. Amar in great details explains and defines America’s system of govermnt by stating the following: ”The form of American government is defined as a form of government derived ultimately from the people, in contrast to the governmental form of a monarchy or aristocracy. The etymological roots for the word “republican” are the same for publica, poplicus. Similarly as central as the word “people” is to the Preamble whose Greek counterpart, demo underscores the word democracy. Article V of the Constitution exemplifies how the form of American government is directed by the people. Stipulated by Article V Americans are empowered to circumvent these legislatures with specially elected conventions to purpose and ratify new constitutional rules.”(Amar, 2005)

Moreover Monk explains that specifically stated in Article IV of the Constitution, the United States will guarantee that each state will have a “republican form of government.” In Federalist 39 Madison defines a Republic as being “a government which originates all its authorities indirectly or directly from the great body of the people. The contention and position of America’s founders was that a republic comprising of representative institutions was infinitely superior in contrast to Ancient Greece, a democracy where the people directly ruled which was regarded by the forefathers of America as mob rule. (Monk, 2003) In asking the question would anyone stand up and claim that America could be a democracy while consisting of 260 million individuals? Senator Byrd has bluntly situated himself in contradiction of direct democracy of the American public and in support of the Federalist Constitution and a Senate that privileges the sifting role of representatives within a republic. Correspondingly Senator Byrd asserts that America is a republic with a form of government of a representative democracy where the citizens speak through their representatives(CR session104:1 Jan 4,1995) Furthermore Berkin states the following: “For the American generation rallied to the cry of “No taxation without representation”, the heart and soul of the any republican society must be the representative body that enacted the laws and levied the taxes, not the executive who administrated such laws, not even the courts who administrated justice. It was this conviction that the legislature was the core and all else was periphery that separates them from modern Americans, who look to the president for leadership and policy making.”(Berkin, 2002)

2.4 Constitutional Doctrines Regarding “We the People”

2.4.1 Preamble

Subsequent the examination of the constitutional senatorial instruction and the constitutional doctrines regarding

government there are further constitutional pieces of evidence in the case of the constitutional foundation of the filibuster, The additional constitutional evidence originates with constitutional doctrines pertaining to “We the People” these doctrines comprise of the Preamble, Popular Sovereignty, the ratification process of the Constitution and the Seventeenth Amendment added in 1913. In consideration of American government and the Constitution the Preamble must be given considerable attention for it is the fundamental cornerstone of the Constitution and American government. Monk states that minus the Preamble the emphasis of the Constitution and American form of government would have been steered in an entirely different form of governmental course. This paramount founding portion of the Constitution, the Preamble declares that: “We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” (Monk, 2003)

The significant substance of these fundamentally profound words is immeasurable. Amar states and describes the value of the Preamble the best with these words: “With the simple words placed in the document’s most prominent location, the Preamble laid the foundation for all that followed. “We the people of the United States,...do ordain and establish this Constitution...” These words did more than promise popular self-government. They also embodied and enacted it. Like the phrase “I do” in an exchange of wedding vows and “I accept” in a contract, the Preamble’s words actually preformed the very thing they described. Thus the Founders “Constitution” was not merely a text but a deed – a *constituting*. We the people *do* ordain. In late 1780’s, this was the most democratic deed the world had ever seen.” (Amar, 2005)

2.4.2 Popular Sovereignty

The Preamble leads right into the second constitutional doctrine pertinent to the “We the People” which is the doctrine of Popular Sovereignty. Through historical example Amar gives a great portrait of popular sovereignty by stating the following: the individual Americans had accomplished the great act through taking center stage to ordain their own supreme law. A continual constitutional principle was the Preamble-style popular sovereignty, for no other liberty was more central and supreme than the right of the people to rule themselves under laws of their own choice. (Amar, 2005) Moreover Monk expands upon Amar by saying that the ability of the people to be the source of governmental power is the very definition of the principle of popular sovereignty. (Monk, 2003) Similarly Monk articulates that most imperative are the first three words of the Constitution. Unmistakably asserted by these words that not the king, not the legislature, not the courts – but people are the true rulers in American government which is the embodiment of the principle of popular sovereignty. (Monk, 2003) Epstein also speaks to the doctrine of popular sovereignty by writing that In succeeding history of America President Lincoln affirmed the doctrine of popular sovereignty in his historically momentous Gettysburg Address by declaring ours a “government of the people, by the people [and] for the people”(Epstein, 2011)

Once again Amar gives further and greater attention to this constitutional doctrine by starting that similarly explained by Publius’ meaning of popular rights was that the rights of people qua sovereign to include their right to revise what they had created. The acknowledgment of the people’s rights is evident in the words of the Preamble, “We the People..., secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution...”(Amar, 2005) The constitutional doctrine of popular sovereignty establishes that the voice of the people is supreme. Although the voices of the people are represented through legislative members of the House and Senate it is still the people who give their stamp of ratification or approval. In doing so the people granted permission and authority to all that is in the Constitution which encompasses the Senate, the Senate’s ability to reform its rules and consequently giving the practice of the filibuster the people’s approval for use by the senators who represent them. “We the People” granting approval and authority to the Senate and its capability to alter its rules and to include the filibuster gains more substantial weight through the expansion of the direct representation of the people in 1913 with ratification of Seventeenth Amendment to the constitution.

2.4.3 The Ratification Process of the Constitution

The doctrine of Popular Sovereignty intimately influenced the very process of how the Constitution was established and implemented by the American citizens. According to Monk ratification is defined as the process through which the U.S. Constitution or its amendments are approved by state conventions or legislatures. (Monk, 2003) Amar expands upon the explanation of the ratification process by explaining that although the votes for ratification of in numerous states were not conducted by direct statewide referenda, the various ratifying conventions did resolve to ensure the representation of ‘the People’ in a particularly emphatic manner that was to be more direct than ordinary legislatures. The language of the bold wording of the Preamble “We the People” signaled voting restrictions standard in numerous states to be relinquished and thus permitting an uniquely expansive class of citizens to vote for ratification – convention delegates.

