

26 discussion on these issues on the Senate floor after the vote on the motion to proceed
27 on Defense Authorization Bill failed.

28 We will be having a sixth hearing at 10 a.m. next Wednesday to examine specific
29 ideas related to encouraging debate, as well as reducing unnecessary delays. One of
30 the issues we will cover in that hearing is the one that you folks raised in your colloquy,
31 and that is the issue of limiting debate through the procedure known as filling the
32 amendment tree. When you are in the minority, you hate it that the tree is filled, and
33 when you are in the majority, you like it that the tree is filled.

34 I appreciate the participation of Senators Bennett, Alexander, and Roberts, who
35 are members of this Committee, and others who have attended these hearings and
36 provided their comments and input. They have raised important issues during our
37 discussions, as have the Democratic members of this Committee, Senators Udall and
38 Nelson. We welcome Carte Goodwin, who has been here for every hearing we have had
39 since he has become a member and thank him for that.

40 My view is that while this session has seen its share of milestone moments, it has
41 seen the filibuster become the norm, not the exception. Even motions to proceed are
42 routinely blocked, stopping debate before it can ever begin. I believe that to the public
43 a filibuster is not supposed to mean endless debate. Today it essentially means no
44 debate at all. Just yesterday we failed to even proceed to debate on the substance of
45 the Defense Authorization Bill. We are supposed to be spending today debating that
46 important measure, but it was rejected for consideration altogether. Once again, the

47 Senate showed up for work, but failed to earn its paycheck.

48 No matter what happens in the upcoming elections in November, I worry that
49 more brinksmanship is in store next year unless we consider meaningful rules changes.
50 We can disagree what the solution is, and after listening to my Republican colleagues
51 speaking on the floor yesterday, I think we agree on both sides of the aisle that the
52 current system is broken.

53 The Senate is supposed to be the saucer that cools the drink, but to me it
54 sometimes feels like an icebox where reasonable pieces of legislation get put in a
55 permanent deep freeze. That is why we have been having these hearings.

56 And I just want to say another note. One of my Democratic colleagues came to
57 me yesterday. He had been around the Senate a long time and he said, you know, we
58 may be in the minority next year. I do not think that will happen at the end, but we
59 may be in the minority next year, and you may want to be careful about making any
60 changes. And I said to him, whether you are in the minority or the majority, the place
61 is broken and we ought to fix it without a mind to what particular ascendancy each
62 party has. That is my view, and so that is why we have been having these hearings.

63 Over the course of the hearings, we have looked at a number of issues - the
64 development of the filibuster since the earliest days of the Senate, the growing
65 challenges that the use and some would say abuse of the filibuster presents to the
66 Senate, the impact of the filibuster on nominations, and other matters. Our last
67 hearing in July examined filibuster-related legislation introduced by Senators Frank

68 Lautenberg of New Jersey and Michael Bennet of Colorado. Today we take a look at two
69 other Senate Resolutions that have been introduced to address concerns about abuse.

70 The two proposals we will examine today are Senate Resolution 416, introduced
71 by Senator Harkin, and Senate Resolution 619, introduced by Senator Tom Udall.

72 Senator Harkin has been a leader for more than a decade in trying to make the Senate
73 function better and fulfill its purpose as a deliberate body. His resolution, as I am sure
74 he will explain, was introduced more than a decade ago when he and the Democrats
75 were in the minority.

76 So it goes back to what I mentioned before. His legislation contains what is
77 known as a "ratchet" where the threshold to achieve cloture is decreased after
78 successive cloture votes. It certainly is time for us to listen to Senator Harkin's
79 thoughts about how to make this institution better.

80 Senator Udall joined the Senate only this Congress after much distinguished
81 service in the House of Representatives, but in less than two years, he has become a
82 strong and visible advocate for change. Frankly, it was him--it was he--

83 Senator Bennett. He.

84 Chairman Schumer. It was Senator Udall--

85 [Laughter.]

86 Chairman Schumer. --who suggested that we have these hearings and start
87 delving into this issue. So I thank him for that. He has been to every hearing we have
88 had. He has actively questioned almost every witness. As a new member of the

89 Rules Committee, he has urged this Committee to look seriously at the problems
90 associated with the filibuster, and he is an advocate for the so-called Constitutional
91 option, which is not a specific change, but sort of opens the door to allow specific
92 changes.

93 His current proposal, S. Res. 619, would express a sense of the Senate that "the
94 Senate of each new Congress is not bound by the rules of the previous Senates under
95 Section 5 of Article 1 of the Constitution." And on this issue, I might add, Senator Udall
96 is following in the tradition of one of his distinguished predecessors, Senator Clinton
97 Anderson of New Mexico, whose seat Senator Udall holds. Back in the sixties and
98 seventies Senator Anderson argued in support of the same constitutional issue to the
99 Senate.

100 Our second panel is composed of outside experts in Senate procedures and it
101 will include some familiar faces. Our first witness is Mimi Marziani, an attorney who
102 works with the Brennan Center. Our second witness is Robert Dove, who is well
103 known to all of us as the former Senate Parliamentarian. And our third witness is
104 Professor Steven Smith of Washington University. They are going to share their
105 thoughts about the context of the proposals introduced by Senators Harkin and Udall.

106 I look forward to listening to my colleagues. I am going to ask Senator Bennett
107 to make an opening statement, and then we will go right to our witnesses, if that is
108 okay. But I will give other people on the panel time to make additional statements
109 when we get to the question and answer period.

110 Senator Bennett.

111 **OPENING STATEMENT OF SENATOR BENNETT**

112 Senator Bennett. Thank you very much, Mr. Chairman. Thank you for the
113 hearing and for your thoughtful analysis of what the issue is before us.

114 While I may not share some of the solutions that have been proposed, I do share
115 a sense of significant unease over what has been happening in the Senate and I raised
116 that yesterday in my statements on the floor. It is not an easy problem to solve, as the
117 witnesses we have had in previous hearings and as I think some of the witnesses we will
118 have here today will once again reinforce. You refer to history and let me give my own
119 personal reflections.

120 As many of you know, I was an intern here as a teenager. My father was a
121 senator for 24 years. I served on his staff as his chief of staff. Back in those days it
122 was not assumed that every senator was automatically dishonest and every member of
123 his family automatically corrupting. Several senators found that having members of
124 their family work for them ensured loyalty and security and I hope, in my case, some
125 degree of competence.

126 The Senate is obviously very different from the one that my father served in. It
127 is also different than the one that I entered. I remember just relatively short time, 18
128 years ago, that the filibuster was very seldom used. When it was used it was very
129 seriously examined by the people who entered into it because they recognized they
130 were undertaking a significant step in the direction of trying to stop the legislation.

131 I think in my first two years as a senator, we only had one or two filibusters and
132 they were bipartisan. We had a filibuster over the question of western land use and
133 while the Republicans made up the majority of the votes against it, it was some western
134 Democratic senators who crossed the line to get us over the 41 and Secretary Babbitt,
135 then the Secretary of Interior, came to see me to say what can we do to work this out in
136 such a way as to get enough votes to pass this particular bill.

137 It turned out, as I recall, the answer was nothing and the filibuster was successful
138 and the bill did not get passed. But there was serious negotiation on the issue in an
139 effort to say let us get ahead and move. Now a motion to invoke cloture is filed the
140 same day the bill is filed or the same day the motion to proceed is filed. There is no
141 period of discussion.

142 Without imputing any evil motives to any leader, we see situations where a bill is
143 constructed in such a way as to guarantee that a filibuster will be successful. The
144 leader will say, okay, I don't want to vote on this, this or this because it will hurt too
145 much in the campaign, so I will put them altogether into a single package. I will know
146 the other side will filibuster that. I can check the box to say I tried to bring this, this
147 and this up. The other side prevented me from doing that. Aren't they terrible?
148 And I have saved my members from the responsibility of having cast a vote on any of
149 these controversial items.

150 I do not think that is what the original filibuster rule had in mind, but it has
151 become the norm. And however much Senator Roberts and Senator Alexander and I

152 complained about it on the floor yesterday with respect to the Defense Authorization
153 Bill, since I am leaving the Senate, I can--

154 Chairman Schumer. Regrettably.

155 Senator Bennett. Yeah. I cannot worry about the consequences to my career
156 in the next Congress and say that I have seen Republican leaders do the same kind of
157 thing.

158 So I think these hearings are useful, but I hope we recognize the tangled nature
159 of the problem we are trying to solve and do not look for a quick strike of the sword
160 through the Gordian Knot and say well that's going to solve everything immediately,
161 because there are things that we need to be careful about in terms of the side effects
162 and the way the Senate protects minority rights.

163 All of us have served in the minority and many of you will serve in the minority
164 again regardless of your party, and making sure that the minority is protected from the
165 kind of absolutism that exists in the House of Representatives is a very important
166 challenge that we have here on this Committee.

167 Thank you, Mr. Chairman, for the opportunity to comment.

168 Chairman Schumer. Thank you, Bob. And now we will turn to our witnesses.
169 First, Senator Harkin, your entire statement will be read in the record, and you may
170 proceed as you wish.

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**STATEMENT OF HON. TOM HARKIN, A UNITED STATES SENATOR FROM
THE STATE OF IOWA**

Senator Harkin. Mr. Chairman, thank you very much for your opening
statement and also Senator Bennett's opening statement. But thank you moreover for
having these hearings. I can't think of anything more important for the future of this
country than to unravel the Gordian Knot, as Senator Bennett has alluded to, on getting
legislation through the United States Senate.

The Senate is dysfunctional and I think the general public understands that. I'm
not saying who they blame, but I think everyone recognizes it is just dysfunctional.
And so at the outset I just want to thank you for having these hearings and hopefully
moving this along to some resolution, at least by the time of the next Congress.

Mr. Chairman, if I can sort of say that if I can describe the Rules Committee as a
court of equity, I come with clean hands in this court of equity. As you said, I first
proposed this, my approach, when we were in the minority, 1995. I did so at that
time, but it was not just something flippant. I had been thinking about it for some
time before that in watching how things had transpired in the United States Senate.

I predicted at that time that an arms race was underway. With each
succeeding change in the majority in the Senate, and minority, the use of the filibuster
would escalate. I said that in 1995. Unfortunately, it has come true. I have been
here now, we have had--Senator Bennett, we have had six changes since I have been
here in the Senate, since 1985, six changes. Each time the number of filibusters has

193 gone up. As sure as I am sitting here, we may be in the majority now.

194 Some time we will be in the minority, just like it has changed since 1985, and the
195 arms race will continue. It will get worse. It is not going to get better. It is going to
196 get worse because every time they do a filibuster on us, we are going to do two on
197 them. We do two on them, they are going to do four on us when they get back. That
198 is the way it has been and it has just been escalating.

