

## The U.S. Senate's Rule Allowing Filibusters Is Unconstitutional and Stands in the Way of Meaningful Action on Environmental Challenges

October 26, 2022

By Christopher Rizzo and Karen E. Meara. Published in the [\*New York Law Journal\*](#).

Examples abound of how the Senate's "filibuster" rule has led to legislative paralysis, including on climate change and other environmental challenges. For example, earlier this year, the U.S. Supreme Court issued the final word on long-running litigation over the scope of the Environmental Protection Agency's authority to regulate emissions of greenhouse gases from power plants under the Clean Air Act. In *West Virginia v. EPA*, the Court embraced a narrow view of the statute, severely constraining the Biden administration's ability to tackle climate change via regulation of the energy sector. In another era, *West Virginia* might have prompted swift action by a Congress controlled by the President's party to update the Act to give the EPA every available tool to curb greenhouse gas emissions. Or Congress might have enacted a new regulatory regime, like the failed 2010 cap and trade bill that had the support of the public, the majority of Senators and House members, and President Obama. The failure to update the Clean Air Act and other environmental statutes, or to otherwise address climate change and a host of other problems can be traced in large part to the filibuster.

Senators have used the filibuster (or the threat of one) with unprecedented frequency over the last two decades to block a wide range of important and popular legislation and to frustrate the legislative priorities of winning majorities including on gun control, immigration, voting rights and climate change. With the exception of budget bills and judicial and executive appointments, Senate activity has slowed to a crawl, particularly since 2009, with a minority of Senators wielding de facto veto power through the filibuster. Contrary to popular myth (and what proponents of the filibuster want you to think), this state of affairs has no basis in the U.S. Constitution or history. It's time to take a fresh look at how the filibuster is hobbling efforts to address climate change and other important national emergencies and the troubling constitutional issues at stake.

**What is a Filibuster?** According to the Senate itself, the filibuster is a "tactic of using long speeches to delay action on legislation" enabled by an alleged "right of unlimited debate." [U.S. Senate: About Filibusters and Cloture | Historical Overview](#). Although used only rarely before the 1970s, it has always been counter-majoritarian and allowed a very small number of Senators to delay or block votes on issues ranging from arming merchant ships on the eve of World War I, to the New Deal in 1935, to the Civil Rights Act in 1964.

**The Filibuster Rule:** The Constitution allows both the House and the Senate to "determine the Rules of Its Proceedings." (Article I, Section 5). Both chambers liberally use the clause to set their rules. Per the current Senate Rule 22, the "cloture rule," 40 senators can prevent legislation from ever coming to a vote by demanding that the debate period remain open. Put another way, legislation cannot move to a final vote unless and until 60 Senators vote for "cloture." A minority of senators can thus block votes, and effectively veto legislation they oppose. Narrow exceptions exist for votes on "budget reconciliation" (i.e., matters pertaining to federal spending) and presidential executive branch and court nominees, for which debate can be ended by a simple majority of senators. These exceptions allowed majority of senators to vote to end debate and approve the 2022 Infrastructure Act and the 2022 Inflation Reduction Act.

---

**The U.S. Constitution:** The Constitution sets forth clear intentions for how the Senate is to vote-by majority vote except for six exceptions. The Constitution states for example, “The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.” (Article I, Section 3). This clause would serve no purpose unless the framers of the Constitution intended the Senate to act by majority vote. Further, the Constitution lays out six precise instances where it requires more than a majority Senate vote including presidential impeachments, expelling a legislator, and overruling a presidential veto-in other words, the only exceptions to the rule of a simple majority. The Senate’s filibuster rule is at odds with this framework and the Senate’s rights to set its own rules must surely be constrained by the terms of the Constitution itself.

**The History:** This interpretation of the Constitution is supported by its history. The 13 original states adopted the Articles of Confederation in 1781 and they governed the nation until the current U.S. Constitution was ratified in 1787. The Articles gave each of the 13 original colonies one vote and required a supermajority for any law to pass-9 out of 13. The unicameral national legislature at the time could therefore get virtually nothing done. The framers of the Constitution sought out a completely different model and explicitly rejected a supermajority requirement for the new Senate. In fact, both James Madison and Alexander Hamilton wrote explicitly at the time in opposition to any Constitutional requirement for the Senate’s operations that would give a minority veto power.