(Amar, 2005) Moreover Amor continues by articulating the reality of the state of the Constitution was reiterated by delegate Ellsworth's words that stated and reminded us that the men drafting secretly in Philadelphia fully comprehended the last word on the ultimate destiny of the American Constitution would be spoken by the American people. Envisioned by the drafters, the deed of ratification was uniquely democratic and the uncertainty of the prospects of their plan in the coming months gave definite advantage to the more democratically defensible designs proposed and implemented in Philadelphia. (Amar, 2005) Lastly discussed by Amar regarding the ratification process is the following: "The Americans understood this transformation even as they were doing the transforming and marveling at their handiwork. "The people may change the constitution whenever and however they please," explained Wilson. "It is a power paramount to every constitution, inalienable in its nature." By their very act of assembling in ratifying conventions to debate the Philadelphia plan, the people were making these words flesh. "Under the practical influence of this great truth, we are now sitting and deliberating, and under its operation, we can sit as calmly and deliberate as coolly, in order to change a constitution, as a legislature can sit and deliberate under the [power of the Constitution, in order to alter or amend a law.]"(Amar, 2005)

2.4.4 The Seventeenth Amendment

A future constitutional piece of evidence for the foundation of the filibuster would come in 1913 with the Seventeenth Amendment. The constitutional effect of this amendment was the altering of how Senators were elected, how the American citizens were represented and how the American voter was included and able to voice his or her (after 1920 following the ratification of the 19th amendment) choice in whom represented them. Authors Smith, Roberts, Wicken and Vander explain that the historical reason that brought about this constitutional amendment was public concerns regarding the responsiveness of senators to special interest instead of the will of the public. The political result of these concerns voiced by the public was the adoption of the seventh amendment in 1913. The provisions of the Seventeenth Amendment pertained to the direct election of senators, thus the direct election of senators diminished the variances between the House and Senate with regard to their relation to the constituency. (Smith, Roberts, Wicken, Vander, 2011)

The constitutional consequences of the Seventeenth Amendment impacted the manner in which Americans were represented in a couple of respects. The first change to the representation of Americans was the Seventeenth Amendment establishing that by "the people" of his or her state each senator would be elected. Amar explains that the political significant repercussion of this was that now the same voters who chose state legislators and the House of Representatives also voted for senators and thus all avenues of representation of the people were now equally chosen by the people. The only exemption was with regards to senate vacancies that would be filled by special elections, as with the House with the provision that a state's governor might make a temporary selection until a special election could be held. (Amar, 2005) Also a second substantial constitutional ramification that arose from the Seventeenth Amendment was by establishing direct election of senators considerable increased weight and support was given to the constitutional mandate of "We the People". Accordingly if the people elected senators, they in their election of their senators, are saying and granting approval of what and how their senators represent them and conduct the business of representing a senator's constituents.

2.5 Ties to Democratic Representation

The evaluation of the filibuster and the varying aspects it encompass such as terminology and constitutional based evidence comprising of the constitutional senatorial instructions, constitutional based doctrines relevant to government and the "We the People". Collectively these facets have proven advantageous in presenting of the evidence in the case for the constitutional basis of the filibuster. Equally these elements establishes how this all is coupled to the representation of the American citizens. Furthermore, these components and research establishes that the existence, creation, and implementation of the filibuster influence constituents and is intimately connected to how they are represented by their senators. In the deed of representing and legislating on the behalf of individuals or groups, and the American citizenry there is much expectation that accompanies this undertaking. Sinclair explains that Congress is expected to represent the American citizens. Americans expects their opinions, needs and interests to be brought to the legislative process by the members of Congress on the behalf of their constituents. Congress as an institution is also expected to provide an environment where the interests and demands of all components of American society are voiced. Although, American constituents necessitates Congress to be a forum where the comprehensive scope of their views are voiced, Americans also want Congress to make decisions – to pass laws. (Sinclair, 1996)

Also, the words of La Follette's validates this by maintaining continual support of the filibuster because of the previously discussed progressive mistrust of an over powerful executive. "Belle La Follette expounds upon Senator La Follett's profound conviction that 'representative government depends upon the direct responsibility of the representative, not to the President, but to the people,' and that any 'abject surrender of the legislative to the executive will,' would in the long run result in the loss of fundamental democracy"(CR Jan 4, 1995 session 104:1) Amar

discusses that Representatives directly deriving their authority from the people, the faith of the Americans could be placed the new Congress with authority to directly legislate upon the electorate. (Amar, 2005) Representation is certainly tied to the filibuster for with the employment of this practice senators have been entrusted by their constituents to represent them and their interests. Also the efforts of senator should represent his or her constituents by employing to the fullest extent whatever constitutional or constitutionally based means and tools at their disposal to represent the voices and interests of their constituents.

2.6 The Influence of the Individual/Individualism in the Senate

Fourthly the influential aspect of individualism in the senate or the individualist nature of the senate and Senators is worth consideration and is relevant to the discussion on the filibuster. This facet is pertinent for it relates to the senatorial rules of operation and function. Authors Wicken, Vander, Roberts and Smith speak to this unique set of rules produces the manner in which the business of legislation and representation is conducted in the Senate more particularly related to the tool of the filibuster. The fairly brief rules of the senate reflect a perspective that is egalitarian and individualistic in nature. Debating extensively and limitlessly while offering amendments on any matter are largely protected individual rights and it is only for the extraordinary majorities that the ability to limit amendments or debate. (Smith, Roberts, Wicken, Vander, 2011) Moreover Maisel articulates that consequently, in accordance with the Senate's rules profound authorities are bequeathed to the individual senators which allows for any individual senator to propose an immeasurable quantity of amendments to a piece of legislation on the Senate floor. Also there is nothing necessitating the amendments being relevant to the legislation that they are attached to. The Senate floor can be held indefinitely by any senator unless cloture is to be invoked, thus requiring an extraordinary majority of votes. (Maisel, 2002)

The innate nature of the Senate and filibuster alike demonstrate how extensively each is influenced by the individual and individualism. The practice of the filibuster comprises of components that exemplifies the unique individualist nature and spirit of the Senate. Authors Schickler and Wawro address this key nature of individualism by saying that the right of individual senator to constantly be acknowledged to speak for any amount of time on any subject (whether relevant or not) is the foundation of the filibuster. Also an inherent extraordinary degree of individual influence and authority is characteristic of senators although in contrast to other fellow legislature colleagues this attribute is evident. Consequently members of the senate responding adversely to yield of their prominence can supersede the need to elude compromise on blocked legislative initiatives. (Wawro, Schickler, 2006) Furthermore, Authors Binder and Smith state that the tactic of the filibuster is not just implemented by the extensive minorities but also individual senators use the tactical maneuver of the filibuster. Individual senators have not the power to avert cloture from being invoked, although in accordance to the rules of the Senate individual senators possesses the ability to be heard and thus suspend action in the senate. For some senators this governmental license may be more significant than for other senators. (Binder, Smith 1997)