199 So I proposed this when I was in the minority and I had a lot of my fellow
200 Democrats saying to me, what are you doing? This is nonsense. You cannot do that.
201 Well, I pushed it to a vote. There is a little procedure when you come into session,
202 when a new Congress starts and different rules are set down that you can propose.
203 There is a procedure for doing that under the rules of the Senate. So I offered mine.
204 I got 19 votes for it. So there were at least 19 people willing to change the rules at that
205 time.

206 Quite succinctly, Mr. Chairman, my proposal, as you said, would be relatively
207 simple. On the first cloture vote it would take 60. If 60 votes were not obtained, two
208 days but one, as they say in the book, two days but one or three days would pass and
209 then you would have another vote. And then you would need 57 votes. If you did
210 not muster 57 votes, two days plus one, but one would pass, and you would have
211 another vote and that would be 54 and then finally 51. So it would be about an
212 eight-procedure if it was drawn out.

213 There are three things I think that this approach covers and I think commends it.

214 Number one, it promotes majority rules. And again--and I am going to say a little bit
215 more about that in just a second, but it promotes majority rule. Secondly, it provides
216 for debate and deliberation. You can slow things down, but you cannot absolutely put
217 it in the icebox. You can slow it down, get your views out, alert people as to what is
218 going on, hopefully change some minds, but you can't stop it.

219 And third, I think my proposal promotes true compromise and consultation. I
220 read the testimony of former Senator Nichols, who was here, testified earlier, and he
221 had said that the present system promotes compromise and consultation. I could not
222 disagree more. Why should the minority, any minority, compromise? If they know
223 they got the 41 votes and they can stop something, why compromise?

224 I think this approach that I am advocating really does promote compromise for
225 these reasons. Number one, the minority knows that at some point in time the
226 majority is going to rule. So therefore, better come to the table, let's compromise,
227 let's do some consultation, figure some things out, because in the end, the majority will
228 absolutely be able to determine.

229 Now why would the majority want to compromise if they know they -- because
230 the majority -- one thing I have learned here in all these years, majority, the most
231 precious thing they have is time and if you are going to chew up eight days on this
232 motion and eight days on that motion, the majority is going to want to say wait a
233 minute, we do not have the time for that, let's talk about it.

234 So I think it would bring both sides together to compromise. Now, Mr.

235 Chairman, you have gone to -- been a lot of people have talked about the history of Rule
236 22 and the history of the filibuster. I am not going to go into that in any great detail,
237 but I think there is one takeaway from all the history of Rule 22 and the takeaway is this,
238 it is not written in stone. It has been changed many times and we can change it again.
239 The world will not come to an end or anything like that. No damage will happen if we
240 change Rule 22.

241 Let me just close by reading a couple of things. I just gave a lecture at the
242 Brennan Center, New York University Law School, recently and I just want to--couple
243 things I said there that I would just like to emphasize. At issue is a principle at the very
244 heart of representative Democracy, majority rule. Alexander Hamilton, describing the
245 underlying principle animating the Constitution, wrote that "the fundamental maxim of
246 Republican government requires that the sense of the majority should prevail."

247 The Senate itself has been a check and is a check on pure majority rule. As
248 James Madison said, "the use of the Senate is to consist in its proceeding with more
249 coolness, with more system and with more wisdom than the popular branch."

250 Now to achieve this purpose, citizens from small states have the same
251 representation as large states. Furthermore, we are elected every six years. All
252 those things, they give the Senate a different flavor and a different approach than the
253 House of Representatives. The provisions in the Constitution, I believe, are ample to
254 protect minority rights and restrain pure majority rule. What is not necessary and
255 what was never intended is an extra Constitutional empowerment of the minority

256 through a requirement that a super majority of senators be needed to enact legislation
257 or even to consider a bill.

258 Such a veto leads to domination by the minority. As former Republican leader
259 Bill Frist noted, the filibuster "is nothing less than a formula for tyranny by the minority."

260 In fact, as you know, Mr. Chairman, the Constitution was framed and ratified to
261 correct the glaring defects in the Articles of Confederation. The Articles of
262 Confederation required a two thirds vote to pass anything. Never get that done. The
263 framers were determined to remedy that and they did that, and I think that's one of the
264 reasons why the framers put in the Constitution five specific times when you needed a
265 super majority. I think my implication, meaning that everything else just needed a
266 majority.

267 A super majority requirement for all legislation and nominees would, as
268 Alexander Hamilton explained, mean that a small minority could "destroy the energy of
269 government." The government would be, in Hamilton's words, subject to, and I quote,
270 "the caprice or artifices of an insignificant and turbulent or corrupt junta." End of
271 quote. Alexander Hamilton.

272 Well, Mr. Chairman, I am not going to say that the minority is a turbulent or
273 corrupt junta anymore than I would say the former minority of the Senate was a corrupt
274 junta, but I think his point is well taken. And as James Madison said, that there has to
275 be a way for the majority to eventually determine legislation, but a procedure whereby
276 the minority rights are protected, where the minority can be heard, where they can cast

277 their votes, offer amendments and where the majority just can't run roughshod over
278 them, over the minority. I believe that my approach, I think, covers that adequately
279 and that is why I am still after 15 years, and have been ever since promoting it, whether
280 I am in the minority or in the majority.

281 Thank you, Mr. Chairman.

282 [The prepared statement of Senator Harkin included in the record]

283 Chairman Schumer. Thank you, Senator Harkin, not just for your excellent
284 statement, but for your leadership – your - long-term leadership on this issue. You do
285 come before this Committee with clean hands.

286 Senator Udall.

287 **STATEMENT OF HON. TOM UDALL, A UNITED STATES SENATOR FROM**
288 **THE STATE OF NEW MEXICO**

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290 Senator Udall. Thank you very much, Senator Schumer and Ranking Member

291 Bennett. Mr. Chairman, I want to thank you in particular for convening this fifth
292 hearing and doing a total of six on this very important subject and I want to thank you
293 also for your very kind words at the beginning.

294 But you have shown real leadership in terms of tackling an issue and moving it
295 forward. As members of this Committee over the past few months, we have heard
296 from a distinguished group of men and women who have come before us to testify
297 about the state of the Senate rules. I thank them for sharing their knowledge and
298 expertise. They have helped us further define the challenges we face. As I take my

299 turn in the chair today, I believe more strongly than ever that our Senate rules are
300 broken. And from the testimony we have heard over the last few months, and Senator
301 Harkin's today, and from all the feedback I have received on my own proposal, I know
302 that I am not alone.

303 I commend my Senate colleagues who brought their own solutions before this
304 Committee. Like me they have seen for themselves the unprecedented obstruction we
305 faced over the last few years. In July we heard about reform proposals from Senator
306 Lautenberg and Senator Bennet of Colorado and today discuss Senator Harkin's proposal
307 to amend the cloture rule.

308 He gave a very fascinating history, I think, on his experience here in 20-plus years
309 and his proposal, I believe, deserves very serious consideration and discussion. But I
310 would like to be clear that my proposal differs from the others. Unlike those specific
311 changes to the rules, which I think all deserve our consideration, my proposal is to make
312 each Senate accountable for all of our rules. That is what the Constitution provides for
313 and it is what our founders intended.

314 These hearings have shown that the rules are broken. But they are not broken
315 for one party or for only the majority. Today the Democrats lament the abuse of the
316 filibuster and the Republicans complain that they are not allowed to offer amendments
317 to legislation, and as you pointed out, Mr. Chairman, the debate on the floor with
318 regard to filling the tree yesterday.

319 Five years ago, those roles were reversed. Rather than continue on this

320 destructive path, we should adopt rules that allow a majority to act while protecting the
321 minority's right to be heard. Rule 22 is the most obvious example of the need for
322 reform and the one my colleague's proposals focus on. It also demonstrates what
323 happens when members of the current Senate have no ability to amend the rules
324 adopted long ago. The rules get abused.

325 I have said this before, but it bears repeating, of the 100 members of the Senate,
326 only two of us have had the opportunity to vote on the cloture requirement in Rule 22,
327 Senators Inouye and Leahy.

328 Chairman Schumer. Interesting.

329 Senator Udall. So 98 of us, Tom Harkin, 98 of us have not voted on the rule.
330 And what is the effect of that? Well, the effect is that we are not held accountable to
331 them. We can start to abuse the rules and with a requirement of 67 votes for any
332 rules change, that is a whole lot of power without restraint. But we can change this.
333 We can restore accountability to the Senate. I believe the Constitution provides a
334 solution to this problem.

335 Many of my colleagues, as well as constitutional scholars, agree with me that a
336 simple majority of the Senate can end debate and adopt its rules at the beginning of a
337 new Congress. Critics of my position argue that the rules can only be changed in
338 accordance with the current rules and that Rule 22 requires two-thirds of senators
339 present and voting to agree to end debate on a change to Senate rules.

340 But members of both parties have rejected this argument on many occasions

341 since the rule was first adopted in 1917. In fact advisory rulings by Vice Presidents
342 Nixon, Humphrey and Rockefeller, sitting as the president of the Senate, have stated
343 that a Senate at the beginning of a Congress is not bound by the cloture requirement
344 imposed by a previous Senate and may end debate on a proposal to adopt or amend the
345 Senate standing rules by a majority vote.

346 That is what our founders intended. Article 1, Section 5 of the Constitution
347 clearly states each house may determine the rules of its proceedings. There is no
348 requirement for a super majority to adopt our rules and the Constitution makes it very
349 clear when a super majority is required to act, as Senator Harkin pointed out.
350 Therefore, any rule that prevents a majority in future Senates from being able to change
351 or amend rules adopted in the past is unconstitutional.

352 The fact that we are bound by a super majority requirement that was
353 established 93 years ago also violates the common law principle that one legislature
354 cannot bind its successors. This principle dates back hundreds of years and has been
355 upheld by the Supreme Court on numerous occasions. So first thing, at the beginning
356 of the next Congress, I will move for the Senate to end debate and adopt its rules by a
357 simple majority.

358 At a previous hearing, one of my colleagues on the Republican side questioned
359 whether I would be willing to still do this if my party is in the minority. The answer is
360 yes. This is not a radical idea. It is the constitutional option. It is what the House
361 does. It is what most legislatures do and it is what the U.S. Senate should do to make

362 sure that we are accountable both to our colleagues and to the American people. And
363 it is not, and I want to really emphasize the not here, it is not the nuclear option, which
364 was a recent attempt to have the filibuster declared unconstitutional in the middle of a
365 Congress.

366 The constitutional option has a history dating back to 1917. It has been the
367 catalyst for bipartisan rules reform several times since then. The constitutional option
368 is our chance to fix the rules that are being abused, rules that have encouraged
369 obstruction like none ever seen before in this chamber, and amending our rules will not,
370 as some have contended, make the Senate no different than the House. The Senate
371 was a uniquely deliberative chamber before the cloture rule was adopted in 1917. Our
372 framers took great steps to make the Senate a distinct body from the House, but
373 allowing the filibuster was not one of them.

