

Executive Summary of Testimony by

Steven S. Smith

In May, I testified that today's Senate has reached a point in its procedural history that is qualitatively different than anything it has experienced before. I spoke of a "Senate syndrome" in which, without provocation, the minority blocks every majority move on important legislation and the majority limits minority opportunities to debate and offer amendments as much as possible. The syndrome does not cure itself; senators must address it.

Today, I appear to discuss specific proposals for reform. I favor rules changes that

1. more clearly protect each Senator's opportunity to debate and offer amendments;
2. limit debate on motions to proceed and combine and limit debate on the three motions to go to conference;
3. limit debate on appropriations bills and executive calendar business; and
4. where debate is not otherwise limited, allow a simple majority to eventually close debate.

I make two additional points.

First, every democratic institution must balance majority rule and minority rights. In the Senate, it is time to alter the rules to achieve a new balance. New guarantees for debate and amendment opportunities should be instituted and a new mechanism for bringing a measure or nomination to a vote should be adopted. Senator Tom Harkin's proposal is an excellent approach to establishing an appropriate balance.

Second, public opinion offers little useful guidance. In a nuanced survey of public opinion, a colleague and I discovered that the public endorses both key abstract principles: decisions by a simple majority and protection of majority rights. When asked more specifically about cloture thresholds, the public expresses somewhat unreliable, inconsistent views. However, if anything, a plurality favors a lower threshold than the current three-fifths majority threshold in Rule XXII.

The appendix offers ways to elaborate on Senator Harkin's proposal by guaranteeing opportunities to debate and offer amendments and obligating the Presiding Officer to put pending motions to a vote. I also offer observations on the proposal by Senator Michael Bennet to require a 41 percent minority for a cloture motion to continue debate and Senator Tom Udall's resolution calling for simple majority consideration of the rules at the start of a new Congress.

Testimony of

Steven S. Smith

Director, the Murraray Weidenbaum Center on the
Economy, Government, and Public Policy,
Kate M. Gregg Distinguished Professor of Social Sciences, and
Professor of Political Science
Washington University

Before the Committee on Rules and Administration, United States Senate

September 22, 2010

Thank you Mr. Chairman, Senator Bennett, and members of the Committee.

In May I spoke of a syndrome—of the expansive use of parliamentary rules and precedents by the minority and majority that has changed the character of the Senate. There is a tendency to see this as a majority party/minority party battle, but I am more concerned about the Senate and the role of the Senator. I was invited to address Senator Harkin's proposal.

There are now strong reasons to believe that the full exploitation of the rules is a long-term condition and that is the time to adopt Senator Harkin's proposal. The modern increase in the obstructive use of rules dates to the early 1970s, when Senators and outsiders commented on the "trivialization" of the filibuster. With sharp jumps in the early 1990s and again in recent years, efforts to block majority votes have intensified since then.

What changed?

- A major restraint on filibustering evaporated. As the 1960s came to an end, Senate Democratic conservatives no longer limited their filibusters to civil rights legislation.
- The policy community changed. Organized interests, lobbyists, and party factions ratcheted up the pressure on Senators to fully exploit their parliamentary weapons.
- Party politics changed. As each party has become more homogeneous, resistance from within each party to the full use of parliamentary tools by party leaders faded.
- Strategic premises changed. Each party now seems to assume the worst about the opposition, is usually right, and acts accordingly.

These have proven to be lasting conditions—on the order of decades and clearly more than passing phenomena.

In 1995, in the middle of this process, Senator Harkin first introduced his proposal to reduce the number of votes required for cloture in a stepwise manner. Since that time,

- the number of cloture petitions nearly doubled (Figure 1),
- the percentage of major bills subject to cloture more than doubled from about 40 to over 80 percent (Figure 2),
- and the number of objections to UC requests skyrocketed (Figures 3).

The consequences of these developments are pervasive. Minority strategies and majority responses have contributed to

- moving more policy decisions from standing committees to party leadership offices;
- the demise of the amending opportunities on the Senate floor;
- more packaging in omnibus bills;
- the demise of the appropriations process, with the Senate seldom debating regular appropriations bills on the floor;
- the stretching of the reconciliation process; and
- the avoidance of conferences.