Furthermore the influence of the senatorial attribute of individualism has relevant impact in two respects. Epstein discuss how this is relevant by explaining that this means that while senators are individual leaders or representatives who they represent are the individual American citizens from their prospective state and that state collectively comprises of individuals. Also it is the job of senators to represent and defend the individual liberties of the American citizen, "We the People". This promise of protection involves that each individual American citizen has private individual rights and that these liberties are safeguarded from interference of the government, although it does not require that all Americans have the right to reside collectively in a single massive teepee. The rights of the majority are not spoken for but presently we speak for the rights of every individual to be a majority of one in her or his own space. (Epstein, 2011) The senatorial characteristic of individualism goes beyond the scope of the Senate for a senator's constituency is collectively encompasses individuals citizens. Furthermore it is these individual citizens who, through the voting process express their political needs, interests, views and voices on who should be individually elected to individually represent individually and collectively "We the People".

2.7 The Role of the Filibuster

Succeeding the previously considered components of background material pertaining to the filibuster the attention of this research now will look more specifically at the role of the filibuster. Unique to the Senate, the filibuster is an antagonistic tool that is intertwined in Senate's legislative process. Thus, the senate's has a unique position within the bicameral legislature which is evident in the exemplification by Senate rule XXII, the so-called filibuster rule, which permits free and infinite deliberation in the Senate. Murphy presents evidence of the history of the filibuster through stating that historical events and cultural icons encompassing any and everything from the contentious debates over civil rights of the 1960's to the historical events that led up to the entering of American into WWI and to the cultural icon of the dramatic romanticization of the filibuster by Jimmy Stewart and Frank Capra in *Mr. Smith Goes to*

Washington have set precedent and given evidence to the filibuster having a lengthy and storied history. Consequently the practice of filibustering has been equally witnessed by the American public has with both adoration and scorn. (Murphy, 1995) Wawro and Schickler explain that political observers of the Senate have been presented with a paradox. The institution of the Senate is a strong and influential legislative chamber and the origins of the Senate's influence and strength comes from procedures that support the hindrances of the democratic majority by unchecked legislative gamesmanship, also the unique rules and norms that allow and celebrate obstruction. (Wawro, Schickler, 2006)

Monk writes on the origins of this procedural practice, known as a filibuster, originates from the Dutch word for pirate – and the Senate floor is essentially taken over by a few senators who 'talk a bill to death' The tactic of the filibuster has an extensive, proven history and is also defined, as infinite debate on bills previously before a vote can be called. Some senators take advantage of this rule to kill legislation. They give extended and irrelevant speeches to deter a vote on a bill.'(Monk, 2003) Wawro and Schickler speak to the fundamental and defining characteristics to the senate is the institutional self-image of jealously guarded tradition of unlimited debate, universal recognition, and disregard for germaness and senate's procedures and both of these aspects of the Senate are embodied by the essential practice of the filibuster.(Wawro, Schickler, 2006) Throughout the Senate's history equally the Senate and the filibuster both have experienced alterations and evolutions. Davidson, Oleszek, Wlaters and Lee discuss the differences in the types or styles of filibusters by stating that in contrast to traditional filibusters that has been related with the conducting of solo dramatic talk-a-thon on the senate floor for purposes of edifying or instructing the public about political transgression. Filibusters in its new form and manifestation usually threatened more than actually invoked to achieve bargaining power and negotiated leverage. Currently, the threat to filibuster is frequently adequate to avert action on numerous bills or nominations, in large measure since it is so difficult to muster sixty votes to invoke cloture (closure on debate). Cloture is also a time-consuming technique (two days) that obstructs the Senate's capability to process its extensive workload(Davidson, Oleszek, Walter, Lee, 2012)

Through the implementation of the filibuster a number of legislative aims can be achieved or performed. Binder and Smith give an example of this by presenting the following: "According to the "Little-harm" thesis, few measures supported by a majority have ever been killed by a filibuster. The filibuster is also said to be a moderating influence, which ensures that public policy will better reflect the preferences of the popular majority. Not only does it preserve the minority interests, but it somehow also protects the interest of the majority."(Binder and Smith, 1997) Authors Lee, Walters, Davidson and Olsezek also expand upon this by stating that noted by Senator Byrd (D-W.VA) in many ways the filibuster is the sole most significant technique ever employed to guarantee that the Senate remains truly the unique protector of the rights of the people. In agreement with Senator Byrd, the defenders of the practice of the filibuster articulate that the filibuster protection of minority rights is permitted through consideration of bills and dramatizes issues. (Davison, Olsezek, Walter, Lee 2012) Considering the legislative objectives that the filibuster achieves it is evident that the significant influence that the filibuster has in the Senate, on legislation or policy and by direct extension on the lives of the individual constituents the senators represent.

2.8 Historical Context and Evolutions of the Senate and the Filibuster

The sixth aspect of this research that necessities examination is the historical context and evolution of the filibuster encompassing the origins of the filibuster, the Seventeenth Amendment, the 1917 Cloture/Rule XXII reform and lastly in 1975 the modern reforms of the filibuster and cloture. Since the moment of the Senate's conception and formed by the framers of the Constitution, the Senate was initially one step detached from the popular electorate: state legislatures selected senators. Authors Lee, Walters, Davidson and Oleszek explain that the hope held by some of the Constitution's framers was that the Senate would have a cooling effect on the popular passions articulated in the House. Although, these held hopes by the select forefathers would be eventually overridden in favor for a Senate to be selected by direct election and thus would directly articulate the political interests and voices much as was the case in the House. (Davidson, Oleszek, Walter, Lee 2012)

