



The US senate result could reverberate for decades if under Democrat control the filibuster goes
Any quest to alter the constitutional order would be more proof of how primary contests are destabilising US politics.

Mitch McConnell, first elected to the US senate in 1984, became senate majority leader in 2015 when Republicans regained control of the 100-strong chamber. Perhaps the most famous comment of this unflamboyant 78-year-old politician is when he warned Democrat senators seven years ago: "You'll regret this. And you may regret it a lot sooner than you think." [1]

McConnell was speaking when the then-Democrat-controlled senate voted 52-48 to end the filibuster for most presidential executive and judicial nominations. The filibuster is a senate practice (rather than constitutional requirement) that effectively means that most measures need 60 votes to pass the chamber – this 'super-majority' is needed to end debate to allow a majority vote.[2] As long as the minority party has 41 votes, it can block or modify legislation, thus ensure the senate acts as a house of review. But the senate can set a new precedent (known as the nuclear option) that only requires 51 votes to end the filibuster on certain measures.[3] This was the loophole by which the Democrats in 2013 abolished the filibuster for most presidential nominations.

McConnell's comment is remembered because the Republican-controlled senate exploited the filibuster's removal when Donald Trump became president in 2017. A key plank of Trump's re-election campaign is that he has appointed more than 200 conservative federal judges without needing to worry about Democrat opposition. Perhaps even more notable, to overcome a Democrat obstruction, Republicans in 2017 eradicated the filibuster for all judicial appointments to confirm Trump's first of now two nominees for the supreme court – and possibly soon three.[4]

Skip to 2020 and, amid the pandemic, polls show the Democrats in November could capture both houses of congress and the presidency for Joe Biden. Any Democratic senate majority, however, would likely only be a narrow one – the polls say today's Republican senate majority of 53-47 (counting two independents in opposition) will be reversed in favour of the Democrats when the 35 senate seats are decided (a tally that

includes two 'special' elections).[5] Thus, the only barrier to the Democratic party instilling its agenda would be the senate's legislative filibuster (though legal provisions allow bills tied to 'budget-reconciliation process' to avoid the hurdle). A view is hardening among leading Democrats including former president Barack Obama that the legislative filibuster must go.

Why would a Democrat-controlled senate under majority leader 69-year-old Chuck Schumer of New York state diminish the raison d'être of the senate, which is to block rash legislation, improve promising laws and slow change?[6] Democrats know Republicans will regain control of congress one day.

The answer is that Democrats are so determined to implement their agenda, especially to ensure action on combating climate change, they are prepared to alter the political system to do so. Eradicating the legislative filibuster might only be the first move. The Democrats talk of making the District of Columbia (where Washington sits) and the territory of Puerto Rico states so all US citizens have the same voting rights. They talk of expanding the number of judges on the supreme court, which congress sets, to ensure like-minded judges are a majority. Such talk goads Republicans, especially that these two new states would likely produce at least three extra Democrat senators.[7]

Part of the reason the Democrats are prepared to take such controversial steps is that the Republicans have made many contentious moves in recent times too. Republicans broke norms when they blocked an Obama appointment to the supreme court in 2016 that left a vacancy that became Trump's first pick. Republican intransigence has led to debt-ceiling brinkmanship and has triggered budget bastardry such that passing a budget on schedule is a rare feat in Washington. Trump has endlessly flouted norms.

A shift in how the US political system operates explains why these parties have become more uncompromising, even radicalised. From the early 1970s candidates have been selected from contested primaries, when people registered to a party vote to decide candidates, whereas before then party leaders worked alongside a patch primary system to choose their preferred candidates. Under contested primaries, in safe senate races and safe (often gerrymandered) seats in the house of representatives – and that would be most of them – the biggest threat to an incumbent is someone more extremist within the same party launching a primary challenge. This has seen both



parties shed their centrists for more militant candidates. [8] One fact that many people think makes it more likely the Democrats will abolish the filibuster is that the socialist-leaning Alexandria Ocasio-Cortez is bracing to challenge Schumer in a Democratic primary ahead of the 2022 mid-term elections. Schumer already appears to be leaning left to protect his political career.[9]

That even talk of a primary threat is mixed up in fundamental change to how congress turns legislation into law highlights the damage contested primaries have done to the US political system. It's hard to argue against more democracy so contested primaries will deliver more hardliners into congress and maintain donation flows towards candidates rather than the parties. The likely result is an ever-more-dysfunctional and polarised US political system. As inflammatory as the presidential election might be, watch the outcome of the senate contests that could flip the chamber to the Democrats. Such a result could usher in changes to the constitutional order that over the long term could destabilise the US political system.