These developments undercut the role of the Senator and harm the Senate as a policy-making institution.

It has been argued that problem is easily addressed by demanding more restraint on the part Senators and their leaders, but, realistically, after two decades of intensifying parliamentary warfare it appears that wishing for better behavior is not sufficient.

Consequently, I favor rules changes that

1. more clearly protect each Senator's opportunity to debate and offer amendments;
2. limit debate on motions to proceed and combine and limit debate on the three motions to go to conference;
3. limit debate on appropriations bills and executive calendar business; and
4. where debate is not otherwise limited, allow a simple majority to eventually close debate.

I will limit my comments to Senator Harkin's proposal. It is a move in the right direction. The Senate and the nation would be well-served by rules that both (a) protect the minority's opportunity to debate and offer amendments and (b) allow a majority of senators to close debate and vote on the motion before the Senate.

Senator Harkin's proposal reduces the number of votes required for cloture in a stepwise manner in order to allow a minority of Senators to extend Senate floor consideration of a measure but to allow a determined majority to eventually gain a vote on the measure.

I would strengthen the Harkin proposal by providing guarantees for pre-cloture debate and amendment on legislation and obligating Senators favoring the extension of debate to conduct debate. I would be happy to mention some ideas on those subjects in response to your questions.*

In July, you held a hearing on Senator Michael Bennet's proposal to require a 41 percent minority for cloture to continue debate, forcing the minority to turn out its votes. I discuss it in my appendix. I do not find it to be an adequate substitute for Senator Harkin's approach.

Finally, let me observe that the American public offers little consistent guidance on Senate procedure, but, what evidence we have, suggests support for the approach of Senator Harkin. The details of Senate procedures are lost on most Americans, and yet general principles of majority rule and minority rights resonate with them.

In August, a national probability sample was asked several questions about these tradeoffs.

Table 1 shows that the effect of variations in wording is large. In Table 2, the current rule is pitted against simple majority cloture, the current rule is favored by a majority. But before one side starts distributing copies of that table, check Table 3. A plurality favors simple majority cloture and a majority favors something less than a 3/5s majority. Although matching public opinion to reform proposals is tricky, it appears that a majority of the public favors the spirit of Senator Harkin's proposals.

My guess is that public responses to these questions reflect the public's very weakly held attitudes about the issue and ambivalence about the right balance.

Let me conclude. Every democratic institution needs to balance majority rule and minority rights. The balance must reflect a sense of fairness and be designed to encourage meaningful deliberation. The balance also must reflect the everyday behavior of its occupants. In the Senate, that behavior has changed—changed in a fundamental way—and requires new rules that protect the minority's right to debate and offer amendments, grant to a majority the power to act, and create incentives for more meaningful interaction across party lines.

* See appendix.

Appendix

1. Approaches to Elaborating on Senator Harkin's Proposal

A limitation of Senator Harkin's proposal is that it does not guarantee debate or amendments during the time between cloture votes. The majority leader may simply move to other business while waiting for the next cloture petition to mature. If the proposal is to allow the minority to extend debate for a limited period, I recommend that the Senate ***elaborate the Harkin approach by guaranteeing ten hours of debate between the step-wise cloture motions, during which amendments are in order.*** Additionally, I would ***guarantee the minority an opportunity to offer relevant amendments between cloture motions,*** perhaps by requiring alternating amendments under the control of the two floor leaders or simply guaranteeing a vote on at least one amendment offered by a Senator who voted against the previous cloture motion.

To encourage the minority to conduct real debate, I recommend that, ***after a cloture motion has failed, the Senate obligate the presiding officer to call a vote on the subject of the cloture motion when that matter is pending and no Senator seeks recognition to address the Senate.*** Under current practice, when no Senator seeks recognition, a Senator observes the absence of a quorum and floor proceedings are put on hold. This norm is observed as a courtesy to all Senators, although under existing procedures, if no Senator seeks recognition, the Presiding Officer may put the pending question to a vote. A strong argument can be made that Senators who oppose cloture incur some obligation to carry on a public debate after refusing to close debate.