374 So in January, on the first day of the new Congress, we should have a thorough
375 and candid debate about our rules. We should discuss options for amending the rules,
376 such as Senator Harkin's proposal, and after we identify solutions that will allow the
377 body to function as the founders intended, a majority decides that we have debated
378 enough, we should vote on our rules. And even if we adopt the same rules that we
379 have right now, we are accountable to them. We cannot complain about the rules
380 because we voted on them and if someone is considering abusing the rules, they will
381 think twice about it because they will be held accountable. We need to come together
382 on this for the good of the Senate and the good of the country. It is the job the

383 American people sent us here to do.

384 Thank you again and I ask unanimous consent to include several articles in the
385 record that were discussed in my submitted testimony.

386 [The prepared statement of Senator Udall included in the record]

387 Chairman Schumer. Without objection.

388 [The information of Senator Udall included in the record]

389 Chairman Schumer. I want to thank both our witnesses. Really outstanding
390 testimony and I mean that seriously.

391 Now, two points of business here. First, Senator Udall is on the Committee and
392 will resume his seat on the panel here. Senator Harkin has a long history, so I checked
393 with Senator Bennett and Senator Harkin, if you would like to come to the panel and ask
394 the next panel of witnesses some questions, without objection I would ask consent to
395 do that.

396 Thank you. And then it is so ordered.

397 And second, both Senators Alexander and Roberts, who have been here every
398 hearing we have had, have asked to make some opening brief statements and I think
399 that would be a good and reasonable thing to do. So if they can decide who is going to
400 be more polite and who will go first and who will go second, I would turn to them and I
401 am going to ask Senator Nelson if he wishes to make a statement as well.

402 Senator Nelson. Thank you, Mr. Chairman. I will defer to my colleague.

403 Chairman Schumer. You guys decided who is going first?

404 Senator Roberts. I think we are going to flip a coin. I am going to yield to
405 seniority, not in terms of service here in the Senate, but certainly on the Committee,
406 which I think is a rule that perhaps the senator from New Mexico would not try to do
407 away with.

408 Chairman Schumer. Great. Senator Alexander.

409 **OPENING STATEMENT OF SENATOR ALEXANDER**

410 Senator Alexander. Thank you, Mr. Chairman.

411 Chairman Schumer. We just try to limit each statement to five minutes.

412 Senator Alexander. Thank you, Senator, from Kansas, and I thank Senator Udall
413 and Senator Harkin for their--

414 Chairman Schumer. I do not have to ask you to do that, Senator Alexander. I
415 know that.

416 Senator Alexander. No, you know I will stay within my time. I would like to
417 make three points. In his last testimony before any committee, I think in May, Senator
418 Byrd made an eloquent argument here and he said number one, we do not have to
419 change the rules to get things done in the Senate. He suggested how to do that.
420 That was the first thing, and I think we ought to pay attention to that.

421 Second thing he said, the second thing I would like to say is that if there has been
422 any abuse of the existing rules it has been by the Majority Leader, who has 39 times
423 during the last two Congresses used procedural maneuvers to limit amendment and
424 limit debate. That is called filling the tree and then filing a motion for cloture on the

425 same day that the major was raised. He had done the lateral 141 times.

426 And in the last two Congresses, he has filled the tree 39 times. That is six times
427 more than all the previous majority leaders. That is more than the last six majority
428 leaders, excuse me. The effect of that is the real obstruction. It denies the minority
429 the right to amend and the right to debate, which is what makes the Senate unique.

430 Senator Byrd again is probably the most eloquent advocate of that, saying what
431 makes this body unique is the unlimited right to amend and the unlimited right to
432 debate. And the American people know that it is not just the voices of the senator
433 from Kansas, the senator from Iowa that are suppressed when the majority leader cuts
434 off the right to debate and the right to amend; it is the voices that we hear across this
435 country who want to be heard on the Senate floor.

436 So my hope is that--and I believe my colleagues on the Republican side, and I
437 hope Democrats, will say that when the new Congress convenes we ought to look at
438 what the Senate does, but we ought to restore it to its traditional role as the
439 deliberative body where we have amendments and we have debate. That is the way it
440 used to operate. When Senator Baker and Senator Byrd were the leaders, about
441 everybody got their amendments, not in every case, but most people got their
442 amendments and they had to be here at night and they had to be here on Fridays and
443 Saturdays sometimes, but they got them.

444 The voices of the country were heard. I would like to see that happen again.
445 It is hard to say this is a dysfunctional Senate when it has passed a healthcare law, a

446 financial regulation law and a trillion dollar stimulus. Some Democrats say it is the
447 most productive Congress in history, maybe the most unpopular too because of what
448 they got done. But it was not dysfunctional. It achieved a lot.

449 And second, what it achieved was a good argument for why we should not make
450 the changes that were suggested, because what the American people have seen in the
451 last two years is the ability of a majority that has so many votes to run over the minority
452 and not take their views into account. And that is what would happen when you
453 have--if you had 51 votes. And of course Senator Harkin and Udall are very honest
454 about this in saying they want to impose majority rule on the Senate.

455 The whole idea of the Senate is not to have majority rule. It is to force
456 consensus. It is to force there to be a group of senators on either side who have to
457 respect one another's views so that they work together and produce 60 votes on
458 important issues. In Senator Byrd's view, and in the views of many historians, that has
459 been the way the Senate has been supposed to work during the whole time. And of
460 course the shoe is not always on one foot. Many on the other side have been glad to
461 have the right to filibuster when the issue was the privatization of Social Security or the
462 repeal of the estate tax or the war in Vietnam or the war in Iraq, the war in Afghanistan.
463 Senator Frist may have talked about the tyranny of the minority, but Alexis de
464 Tocqueville talked about the tyranny of the majority and Rule 22 and the right of
465 unlimited debate and amendment have historically in our country been the way to avoid
466 that.

488 about the practice which you have referred to, and my friend from Tennessee has
489 referred to, of filling the amendment tree. It is time for this Committee, I think, to
490 hold a hearing specifically on that practice. It is appropriate in light of the multiple
491 hearings we have had on--

492 Chairman Schumer. If the gentleman would yield. Next week we do intend to
493 do that. There is right on both sides here.

494 Senator Roberts. I appreciate that.

495 Chairman Schumer. There is right on both sides.

496 Senator Roberts. I appreciate that. Give me 15 seconds back. It is
497 appropriate in light of the multiple hearings we have had on measures that would
498 curtail the minority rights without addressing clear abuses by whoever happens to be in
499 the majority.

500 We have examined multiple approaches to curtailing filibusters, but now there is
501 a proposal that threatens more than just minority rights. It threatens the very nature
502 of the Senate and I am referring to the resolution introduced by my friend, my
503 colleague, my neighbor and the distinguished senator from New Mexico, the resolution
504 that would declare Senate rules unconstitutional. Yes, that is right, unconstitutional.
505 On page 2: the procedure "To amend the Senate Rules is unconstitutional because its
506 effect is to deny the majority of the Senate of each new Congress from proceeding to a
507 vote to determine its own rules."

508 Senator Goodwin was here, but I wish he would have been here - I wish

509 everybody could have been here - to hear Senator Byrd in his poignant and emotional
510 testimony. To say that what we have been operating under and what Senator Byrd
511 championed is unconstitutional, and how he would proceed to, if not lecture or give a
512 sermon on the rules to every new member who came to the Senate - bipartisan--I can't
513 imagine his reaction to that.

514 But at any rate, there has been an incessant attempt on the part of some of the
515 majority to paint the minority obstructionist and that this is a broken institution. It is
516 not--what is broken is not the Senate rules, but the attitude and approach to legislating
517 by members of the majority that is fundamentally at odds with the atmosphere of
518 comity and compromise that our rules are intended to foster.

519 It is not the minority that is the obstructionists. As my friend from Tennessee
520 has pointed out, it is the majority and I am not saying it is the current majority that
521 bears all the responsibilities. That has happened before when we have been in the
522 majority, but the tactics like filling the tree, Rule 14 and ping ponging back with the
523 House have now been used on a scale never before seen in the history of this body.

524 Now, I do not know what is going to happen in November, but for anyone that
525 can read the tea leaves, or at least the gurus and the pundits, it would appear that there
526 is a wave out there. I do not know how high it is. It could be Katrina and it could be a
527 simple seventh wave that everybody reads about that appreciates what happens in the
528 ocean. It appears the current majority, however, may be somewhat slimmer than it is
529 in 2000--I mean in 2011.

530 So rather than accept the will of the voters who are rejecting the policies
531 enacted by the 111th Congress, the senator from New Mexico and many of our
532 colleagues on the other side simply want to abolish the Senate as we have understood it
533 for over 200 years and remake it in the House's image. Let me be clear, rather than
534 doing the hard work of building a bipartisan consensus, this resolution is an attempt to
535 rewrite the rules to favor a narrower majority.

536 I would like the rest of my statement be put in the record at this point.

537 Chairman Schumer. Without objection.

538 [The prepared statement of Senator Roberts included in the record]

539 Senator Roberts. And I want to go back to a time in 1985 when I served in the
540 House and there was an election in Indiana and the Secretary of State declared the
541 winner. His name was Rick McIntyre. But it was very close. And somehow it got
542 referred to the House Administration Committee, of which I was a member, and
543 somehow there was a partisan vote where a group went out to Indiana to recount the
544 votes--this is the Administration Committee--despite the fact the Secretary of State had
545 declared Mr. McIntyre the winner.

546 It was over, and the incumbent was declared the winner on a partisan vote by
547 the House. We walked out. The Republicans walked out and it became a situation
548 where I said at that particular time and I had to go back and figure it out here because I
549 think this is what would happen if the distinguished senator from New Mexico's
550 resolution was adopted, "this wound will not heal without a terrible price and a scar

551 that will be with this House for many years," just substitute Senate, "it would appear,
552 Mr. Speaker," Mr. President, "there are two kinds of members within your majority.
553 We have those who listen and work with the minority and those who do not believe we
554 are fully-fledged partners in this House. In baseball terms, they are the ones who call
555 for their pitcher to stick it in the batter's ear. The unmitigated gall occurs when once
556 you make us hit the dirt, you take offense when we come up swinging."

557 Now, that was pretty strong rhetoric and I said that this would lead to things that
558 we could not really anticipate, and it did. Michael no longer was leader. Newt
559 Gingrich became leader. This was the spark that started the so-called Revolution of
560 '94. Some obviously would agree with some of that. I was part of it. I became a
561 chairman. So I really was not objecting to that, but the way that it was done I think
562 was a very bad road to follow.

563 And let me just point out that during the healthcare debate, both on the HELP
564 Committee with Senator Harkin and with the gentleman from New York and with the
565 senator from Montana being Chairman Max Baucus, I had 11 amendments and every
566 one of them were voted down without even any debate. Some were ruled
567 non-germane, or whatever. So then I decided I would pick an amendment that was
568 introduced by the distinguished chairman, Senator Schumer. So I offered his
569 amendment under my name, and it was defeated on a party-line vote. Nobody even
570 bothered to read it.

