

Testimony of Mimi Marziani
Submitted to the U.S. Senate Committee on Rules and Administration
For the Hearing Entitled
Examining the Filibuster: Legislative Proposals to Change Senate Procedures
September 22, 2010

EXECUTIVE SUMMARY

The Senate has wrestled with its rules governing debate and cloture for over a century. Again and again, senators have agreed that a simple majority of the Senate has the constitutional authority to cut off debate and vote to amend the Rules at the start of a new Congress, notwithstanding any contrary traditions or provisions within the Rules themselves. Today, a group of senators led by Senator Tom Udall (D-NM) has made clear that they too recognize that a majority of the Senate must be able to effect rules change at the start of the 112th Congress.

As a matter of constitutional law, their position is undoubtedly correct. The Senate has continual constitutional authority to “determine the Rules of its Proceedings.” Under the constitutional principle prohibiting legislative entrenchment, the Senate cannot trap future Senates under supermajority barriers to change. Entrenchment not only impermissibly detracts from the Senate’s own power and violates anti-entrenchment principles, it also blunts legislative accountability. In this way, the current Senate Rules disrupt one of the most important checks on government power – the voters’ ability to hold their representatives responsible for their legislative actions.

In the testimony that follows, I first give the relevant historical background to provide context for today’s debate. I illustrate that ever since the Senate has perceived the filibuster as a problem, there has been robust support for the position that a majority of senators can effect rules change at the start of a new Congress. Next, I examine the scope of the Senate’s constitutional power to establish its rules as well as the longstanding constitutional prohibition against legislative entrenchment. I conclude that if the Rules could not effectively be changed via majority vote at the start of a new Congress, they would be unconstitutional. Finally, I refute the main argument advanced to justify binding future Senates to the current Senate Rules – the notion that the Senate’s overlapping term structure justifies entrenchment. Even assuming that the Senate is a “continuing body” in some meaningful way, this alone cannot explain why the Senate has the power to commit *itself* for perpetuity. Instead, such binding exceeds the authority granted to the Senate by the American people.

Testimony of

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Submitted to the

U.S. SENATE COMMITTEE ON RULES & ADMINISTRATION

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**EXAMINING THE FILIBUSTER: LEGISLATIVE PROPOSALS TO CHANGE
SENATE PROCEDURES**

September 22, 2010

Mr. Chairman and members of the subcommittee:

I am pleased and honored to testify today about the Senate's constitutional power to establish and amend its rules of proceedings. I appreciate the decision of this committee to explore this issue among the other important constitutional and practical questions raised by the filibuster. In the testimony that follows, I will explain why a simple majority of the Senate has the constitutional authority to cut off debate and vote to amend the Rules at the start of a new Congress, notwithstanding any contrary provisions within the Rules themselves.

In the testimony that follows, I first give the relevant historical background to provide context for today's debate. I illustrate that ever since the Senate has perceived the filibuster as a problem, there has been robust support for the position that a majority of senators can effect rules change at the start of a new Congress. Next, I examine the scope of the Senate's constitutional power to establish its rules as well as the longstanding constitutional

¹ The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that focuses on fundamental issues of democracy and justice. Today's testimony supplements the Center's earlier submissions, available at www.brennancenter.org.

prohibition against legislative entrenchment. I conclude that if the Rules could not effectively be changed via majority vote at the start of a new Congress, they would be unconstitutional. Finally, I refute the main argument advanced to justify binding future Senates to the current Senate Rules – the notion that the Senate’s overlapping term structure justifies entrenchment. Even assuming that the Senate is a “continuing body” in some meaningful way, this alone cannot explain why the Senate has the power to commit *itself* for perpetuity. Instead, such binding exceeds the authority granted to the Senate by the American people.

I. There is Strong Historical Precedent for the Senate’s Constitutional Power to Effect Rules Change by a Majority Vote at the Start of a New Congress.