2. Notes on Senator Bennet's Proposal to Require a 41 Percent Minority to Continue Debate

Senator Michael Bennet has proposed to change Rule XXII to require that 41 senators vote to continue debate in order to shift the burden for turning out votes from the majority to the minority. I consider this to be an issue of marginal importance and no substitute for something like Senator Harkin's proposal. In the 110th and 111th Congresses to date (see Table 4), less than ten percent of all cloture votes and 27 percent of *failed* cloture votes generated a minority of fewer than 41 votes.

The evidence seems to be that Senator Bennet's approach creates only a small disincentive for filibustering. It is no substitute for something like Senator Harkin's proposal.

A better approach, if something like Senator Harkin's approach is not adopted, is to ***set the threshold for cloture on the basis of Senators present and voting, rather on the basis of Senators duly elected and sworn,*** which creates an incentive for

both sides of cloture to maximize turnout. The nation's interest is to have Senators on both sides of a cloture motion cast votes.

3. Notes on Senator Tom Udall's Sense of the Senate Resolution (S.Res. 619)

I share Senator Udall's sense that a simple majority of the Senate should be able to reach a vote on a rules resolution, but the "resolved" clause of S.Res. 619 implies inappropriate inferences from the Constitution.

The preamble of S.Res. 619 is correct that the Rule XXII requirement for a two-thirds majority for cloture on a measure amending the Senate's rules is unconstitutional. This is a reasonable interpretation of Article I, Section 5, of the Constitution, on the grounds that the clause implies that a simple majority may determine the Senate rules and Rule XXII cannot impose an effective barrier to action by a simple majority.

My Interpretation. The Constitution implies that a simple majority of either house may close debate on a resolution concerning Senate rules. The power to determine rules is general. The power is not limited to the start of a new Congress. The power does not prevent the Senate from adopting a rule that the rules continue from Congress to Congress.

The question of closing debate on a resolution concerning Senate rules by a simple majority is separable from the question of whether the Senate is a continuing body. The Constitution implies that (a) a simple majority may close debate on a resolution concerning Senate rules and (b) the Senate may consider itself to be a continuing body.

Senator Udall's Interpretation. S.Res. 619 provides "that the Senate of each new Congress is not bound by the rules of previous Senates and should, upon a motion by a Senator to bring debate to a close, if said motion receives the affirmative vote of a majority of the Senators duly chosen and sworn, proceed to determine the Rules of its Proceedings in accordance with section 5 of article I of the Constitution."

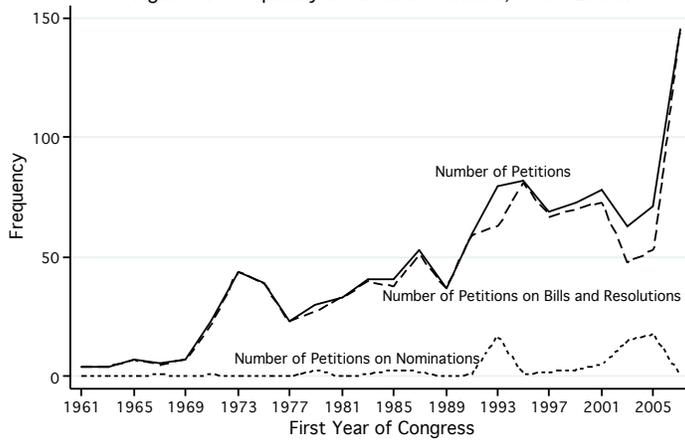
This is unwise for two reasons.

First, it is not unconstitutional for the Senate to provide that the rules adopted in previous Congresses remain in place until changed. Thus, while the Senate is not bound to past rules, it is free to keep them in place until a simple majority moves to consider a resolution to change the rules. That is, the Senate can both (a) choose to operate as a continuing body and (b) permit a simple majority to reconsider the rules.