As America, American history and politics progressed so did the needs and

interests of the citizenry. Murphy's writing moves the political observer through the evolution and progression of the filibuster by stating the following: "As with the original debate among the Federalists and Anti-Federalists, the progressive movement of this era, with the populist experiences, reacted against what was depicted as an elitist, aristocratic government out of touch with the wishes of the people. They wanted to bring representation closer to the mirror analogy of representatives voting directly as their constituents wished and generally mistrusted the current elitist government." (Murphy 1995) To answer these concerns, as discussed previously, a Seventeenth Amendment was adopted and ratified as part of the Constitution which provided for direct popular election of senators. Authors Lee, Walters, Oleszek and Davidson explain the the resulting consequences of this amendment, was that the historical

development finally besieged the framers' purposes. Direct election of senators was shepherded in with the seventh amendment, ratified in 1913. The Progressive movement created a constitutional consequence which involved a new constitutional arrangement that was purposed to expand citizens' involvement and diminishes the control or authority of shadowy special interests including business trusts and party bosses. Consequently the Senate became directly subject to popular sovereignty or will of the people. (Davidson, Oleszek, Walter, Lee 2012)

The final two significant components to the historical evolution of the filibuster in the Senate is what transpired prior to and between 1917 and 1975 in relation to the cloture rule. Murphy states that although not addressed until an outcry of the citizenry over the practice of the filibuster, throughout the years spanning from 1845 to 1916 numerous proposals were presented offering reform that would have seriously abridged unrestricted deliberation. The resulting ramification of the public uproar against the rule created significant pressure on the Senate where Senators were able to gather sufficient votes to permit for the first cloture motion in 1917. (Murphy, 1995) Furthermore Walters, Lee, Oleszek and Davidson explains that although Senate Rule XXII was adopted in 1917 it has since experienced numerous restructuring currently Rule XXII allows three-fifths of the Senate (60 senators) to conclude debate on substantive policy issues or procedural motions. (To invoke cloture on a proposal to modify the senate's rules a two-thirds vote is obligatory) Thirty hours for debate remains prior to a final vote transpiring on the matter identified in the cloture motion after cloture has been invoked. (Davidson, Oleszek, Walter, Lee 2012)

In the senate between 1917 and 1975 there were calls for an even higher two-thirds vote by the cloture rule (this new stipulation would require 67 senators today as opposed to 60). According to Young and Valerie It is being hypothesized by some political theorists the existence of a conclusive two-thirds "filibuster pivot" throughout that extended middle half of the 20th century. (Young, and Valerie, 2003) Moreover Murphy states that the current cloture rule adopted in 1975 allows for cloture to be invoked by three-fifths of Senators properly elected and sworn, or 60 votes. (Murphy, 1995) The relevance of this historical and contextual backdrop demonstrates how the Senate and the practice of the filibuster have evolved throughout their perspective histories. Apart from the historical evidence of the Senate and the filibuster undergoing modifications this evidence equally illustrates how the representation of the individual American citizen and their rights and lives, can be directly impacted by these revisions that the Senate currently operates and conducts the business of legislative and representative work.

3. To Filibuster or to not Filibuster – Arguments for and Against the Filibuster

After extensive consideration of the relevant, diverse aspects of the background material of the filibuster a political observer would be remiss in not giving substantial attention to the examination of the extensive and intricate arguments for or against the filibuster presented by the advocates and adversaries of the filibuster. Equally each side of this debate surrounding the filibuster brings much to the political table worth evaluating comprising of issues regarding the potential constitutional foundation or not of the filibuster, protection of the individual liberty and minority rights, polarized politics, divided government, gridlock and also prevention of the legislative process and progress. Understanding the myriad of issues involved in each proposed arguments assists in the determining of the constitutional or unconstitutional foundation of the filibuster. Also this comprehension of the concerns of each argument allows for the ability to formulate a constitutional solution to either the maintaining or restoring the constitutional foundation of the filibuster.

3.1 Arguments in Favor of the Filibuster

3.1.1 The Constitutional Basis of the Filibuster

The proponents of the filibuster have an abundance to say on the the matter. They present extensive, substantial evidence worth considering in favor of their case for the filibuster. The case presented by the advocates of the filibuster is fundamentally and predominately founded on the core assertions of the constitutional foundation of the filibuster, the long historical precedent of the filibuster and that the filibuster protects the individual liberties and the minorities' rights. The first argument put forth by supporters of the filibuster is the assertion of Thomas Mann co-author with Sarah Binder, they articulate that the filibuster is predominately attributed to the proposal of the framers by both observers and members of the senate equally. Also similarly contended by Binder and Smith is that the traditional wisdom bestows the filibuster as having a constitutional foundation thus making it significantly increasingly challenging to refurbish the rules of the Senate. (Binder and Smith, 1997) Similarly, also put forth by Smith and Binder, "the Senate's small size, longer terms, and state wide constituencies all predispose it to be a more temperate, measured body than the House of Representatives, less influenced by the fluctuating winds of public opinion. The filibuster, though not formed by the frames themselves, grew out of the independent precedents and procedures evident in the Senate from the outset, which themselves grew out of the constitutional design of the Senate." (Binder and Smith, 1997) Thirdly Binder and Smith state that the filibuster's advocates propose that there is a vital distinction to be made first, adversaries of reforming Rule 22 preserve extended debate on the criteria of its prominence in the initial design of the Senate. Minus the

filibuster the senate could no longer accomplish its initial and unique intent of cooling the passions of hasty and rash House majorities. (Binder and Smith, 1997)

Secondly argued in defense of the filibuster by its proponents is that in Section 5 of Article I explicitly states and vests both the House and the Senate with the power to “govern the Rules of its Proceedings.” Chafetz expresses that the forefathers did not oppose the establishment of particular procedural requirements in the House or Senate, but specifying no restrictions on the procedures that the House and Senate may devise for its proceedings. This portion clearly affords the Senate comprehensive authority to develop and form procedures for internal governance, and the filibuster is a rule for debate. Second, overwhelming the constitutionality of the filibuster is supported by historical practices. (Chafetz, 2010) Presented by Murphy who states that another piece of evidence that goes to the constitutional basis of the filibuster is what Sherman contended that the cloture motion proposal was another reactionary measure cloaked in the name of reform. Furthering to argue Sherman stated that to abolish the filibuster goes directly against the constitutional doctrines that was the forming foundation of the senate as a body. (Murphy, 1995) Furthermore Murphy states the following: The filibuster was cast as the sole means by which the Constitution could be protected. Still a protector of the filibuster Senator Robert La Follette, in the face of mammoth hostility, contended on parallel principles identifying the practice of the filibuster as a constitutional right. “under the Constitution of our republic and the rules as they stand today, the constitutional right is reposed in a member to halt a Congress or a session on a piece of legislation which may undermine the liberties of the people and be in violation of the Constitution which Senators have sworn to support. When you take that power away from the members of this institution, you let loose in a democracy forces that in the end will be heard elsewhere if not here” (Murphy 1995)