To be sure, one party has to win congress and the presidency for the filibuster to go and then that party's members of congress need to agree to the move (that advocates say will improve the legislative process). While polls in mid-September showed the Democrats were positioned to achieve this feat, public voting intentions could shift, especially if riots persist, coronavirus infections ebb and the economy extends its recovery. The presidential winner will still be important, as will be the outcome for the now-Democrat-controlled house of reps. Many other concerns surround this (and every) election, from voter fraud and foreign interference to the risk the loser of the presidential election might not accept the outcome. Television from the 1960s and social media in recent years have helped elevate candidates over the parties, as did the corruption and cronyism of the era when the parties were under the control of bosses. What's not to like about more public involvement in politics? Just that the change has delivered less compromise into a political system designed for compromise. The consequences of a gridlocked congress bereft of centrists are unpredictable when the political polarisation of the US is causing people to lose faith in the country's liberal democratic system.

LIKELY ATTACK

President Franklin Roosevelt, on winning a second term in 1936 by a landslide and extending the Democrat's hold on congress, took on the nine-strong supreme court for declaring six key parts of his New Deal legislation unconstitutional. Inspired by how other presidents had added judges to reverse verdicts,[10] Roosevelt launched a bill in February 1937 that would allow him to appoint a new judge for every one with 10 years of service who failed to retire at 70, an equation that would allow him to nominate six more supreme court justices. "The people are with me," Roosevelt declared. But neither voters nor congress approved. In another miscalculation, Roosevelt persisted with his court packing even when the supreme court ruled for the New Deal on four cases. Roosevelt then miscalculated for a third time by failing to attend the funeral of majority leader Democrat Joe Robinson. The senate in July 1937 rejected his bill 70 to 20, at a time when Republicans only held 16 seats. The legacies of Roosevelt's effort were squandered public support and a split in the Democratic party that hampered his agenda.[11]

Roosevelt never signalled his intentions for the supreme court in the 1936 election campaign. Biden's platform[12] contains no hint of any change to the filibuster, the creation of two more

states or expanding the supreme court, in what would be the biggest proposed change to the US political system since 1937 or perhaps 1970 when senators from small and southern states filibustered a Democrat-initiated attempt to abolish the electoral college (a step contemporary Democrats have called for too but it would require a referendum).[13] Nor during the first presidential debate would Biden refuse to rule out supporting such action, a refusal that some took as an admission he would. The Democratic Party platform of 2020, however, argues for the District of Columbia to become the 51st state. It seeks self-governing status, but no explicit mention of state status, for Puerto Rico, a US territory since 1917, and full voting rights attached for all US territories.[14] The word filibuster yields no matches. None of the three mentions of the supreme court refers to expanding the number of justices.[15]

But talk is mounting that a Democrat quest to change the constitutional order is coming if the party triumphs in November. The lack of federal voting rights for Washington DC's 700,000 inhabitants is a long-standing anomaly. Puerto Rico has long sought state status; in November, the territory of three million US citizens will hold its fifth referendum on becoming a state and the score so far is 4-0 in favour.[16] To most people, the argument for granting state status to these regions only seems fair. The likely appointment of a third Trump nominee as a supreme court justice has fuelled talk among Democrats of expanding, or 'packing', the supreme court. The political problem, however, is that Republicans see that the Democrats want to bias the political system in their favour, especially by securing extra senators.

The Democrats would most likely need to abolish the filibuster to implement their agenda. An indicator of their intent is that Obama, when in July giving the eulogy at the funeral of revered lawmaker John Lewis, declared the quest an extension of Lewis's fight for Black civil rights. "If it takes eliminating the filibuster, another Jim Crow (racist) relic, in order to secure the God-given rights of every American, then that's what we should do," he said.[17]

Not every Democrat senator is reported to agree with changing the constitutional order. But the party base seems to. Democratic senators who hesitate on abolishing the filibuster might face Schumer's likely fate, a primary contest from the left they might lose.

THE ENEMY WITHIN

The story goes that a just-elected politician on taking his place in Australia's house of representatives looked across the chamber and gushed: "There they are. The enemy." An experienced MP sitting on his side of the chamber smiled sardonically. "No, son," he said. "That's the opposition. The enemy are the ones sitting all round you." [18] No matter the veracity of the anecdote, Schumer would understand the message as to from where comes the biggest threat to his political career. The last Republican elected to the senate from New York state was in 1992. Ocasio-Cortez refuses to rule out a senate run in 2022 and Schumer might think that Trump's taunt that she would "kick his ass" in any primary rings true.[19]

Ocasio-Cortez would be the classic lethal primary candidate because firebrands are best positioned to garner support from the impassioned within a party to topple more moderate intra-party rivals. The Instagram star with 6.4 million followers who is better known as AOC is incredibly high profile for a first-term member of the house of reps. But the Biden campaign



only allowed the youngest woman ever elected to congress 94 seconds at the 2020 Democratic National Convention in August for a reason.[20] Party powerbrokers think she deters swinging voters.