Today, it is well known that a minority of senators can prevent the entire chamber from taking a final vote on almost all bills and nominations. This unique ability derives from the Senate’s procedural rules, which require a supermajority vote of 60 to end debate and force a vote on the underlying matter.² The Rules of the Senate place an even higher bar on their own amendment – under Rule XXII, when a rules change is being considered, 67 senators must agree to stop debate.³ And, the Rules claim to be perpetual. Under Senate Rule V, “[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”

Several legal scholars and political scientists have detailed the Senate’s many attempts to curb obstruction by reforming these rules.⁴ Although there is no need to rehash this long history in full, it is important to understand the precedent that has been established through past reform efforts. As illustrated below, numerous senators have voiced support for the Senate’s constitutional power to override obstruction and determine its rules by majority vote. Several Vice Presidents, sitting as Presidents of the Senate, have agreed. And, in 1975, the Senate formally adopted that view as well.

A. The Early Senate Recognized that a Majority of the Senate Could Override a Filibuster and Force a Rules Change at the Start of a New Congress.

Although the filibuster – the term used to describe any strategic use of delay to block legislative action⁵ – is a tactic as old as Congress itself,⁶ the Senate’s serious struggle with obstruction has a shorter history. By most accounts, the first identifiable filibusters did not

² Senate Rule XXII, § 2.

³ *Id.*

⁴ See GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 62-87 (2006); SARAH BINDER & STEVEN SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 161-197 (1997); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 217-60 (2004); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 209-213 (1997); see also John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 513-518 (2004).

⁵ Fisk & Chemerinsky, *supra* n. 4, at 183-184.

⁶ See GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 44, FIG. 3.1 (2010).

occur until the mid-nineteenth century, emerging with the profound North-South sectional disputes and party crises of that time.⁷ Filibusters were not particularly effective until the end of the 1800s, however, when delay tactics were used more frequently and with greater severity.⁸ As obstruction worsened, cries for reform intensified. And, with reform efforts, came arguments of the Senate's power to establish its rules by a majority vote, filibusters notwithstanding.

Indeed, Henry Clay (Whig-KY), opposing a Democratic filibuster of a 1841 bill to establish a national bank – “the first major episode[] of obstruction in Senate history”⁹ – argued that he would “resort to the Constitution and act on the rights insured in it to the majority, by passing a measure that would insure the control of the business of the Senate to the majority.”¹⁰ Specifically, Clay called for a revival of the previous question motion¹¹ to quash debate upon a majority vote. The Democrats soon retreated, however, allowing the Senate to pass the Whig's key legislative items and prompting Clay to drop his proposal.¹² But, while Clay never formally proposed procedural reform, his threats likely spurred the Democrats' change of strategy.

In 1891, after repeated Democratic filibusters of a bill authorizing federal troops to supervise federal elections, Republican leaders sought – and obtained – a series of rulings from Vice President Levi Morton permitting a majority vote to cut off debate and create a cloture rule.¹³ Despite the Senate's tradition of unlimited debate, veteran Senator George Edmunds (R-VT) explained that the majority must be able to exercise this power: “The Constitution. . . necessarily implies that no minority, whether of one or any other number, should or could unduly obstruct the expression of the will of the majority.”¹⁴ And, a majority of the Senate agreed, subsequently approving a motion to proceed to floor debate on the proposed procedural reform. Ultimately, the reform did not pass, but for reasons unrelated to Edmunds' constitutional claims.¹⁵

Two decades later, after a “little group of willful men” successfully filibustered a bill to arm U.S. merchant ships against German attacks during World War I, the President and public

⁷ BINDER & SMITH, *supra* n. 4, at 60-63; WAWRO & SCHICKLER, *supra* n. 4, at 159-179; Fisk & Chemerinsky, *supra* n. 4, at 190-193.

⁸ BINDER & SMITH, *supra* n. 4, at 63-68; WAWRO & SCHICKLER, *supra* n. 4, at 69-71; Fisk & Chemerinsky, *supra* n. 4, at 195-199.

⁹ WAWRO & SCHICKLER, *supra* n. 4, at 72.

¹⁰ *Id.* at 73 (quoting Congressional Globe).