A third component to the evidence presented by advocates of the filibuster pertains to the historical support of the filibuster. Arenberg and Dove speak to the long history of the filibuster by stating that the filibuster’s proponents contend that the U.S. has a long and extensive history of unrestrained debate and this history supports the filibusters’ constitutional basis. During the Senate Rules Committee’s on

May 19, 2010 hearing articulated by the Late Senator Robert Byrd, the Senate’s foremost expert on its rules and history, just a month prior to his death, declared, “Our Founding Fathers intended the Senate to be a continuing body that allows for open and unlimited debate and the protection of minority rights. Senators have understood this since the Senate first convened.” (Arenberg, Dove, 2012)

3.1.2 The Protection of the Individual Liberties and Rights of the Minority

The sentiments of Senator Byrd speak to the second argument that advocates of the filibuster raise in defense of the filibuster and its purpose. James Madison and James Wilson, two authors that were most relevant to the Constitution completely comprehended the electiveness of state welfares and the requirement to defend minorities that are embodied in the Constitution. Nelson speaks to this by writing that no necessity did they see in conferring further authority to small states through the Electoral College. “Can we forget for whom we are forming government?” Wilson questioned. “Is it for men, or for the imaginary beings called states?” Madison affirmed that experience had shown no hazard of state interests being harmed by a federal majority consensus and that “the president is to act for the people not for the States.”(Nelson, 2010) Also presented by Nelson, there are numerous limitations placed on the activities of the simple majority can take by the Constitution. Having the ability to organize, communicate, and participate in the political process are fundamental rights of the minority. Small states are greatly overrepresented by the senate and the filibuster is a powerful extra-constitutional instrument for frustrating majorities. (Nelson, 2010)

Murphy expresses that similarly, the protection of the minority rights and adhering to the Constitution consequently, as regarded by La Follette, grants defense of the liberty. Whether the “organized power” was a fervent executive or the fleeting and variable passions of the public, individual liberty could only be guaranteed through the “filter” of representative government known as the filibuster. (Murphy, 2005) Magillocca also comes to the aid of the advocates of the filibuster by stating the following: “Thus a solution to the flaws in the current form of the filibuster would to be to permit the senate majority to cut off debate whenever it chooses. This potential reform is erroneous for there are ample good reasons for continuing with the practice of extended floor debate on some matters if true debate transpires-senators potentially be persuaded to change their position or gain insight on issues of policy or legislation. Equally there are substantial concerns regarding runaway majorities pushing bills through late in a Congress without allowing the minority or the public an opportunity to respond” (Magillocca 2012) Arenberg and Dove state their agreement with this aspect of the case for the filibuster by stating the relevance of the concerns over the minority rights raised by the proponents of the filibuster becomes increasingly significant when a matching party controls the White House and Congress the status of the filibuster in defending the minority opinions grows. Certainly, this is precisely the conditions in which majorities are most infuriated by the filibuster (Arenbeg, Dove, 2012)

Furthermore there is good reason for such concerns being raised by the advocates of the filibuster. According to

Arenberg and Dove in August of 2010 during a meeting with Democratic freshmen senators, many voiced equally their support of the Udall and Harkin positions and great annoyance with the filibuster. Former chairman of the Senate Rule Committee, Senator Chris Dodd (D-CT), articulated his opposition to the modifications and later remarked that “These are individuals who have never been in the minority. Furthering to explain to E.J. Dionne of the Washington Post, a severe opponent of the filibuster, ‘Those ideas are normally being promoted by individuals who have not been in the minority and don’t comprehend how the rules, if intelligently used, can help protect against the tyranny of the majority’ (Arenberg, Dove 2012) Moreover Deering goes on to say that consequently in absence of the filibuster another potential effect for senators in a Senate controlled by a simple majority would be a weakening of their power on the Senate floor. Thus the leverage individual senators would have in a senate without a filibuster would be severely limited. Chris Deering and Steven Smith write, “The defining institutional arrangements of that chamber [the Senate] – unlimited speech and lack of a germaneness rule force committees, parties and leaders to accommodate broader participation.” (Deering 1997) Epstein as well states support of the filibuster by stating that for these stated reasons, we should be diligent in working to return to the initial convention that takes enumerated authority and individual rights more seriously than we do as a nation and the best way to return to a more rational government is to ensure that temporary prevalent majorities are unable to overrun the entrusted rights of liberty and property of other citizen which will be the effect if the filibuster is reformed and modified. (Epstein, 2011)

3.1.3 Advocates of the Filibuster Speak Out

Subsequent to the evaluation of the presented arguments by the proponents of the filibuster the advocates have ample to say in favor of the filibuster. Authors, Arenberg and Dove state that “We firmly believe that the right to virtually unlimited debate lies at its heart. The filibuster is truly the soul of the Senate.” (Arenberg, Dove 2012) Articulated also by Byrd is his belief in that their position affords them an obligation to sift the public’s views through hierarchies of government: “You take away my right of freedom of debate as an elected representative of the people, and you take away their liberties” (CR Jan 4, 1995 session 104.1) Furthermore, Byrd depended upon the rhetorical salience of what as an initially Anti-Federalist principle: “I may want to implement [the filibuster] sometime to protect poor little West Virginia and her rights. This is the forum of the States. We are here to represent States. And the State of West Virginia, the State of Iowa, the State of Kentucky, the State of Mississippi, each of these States is equal to a great State of California with its 30 odd million-equal. We speak for the states and it is the only forum in the government in which the States are equally represented. Now, if we do not have that right for unlimited debate, these poor little old states like West Virginia, they will be trampled underfoot” (CR Jan 4, 1995 session 104:1)