How different from the era when power brokers in both parties held sway such that in 1948 Democratic party leaders called for a secret caucus to dump President Harold Truman from the party's ticket and draft retired general Dwight Eisenhower in his place. The quest only failed because Eisenhower killed it and Truman went onto a surprise victory. The sequel is that in 1952, in a year when only 13 states held presidential primaries, Republican leaders installed Eisenhower as their nominee and he became a two-term Republican president.[21]

Party bosses lost their grip from 1968 when, in an unruly Democratic Party convention in Chicago marked by disagreements over the Vietnam War, Democratic leaders enforced the nomination of vice president Hubert Humphrey who had contested no primaries against the wishes of party members. The Democrats switched to nationwide primaries and so did the Republicans such that since 1972, party primaries, which entered the US political system around the start of the 20th century and are run in different ways across states, have selected presidential nominees. The shift in power from the party backroom players to party members came at the cost of internal party cohesion. [22] The result is that over time more ideologues, untapped and unvetted by party leaders, have successfully sought selection for congress via 'direct primaries'. Nowadays contested primaries – even the threat of them – that require millions of dollars in campaign funds provide unending angst for incumbents. Ocasio-Cortez faced a contested primary this year and, as usual, the less-moderate candidate beat the moderate.

This result speaks for how contested primaries have given rise to a congress crammed with hardliners who are less willing to compromise with the opposition – and less able to, lest they get primaried. The primary defeat in 2014 of Republican hard-line house majority leader Eric Cantor to a 'Tea-Party'-backed unknown who accused him of not being conservative enough is the watershed example of the vulnerability of incumbents from people more extreme from their side of politics.

The problem with the rise of contested primaries is that the small number of party-registered voters who decide the outcomes of primaries are more ideological about politics than the general population. The result is the party extremists have entered congress and the unintended radicalisation of US politics. Court decisions that have enhanced the power of donations to individuals and the ability of state governments to gerrymander house seats are among the causes that have dimmed mass enthusiasm for politics and left politics to the more dogmatic. The same pitfall is evident elsewhere, most notably when leftist Jeremy Corbyn won a vote of party members in 2015 to lead the UK Labour Party.[23] Corbyn led the party to electoral defeats in 2017 and 2019.

Party powerbrokers are aware primaries favour extremists over the centrists whom they and the broader public generally prefer. Party leaders have some power to steer the outcome towards a candidate who has more chance of winning the general election. They can encourage certain people to run. The Democrats came up with the idea of 'superdelegates', unpledged party powerbrokers who helped Hillary Clinton defeat leftist senator Bernie Sanders for the presidential nomination in 2016.[24] Party bosses can organise the mass endorsement of one candidate, which is how Biden prevailed over Sanders in 2020. But these steps seem less effective in less-prominent, lower-office primaries.

The US system could become less partisan if many more people re-engaged in politics and chose more mainstream candidates for congressional elections. Less gerrymandering in house seats could prompt the appointment of more centrist house candidates and efforts are underway in some states to set fairer electoral boundaries.

But until such things happen, US politics will only become a greater clash of money-backed zealots that further erodes people's faith in democracy. And if that goes, everybody will be sorry.

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[1] The New York Times. 'In landmark vote, senate limits use of the filibuster.' 21 November 2013. [nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html](https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html)

[2] A vote requiring this number ends debate on a bill (cloture) and allows the senate a majority vote on the legislation. Without those 60 votes to end debate, senators can fill hours or days with meaningless talk to delay a vote on a bill or, more usually, just threaten to do so. The senate, seeing the pointlessness of debating a bill, moves onto other matters without voting on a bill.

[3] For an explanation of the filibuster in the US senate, see: The Brookings Institution 'What is the senate filibuster and what would it take to eliminate it.' 19 October 2019. [brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/](https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/)

[4] The New York Times. 'Senate republicans deploy 'nuclear option' to clear path for Gorsuch.' 6 April 2017. [nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html](https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html)

[5] See The Cook Political Report. '2020 Senate race ratings.' 17 August 2020. [cookpolitical.com/ratings/senate-race-ratings](https://www.cookpolitical.com/ratings/senate-race-ratings)

[6] The other way the senate is designed to slow change is that only a third of the chamber is up for re-election every two years.