¹¹ The first House and the first Senate had nearly identical rulebooks and both included a motion for a “previous question.” Today, the House uses this motion to allow a simple majority to cut off debate. The Senate removed this provision in 1806, not due to a desire to promote unlimited debate, but because it was unnecessary. At the time, the Senate was a small, fraternal place with little need to reign in relentless obstruction – as a result, the previous question motion was rarely used. See BINDER & SMITH, *supra* n. 4, at 35-39.

¹² WAWRO & SCHICKLER *supra* n. 4, at 73-76; BINDER & SMITH, *supra* n. 4, at 74-75.

¹³ WAWRO & SCHICKLER *supra* n. 4, at 72-87; see also *By Aid of the Chair*, WASH. POST, Jan. 23, 1891.

¹⁴ *The Senate's New Rule*, WASH. POST, Dec. 28, 1890.

¹⁵ Key Republicans backed away from both the civil rights initiative and the proposed procedural reform, viewing them to be inextricably linked. WAWRO & SCHICKLER *supra* n. 4, at 76-86.

demanded procedural reform.¹⁶ When the Senate began its debate on rules changes, Senator Thomas Walsh (D-MT) argued at length that the Senate had the constitutional power to determine its own rules by a simple majority vote at the start of a new Congress in spite of the Senate’s tradition of unlimited debate.¹⁷ Walsh pointed out that the Constitution gives each chamber the same authority to determine its rules, a power that the House has long used to set new rules each session by a majority vote. Moreover, the Senate’s overlapping term structure could not justify decreasing the institution’s rulemaking power: “A majority may adopt the rules, in the first place. It is preposterous to assert that they may deny future majorities the right to change them.”¹⁸ If any Senate rule actually prevented a majority from acting in this manner, Walsh declared, that rule would be unconstitutional and thus invalid.¹⁹ Soon thereafter, the Senate enacted its first formal cloture rule in 1917 by an overwhelmingly affirmative vote of 76-3.²⁰ Walsh’s arguments were never formally considered.

B. The Modern Senate Has Expressly Recognized its Constitutional Authority to Effect Rules Change at the Start of a New Congress, Notwithstanding Any Rules to the Contrary.

Since 1917, the cloture rule has been amended several times – each time, with the goal to make it easier for a majority to overcome obstruction and force a substantive vote on the underlying matter.²¹ During each significant push for reform, senators have argued that the Constitution allows a majority to override a filibuster and vote on proposed reform, notwithstanding any contrary provisions within the Rules. In 1953, 1957, 1959, 1961, 1963, and 1967, there were organized movements at the beginning of the congressional session to assert this power.²² Vice Presidents Richard Nixon (in 1957 and 1959) and Hubert Humphrey (in 1967) each issued advisory opinions explicitly endorsing the Senate’s constitutional power to effect rules change in this manner.

¹⁶ “In a formal statement to the country that bristled with the indignation he felt,” President Woodrow Wilson chastised the group of senators standing in his way as a “little group of willful men representing no opinion but their own.” *Sharp Words by Wilson*, N.Y. TIMES, Mar. 5, 1917. According to President Wilson, their actions “rendered the great Government of the United States helpless and contemptible.” *Id.*

¹⁷ 55 CONG. REC. 17 (1917); Gold & Gupta, *supra* n. 4, at 208.

¹⁸ 55 CONG. REC. 17, 18 (1917); Gold & Gupta, *supra* n. 4, at 225-226.

¹⁹ 55 CONG. REC. 18 (1917); Gold & Gupta, *supra* n. 4, at 225-226.

²⁰ 55 CONG. REC. 18, 45 (1917); Gold & Gupta, *supra* n. 4, at 225-226.

²¹ Under Senate Rule XXII, § 2 as originally enacted, two-thirds of senators present and voting had to vote affirmatively in order to invoke cloture “upon any pending measure.” In subsequent years, this language was interpreted as applying to substantive legislation only, allowing obstructionists to filibuster procedural motions without any possibility of cloture. This loophole was closed in 1949, when a reform proposal was enacted to allow cloture on any pending business by two-thirds vote of the entire Senate, except for motions to change the Senate Rules. A decade later, in 1959, Rule XXII was again amended; this time, to allow cloture by a two-thirds vote of senators present and voting on all motions, including those to change the rules. In 1975, cloture voting requirements were decreased to a three-fifths vote for all matters except motions to change the Senate Rules.