571 And I thought to myself, you know, it is important to pass legislation here, but it
572 is important to prevent bad legislation from passing and I thought I had an amendment
573 to prohibit rationing and that is what it was all about. And then I tried it under
574 reconciliation, and again I brought up Senator Schumer's amendment, which I thought
575 was a pretty good amendment, and it just by rote, bingo, down. That is not
576 bipartisanship.

577 Chairman Schumer. I am glad I did not cut you off at five minutes.

578 Senator Roberts. I appreciate that. That seems to be a continuing challenge
579 for you, sir. I understand that. If we are going to do this in a bipartisan way, we
580 ought to change attitudes around here and at least give us the opportunity to offer
581 amendments and to be considered and to discuss them, and that is exactly what
582 Senator Bennett said yesterday. Here we were using the military as a laboratory as
583 civil rights for a particular situation regarding sex, gender, race, whatever - but this
584 happens to be sexual orientation - in the middle of a war and we are trying to get the
585 Joint Chiefs to come back with a study to say is this going to work?

586 It is a tough issue on both sides. And then we tossed in immigration and then
587 we could not even - you filled the tree - we could not even bring amendments that were
588 related to military issues or national security. That is why this happened. And so
589 filling the tree is a very important matter and if we do that during the next hearing it just
590 indicates the tremendous bipartisanship of the chairman and what he is trying to do.

591 I yield back. I'm done.

592 Chairman Schumer. I thank my colleague from Kansas who always is an eager
593 and very valuable participant here. The only thing I would say is there are abuses on
594 both sides, and we tend to focus on some and you tend to focus on others. Many
595 would argue that if we could try to solve both those abuses - and it is not a clear cut way
596 to do it - you do not want to allow unlimited amendments by one member forever to
597 slow things down either. The Senate would be a better place no matter who is in the
598 majority or who is in the minority.

599 That is the only thought I would have. But I have not, I don't think, throughout
600 these hearings said the abuses are just on your side. They are on both sides. Our job
601 is to fix them.

602 Let me call on our next second panel and ask them to come forward please and I
603 will read the introductions while they come forward to save a little bit of time.

604 Steven Smith. Dr. Steven Smith is a professor of social sciences at Washington
605 University in St. Louis and director of the Weidenbaum Center on the Economy,
606 Government and Public Policy there. He is author or co-author of several books on the
607 U.S. Congress, including *Politics or Principle?*, which is about the filibuster. He is a
608 former fellow at the Brookings Institution.

609 Ms. Mimi Marziani is counsel with the Brennan Center at New York University
610 School of Law, where she also serves as an adjunct professor. She has studied the
611 filibuster from a constitutional law perspective, and has contributed columns about
612 Senate procedures to several newspapers.

613 We all know Dr. Robert B. Dove. He served as the Senate parliamentarian for
614 13 years and now holds the title of Parliamentarian Emeritus of the Senate. He is
615 currently a professor at George Washington's University Graduate School of Political
616 Management and is counsel at the firm of Patton Boggs.

617 Your entire statements, folks, will be read into the record. Who are we going
618 to begin with? We are going to begin with Dr. Marziani first, Ms. Marziani first, excuse
619 me.

620 **STATEMENT OF MIMI MURRAY DIGBY MARZIANI, COUNSEL/KATZ**
621 **FELLOW, DEMOCRACY PROGRAM, BRENNAN CENTER FOR JUSTICE, NEW**
622 **YORK UNIVERSITY SCHOOL OF LAW**

623
624 Ms. Marziani. I was not going to correct you there. Mr. Chairman and
625 members of the subcommittee--

626 Chairman Schumer. And excuse me, your entire statements will be read into
627 the record and if we could keep the testimony to five minutes, because we will have
628 extensive questions.

629 Ms. Marziani. Thank you very much for inviting me to testify. I have been
630 asked to address whether a Senate majority has the right to override obstruction and
631 affect a rules change at the start of a new Congress. The weight of constitutional
632 history, scholarship and doctrine overwhelming answers yes and today I will offer three
633 main points in support of my conclusion.

634 First, there has long been robust support for the constitutional argument offered
635 today by Senator Udall and me. For example, when Senator Henry Clay confronted the

636 Senate's very first filibuster in 1841, he threatened to stop debate by "resorting to the
637 Constitution and acting on the rights ensured in it to the majority."

638 Since then, numerous senators and at least three vice president have agreed.
639 At the start of the 94th Congress in 1975, a majority of the Senate voted to allow a
640 simple majority to end debate on new rules, thereby setting a new precedent. While
641 the Senate later purported to reserve this incident, the fact remains that the Senate had
642 already exercised its constitutional authority.

643 Second, this position is undoubtedly correct under constitutional law. The
644 Constitution authorizes each chamber of Congress to determine the rules of its
645 proceedings. In *U.S. v. Ballin*, the Supreme Court explained that this authority is
646 continuous, meaning that each Senate has equal power to set its procedures. So a
647 past Senate cannot enact rules that decrease the rulemaking power of future Senates.
648 If legally binding, super-majority barriers to amending the Senate rules would also
649 violate the age-old principle against legislative entrenchment.

650 As the Supreme Court recognized long ago in cases like *Ohio Life Insurance v.*
651 *Debolt*, this principle is vital to our democratic structure. Each legislature made up of
652 representatives elected by the people must be equally able to serve the public good. If
653 yesterday's senators are allowed to use the Senate rules to reach into the future,
654 today's senators can no longer effectively serve their constituents' current desires, plus,
655 by insulating the 60-vote cloture rule from amendment, the rules perpetuate similar
656 accountability problems now posed by the filibuster itself. Blunting accountability is a

657 serious constitutional problem because it cripples the most important check on
658 government power, which is the voters.

659 Third, the notion that the Senate is a continuing body cannot justify trapping the
660 Senate under super majority barriers to rules change. To start, there is no reason to
661 believe that the Framers intended for structural differences between the Senate and the
662 House to reduce the scope of the Senate's rulemaking power. Plus, in many ways, the
663 Senate does not actually act like a continuing body.

664 For example, pending bills die at the end of each Congress and nominations cannot
665 survive the end of a term. Instead, the president must resubmit nominations to the
666 next Congress.

667 More importantly, however, even assuming that the Senate is a continuing body
668 in some meaningful way, this alone cannot justify entrenchment. To say that today's
669 Senate shares an identity with yesterday's does not explain why the Senate has the
670 power to bind itself in perpetuity. After all, the Senate is an agent of the people. It
671 derives its power from those it represents.

672 Each election, voters elect a senator to address the country's current and future
673 problems. Why would the voters allow the Senate to handicap itself under old
674 procedural rules? In fact, self-binding creates the exact same problems with
675 democratic representation and legislative accountability. For all of these reasons, a
676 simple majority must be able to override a filibuster and vote to revise the Senate rules
677 at the start of a new Congress.

678 Thank you very much and I am very happy to answer questions.

679 [The prepared statement of Mimi Murray Digby Marziani included in the record]

680 Chairman Schumer. Thank you, Ms. Marziani.

681 Mr. Dove or Professor Dove, whichever you prefer.

682 Mr. Dove. Bob.

683 Chairman Schumer. We will now call on witness Bob.

684

685 **STATEMENT OF ROBERT DOVE, PARLIAMENTARIAN EMERITUS, UNITED**
686 **STATES SENATE, PROFESSOR, WASHINGTON UNIVERSITY**

687

688 Mr. Dove. I normally teach a class at this time on Wednesday and I suggested

689 to the members of that class that this would be far better than any class I could teach

690 them and I am really glad that they could come.

691 Chairman Schumer. Dr. Dove's class, thank you for being here.

692 Mr. Dove. As my class will not be surprised to hear, I hold a contrary view to

693 this first witness. I do believe that the Senate is a continuing body and I have always

694 loved the statement, I believe, of Justice Oliver Wendell Holmes that the life of the law

695 is not logic but experience.

696 The experience of the Senate is that it has always considered itself a continuing

697 body. It was mentioned that with regard to bills that die at the end of a Congress, that

698 is evidence that the Senate does not consider itself a continuing body, that the

699 nominations which by specific rule of the Senate not only die at the end of a session,

700 they die when the Senate goes out for more than 30 days.

701 But treaties were not mentioned and the reason I think they might not have
702 been mentioned is that we have had some very significant treaties sent to the Senate.
703 And I remember very well the genocide treaty, which was sent to the Senate by
704 President Truman and ratified under Majority Leader Bob Dole years and years and
705 years later. It did not have to be resubmitted by the president to the Senate.

706 But when I am talking about experience, I was intrigued by Senator Roberts'
707 account of the election in Indiana, because I use that election when I talk about the
708 differences between the Senate and the House because there was an earlier election
709 contest in the 1970s that I remember very well, the fight between Louis Wyman and
710 John Durkin for the New Hampshire Senate seat.

711 And that fight occurred when there were 61 members of the Democratic caucus
712 and it occurred just after the cloture rule had been changed in January of 1975 and
713 there was a general assumption that the Democrats would use that new cloture rule;
714 they would shut down debate and they would seat the Democrat in that contested
715 election. Only because there were three Democrats who refused to vote for cloture
716 every time it was filed did the Senate not go down that road and indeed declared the
717 seat vacant. A new election was held. The Democrat won and the Senate did not
718 have the period of bitterness that the House had after the Indiana election contest.

719 My experience has only been working for the Senate. I never worked for the
720 House of Representatives, but my experience in working for the Senate has been one in

721 which I saw the great value of a kind of enforced comity between the two parties
722 because of Rule 22. I remember so well a conversation with a presiding officer, a
723 member of Congress who had been in the House. He was a very conservative senator
724 from the Republican Party and he told me that when he was in the House he had never
725 spoken to any Democrat. He had no reason to speak to Democrats. They were
726 irrelevant to his life. They could do nothing for him.

727 And he was telling me with such glee the issue on which he was working was a
728 very liberal Democrat because what he saw in the Senate was that was how things got
729 done in the Senate, that if you could put on the same issue a liberal Democrat and a
730 conservative Republican, you had a very good chance of carrying the day. And I just
731 remember that conversation and in a sense, that is what I thought the Senate was
732 about.

733 Now, I understand the frustration of the filibuster. I have sat in the
734 parliamentarian's chair and watched filibusters and they are not all that much fun to
735 watch. I came to the Senate in 1966, back when they had real filibusters, and back in
736 1966 it did not take a two-thirds vote to end a filibuster. But I also remember a 1968
737 vote when the Senate had been debating the Fair Housing Act and they had had four
738 cloture votes and on four cloture votes they had failed to get the necessary two-thirds.
739 And then on that fifth vote, I remember those senators who had been voting no
740 standing up--there were five of them--and one by one they gave the necessary
741 two-thirds and that law was passed.