The concept of a filibuster, where Senators could delay a vote by extended debate, did not come into existence until 1806 at the earliest. And this unwritten rule allowing Senators to delay votes by extending debate required those Senators to be physically present and actively speaking in the Senate-a requirement that was hard to meet for days on end. Prolonged debate also brought other Senate business to a screeching halt. As a result, it was rarely used even after a 1917 refinement putting limits on the procedure.

This all changed in the 1970s when the Senate amended Rule 22 to allow 40 Senators to extend debate without being present, speaking or debating, simply by indicating their intention to extend debate, and without holding up other Senate business. The result has been a wild uptick in the use of the filibuster from less than seven instances of cloture motions per congressional session between 1917 and 1970 to over 200 per session since 2013. And that does not capture legislation that died from the mere threat of a filibuster without any recorded cloture vote. While the filibuster has been used by both parties to thwart opponents’ legislative priorities, it is generally viewed as most hobbling to Democrats, since key Republican priorities like tax cuts, defunding the administrative state, and court appointments are not subject to the filibuster.

**Filibuster Induced Federal Paralysis on Climate Change and Other Pressing Environmental Issues:** Climate scientists, a solid majority of Americans, the Democratic party and even most fortune-500 companies consider climate change a national legislative priority. *See, e.g., Pew Research Center* (finding in 2020 that over 80% of U.S. adults and 63% of those identifying as Republican favor “tougher restrictions on power plant carbon emissions.”). Yet, Congress has been unable to pass federal legislation to create the new tools needed, even when Democrats have been in control of government. The Waxman-Markey cap-and-trade bill passed by the House of Representatives in 2009 would have reduced U.S. greenhouse gas emissions to 17% of 2005 levels by 2050 and spurred the transition of the country into a global leader in renewable energy and sustainability. The nation has lost a critical decade of progress.

**Litigation:** Changing the filibuster rule will not be easy unless the Senate itself decides to eliminate or sharply scale back the rule, which it can do by a simple majority vote. Litigation will be a harder path. Only a few federal court cases have even addressed the subject, and none have addressed the legal merits. In *Common Cause v. Biden*, 748 F.3d 1280 (D.C. Cir. 2014), for example, the U.S. House of Representatives, immigrants and the nonprofit organization Common Cause sued then Vice President Biden as Senate President, the Secretary of the Senate, the Parliamentarian and the Sergeant at Arms. They objected to the defendants’ actions and inactions that allowed a Senate filibuster to prevent a vote on immigration laws including the DREAM Act, which would have created a pathway to citizenship for undocumented Americans brought to the United States as children. The U.S. Court of Appeals of the D.C. Circuit acknowledged the tortured history of the filibuster, the importance of the legislation and fact that individual senators cannot be sued for their particular speeches, debates and votes. (Article I, Section 6). Nevertheless, the Court held that the lawsuit did not raise a justiciable controversy because the defendants had no authority over the

filibuster rule and the harm was caused by “an absent third party-the Senate itself.” Crafting a winning lawsuit that gets past this standing issue is beyond the scope of this article.

**Progress despite the filibuster:** Both the executive and legislative branches have used every tool at their disposal to chip away at greenhouse gas emissions, despite the filibuster. The 2022 Inflation Reduction Act, for example, contains vast tax credits, loans and grants that will incentivize, at both the industry level and the consumer level, the transition of heating systems, appliances and vehicles. The package of measures is expected to reduce emissions to 41 % below 2005 levels by 2030. The Biden administration is working on new rules to regulate emissions at existing power plants in the wake of *West Virginia*. And the U.S. Bureau of Ocean Energy Management is working closely with states like New York and New Jersey to issue leases for offshore wind farms supported by the states. But the progress these measures will achieve will be limited in comparison to what the Clean Power Plan (the rule rejected by the Supreme Court in *West Virginia*) or the 2010 Waxman-Markey bill would have achieved and will not get the United States to the standard scientists tell us is needed-net zero emissions by 2050. The nation cannot respond to and plan for the crises of the day without a functioning legislature. Nor can a president, no matter how creative, solve every problem through a budget bill. The filibuster is illegal, harmful and must be repealed.

---

*Karen E. Meara and Christopher Rizzo are members of Carter Ledyard's [Environmental and Land Use practice](#).*

*Reprinted with permission from the October 26, 2022 edition of the New York Law Journal © 2022 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or [reprints@alm.com](mailto:reprints@alm.com).*

#### **related professionals**

**Karen E. Meara** / Partner

D 212-238-8757

[meara@clm.com](mailto:meara@clm.com)

**Christopher Rizzo** / Partner

D 212-238-8677

[rizzo@clm.com](mailto:rizzo@clm.com)