²² For a detailed description of these reform attempts, see Gold & Gupta, *supra* n. 4, at 230-247. See also BINDER & SMITH, *supra* n. XX, at 168-76; Roberts, *supra* n. 4, at 516; Fisk & Chemerinsky, *supra* n. 4, at 199-200.

Vice President Nixon considered this issue at length in 1957. He concluded that:

It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress. Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that [Rule XXII] in practice has such an effect.²³

Thus, Nixon continued, the Senate has three options at the start of each new Congress: (1) proceed to conduct business under the standing rules, thereby adopting them for the new session; (2) vote down any motion to change the Rules, also thereby adopting them for the new session; or (3) vote affirmatively to proceed with the adoption of new rules by a majority vote.²⁴ That year, the Senate voted to table the pending motion to proceed on a rules change proposal, and thus decided to operate under the standing rules for the remainder of that congressional session.

In 1959, at the start of the next session, Nixon reiterated his understanding of the Senate's constitutional power in response to a series of parliamentary inquiries. This time, with a clear majority supporting reform, a compromise deal was struck. Although the cloture rule was tightened,²⁵ the Senate also agreed to add Senate Rule V, stating that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

Although many objected to Rule V as unconstitutional,²⁶ others argued that it would not be legally binding. Senator Thomas Hennings (D-MO), for instance, repeatedly assured his colleagues that Rule V was "without final force or effect."²⁷ Or, as Senator John Cooper (R-KY) put it, "I do not think [Rule V] would have any legal or constitutional effect, but certainly might have some psychological effect."²⁸ Ultimately, the vast majority of the Senate apparently approved of finding a middle ground that generally satisfied both reformers and anti-reformers. This compromise passed by a vote of 72-22.²⁹

²³ 103 CONG. REC. 178 (1957).

²⁴ *Id.* at 178-789.

²⁵ See, *supra* n. 21, for an explanation of the ways the cloture rule has been amended over the years.

²⁶ See 86 CONG. REC. 124 (1959). Senator Jacob Javits (R-NY), for one, vehemently criticized the proposed rule: "Are we going to follow the Constitution of the United States or are we going to follow a rule made by one Senate for all succeeding time, to bind all Senates? In other words, are we going to try to give ourselves an extra-constitutional power or are we going to obey the Constitution?"

²⁷ *Id.* at 447.

²⁸ *Id.* at 450.

²⁹ 86 CONG. REC. 124, 494 (1959); Gold & Gupta, *supra* n. 4, at 246-247.

In the years that followed, however, civil rights legislation continued to be thwarted by the filibuster, prompting calls for additional reform. In 1969, at the start of the new Congress, a group of 37 senators introduced a proposal to decrease the number of votes needed for cloture. Then, one senator asked Vice President Humphrey if a simple majority could invoke cloture on the rules change resolution. Humphrey explained that they could:

There is perhaps no principle more firmly established than the constitutional right of the Senate under article I, section 5 to “determine the rules of its proceedings.” The right to determine includes also the right to amend. No one has ever, to the Chair’s knowledge, seriously suggested that a resolution to amend the Senate rules required the vote of more than a simple majority. On a par with the right of the Senate to determine its rules, though perhaps not set forth so specifically in the Constitution, is the right of the Senate, a simple majority of the Senate, to decide constitutional questions. . . . It is the view of the Chair, just as it was the view of an earlier President of the Senate, who is now the President-elect, that, at least, at the opening of a new Congress: “The majority has the power to cut off debate in order to exercise the right of changing or determining the rules.”³⁰

Soon thereafter, a majority of the Senate narrowly voted to invoke cloture, 51-47. Recognizing this as a valid legislative act, Humphrey announced that the Senate would proceed to consider the resolution. The cloture vote was immediately appealed, however, and some apparently had a change of heart. In a second vote, again decided by a narrow margin, the Senate overturned Humphrey’s ruling.³¹ The 1969 reform proposal died with this second vote.