742 My view is that the Senate has benefitted from the struggle to pass legislation.
743 I was a graduate student during the debate on the 1964 Civil Rights Act. I found that
744 debate incredibly frustrating as it was described on the CBS Evening News every night.
745 But what I remember is that after the end of that debate, and it went on more than 80
746 days, the senator from Georgia went on television to talk to the people of Georgia and
747 explain that he had fought that bill with every weapon at his command, and he was
748 good, but that that law was now the law of the land and the people of Georgia needed
749 to follow it.

750 I do not know if the Senate had been able to easily pass the '64 Civil Rights Act
751 whether it would have had the effect that it did. I was living in the south. I was living
752 in Charleston and I remember the effect it had. It was like someone had turned a light
753 switch and suddenly things were different.

754 So yes, I think the experience of the Senate is that the Senate is a continuing
755 body, but I think the logic of that experience is that that has been a good thing and that
756 basically is where I come from.

757 [The prepared statement of Robert Dove included in the record]

758 Chairman Schumer. Thank you, Bob. And now we will hear from Mr. Smith.

759

760 **STATEMENT OF STEVEN S. SMITH, KATE M. GREGG PROFESSOR OF**
761 **SOCIAL SCIENCES AND PROFESSOR OF POLITICAL SCIENCE, DIRECTOR,**
762 **WEIDENBAUM CENTER ON THE ECONOMY, GOVERNMENT AND PUBLIC**
763 **POLICY, WASHINGTON UNIVERSITY**
764

765 Mr. Smith. Well, it is a great pleasure to be here again. I was here in May
766 when I spoke of a syndrome of the expansive use of parliamentary rules and precedents
767 by both the minority and the majority in such a way that it has really changed the
768 character of the Senate over the last few decades. I know there is a tendency to see this
769 as a minority versus majority matter, but in fact, both parties have been behaving
770 strategically, that is, that they are behaving in a manner that anticipates the behavior of
771 the other. They are connected at the roots.

772 So to address the minority concern about opportunities to debate and offer
773 amendments and the majority concern about the ability in most circumstances to get a
774 vote on an issue is something that I think that the Committee should address
775 simultaneously.

776 The real problem here is the nature of the Senate and the role of a senator.
777 You know, there are now strong reasons to believe that the full exploitation of the rules
778 is a long-term condition of the Senate and that it is time to consider a proposal like
779 Senator Harkin's. The modern increase in the obstructive use of rules really dates to
780 the early 1970s in the aftermath of the civil rights battles and when senators in the early
781 1970s leading up to the 1975 reform spoke of the trivialization of the filibuster.

782 So what has changed since the 1960s? Well, for one thing, a major restraint on
783 filibustering evaporated. As the 1960s came to an end, Senate Democratic
784 conservatives no longer limited their filibusters to civil rights legislation so as to avoid
785 more impetus, more reform. They more freely joined with the minority to pursue

786 filibusters in the early 1970s, which was a primary impetus for the reform of 1975.

787 The policy community in Washington has changed radically. Organized
788 interests and lobbyists and party factions have really ratcheted up pressure on senators
789 to fully exploit their parliamentary weapons. Party politics has changed. Each party
790 has become more homogeneous internally and in doing so, the resistance from within
791 each party to the full use of parliamentary tools by their own party leaders has faded.
792 No longer is there that moderate Republican or moderate Democrat telling their own
793 leaders do not obstruct, do not fully exploit your tools, I am going to get hurt. Fewer
794 senators are being hurt by that obstructionism.

795 In the strategic premises of change, each party now seems to assume the worse
796 about the opposition and as yesterday showed is usually right and acts accordingly.
797 Now these have proven really to be lasting conditions really on the order of decades
798 now and more than just merely a passing phenomenon. Now in the middle of this
799 process, Senator Harkin in 1995 introduced his proposal to reduce the number of votes
800 required for cloture in a stepwise manner. Of course, since that time, partisan
801 strategies have made obstructionism and restrictions on the minority an even more
802 severe problem. I will not even bother reviewing the evidence for you.

803 But the consequences of these developments are pervasive. The focus tends to
804 be on what the threshold for cloture should be in blocking legislation. But just
805 consider what these minority strategies and the majority responses have contributed to.
806 They have moved many policy decisions from committee rooms to party leadership

807 offices as leaders try to bargain over cloture.

808 It has led to the demise of standard amending opportunities on the Senate floor.

809 It has elevated packaging strategies and the use of omnibus bills. It has contributed to

810 the demise of the appropriations process as majority leaders do not dare bring most

811 appropriations bills to the Senate floor. It has stretched the reconciliation process, my

812 dear Bob, beyond recognition and it has led to the avoidance of conferences on a wide

813 range of important legislation.

814 Add it up. Fundamental changes in the role of standing committees and party

815 offices, the nature of amending activity and debate on the Senate floor, the

816 appropriations process, the reconciliation process and conferences, what has not been

817 fundamentally changed by this new turmoil, this new syndrome of obstruction and

818 restriction? The Senate has been thoroughly changed by these changes in practice.

819 It is time to consider the reforms that have been suggested by Senator Harkin.

820 [The prepared statement of Steven S. Smith included in the record]

821 Chairman Schumer. Well, these have been three really excellent witness.

822 This has been a very good and thoughtful day. Let me ask a question first to Mr. Dove,

823 but others can comment. It is sort of two questions. I'm just trying to think this

824 through.

825 In the golden days of the sixties, and I think you are right, Mr. Parliamentarian

826 Emeritus, for lack of a better term, that because the Civil Rights Act passed with such a

827 large amount of support, it was the law of the land, and it was more effective than if had

828 it passed by 51/49. The difference we face today is that was a bipartisan coalition and
829 partisanship seems to have enveloped our politics over the last 30 years. One of the
830 reasons is actually the great reform of primaries because primaries, puts the Democratic
831 Party to the left and the Republican Party to the right only because there are too few
832 participants.

833 Senator Bennett. Tell me about it.

834 [Laughter.]

835 Chairman Schumer. Well, it is true. It is true. You are right. And it is with
836 regret --I think everyone of us feels the incredible loss of Bob Bennett. We will feel it
837 next year for that reason. So the question is, does what you are saying apply to today?
838 Should it matter? Maybe this partisanship is a temporary. You know, maybe it is a
839 30-year process, and we should not change how the Senate works regardless.

840 And then the third question, which relates to Mr. Smith's testimony. Can't you
841 make an argument--he did--what do you think of his argument?--and I would like to
842 address his argument to my colleagues on the other side who say we have to keep the
843 Senate as it is. But what Professor Smith is saying here is that this rule has changed
844 the Senate. We do not have conference committees. We do not have deliberation.
845 We do not have amendments on the floor. And I am trying to do this from, you
846 know, as bipartisan or nonpartisan a way as possible. When I was in the minority, I
847 used to say - look, they can set the agenda. We should offer amendments. I
848 understand that. I have been in all four positions - minority/majority in both the

849 House and Senate. Only one really is horrible, and it is not in the Senate at either side.

850 So could you address this a little bit?

851 And then the second question, I will let each of you speak on this, is there a way
852 then we would not need Senator Udall's legislation to solve the complaints of the
853 minority about filling the tree and not allowing amendments, and the complaints of the
854 majority about obstruction on every little thing that goes way beyond. I think you know,
855 I do not think you wonder if the tree is filled when we do not allow the District judge
856 from the Southern District of New York - let's leave out the New York District judge -
857 and instead we do not allow the District judge from the Southern District of Florida to be
858 put on the Senate floor.

859 So if Bob could address that and that is my only question.

860 Mr. Dove. Well, first of all, there was some mention in an earlier statement
861 about coming here with clean hands. I unfortunately, do not come here with clean
862 hands. I helped write the Budget Act in 1974 which created the reconciliation process.
863 All I can tell you is we meant well.

864 That process has evolved into what I think is a monster which allows the majority
865 to trample the minority. It is the one process that the Senate created which if the
866 budget resolution for any particular year creates a budget that has reconciliation
867 instructions and I will say on my advice in 2001, we were in a situation where the House
868 came out with a budget resolution that I think was going to create seven reconciliation
869 bills over the course of that year. I gave the advice no, you can only create one.

870 That led to an unfortunate situation for me as I ceased to be parliamentarian.

871 But that, I believe, has been followed. That to me is a process that needs reform. My

872 reaction--

873 Chairman Schumer. And not slowing down the Senate to a crawl on every

874 issue. Are the two resolvable together?

875 Mr. Dove. Well, my reaction, as long as the majority party sees that they are

876 using reconciliation, they can pass things by a bare majority, even no majority at all. If

877 you have a tie vote and you have the vice presidency, you win with reconciliation. The

878 filibuster amendments have to be germane.

879 To me, that is the process that has distorted the Senate more than anything else.

880 Yes, I know the enormous power that the majority leader has with the right of

881 recognition to offer amendment after amendment until no more can be offered and I

882 have seen majority leaders use their powers. To me the most powerful majority leader

883 I ever witnessed was Robert Byrd in the period of '77 to '81, when he set precedent

884 after precedent using his powers as majority leader.

885 And there was pushback when the Republicans took the Senate in the 1980

886 election because of the power of that particular majority leader. And I have used this

887 phrase before in testimony, that I do not think, as Shakespeare said, that the fault is in

888 our stars but in ourselves. To me there are senators who can make this place work

889 with the rules that you all have and I do not think the problem, frankly, is the rules.

890 I think the problem is restraint in effect on the part of various--

891 Chairman Schumer. Professor Marziani and Smith, do you want to comment
892 on my question, or try to answer it, or comment on what Bob Dove said.

893 Ms. Marziani. To start, there is no reason to believe that the intense
894 partisanship that we see in today's Senate is going anywhere. We have seen a
895 ratcheting up of partisan politics in at least the last 30 years and as one of my colleagues
896 at NYU, Rick Pildes, has written about eloquently, this for better and for worse is very
897 likely the face of national politics in the 21st Century. So with that understanding in
898 mind, perhaps best case scenario, we would address that intense partisanship, but
899 without being able to figure out what to do with that situation, I think that we need to
900 adopt new rules that work for a modern Senate.

901 The Senate is an extraordinary institution and it is one that everybody agrees
902 was intended for deliberation.

903 In other institutions intended for deliberation, like a courtroom, we have simple
904 rules that are purposed to achieve just and equitable results, like Criminal Rules of
905 Procedure or the Federal Rules of Civil Procedure. And in my opinion, the best way for
906 the Senate to move forward, recognizing as Senator Bennett said earlier today that
907 there are many complex considerations involving rules change would be to convene
908 some sort of bipartisan group that can seriously deliberate and think about ways to
909 preserve the minority's right to debate, to actually debate and to offer amendments,
910 but while allowing the majority to represent their constituents and the will of the
911 people and actually make a decision once debate is over.