Arenberg and Dove also present what has been stated by Senator Hatch states that a Senate without the filibuster would be a mistake. He argues that, “Although I have been a victim as well as a beneficiary of filibusters, I hope that the procedure remains intact. It is, in many ways, the fundamental parliamentary power available to the minority in Congress. Unlike the rules in the House of Representatives, where a simple majority can always force the passage of any bill, in the Senate the filibuster or threat of one ensures that the majority must give some consideration to the interests of the minority, or risk losing control of the legislative process.” (Arenberg, Dove 2012) Arenberg also present other defenders of the filibuster, Bill Frist – [Republican Senate Majority Leader], and Tom Delay [Republican House Majority Leader] articulated these dynamic comments that: “This is a moment when we decide whether this country will remain a democracy in which those who govern must play by the rules, or will become a winner-take-all system where the gravest fear of the founders – tyranny of the majority – will be the lasting legacy of George W. Bush. (Arenberg, Dove 2012) A concluding evidence in defense of the filibuster, is presented by Arenberg and Dove, is that the historical pattern is unambiguous as to what has been exemplified by the Senate remains faithfully resolved in the practice of infinite or at minimum extended debate. In instances when this right has been methodically abused, in order to calm the passions of those incensed by the exploitations and to defend the current rules of the ongoing Senate, senators have compromised and restructured Rule XXII and the filibuster. For over 200 years, each instance the right to filibuster has come under serious fire a way has always been found to defend it by senators. (Arenberg, Dove 2012)

3.2 Arguments against the Filibuster

3.2.1 The Unconstitutionality of the Filibuster

The adversaries of the filibuster have considerable amount to contribute on the matter of the filibuster. They present an abundance of significant evidence worth contemplating in establishing their case against the filibuster. The filibuster’s antagonists present a case opposing the filibuster that is essentially ground in the central contentions of the unconstitutionality of the filibuster, prevention of the legislative process and progress and consequently the filibuster is the cause of polarized politics, divided government and gridlock. First maintained by the opponents of the filibuster is that the senatorial practice is unconstitutional. Critics have suggested that senators, and others who advocate the filibuster, do so out of a belief that the filibuster was created by the Constitution. Gregory Koger asserts that “no matter

what you might hear from confused senators, the Constitution does not explicitly include a right to filibuster (Koger, 2010) Also Arenberg and Dove explain the position of the opponents of the filibusterer by presenting the following: "The heart of the argument against the filibuster and the supermajority requirement imposed by Rule XXII is that it undermines the Senate's constitutional powers and responsibilities to legislate. The argument is made that is broadly undemocratic, perhaps unconstitutional, and certainly inefficient." (Arenberg, Dove 2012)

Chafetz presents the second constitutional objection that is based in the principle of majoritarianism and the opponents of the filibuster sees the increasing implementation of the filibuster as being in direction violation of this principle in Article 1 section 7 of the Constitution. (Chafetz, 2010) Arenberg go on to explain more extensively the opponents position. In the opponents' criticism of the filibuster they give credence to this contention by presenting evidence of the Constitution stipulating supermajority requirements in five situations – to ratify treaty (two-thirds vote in the Senate), to supersede a presidential veto (two-thirds vote in both houses), to amend the Constitution itself (two-thirds vote in both house, ratify by three-fourths of the states), to convict an impeached president or other federal officeholder (two-thirds vote in the Senate), and to expel a member of the House or Senate (two-thirds vote in the appropriate house) – thus it is purposed that every other vote must be by simple majority to be constitutional. (Arenberg Dove 2012) These proposed objections have merit as for presenting and making the case for the opponents who speak against the filibuster.

3.2.2 Prevention of the Legislative Process and Progress

A second concern voiced by the adversaries of the filibuster is that the filibuster is used as strategic tactical tool for the purposes of thwarting and obstructing of the process and progress of legislative work. Dove and Aregberg discuss statements made by Orrin Hatch (R-UT), Senate Judiciary Committee Ranking Member senator, has noted commented "A lot of individuals object to the filibusters, contending that the practice needlessly hampers the passages of legislation and exasperates the capability of the Senate to function proficiently..... New comers to the senate, particularly former members of the House, regularly intend for the abolishing of the method entirely." (Arenberg, Dove 2012) Also Chafetz states that the filibuster of modern politics is not about unrestricted deliberation – certainly, it is not about debate at all. It is merely about perpetual minority obstruction. (Chatetz, 1995) Murphy iterates former President Wilson's position on the filibuster. This opinion and perspective of the filibuster is not a new thought related to this matter for President Wilson, declared: "The filibuster itself stood in the way of progress and precluded a more direct form of democracy of the people because of the power it afforded elitist representatives." (Murphy, 1995) Finally Coleman echoes the position of the opponents of the filibuster. In the achievement of the opponents legislative goals of defusing and or eliminating the influence of the filibuster by Senate supermajorities providing to any party legislative benefits regardless of that specific party having control of the presidency. For a party with unified control of government, a supermajority's ability to resolve filibusters can be particularly helpful in overcoming confrontation to proposals that do not have bipartisan backing. (Coleman, 1999)

3.2.3 Opponents of the Filibuster Speak Out

Subsequent to the consideration and proposed contentions by the adversaries of the filibuster, equal to the advocates of the filibuster the opponents have as much to say in defense of their case against the filibuster as do their counterparts. Going to the extreme the numerous critics of the filibuster have debated that the filibuster is unconstitutional. Arenberg and Dove state that before the Senate Rules Committee in 1951 Senator Hebert Lehman (D-NY) articulated that "In my unmeasured judgment, Rule XXII in its current form is divergent to the spirit of the Constitution, the ideologies of legislative process, to the essence of democratic government, and to the best interest of the Senate and of the United States." (Arenberg, Dove 2012) Similarly ,Arenberg and Dove state the following, declared by Senator Tom Harkin in 1994 on the senate floor "I believe quite frankly after reading the Constitution and looking at the rules of the Senate... that the filibuster rules are unconstitutional." (Arenberg, Dove 2012)

Moreover Arenberg and Dove states that more recently in 2010, Senator Durbin, now in the majority, launched an on-line petition titled "Fed up with the Filibuster" and stated, that the American citizens are sick of the process of obstructive progress. They are fed up with a random tradition that permits minority Senators to avert popular and essential legislation from coming to a vote. Frankly, so am I." (Arenberg, Dove 2012) Murphy also presents that the adversaries, such as Harkin, of the filibuster have historically depended on the political mythology of Democracy, holding the senate in contempt for stifling direct democracy and the will of the people. (Murphy, 1995) Throughout the debate in 1995, the filibuster was depicted by Harkin as a "dinosaur of ancient times." Also Harkin maintained that: "the Senate needs to press on with the business of the American people by liberalizing cloture rule.(CR Jan 5, 1995 Session 104.1) The opponents and advocates of the filibuster equally have ample merit in each of their arguments for their perspective cases with regards to the filibuster, the constitutionality of or not of the filibuster and also their statements of support for each of their cases either for or against the filibuster.