The reform push of 1975, however, ended differently – that year, the Senate set a formal precedent that future rules reform could be effectuated by majority vote. At the start of that Congress, a group of senators led by Senators Walter Mondale (D-NM) and James Pearson (R-KS) again sought to amend Rule XXII.³² Their resolution included a provision stating that a majority could end debate and proceed to vote on the underlying rules change proposal. An opponent of reform quickly raised a point of order that the resolution was controlled by the Senate’s standing rules and thus subject to the supermajority cloture requirement. Vice President Nelson Rockefeller disagreed, instead recognizing each Senate’s constitutional right to effect rules change by majority vote.³³ The Senate followed suit, voting 51-42 to table the opposing point of order and setting an important precedent.³⁴ The Senate reaffirmed its position twice in the week that followed, overturning two more contrary motions.³⁵

³⁰ 115 CONG. REC. 593 (1969).

³¹ 90 CONG. REC. 994 (1967); Gold & Gupta, *supra* n. 4, at 251-52.

³² For a thorough description of the 1975 reform efforts, see Gold & Gupta, *supra* n. 4, at 252-59. *See also* BINDER & SMITH, *supra* n. 4, at 181-82; Roberts, *supra* n. 4, at 516-517; Fisk & Chemerinsky, *supra* n. 4, at 212-13.

³³ *See* 94 CONG. REC. 3839-40 (1975).

³⁴ *Id.* at 3854.

³⁵ *Id.* at 4116.

Eventually, as has oft occurred, the threat of more drastic changes to the Senate Rules inspired compromise. Said simply, anti-reformers agreed to lower the cloture requirement in exchange for another vote meant to reverse the new precedent.³⁶

Many senators noted, however, that precedent cannot be erased so simply. As Senator Robert Byrd put it, “Senators can argue these precedents any way they wish. They can place any interpretations on these recent precedents that they want to place.”³⁷ Senator Alan Cranston (D-CA) echoed that sentiment, arguing that “no precedent can reverse the fact that the Constitution supersedes the rules of the Senate – and that the constitutional right to make its rules cannot be challenged.”³⁸

Scholars of senate procedure largely agree. Professor Charles Tiefer, the author of an extensive treatise on Senate procedure, characterized the reconsideration vote as little more than a token gesture – in truth, he explained, “the Rubicon had been crossed.”³⁹ As political scientists Sarah Binder and Steven Smith have concluded, there is simply no doubt that “a majority of senators favored an interpretation of the Constitution and Senate rules that would have permitted a simple majority to close debate on new rules at the beginning of a Congress.”⁴⁰ In other words, the Senate clearly defined the scope of its constitutional authority.

II. If a Simple Majority Lacked the Power to Effect a Change in the Senate Rules, the Rules Would Be Unconstitutional.

As a constitutional matter, there is little doubt that the precedent set by the Senate in 1975 is legally sound. The Senate has continual authority to establish the rules of its procedure. It cannot entrench its current rules by imposing supermajority barriers that render change effectively impossible. Moreover, entrenchment blunts legislative accountability in a way that offends key democratic values. For these reasons, elaborated upon below, a simple majority must be able to cut off debate and vote to revise the Senate Rules at the start of a new Congress – otherwise, the Rules would be unconstitutional.

A. If a Simple Majority Lacked the Power to Effect Rules Change, the Rules would Improperly Impinge Upon the Senate’s Rulemaking Power.

Article I, Section 5, Clause 2 of the Constitution authorizes each chamber of Congress to “determine the Rules of its Proceedings.”⁴¹ The Rulemaking Clause was never debated at the Constitutional Convention, nor was it the subject of any public debate surrounding the adoption of the Constitution – the provision apparently provoked no controversy.⁴² But,

³⁶ 121 CONG. REC. 5651-5652 (1975).

³⁷ *Id.* at 5249.

³⁸ *Id.* at 5251.

³⁹ CHARLES TIEFER, CONGRESSIONAL PRACTICE & PROCEDURE 705 (1989).

⁴⁰ BINDER & SMITH, *supra* n. 4, at 182.

⁴¹ U.S. Const. art. 1, § 5, cl. 2.