912 Chairman Schumer. Professor Smith.

913 Mr. Smith. I think that Senator Harkin has actually laid out a framework that
914 could be used as the basis for addressing both sets of concerns. He provides for a
915 stepwise process of reducing the threshold for cloture. A weakness I think of Senator
916 Harkin's approach, if I may, Senator, is that there is no guarantee for debating
917 amendments between the cloture votes, just as there is no guarantee of debate now
918 following the filing of the cloture motion.

919 I would elaborate on Senator Harkin's approach by guaranteeing say 10 hours of
920 debate on a measure between the cloture motions, between consideration of the
921 cloture motions and perhaps in those 10 hours guarantee the minority opportunities to
922 offer relevant amendments. That could be done by guaranteeing each leader
923 alternating amendments.

924 It could be done by guaranteeing a senator who voted in the minority an
925 opportunity to write an amendment. But the brilliance of this framework is that it
926 creates a time structure within which those minority amendments can be considered.
927 I would guarantee them those rights.

928 Chairman Schumer. Interesting, very interesting.

929 Senator Bennett. Thank you, very much, Mr. Chairman, and one of the things
930 that has developed, the byplay between the three of you that I want to highlight is that
931 it may very well be that the solution to the problems that we talk about as a
932 dysfunctional Senate lies somewhere other than amending the filibuster rule. And I

933 have made notes--I have listened to you--of some of the things that I have observed that
934 in my opinion have been detrimental to the functioning of the Senate and very few, if
935 any of them, have anything to do with the filibuster rule.

936 Mr. Smith, you got into this a little. One of the things that I have seen in my
937 time here is Mr. Dove, you talk about the problem lies in ourselves, breaking of a Senate
938 precedent as opposed to a Senate rule, that conferees are always adopted by
939 unanimous consent. Without naming any names, one minority leader broke the
940 precedent and said we will not allow the appointment of conferees on this bill unless we
941 can get an absolute ironclad agreement out of the majority that the conference report
942 will say the following things, thus putting himself in the position where the minority
943 leader of the United States would dictate the final version of the bill over the opinion of
944 the majority of the House of Representatives and the majority of the Senate or not
945 allow it to go through.

946 And that was sufficiently arcane that it did not get into any editorial in the New
947 York Times. I will not comment any further about what I think about the editorials in
948 The New York Times, other than to say that I think they are basically irrelevant.

949 The concept of ping-ponging a bill, the Senate was unable to produce a certain
950 bill for a variety of reasons and so the Speaker sat down with the Majority Leader and
951 given the power of the party in power in the House, wrote a bill in the House, rammed it
952 through with the requisite number of votes in the House and then the majority leader
953 had already pre-committed to the Speaker that the bill would be held at the desk, voted

954 on in the Senate, never referred to a committee, never a subject of a hearing, and with
955 the ability of the majority in the Senate to overcome a filibuster by virtue of numbers
956 passed through.
957 Those of us who wanted to debate it, to amend it, to have anything to do with it, we
958 never got any opportunity at all.

959 And then we go, Mr. Smith, to the omnibus bill. I am an appropriator. I have
960 participated in the drafting of omnibus bills and as I came out of my session with the
961 two chairmen, the chairman of the House Appropriations Committee and the chairman
962 of the Senate Appropriations Committee, I said to my staff, we better call Senator Kohl
963 and tell him what we just did. He was the ranking member of the subcommittee and
964 he had no input whatsoever under that system.

965 Increasingly we are seeing the appropriations bills structured so that they will
966 not go to the floor and they will go to an omnibus and the omnibus ultimately is decided
967 between the two chairmen of the two houses and the two leaders of the two houses
968 and you might as well not have an Appropriations Committee under those
969 circumstances and I have seen it happen over and over again.

970 As I sit here and listen to this and contemplate, what occurs to me is I hear you.
971 It occurs to me that this has nothing to do really with changing the filibuster, and if we
972 change the filibuster rule and allow all of these other things to continue to go on, we
973 will see minority rights trampled on in far greater degree than they are now. So I give
974 you that response to your testimony and I would like to hear your response to the

975 observations that I have.

976 I will make this one observation. I do believe the Senate has the right to
977 change its rules and I do believe the Senate has the right to say we will do it at the
978 beginning of each term. That is what Vice President Nixon said. That is what Vice
979 President Humphrey said. I think that is a given.

980 I disagree with Senator Udall that it can happen at any time in the course of a
981 session. I think once it happens, at the beginning. And I agree with Vice President
982 Nixon when he said if the Senate does not act, it de facto says we are a continuing body
983 and we will go by the old rules and that is the precedent that we always follow. But
984 that does not mean we should willy-nilly say well, since we have the power to do it, let
985 us tinker with the rules at the beginning of every single session, the beginning of every
986 Senate.

987 I have now filibustered past my time and I apologize for that.

988 Chairman Schumer. I am not sticking to the time limits. This has been a great
989 discussion. I am not sticking strictly to the time limits so we can hear from our panel.

990 Professor Smith.

991 Mr. Smith. Well, I agree with much of what Senator Bennett suggests, but let
992 me just say two things. One is I think he is right on the question of the Senate as a
993 continuing body. My view is that the Senate has the right by simple majority to
994 reconsider the rules. If it has that right under Article 1, Section 5, it has the right to do
995 that at any time.

996 Obviously the Senate has adopted rules throughout its sessions over the
997 centuries, but I do not see why this power should be restricted to the beginning of a
998 Congress. I think that would be unwise for the Senate to restrict itself in its
999 interpretation in that way.

1000 I do think though, Senator, that the use of instruction--obstructionist tactics by
1001 the minority and the majority's response in trying to get its program enacted has played
1002 a fundamental role, though it is not the only cause, in many of the problems that we
1003 have encountered in the demise of regular order in the Senate, the demise of the role of
1004 standing committees, the transformation of the role of the floor and especially
1005 individual senators amending opportunities, the use of conferences. All of this has
1006 been directly affected by these strategies of the two parties in the Senate.

1007 Now, there are other contributing causes, but surely the use and abuse of the
1008 rules is a core part of it. Now, what I do not agree to is the claim that this is only about
1009 the polarization of the parties in American politics more broadly or in the Senate.
1010 Because in the 1970s, long before the modern polarization, the polarization we have
1011 seen in the last 20 years has occurred. We saw a ratcheting up of the use of
1012 obstructionist tactics. Why? Because the policy community within which senators
1013 operate had already begun to transform. The pressure and the incentives for
1014 individual senators to more fully exploit their parliamentary prerogatives was
1015 tremendous.

1016 Senator Byrd complained about lobbyists walking into senators' offices and

1017 asking them to place holds on bills. This was something that was emerging in the
1018 1970s, before most of you got here, but was already a part of the environment. When
1019 that was combined with the polarization of the parties, you can see where that would
1020 lead.

1021 But it is, I think, a bit pollyannish to think that if we simply had better behaving
1022 leaders, better behaving senators that the pressure for them to exploit their--fully
1023 exploit their parliamentary prerogatives would disappear. I do not think that is true.
1024 The world has changed.

1025 Chairman Schumer. With the indulgence of my colleagues here, could we ask
1026 either of the other witnesses if they want to say something about what Senator Bennett
1027 said? Professor Marziani or Mr. Dove? Just try to make it brief, that is all.

1028 Mr. Dove. I will talk about what happened yesterday because all the focus--

1029 Chairman Schumer. You got to put your microphone on.

1030 Mr. Dove. I am sorry. All the focus was on the failed cloture vote.

1031 Something else happened yesterday. A bill was passed in the Senate by voice vote,
1032 jointly sponsored by Senator Patrick Leahy and Senator John Cornyn, to amend the
1033 financial regulatory law with regard to the Freedom of Information Act.

1034 To me that is how the Senate works. That is what the Senate does. Maybe
1035 there was not a big article about it in the paper, but to me that kind of thing happens all
1036 the time. Senators from very different perspectives on most issues get together across
1037 the aisles on something that they care about and the Freedom of Information Act is

1038 something that happens to be in the purview of both Senator Leahy and Senator
1039 Cornyn, and it would be something they really do care about and they get it through.

1040 So I am not of the mind that the Senate is dysfunctional. It is doing things.
1041 They just do not happen to make the papers.

1042 Chairman Schumer. The third level issue is not first. That is the only thing I
1043 would say. I agree with you. Professor Marziani.

1044 Ms. Marziani. Sure. My one quick response to Senator Bennett, you know, I
1045 think that you highlight the complexity of current Senate procedure and I do think there
1046 is a lot to be said for thinking of rules reforms that make the rules more simple and thus
1047 easier for voters to understand and to follow, because I do think that that would
1048 therefore enhance legislative accountability.

1049 Chairman Schumer. Thank you. Senator Udall.

1050 Senator Udall. Thank you, Mr. Chairman, and Senator Bennett, I think that the
1051 principle you have recognized is an important one, the principle with different presiding
1052 officers. And I think you had mentioned Vice President Nixon and Vice President
1053 Humphrey, also Vice President Rockefeller, all sitting as the presiding officer of the
1054 Senate and making a ruling at the beginning of a Congress for the two-year period at the
1055 beginning of a Congress that the Senate has a right to adopt its rules by a majority vote.
1056 I mean that is an important principle and I think that that is what I have tried to embody
1057 in my testimony. And I think that is what Ms. Marziani has been talking about in terms
1058 of the constitutional scholarship here.

1059 I would like to focus with Ms. Marziani on this whole idea that we hear raised
1060 over and over again, if we change the cloture rule, that we are somehow making the
1061 Senate just like the House. Now, to me one of the biggest differences is every member
1062 of the House--and I served in the House for 10 years--you stand for election in two years
1063 and so it does have--the forces of the election have a result on the legislative process,
1064 while in the Senate at any one time, we have two-thirds of the senators at least four
1065 years away from an election.

1066 So could you comment on the idea that has been raised here that if the Senate
1067 changed the cloture rule it would make the Senate no different than the House of
1068 Representatives?

1069 Ms. Marziani. I believe quite strongly that reforming the rules would not make
1070 the Senate more like the House, but would in fact make the Senate more like the Senate
1071 is supposed to be. And specifically, I mean, as we have heard in each of these
1072 hearings, the current rules are not promoting deliberation. Instead they are
1073 incentivizing obstruction. They are being used not to achieve just, equitable and
1074 compromised decision making, but they are many times unfortunately used for little
1075 more than game playing.

1076 With that, if you look at the history of the structure of the Senate, the Framers
1077 surely wanted the Senate to be a stable body. There is no indication that they
1078 anticipated that the rules would somehow lead to stability or that the rules would be
1079 entrenched and that would make the body more stable. Instead, the framers gave

1080 senators longer terms that were overlapping and they thought in this way senators
1081 would have more time and have more experience as legislator, but also learn more
1082 about specific issues that they grappled with.