4. Reforming the Filibuster

The question of reforming the filibuster is contingent on whether or not political observers consider the filibuster to be broken and or if the filibusters to be founded constitutional or unconstitutional. Certainly if the filibuster is not in fact broken or found to be unconstitutional then why bother with discussion on proposed reform. Entertaining the political topic of reforming the filibuster would be pertinent and relevant under three circumstances one being if the filibuster is indeed broken or found to be unconstitutionally based then there would be necessity in having a debate on the restructuring of the filibuster. Secondly if the filibuster is constitutionally founded in its current form then only discussion necessitated would be with regards as to how to maintain its current constitutional procedural form. The third situation which would merit a discussion of the reforming of the filibuster is in the case being found to be unconstitutionally based then the filibuster would either need to be abolished or reformed so that it could be and maintain its constitutional foundation. The argument of this research is that the filibuster in its current form and practice is certainly constitutionally founded. Thus correspondingly, the filibuster should be preserved as a continuing essential aspect of the Senate's structural design, institutional character and governing procedures. If the practice of the filibuster was to ever deviate from its basis in constitutional doctrines and purposes then at that point reform would need to be considered to implement and reestablish the constitutional foundation of the filibuster. Chatetz states that the filibuster's fate has been constitutionally given over to the members of the senate and of the American citizenry. The filibuster cannot be determined unconstitutional on the grounds of numerous individual maintaining dislike of the practice. Nor does the constitutionality of the filibuster require that the filibuster be implemented by the senate. (Chafetz 2010) Furthermore Chafetz also states the following: "Reforming the filibuster that will be to the American people to say. However, the place to find or fortify the courage to change the filibuster is the electoral process. The filibuster is unlikely to change until or unless the American people want to change it. As history shows, they sometimes do and when they do, the filibuster will have met its match. But until then, the filibuster still stands." (Chafetz 2010)

5. Research Methods

5.1 Theoretical Framework

In the examination of the senatorial tool of the filibuster extensive, expansive and comprehensive research has been conducted. Throughout this research process on the filibuster the basis of the research has been found on the theoretical framework of the constitutionality of the filibuster. Thus the goal of this research has been to set out to find evidence to validate and prove the theoretical framework of this research. In endeavoring to seek out evidence to substantiate the theory of the filibuster's constitutional foundation comprehensive facts of the filibuster has been researched which encompasses the terminology relevant to the filibuster, congressional constitutional instruction involving the Senate's role, powers (explicit and implicit), tools and purpose, constitutional doctrines relevant to government and 'We the People', the filibuster's ties to democratic representation, the role of the filibuster and the arguments equally presented by the opponents and advocates of the filibuster. It has been through this extensive and involved research process that the evidence found has proven the theoretical framework of this body of research thus rendering the filibuster is constitutionally founded and correct.

5.2 Methodology

In the process of searching for evidence to prove the proposed theoretical framework of the body of research on the filibuster much has been extensively examined and evaluated. The evidence that was discovered proving the correctness and constitutional foundation of the filibuster was found through using the research methods of qualitative research methods. The information and data collected for and used in this research was taken from diverse experts and writers of scholarly texts and articles alike relevant to the Senate and the filibuster. Through these sources vast amount of material was discovered and found relevant to the senatorial tool and practice of the filibuster. Thus much was learned and the qualitative research material implemented in this research clearly gives evidence to the constitutionality of the filibuster.

6. Recommendations

In conclusion of the examination of this research on the filibuster it is the recommendation of this research, based upon the evidence presented, that yes the filibuster is constitutionally founded and correspondingly must be maintained as constitutional. Also, the filibuster must be persevered as a continuing vital and essential practice of the Senate to be implemented for the task of achieving the constitutionally purposed legislative and representative objectives of the Senate's work. Thirdly it is the position of this research that the filibuster has an imperative role and useful influence in the Senate. Consequently the reforming or abolishment of the filibuster would involve substantial and extensive political ramification which would severely alter the intent of and character of the Senate. The detrimental adaptations to the filibuster would also be a significant hindrance to the Senate's ability to perform their legislative responsibilities to the people whom they represent. There is only one occasion that would necessitate reform of the filibuster it would be in the political situation where the constitutional foundation of the filibuster has been compromised and or is no

longer grounded in the doctrines of the Constitution. Then reforming of the filibuster would be required to reestablish the constitutional basis of the filibuster. The filibuster as a senatorial tool and practice serves the doctrines of the Constitution, the legislative and governmental process and the American citizenry well.

7. Conclusion

7.1 Summary

In conclusion of all that has been considered, in this research of the controversial senatorial practice of the filibuster encompassing the relevant material pertaining the following of: the terminology, the constitutional basis of the filibuster, ties to democratic representation, influence of the individual or individualism in the senate, the role of the filibuster, the historical context of the Senate's and filibuster's evolution, arguments for and against the filibuster, the reform of the filibuster and among numerous other aspects of the filibuster there are a couple of things that are paramount and fundamentally evident from the conducting of this research. First and foremost the filibuster does unquestionably have a substantial constitutionally founded basis. Secondly, the research presents ample constitutional evidence that validates the argument of this research being that the tool of the filibuster, although not explicitly stated in the Constitution, the filibuster does have a constitutional foundation. Furthermore the filibuster is a senatorial procedural rule that must be implemented to guarantee and protect the constitutional founded doctrine of "We the People" and their political voices, rights and interest. Thirdly it is evident that the filibuster has a long established history as a senatorial practice which has merit in its role and purposed implementation in the Senate. Also there is evidence of the filibuster having strong and substantial support from the filibuster's advocates who are proponents of the role, influence, purpose, and the practice of the filibuster in the Senate and of the representation of "We the People". The voices of the filibuster's proponents and American people cannot be ignored. Equally nor can the valid proposed arguments in the case in favor of the filibuster being disregarded. The presented arguments of the advocates for the filibuster encompass the constitutional basis of the filibuster and the protection of the individual's liberties and the rights of the minority. Thus in consideration of all that it is evident and the position of this research that the filibuster is constitutionally founded and is fundamentally essential to the institution of the Senate. Subsequently the practice of the filibuster must be upheld and preserved for the voices and interests of "We the People".