[7] See Politico 'Is Puerto Rico the next senate battleground.' 9 September 2020. [politico.com/news/magazine/2020/09/09/puerto-rico-statehood-politics-democrats-republicans-senate-409191](https://www.politico.com/news/magazine/2020/09/09/puerto-rico-statehood-politics-democrats-republicans-senate-409191)

[8] For a similar view on how contested primaries have destabilised US politics, see George Friedman. Stratfor. 'The Roots of the Government Shutdown.' [worldview.stratfor.com/article/roots-government-shutdown](https://www.worldview.stratfor.com/article/roots-government-shutdown)

[9] An "angry centrist" is now marketing himself as a 'progressive' seeking "income and wealth equality, climate [change], racial justice, health care, and improving our democracy". Politico. 'Chuck Schumer isn't an 'angry centrist' anymore.' 24 August 2020. [politico.com/news/2020/08/24/chuck-schumer-senate-progressives-leader-399870](https://www.politico.com/news/2020/08/24/chuck-schumer-senate-progressives-leader-399870)

[10] His inspiration was how in 1870 president Ulysses Grant appointed two extra justices to ensure the court reversed itself and validated the paper money circulating since the Civil War as a substitute for gold.

[11] Jean Edward Smith. 'FDR'. Random House. Paperback edition 2008. Pages 377 to 390.

[12] See Joe Biden's campaign website at joebiden.com

[13] See David Roos. 'How the electoral college was nearly abolished in 1970.' history.com/news/electoral-college-nearly-abolished-thurmond and Brookings Institute 'It's time to abolish the electoral college.' 15 October 2019. [brookings.edu/policy2020/bigideas/its-time-to-abolish-the-electoral-college/](https://www.brookings.edu/policy2020/bigideas/its-time-to-abolish-the-electoral-college/)

[14] The other US territories are American Samoa, Guam, the Northern Mariana Islands and the US Virgin Islands.

[15] 'The 2020 Democratic Party Platform.' democrats.org/where-we-stand/party-platform/

[16] See 'Statehood movement in Puerto Rico.' [wikipedia.org/wiki/Statehood_movement_in_Puerto_Rico](https://www.wikipedia.org/wiki/Statehood_movement_in_Puerto_Rico)

[17] To read the full speech, see: 'Former president Barack Obama delivers a rousing eulogy: 'America was built by John Lewises''. USA Today. 30 July 2020. [usatoday.com/story/news/politics/2020/07/30/barack-obama-eulogy-john-lewis-funeral-full-transcript/5544048002/](https://www.usatoday.com/story/news/politics/2020/07/30/barack-obama-eulogy-john-lewis-funeral-full-transcript/5544048002/)

[18] Mungo MacCallum. 'How to be a megalomaniac.' Duffy & Snellgrove. 2002. Page 12. A similar quote is sometimes attributed to Winston Churchill but other Australian political anecdotes are attributed to him too.

[19] New York Post. 'Trump says AOC will challenge Schumer for his senate seat and 'kick his ass''. 4 February 2020.

[20] To watch Representative Alexandria Ocasio-Cortez's full speech at the 2020 Democratic National Convention, go to: [youtube.com/watch?v=Eht6oIkzkew](https://www.youtube.com/watch?v=Eht6oIkzkew)

[21] From these Democratic efforts of 1948 a 'Draft Eisenhower' movement arose, a grassroots campaign pushed by both major parties. Eisenhower's Democratic opponent in 1952 (and again in 1956) was Adlai Stevenson, who received that party's nomination that year without campaigning in any primaries. Jean Edward Smith. 'Eisenhower in War and Peace.' Random House 2013. Quote from page 477. See chapters 17 and 18 for the details of Eisenhower's rise to the presidency.

[22] For a view on all the forces that have weakened the political class, see Jonathon Rauch 'How American politics went insane.' The Atlantic. July/August 2016 issue. [theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/](https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/)

[23] This unexpected triumph was accredited to an innovation that allowed a flood of 'registered supporters' to pay three pounds for the right to vote in the party poll.

[24] These superdelegates, who in the 2016 campaigns consisted of governors, members of congress and party activists and accounted for 15% of the vote, helped Hillary Clinton stave off the challenge from self-described socialist senator Bernie Sanders. Sanders galvanised changes to this 'rigged' system for 2020 such that the superdelegates could not vote in the first ballot. When Sanders this year looked like gathering enough elected pledged delegates to win the nomination, party powerbrokers, worried at the prospect of such a leftist as the nominee, intervened by unanimously endorsing Biden such that he secured the nomination.

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