⁴² See Roberts, *supra* n. 4, at 532; Aaron–Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. R. 1401, 1424 (2010).

lack of argument should not be taken to mean that this provision is insignificant. Instead, the power to set its procedure is an obviously vital aspect of Congress' legislative authority.

The Rulemaking Clause is necessary for each house to perform its constitutional lawmaking duties. While the Constitution grants Congress "all legislative Powers" within Article I,⁴³ and specifies that all legislation must "pass" both houses in order to become law,⁴⁴ it provides no guidance for legislative procedure. Without ordering mechanisms of some kind, it is difficult to imagine how Congress would be able to achieve a quorum, let alone determine which national problems require federal legislative attention or what solutions are most desirable. As Justice Joseph Story, in his seminal treatise on constitutional law, put it:

No person can doubt the propriety of the provision authorizing each house to determine the rules of its proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.⁴⁵

The Supreme Court has recognized that Congress' rulemaking authority is a key part of its legislative power. Accordingly, the executive and judicial branches cannot interfere with congressional rules on the grounds that "some other way would be better, more accurate, or even more just."⁴⁶ Even the Supreme Court lacks the power to question "the advantages or disadvantages, the wisdom or folly" of any particular rule.⁴⁷ Indeed, to cripple the Senate or House's ability to set procedure would impinge upon their clear constitutional authority to do so, disrupting the careful separation of powers achieved by our Constitution's design.

While Congress has broad discretion to set procedural rules, the House and Senate cannot pass rules that "ignore constitutional restraints or violate fundamental rights."⁴⁸ One such restraint is that Congress' rulemaking power is continuous, just like its other enumerated powers within Article I. As the Court has explained, "the power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."⁴⁹ So, the D.C. Circuit, recognizing the continuous nature of the rulemaking authority, has specifically held that a subsequent Congress may, by majority vote, disregard procedural restrictions meant to apply to future amendments of a particular statute.⁵⁰

⁴³ U.S. Const. art. I, § 1.

⁴⁴ U.S. Const. art I, § 7.

⁴⁵ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 835 (1833).

⁴⁶ *United States v. Ballin*, 144 U.S. 1, 5 (1892); *accord* *United States v. Smith*, 286 U.S. 6, 33 (1932).

⁴⁷ *Ballin*, 144 U.S. at 5; *accord* *Smith*, 286 U.S. at 48 ("The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.").

⁴⁸ *Ballin*, 144 at 5.

⁴⁹ *Id.*

⁵⁰ *Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1286-88 (D.C. Cir. 1982). Specifically, the plaintiffs challenged the validity of amendments to a federal law, alleging that the

There is little doubt that the House and the Senate understand both the significance and the continuous nature of their rulemaking authority. The House, of course, has historically exercised its power to establish new rules at the start of each term, and formally recognizes its right to do so in the House Manual.⁵¹ Senate Rule V, of course, creates a default rule providing that the Rules carry over until the Senate chooses to change them. And, these rules have been subject only to relatively minor amendment over the years. In less formal ways, however, the Senate changes its procedure constantly – through unanimous consent agreements, for instance. And, both chambers occasionally enact statutes with procedural restrictions that allegedly apply to future Congresses.⁵² These statutes typically contain disclaimers, however, explaining that these laws do not, in fact, reduce either house’s rulemaking power. Disclaimer or not, if a majority of a future House or future Senate disagrees with these procedural restrictions, they frequently simply ignore them.⁵³

By requiring 67 senators to agree before allowing a vote on any rules change, Senate Rule XXII imposes a procedural barrier that makes even slightly controversial change virtually impossible to achieve. If this rule were legally binding, it would impinge upon future Senates’ rulemaking authority, leaving them with less power than their contemporary counterpart in the House. This result would be at odds with the clear language of the Rulemaking Clause, which grants each chamber the same rulemaking power. Similarly, a legally-binding 67 vote threshold for change would reduce the rulemaking power of future Senates – a result contrary to the continuous nature of the Senate’s authority. Indeed, it is hard to imagine any serious argument that the Senate could expressly impinge upon its other Article I powers in this way – by requiring 67 votes to stop debate on all future revisions to U.S. citizenship requirements, for example. In short, unless a majority can, in fact, effect rules change at the start of a new session, the current Rules are unconstitutional.