Second, the Constitution implies that the Senate majority may close debate on a change in the rules *at any time*. S.Res. 619 may be misread in the future to imply that the ability of a majority to consider a rules change is limited to the start of a

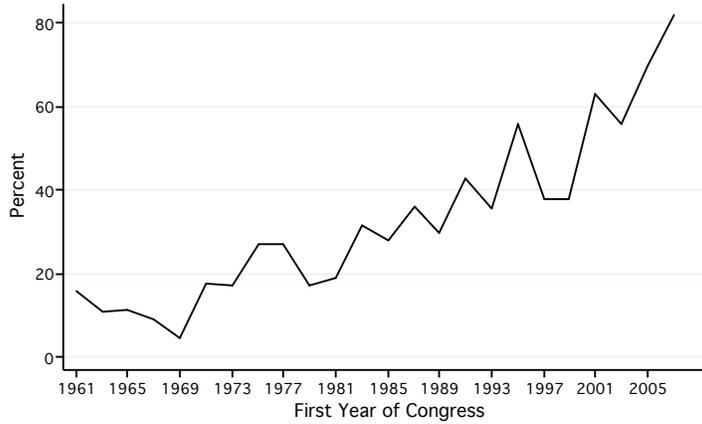
new Congress. It is unwise to interpret the Constitution as implying a temporal constraint on the rule-making power of the Senate. The Senate often has adopted, and should continue to be allowed to adopt, rules throughout its sessions. A simple majority must be allowed to gain Senate consideration and a vote on a rules resolution.

Figure 1. Frequency of Cloture Petitions, 1961-2008.



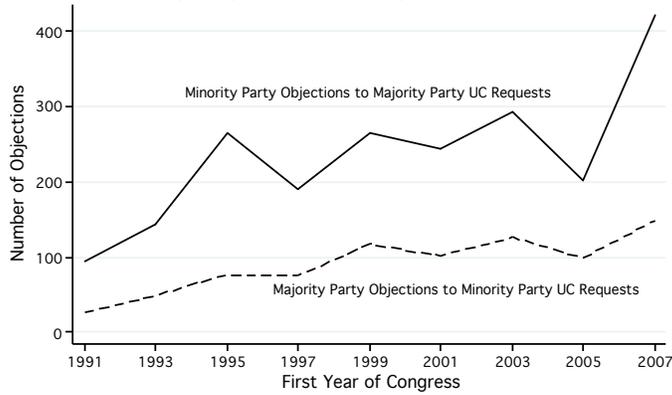
Source: U.S. Senate, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm

Figure 2. Percent of Key-Vote Measures Subject to Cloture Petitions, 1961-2008.



Source: CQ Almanac, annual editions.

Figure 3. Objections to Unanimous Consent (UC) Requests by Party of Author and Objector, 1991-2008.



Source: Congressional Record.

Table 1. Public Attitudes About Cloture Thresholds, August 2010 (in Percent)

Question	Agree	Uncertain	Disagree	Don't Know/Refused	Total
Minority rights are important, but, in a democracy, major issues of public policy ought to be decided on the basis of majority rule.	71.3	13.4	14.4	.9	100 (1713)
A majority of senators should be allowed to get a vote on a bill even if a large minority does not want to have the vote.*	61.2	14.2	24	.5	99.9 (861)
A large minority of senators should be allowed to prevent the majority from getting a vote on a bill.*	34.9	14.9	49.4	.8	100 (852)
If I had to choose between allowing the majority to get what they want or protecting the rights of the minority, I would choose protecting the rights of the minority.	58.0	17.7	23.0	1.3	100 (1713)

Source: National survey sponsored by the Weidenbaum Center, Washington University, August 2010. Survey conducted by SRBI. Responses weighted to reflect Current Population Survey demographics.

*Half of sample was asked each of the first two questions. Number in parentheses.

Margin of error: Plus/minus 3.5 percent for first two questions; plus/minus 2.5 percent for third question.

Table 2. "All things considered, which of the following statements do you agree with most?" (in Percent)	
51 Senators, a simple majority, should have the right to stop debate and get a vote	34.8
Current rule, requiring 3/5 of the Senate, or 60 senators, to stop debate and get a vote should be retained	58.4
Refused/Don't Know	6.8
	100.0 (1713)
See Table 3 notes.	