1083 They also thought that the staggered terms would allow older senators to
1084 mentor younger senators that having some continuity of membership would make the
1085 Senate a more respectful institution both nationally and domestically and it would make
1086 it harder for people to kind of strategize and come into the Senate with conniving
1087 motivations.

1088 So with that all in mind, I think that it is very fair that changing the rules will not
1089 make the Senate anything like the House. The Senate will remain a distinctive body
1090 and instead the Senate will become much closer to its ideal.

1091 Senator Udall. Could you also comment on the continuing body argument that
1092 is out there and whether or not you think the entrenchment of the rules--and describe
1093 for people entrenchment. You have used that term several times. What do we mean
1094 when we say the rules are entrenched and how does that relate to the constitutionality?

1095 Ms. Marziani. Legislative entrenchment is typically the term used for laws that
1096 are insulated from later amendment or appeal. So the Senate rules, the current
1097 Senate rules in setting a two-thirds threshold of 67 senators to agree to stop debate
1098 before the rules can change clearly entrenches those rules.

1099 As far as the continuing body theory goes, as I said earlier, there is no indication
1100 that the Framers intended for the structure of the Senate to somehow give the Senate a

1101 unique rulemaking authority that would allow entrenchment. Instead, as I noted
1102 before, and as Senator Udall has noted, legislative entrenchment has long been
1103 recognized as an illegal procedure.

1104 Also, of course, the Senate in many ways does not act like a continuing body.
1105 Mr. Dove pointed out some ways the Senate may act like a continuing body. There are
1106 many ways that it does not. The point of that is the Senate does not consistently
1107 regard itself as a continuing body and probably more importantly, there is no other way
1108 in which the Senate allows itself to become entrenched.

1109 For instance, the president pro tem of the Senate is assumed to go forward to
1110 future terms unless changed. But of course, if there is a shift between minority and
1111 majority party, everybody understands that the president pro tem can be replaced at
1112 the start of a new term.

1113 Chairman Schumer. Thank you. Senator Alexander.

1114 Senator Alexander. Thanks, Mr. Chairman. Senator Howard Baker told me
1115 that in 1968 he was sitting in his father-in-law's office, the Republican leader, Everett
1116 Dirksen, and the telephone rang and he heard Senator Dirksen say, no, Mr. President, I
1117 cannot come down and have a drink with you tonight; I did that last night and Louella is
1118 very angry with me.

1119 And about 30 minutes later, there was a rustle outside and two beagles and a
1120 president showed up and President Johnson arrived and said well, Everett if you will not
1121 drink with me, I will come drink with you. David Gergen told me that President

1122 Johnson called President Dirksen every afternoon at 5:00 to find out how he was doing.
1123 He did that for a variety of reasons, but one reason was he had to if wanted to pass the
1124 Civil Rights Bill.

1125 He not only knew that he had to pass it, but as Mr. Dove said, he had to create
1126 an environment in which the country would accept it. Now, it seems to me listening to
1127 what is being proposed here is to make the Senate permanently like it has been the last
1128 18 months where the majority had enough votes to run over the minority and pass bills
1129 with no bipartisan support and the result has been, it scared the country to death,
1130 produced an upheaval and in the case of the healthcare law, a determination to repeal it
1131 from the day it was passed.

1132 So you want a bipartisan consensus forced in the Senate, not just to pass a bill,
1133 but so that the country will accept it, will look up there and say well, Senator Harkin is
1134 for it and Senator Roberts is for it, so it may not be as bad as I think it is. I mean, that is
1135 sort of the way to look at it.

1136 Now, Mr. Dove, and to any of the witnesses, Senator Bennett made the point
1137 that it was not just a filibuster and the Senate also operates by unanimous consent.
1138 That is quite separate from the filibuster issue and there is nothing new about senators
1139 insisting on their prerogatives. I can remember Senator Metzenbaum sitting down at
1140 the front of the Senate negotiating with every single senator on every single piece of
1141 legislation that came up. And Senator Allen did the same and Senator Williams did the
1142 same in the sixties. I mean, this has been going on forever. It is a way of causing

1143 deliberation. You can call it entrenchment or obstructionism if you want to. Others
1144 call it the asserting of their right to amend or right to speak, their right to have a say.

1145 But my question is this, Mr. Dove, what years were you in the parliamentarian's
1146 office?

1147 Mr. Dove. I entered the office in 1966. I was parliamentarian from 1981 to
1148 '87 and then once again from 1995 to two thousand--

1149 Senator Alexander. You saw it during the years that Senator Byrd was the
1150 Democratic leader and Senator Baker was the Republican leader.

1151 Mr. Dove. Oh, yes.

1152 Senator Alexander. Now, if I am not mistaken, during that time, didn't they,
1153 during that eight-year period when one was the majority leader four years, one for four
1154 years, didn't they pretty well run the Senate in a way that created an environment
1155 where the majority leader brought up a law, a bill or a motion and then they basically
1156 gave senators their right to amend and their right to debate, and in exchange for that,
1157 the senators gave back an ability for the majority leader to manage the floor, and that
1158 produced a lot of votes, some late nights, some weekends, but Senator Byrd first,
1159 Senator Baker next, basically took the position that under the existing rules we have
1160 then and today, we can move what we need to move?

1161 As I mentioned earlier, this Senate--and I would disagree respectfully with the
1162 chairman--this Senate has not been passing second- and third-level bills. It has passed
1163 a healthcare law and a financial regulation law a trillion dollar stimulus. But my point

1164 is, is it not possible in the current rules as shown by the way Baker and Byrd operated
1165 the Senate that the Senate can operate quite well given quite a bit of ability for senators
1166 to bring up amendments, debate them and vote on them if the leaders will just do it in
1167 that way under the rules we have today?

1168 Mr. Dove. Well, the instance I remember probably most vividly was the issue
1169 of the Panama Canal Treaties, which were submitted by President Carter when Senator
1170 Byrd was the majority leader and Senator Baker was the minority leader.

1171 Senator Alexander. And where both of those senators actually changed their
1172 views on that issue during the debate.

1173 Mr. Dove. They worked together hand in glove frankly and those treaties were
1174 debated for eight weeks. Cloture was never filed on those treaties. Every
1175 amendment that any senator could dream up was offered, debated and voted upon,
1176 and at the end of the period, the necessary two-thirds voted in favor of ratification.

1177 Those were not popular treaties. If you saw the polls, about two-thirds of the
1178 American public were against those treaties. But the Senate decided in its wisdom
1179 that they were important enough to be ratified. I thought it was a high point for the
1180 Senate in the way that it ran. And yes, the Senate could function under its rules and
1181 achieve big things, yes.

1182 Chairman Schumer. Thank you, Senator Alexander. Senator Harkin.

1183 Senator Harkin. I am not on the committee.

1184 Chairman Schumer. Actually, yes, I think we will go to Senator Roberts because

1185 Senator Harkin is not a member of the Committee. You are right, thank you.

1186 Senator Roberts. Well, I am going to be talking about Senator Harkin in my
1187 remarks, so it is fine. Thank you too, Sir Robert. I do not call him Bob. I call him Sir
1188 Robert.

1189 When I first came here in 1996, I dragged him over to my office, my temporary
1190 office and said how on earth am I going to understand all this parliamentary procedure
1191 that is different from the House? And I went through Sir Robert's six-hour, quick
1192 six-hour period of--I thought maybe by osmosis or something that it would get into my
1193 head.

1194 But he finally told me, he said, Pat--we were friends, so he said Pat, you just ask
1195 me what you want to know up there when you are acting presiding officer and I will tell
1196 you and you do that and you will be fine. We could have started that at the first of the
1197 six hours, but you remember that Bob, I am sure.

1198 I only did something untoward once or twice. Once I adjourned the Senate
1199 subject to call of the chair, which you cannot do if you are the acting presiding officer,
1200 but it was Saturday and they had forgotten me and I had been up there for three hours
1201 and it was a matter of personal need.

1202 So at any rate, I came back and we went back into session.

1203 Then there is the time that I kicked Trent Lott off the floor into the Cloak Room
1204 and Bob said, was that wise? And I said, he has already assigned me to the Ethics
1205 Committee, but what else can he do?

1206 [Laughter.]

1207 Senator Roberts. So we had a good time and some of the things that my
1208 antics--I sure got on the film of your annual inter-parliamentary session of whatever,
1209 and I plead guilty. So thank you for coming.

1210 Ms. Marziani, I plead guilty. I am an obstructionist. I could not figure out
1211 TARP. I did not know what a credit default swap was until somebody could explain it
1212 to me and Mr. Paulson could not and Mr. Geithner could not and so I voted no.

1213 AIG, I did not know how deep that hole was going to be dug and I do not know
1214 why we let Lehman go one way and AIG the other, so I thought that was wrong. The
1215 automobile bailout, I could not figure out why were closing dealerships in small towns.
1216 As it turns out, it was not needed. The inspector general has said now that somebody
1217 just said well, we decided everybody ought to share the pain.

1218 That is not the way to run the government. Cash for clunkers, good at the time,
1219 now, no. I opposed that too. Stimulus I and II, ObamaCare, there are 41,000
1220 regulations now coming out, being enforced by the IRS, but also implemented by a man
1221 that has never been confirmed. We have financial reform, 243 regulations, 30 of them
1222 aimed at our community banks, card check, cap and trade. Actually, they are trying to
1223 do that outside of the Congress by executive order through the EPA. Depending on
1224 your point of view, that is good or bad.

1225 All of the executive orders that are coming out, not even being promulgated in
1226 the Federal Register. And also no confirmation hearings. And I am opposed to this.

1227 So I am an obstructionist and I want to say no, that we ought to do it a different way. I
1228 have alternatives. A lot of us have alternatives.

1229 So I think I go back to it is important to pass good legislation, but it is equally
1230 important to prevent bad legislation from passing. My idea of what to do, Tom Harkin
1231 and I, who have had our differences in the Agriculture Committee to say the least, we
1232 agreed--you know, Tom came to me and said you know a lot about this Farm Bill stuff
1233 and Kansas and wheat and obviously Tom knows about Iowa and corn and et cetera, et
1234 cetera, and he said, why don't we get together, just see if we can come up with a better
1235 Farm Bill?

1236 So we met in his hideaway. This is a secret. Nobody knows this. This is
1237 classified. And we did. We got about three meetings and we were really agreeing on
1238 some things until the word leaked out that you know what, Harkin is meeting with
1239 Roberts. Oh my God. And then on our side, they said Roberts, you are meeting with
1240 Harkin?