B. If a Simple Majority Lacked the Power to Effect Rules Change, the Rules would Violate the Constitutional Anti-Entrenchment Principle.

If the Senate Rules could not be changed by a majority vote of future Senates, they would also violate another fundamental constitutional principle – that one legislature cannot bind

amendments were made in violation of procedures set out by the statute itself. The court found that Congress’ continual right to exercise its rulemaking power was limited only by other aspects of the Constitution. Thus, Congress’ decision to override these procedural limitations was valid. *See also* Roberts, *supra* n. 4, at 535.

⁵¹ Roberts, *supra* n. 4, at 536.

⁵² *See, e.g.*, Roberts, *supra* n. 4, at 536-37 (discussing rules statutes generally); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (focusing on so-called “fast track” legislation”).

⁵³ *See* Bruhl, *supra* n. 52, at 366-71. As Professor Bruhl explains:

If history is a reliable guide, the disclaimer clause is probably unnecessary. The sentiment that the clause expresses – that Congress may not impair its rules power by statute – finds overwhelming support in past parliamentary practice. For while statutes regulating internal procedures have a long history, so too does Congress’s belief that it may ignore them, even in the days before the disclaimer clause.

Id. at 366.

future legislatures by insulating statutes or procedural rules from subsequent appeal.⁵⁴ This anti-entrenchment principle has deep roots in English parliamentary practice. In fact, in his famous commentaries on English law, William Blackstone put it unequivocally: “Acts of parliament derogatory from the power of subsequent parliaments bind not.”⁵⁵ At the time of our country’s founding, this principle was widely accepted as fundamental. Indeed, speaking to the House of Representatives in 1790, James Madison addressed fears that a bill temporarily establishing the Nation’s capital in Philadelphia would later prevent the capital from moving to Washington D.C. He explained:

But what more can we do than pass a law for the purpose [of making Washington the future capital]? It is not in our power to guard against a repeal. Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made. If that is an objection, it holds good against any law that can be passed.⁵⁶

Similarly, the Supreme Court has long held that legislative entrenchment is unconstitutional. In 1810, Chief Justice John Marshall, recognizing that “one legislature cannot abridge the powers of a succeeding legislature,” asserted that “[t]he correctness of this principle, so far as respects general legislation, can never be controverted.”⁵⁷ Almost 200 years later, quoting Justice Marshall’s words, Justice Antonin Scalia noted that the Court’s cases “have uniformly endorsed this principle.”⁵⁸ Indeed, a survey of the relevant case law confirms that the Supreme Court has reaffirmed this “centuries-old concept”⁵⁹ time and time again.⁶⁰

The anti-entrenchment principle is grounded in notions of legislative equality, a concept closely related to ideas of popular sovereignty. Each legislature, comprised of representatives duly elected by the people, must be equally able to serve the public good. As the Court once put it, “No one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.”⁶¹ Or,

⁵⁴ While legislative entrenchment is prohibited, constitutional entrenchment is considered to be different and permissible. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (distinguishing constitutional provisions from ordinary legislation which is “alterable when the legislature shall please to alter it”); see also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 417-439 (2003) (defending Constitution as beneficial example of symmetric entrenchment).

⁵⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *90.

⁵⁶ McGinnis & Rappaport, *supra* n. 54, at 206 (citing 2 Annals of Cong. 1666 (1790)).

⁵⁷ *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

⁵⁸ *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (Scalia, J., concurring).

⁵⁹ *United States v. Winstar*, 518 U.S. 839, 872 (1996).

⁶⁰ See, e.g., *id.*; *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932) (“[T]he will of a particular Congress does not impose itself upon those in succeeding years.”); *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (“[E]ach subsequent legislature has equal power to legislate upon the same subject.”); *Douglas v. Kentucky*, 168 U.S. 488, 497-98 (1897); *Butcher’s Union Co. v. Crescent City*, 111 U.S. 746, 751 (1884); *Stone v. Mississippi*, 101 U.S. 814 (1880); *Newton v. Comm’rs*, 100 U.S. 548 (1879); *Boyd v. Alabama*, 94 U.S. 645, 650 (1877); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1850).