7.2 Future Research

In the future further research on the filibuster could prove to be profitable for political observers, senators and the American people. Some aspects of the filibuster worth considering for future research should involve more extensive research on how and for what reasons the filibuster is being implemented in the Senate. Also the reasons behind the increased implementation of the filibuster would prove beneficial. A third potential area of future research relevant to the filibuster that would prove to be advantageous is the political party system. Two final areas where there is deficiency in the current research and having more expanded future research would prove to be profitable are the areas of the protection of the minority rights and the characteristic of individualism in the Senate. Each and collectively these areas of future research would prove to be instrumental for numerous spheres of influence. This research would profit

certain spheres of influence well and these spheres of influence comprise of the Political Science field, community, academia and members of the senate. Also future research would increase the knowledge and understanding of the filibuster and how the practice of it can better serve the voices and interests of the represented, "We the People".

References

- Amar, A. R. (2005). *America's Constitution: A Biography*, New York, NY: Random House.
- Arenberg, R. A., & Dove, R. B. (2012) *Defending the Filibuster: The Soul of the Senate.*, Indianapolis, IN: Indiana University Press.
- Berkin, C. A. (2002). *Brilliant Solution: Inventing the American Constitution*, New York, NY: Houghton Mifflin Harcourt Publishing.
- Berkowitz, P. (Dec 2006). Democratizing the Constitution. *Policy Review no. 134* (Dec, 2006) 87-96. <http://search.proquest.com/docview/216452869?accountid=8289>
- Binder, S. A., & Smith, S. S. (1997). *Politics or Principle? Filibustering in the United States Senate.*, Washington D.C.: Brookings Institution Press.
- Burdette, F. (1940). *Filibustering in the Senate*. Princeton, NJ: Princeton University Press.
- Chafetz, J., & Gerhardt, M. (2010). Debate, *Is the Filibuster Constitutional?* 158 U. Pa. L., Rev. PENNumera 245. <http://www.peenumbra.com/debates/pdfs/Filibuster.pdf>
- Coleman, J. J. (Dec 1999). Unified government, divided government, and party responsiveness. *The American Political*

- Science Review*, 93(4), 821-835. <https://doi.org/10.2307/2586115>
- Congressional Record. (1917b). 65th Congress. 1st Session. March 8.
- Congressional Record. (1995a). 104th Congress, 1st Session, January 4.
- Congressional Record. (1995b). 104th Congressional. 1st Session. January 5.
- Davidson, R. H., Oleszek, W. J., & Lee, F. E. (2012). Congress and its Members 9th ed. Washington D. C.: *CQ Press*.
- Deering, C. J., & Steven, S. S. (1997) Committee in Congress. Washington D.C.: *CQ Press*. <https://doi.org/10.4135/9781483329895>
- Devins, N. (2012). Party Polarization and Judicial Review: Lessons from the Affordable Care Act. *Northwestern University Law Review*, 106(4), 1821-1848.
- Dewhirst, Robert E. (Fall 1998). Resolving Gridlock: Politics and Policy from Carter to Clinton. *Perspectives on Political Science*, 27(4), 233.
- Epstein, R. (Summer 2011). Direct Democracy: Government of the People, by the People and for the People. *Harvard Journal of Law and Public Policy*, 34(3), 819-826.
- Koger, G. (Sept 23, 2009). The Case for Filibustering: or, How I Learned to Stop Worrying and Love Mitch McConnell. *Monkey Cage*. accessed February 12, 2010.
- Maisel, S. L. (2002). The Parties Respond, 4th ed. Boulder, CO: *Westview Press*.
- Majolica, G. (2011). Reforming the Filibuster. *Northwestern University Law Review*, 105(1), 303-328.
- Mangu-Ward, K. (June 2013). #Stand with Rand? *Reason*, 45(2), 22-25.
- Mayhew, D. R. (Jan 2003). Supermajority Rule in the U.S. Senate. *Yale University*. 31-36
- Monk, L. R. (2003). The Words We Live by: Your annotated guide to the Constitution, New York: NY. *Stonesong Press*.
- Murphy, T. A. (Fall 1995). American Political Mythology and the Senate Filibuster. *Argumentation and Advocacy*, 32, 90-107. <https://doi.org/10.1080/00028533.1995.11977983>
- Nelson, M. A. (2010). The Presidency and the Political System, 9th ed. Washington D.C.: *CQ Press*
- Sinclair, B. (Sept 1996). An effective Congress and effective Members: What does it take? PS. *Political Science & Politics*, 435. <https://doi.org/10.1017/S1049096500045030>
- Smith, S. S., Roberts, J. M., & Wiclen, R. J. V. (2011). The American Congress, 7th ed. New York, NY: Cambridge University Press. <https://doi.org/10.1017/CBO9781139059312>
- Sorcher, S. (March 6, 2013). What was behind Rand Paul's Filibuster of John Brennan, *National Journal Daily A.M.* Washington: Atlantic Media, Inc.
- Wawro, G. J., & Schickler E. (2006). Filibuster: Obstruction and Lawmaking in the U.S. Senate. Princeton University Press., xx-326.
- Wirls, D., & Wirls, S. (2004). The Invention of the United States Senate. Baltimore, MD: John Hopkins University Press.
- Young, G., & Valerie, H. (2002). Testing Competing Theories of Policy. 1874-1946. Presented at the annual meeting of Midwest Political Science Association. Chicago. react-empty, 8092.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the [Creative Commons Attribution license](#) which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.