1241 So we got the pants put on us and then as it turned out, my dear friend, in the
1242 markup of the bill, we pretty well ended up where we would have ended up, what was
1243 it, six months prior to that. And so I think my--the way I would like to approach
1244 amendments, I do not want to have an amendment. I do not want to have it voted on.
1245 If I cannot get the minority or the majority, either way, to agree to my amendment, put
1246 it in the manager's amendment or just agree to it and just zip, get it through by UC or
1247 just everybody understands it, then I haven't done my work if I have an amendment and

1248 I have to have a vote and then stand to lose.

1249 But there are some in either party who want to bring amendments to lose, to
1250 make a point, to make a speech. Now, what happens--and the best way to cut that out
1251 is called peer pressure. We have had several current members and past members who
1252 want to stand up and make amendments. I have told them, why don't you--you might
1253 want to cut that down from 10 a day to five, maybe three, or why don't you just go
1254 make a speech in front of a group and just get it out of your system?

1255 There is many times I have come to the floor and say why are we voting on this,
1256 for my own party, let alone others? So I think peer pressure can do an awful lot and I
1257 would tell Mr. Smith, who obviously came to Washington, that if a lobbyist came into
1258 my office and said, I want you to put a hold on somebody because of what they were
1259 interested in, I would kick them out. The only hold I have ever put on anybody is the
1260 Secretary of the Army because the administration wanted to put the terrorists at Fort
1261 Leavenworth, which was the intellectual center of the Army, which I thought was one of
1262 the silliest things I have ever heard. But that was public.

1263 And so I do not think members do that so much anymore and I do not think in
1264 terms of partisanship that this is any worse than--let me just go back to the days that I
1265 first started, intense partisanship. Oh, hey, hey, LBJ, how many babies did you kill
1266 today, during Vietnam. I mean, that was terribly partisan. The Nixon resignation,
1267 my word, that was unprecedented.

1268 I just have two more. The resignation of three speakers, if you really count the

1269 one that would have, impeachment, we have come through some very difficult times in
1270 the history of the Senate and it has always been partisan. We are a reflection of the
1271 balkanization of American society. I would agree with Mr. Smith on that. But I think
1272 we can do it better with peer pressure and with good people like the chairman and
1273 myself and Mr. Bennett.

1274 That is exactly what Bob said. He stood up when he was badgered by another
1275 member of our party and defended himself in such a way that that individual started to
1276 behave himself. Amazing. It seems to me that would be a better answer than
1277 messing with these rules.

1278 Senator Harkin. Mr. Chairman, first of all, thank you for letting me sit in on this
1279 panel today. I particularly wanted to hear this panel and to at least ask a couple of
1280 questions, but first, an observation or two. One, that in looking ahead as to what we
1281 need to do to reform the rules, if we want to do that, I am not certain it serves us very
1282 well to go back and fight old wars. We can do tit for tat, tit for tat, this example, that
1283 example. We will never get anywhere.

1284 For every example that one person has on one side, we got one on this side and
1285 we are back fighting those old battles again. So I would hope that we get away from
1286 that sort of tit for tat kind of thing. Secondly, on the entrenchment of the rules, let us
1287 say an anomaly happened that there was 90 senators of one party and they changed the
1288 rules and they said, here are the rules we have now and in the future there has to be 90
1289 senators to vote to change it. We would have to live by that forever and ever?

1290 So 90, well, how about 67? At what point do you say this is--no, that does not
1291 sound right, that cannot be? Why is 67 so profound? The reason 51 is profound is
1292 because of the structure of our whole government and the structure of the way the
1293 framers framed it and the way we set it up for the majority to eventually be able to do
1294 something.

1295 The process in the Senate, I think there are a lot of ways that the Senate will
1296 never be like the House. As long as we have six-year terms, as long as we do not have
1297 a Rules Committee, as long as a bill has to pass both houses in exactly the same form, as
1298 long as the president has a veto, as long as the Senate has the veto power along with
1299 the House, and on and on, the Senate will never be like the House.

1300 Those are just a couple of observations. I just had one question though. I
1301 understand, Dr. Smith, your problem with my construct is fine, but I think you hit on a
1302 point, and all of you have, and that is, how do you structure it so that the minority is
1303 able to offer amendments and has some input? So if one desired to allow those
1304 opposed to the cloture to be able to offer a number of germane amendments, and I use
1305 that word "germane" amendments--let me digress here for a second.

1306 We do have an opportunity--I wish Pat hadn't left--we do have an opportunity in
1307 the Senate almost every year to vent and get amendments out there that we think will
1308 score points. We do that under that--

1309 Senator Udall. Vote-a-rama.

1310 Senator Harkin. Vote-a-rama. You get one minute to speak and somebody

1311 else gets a minute, and you vote and there is all these ridiculous amendments that are
1312 out there. The people think they are scoring points on. Quite frankly, I do not think
1313 they score points. I do not think one of those votes has cost anybody an election yet,
1314 but I guess we go through that exercise.

1315 But that is why I use the word "germane." If you wanted to have those
1316 opposed to cloture to be able to offer a number of germane amendments, how do you
1317 structure that? How do you structure that portion of a new rule? Any thoughts on
1318 that? Any of you?

1319 Mr. Smith. Well, I suggested a couple of ways and I would be happy to have
1320 the others comment. I guess my view of this is that there are two or three days
1321 between each cloture vote on the cloture motion under your proposal.

1322 Senator Harkin. Right.

1323 Mr. Smith. I think that is an excellent idea. I like the idea that it would be in a
1324 stepwise fashion reduced to a simple majority over the course of about a week or so.
1325 The question is, is between those cloture motions, what guarantees the minority an
1326 opportunity to debate and offer an amendment?

1327 The common procedure for the majority in the modern Senate is to file a cloture
1328 petition, get on with other business, get a vote. If it goes down, go on to other
1329 business, and the debate on the bill subject to the cloture motion never actually starts.
1330 Even if it is a motion to proceed, there is no debate on the motion to proceed, the
1331 majority leader is off to something else. Who can blame him? He has other

1332 activities.

1333 So my view is that if there was a cloture motion on a bill or a cloture motion on a
1334 conference report or a cloture motion on a House amendment to a Senate bill, that that
1335 be followed by a guaranteed period of debate and amendment on the bill, and that
1336 there be guarantees. I would leave it to you to give that further consideration. It
1337 might be on the basis of alternating amendments between the two sides.

1338 And I would loosen it a little bit from germaneness to relevant just because the
1339 germaneness requirement under Senate precedent is exceedingly tight. Relevant
1340 would allow the issues to be fully aired and eventually, of course, the new cloture
1341 motion would ripen in a day or two and you would get that next cloture vote. You get
1342 both then, minority debate and amendment and simple majority rule eventually.

1343 Senator Harkin. Mr. Dove?

1344 Mr. Dove. I am struck a little bit by the discussion over the cloture on the
1345 motion to proceed, because under Senate rules as they exist, you do not have to have
1346 debate on a motion to proceed. All you have to do is make that motion during the first
1347 two hours after an adjournment.

1348 Senator Byrd used to do that when he was majority leader. It seems to me that
1349 what has happened is that majority leaders have found it very handy to make that
1350 motion when it is debatable and file cloture and get this symbolic vote at least on going
1351 to a bill and then be able to either argue that they have been frustrated or if they get it
1352 then they know they have 60 votes for the eventual bill.

1353 But since the rules already allow getting to a bill without debate, it seems to me
1354 that it might be a possibility that majority leaders could resume the practice, as I say,
1355 that Senator Byrd did when he was majority leader and used that morning hour, the first
1356 two hours after an adjournment and make motions to proceed.

1357 Senator Harkin. Am I correct in assuming, Bob, that your position is that the
1358 Rule 22 ought to remain as it is without change?

1359 Mr. Dove. Okay--

1360 Senator Harkin. I mean, it seems to me that that is what your position is.

1361 Mr. Dove. I have seen it changed. I have seen it attempted to be changed. I
1362 was there when Vice President Humphrey made his ruling in 1967, which was
1363 overturned by the Senate. I was there when he made his ruling in 1969, which was
1364 overturned by the Senate, and then I was there when Vice President Rockefeller came
1365 back and had to apologize to the Senate for what he had done during the 1975 change
1366 to the rules.

1367 Those are not situations that I think lend themselves to well, that is a nice way of
1368 dealing with things.

1369 Senator Harkin. Ms. Marziani, do you have any thoughts? Again, my initial
1370 question was if you had a construct where the majority would finally be able to bring
1371 something to a vote, how would you construct it so that the minority has some rights to
1372 offer? I said germane or maybe relevant amendments; how would that be
1373 constructed?

1374 Ms. Marziani. I think that is an excellent question. I think Dr. Smith gave a
1375 very good answer. Right now I do not think I have an answer that is better than Dr.
1376 Smith's, but I am perfectly happy to go back to the Brennan Center and discuss that
1377 question--

1378 Senator Harkin. Think about it.

1379 Ms. Marziani. --with my colleagues and submit further written testimony.

1380 Senator Harkin. I would appreciate it.

1381 Ms. Marziani. Great.

1382 Senator Harkin. One last thing. You know, you talk about providing for
1383 consultation, compromise, that type of thing, but how do you respond when
1384 someone--when a conferee--or no, a nominee, presidential nominee for judge or
1385 something like that is blocked for several months and gets by with a 99-0 vote? It
1386 seems to me that that obstruction is not--and like I say, both sides have done that one.
1387 There are no clean hands on that one.

1388 But it seems to me then that is not done for the purpose of debate and
1389 discussion. It is done simply for obstructing something.

1390 Mr. Dove. I have also seen that, in which case I have seen nominations that
1391 were blocked for nothing about the nominee at all, but some side issue that the
1392 obstruction gives leverage.

1393 Senator Harkin. Yes.

1394 Mr. Dove. Again, my reaction to what that represents is basically how powerful

1395 every individual senator is. I think it is one of the reasons that people like to come to
1396 the United States Senate. You really are incredibly powerful.

1397 Senator Harkin. Well, Mr. Chairman, thank you. It has often been said and it
1398 is true, the power of a senator comes not by what we can do, but what we can stop.
1399 That is the power of a senator, and no one wants to give it up. We all want to keep
1400 some semblance of that power and I am saying for the good of the country, for the good
1401 of the Senate, we got to give up a little bit of that power, that right that we have to stop
1402 something.

1403 I am willing to give it up. I hope others are willing to give it up, I think, for the
1404 benefit of having a better functioning United States Senate. So I thank you very much,
1405 Mr. Chairman.

1406 Chairman Schumer. That is a very appropriate place to conclude. I think this
1407 was an excellent hearing, no matter what your view is. We have heard a lot of diverse
1408 opinions, and it is going to help us as we move forward.

1409 I want to thank all five of our witnesses, all of whom are here, because this
1410 hearing really advanced things a great deal. And I want to thank Senator Bennett, who
1411 has been a great partner in running constructive, thoughtful, non-partisan hearings on
1412 an issue that lends itself to partisanship.

1413 Thank you. We are adjourned.

1414 [Whereupon, at 12:09 p.m., the hearing was adjourned.]