Table 3. "In your opinion, Senators should get a vote on a bill when..." (in Percent)	
all senators agree to have a vote	12.5
60 percent of senators agree to have a vote	32.2
55 percent of senators agree to have a vote	9.3
51 percent, a simple majority, agree to have a vote	39.2
Refused/Don't Know	6.8
	100.0 (1713)
See Table 3 notes.	

Table 4. Percent of Cloture Motions Receiving a Vote on Which the Minority Had Less Than Two-Fifths of Elected Senators, 1975-2010

Majority Party, Dates	Percent of All Cloture Votes	Percent of Failed Cloture Votes
Democratic Majority, 1975-1980	28.3	56.7
Republican Majority, 1981-1986	23.2	41.0
Democratic Majority, 1987-1994	18.2	29.2
Republican Majority, 1995-2001	8.6	13.1
Democratic Majority, 2001-2002	6.8	14.8
Republican Majority, 2003-2006	5.8	10.5
Democratic Majority, 2007-2010	9.8	27.0

Source: http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm.

Note: The denominator in calculating percent is the number of cloture motions receiving a roll-call vote. It excludes cloture petitions that were vitiated, withdrawn, on which no action was taken, or were decided by unanimous consent.

Table 5. Cloture Thresholds Under Alternative Reform Proposals and Scenarios.

	Number of Senators Voting				
	100	99	98	97	96
Current Rule—Three-Fifths of Senators Duly Elected and Sworn					
with 100 or 99 Elected Senators	60 in majority				
with 98 or 97 Elected Senators	59 in majority				
with 96 Elected Senators	58 in majority				
3/5s of Senators Present and Voting					
	60 in majority	60 in majority	59 in majority	59 in majority	58 in majority
Simple Majority					
	51 in majority	50 in majority	50 in majority	49 in majority	49 in majority
Senator Harkin					
step 1	60 in majority				
step 2	57 in majority				
step 3	54 in majority				
step 4	51 in majority				
Senator Bennet—Minority Thresholds to Continue Debate					
with 100, 99, or 98 Elected Senators	41 in minority				
with 97 or 96 Elected Senators	40 in minority				
Ornstein—Minority Thresholds to Continue Debate					
with 100, 99, or 98 Elected Senators	40 in minority				
with 97, 96, or 95 Elected Senators	39 in minority				
Senator Harkin with Minority Thresholds					
<i>step 1</i>	41 in minority				
<i>step 2</i>	44 in minority				
<i>step 3</i>	47 in minority				
<i>step 4</i>	50 in minority				

Biography

Steven S. Smith is Professor of Political Science, Kate M. Gregg Distinguished Professor of Social Science, and Director of the Murray Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis. Previously, he served on the faculty of the University of Minnesota, Northwestern University, and George Washington University, and was a Senior Fellow at the Brookings Institution. He chaired the Legislative Studies Section of the American Political Science Association and has served on the editorial boards of the *American Journal of Political Science*, *The Journal of Politics*, *Legislative Studies Quarterly*, and other journals. His books are:

- *The American Congress* (Cambridge University Press, 2006, 2009; Houghton Mifflin, 1995, 1999, 2003)
- *The American Congress Reader* (Cambridge University Press, 2009)
- *Committees in Congress* (CQ Press, 1984, 1990, 1997), with C.J. Deering
- *Call to Order: Floor Politics in the House and Senate* (Brookings, 1989)
- *Managing Uncertainty in the House of Representatives: Adaptation and Innovation in Special Rules* (Brookings, 1988), with S. Bach
- *Politics or Principle: Filibustering in the United States Senate* (Brookings, 1997), with S. Binder
- *The Politics of Institutional Choice: The Formation of the Russian State Duma* (Princeton University Press, 2001), with T. Remington
- *The Principles and Practice of American Politics* (CQ Press, 2000, 2004, 2007, 2009), with S. Kernell, edited volume
- *Party Influence in Congress* (Cambridge University Press, 2007)
- *Reforming the Presidential Nomination Process* (Brookings, 2009), with M. Springer
- *Steering the Senate: The Development of Party Leadership in the U.S. Senate*, with G. Gamm (Cambridge University Press, forthcoming)