⁶¹ *Ohio Life Ins.*, 57 U.S. at 431.

in the eloquent words of Professor Julian Eule, later echoed by Professor Erwin Chemerinsky,

Just as the members of Congress lack power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms. Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.⁶²

The anti-entrenchment principle is thus forward looking. It prohibits entrenching provisions – like supermajority voting rules – from hindering the majority-supported preferences of legislatures to come. For this reason, this principle is not implicated when the Senate adopts a supermajority voting requirement that lasts throughout a single congressional session. While temporary supermajority requirements may, in effect, offend the majoritarian philosophy underlying our Constitution,⁶³ such requirements at least represent the procedural preferences of the present majority.

Some argue that the anti-entrenchment principle does not apply to procedural requirements like the Senate Rules.⁶⁴ This argument is based, however, on an untenable distinction between substance and procedure. As modern social science research has demonstrated time and again, rules of procedure regularly determine legislative outcome. For instance, studies have shown that a definitive majority opinion very rarely exists. Instead, a legislature is typically composed of multiple and equally-strong competing interests, any of which can win depending on the structure of the legislative process.⁶⁵ So, in a situation in which option A is preferred over option B, but not over option C, option A can win or lose depending on the order in which alternatives are presented. In this way, procedure is virtually inseparable from legislative outcome.⁶⁶

⁶² Fisk & Chemerinsky, *supra* n. 4, at 249 (quoting Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. 379, 384-425 (1987)).

⁶³ There is little doubt that our Framers envisioned that majority voting rules would govern ordinary legislative business. See BINDER & SMITH, *supra* n. 4, at 30-33; Roberts, *supra* n. 4, at 523-531. Moreover, as legal scholars have forcefully argued, the term “passed” in Article I, section VII of the Constitution embodies a principle of majoritarianism that binds both chambers of Congress. See Josh Chafetz & Michael Gerhardt, *Debate: Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010) (Chafetz Opening Stmt.); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996).

⁶⁴ See, e.g., Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & Pol. 1, 22-31 (2004). See Roberts, *supra* n. 4, at 543-46, for a thorough response to this particular argument. See John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal. L. Rev. 1773 (2003), for a complete repudiation of Professors Seitz and Guerra’s article.

⁶⁵ See, e.g., Richard D. McKelvey, *Intransitivities in Multi-Dimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 480-481 (1976).

⁶⁶ See William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 383-385 (1988).

Indeed, the fierce controversy over the rules governing the filibuster and cloture confirms this reality. It is hard to deny that, in today's Senate, no bill or nomination can pass without obtaining support from the 60 senators needed to cut off debate. It is essentially beside the point if a law or nominee has majority support because a supermajority agreement must come first. The result is a *de facto* 60-vote requirement for ordinary Senate business that is functionally indistinguishable from a statute directly requiring 60 votes to pass, amend or repeal future legislation. Likewise, there is little doubt that Senate Rule XXII – setting a 67 vote threshold for cloture on any attempt to amend the Senate Rules – combined with Senate Rule V effectively insulates the Senate Rules, including the cloture rule, from revision.

To further illustrate this point, consider if the Senate, in passing this year's health care reform act, amended the Senate Rules to require unanimous consent to cut off debate on any future attempt to amend or repeal that legislation. Technically, of course, this would be “just” a procedural requirement; but the effect, if legally binding, would be to protect the substance of health care reform from future revision or repeal. There is little doubt that this would constitute impermissible entrenchment – and it is logically no different than the current rule requiring 67 votes to revise the Senate Rules.

For these reasons, a majority of the Senate must maintain the authority to override the Senate Rules and force a vote on any proposed procedural change. If not, the Senate Rules would impermissibly bind future Senates in a manner repugnant to our constitutional tradition.

C. If a Simple Majority Lacked the Power to Effect Rules Change, the Rules would Blunt Legislative Accountability.

As explained above, binding entrenchment of the Senate Rules would improperly impinge upon the Senate's rulemaking power and would violate the anti-entrenchment principle. In effect, it would also blunt legislative accountability, a core democratic value.

Political accountability is a necessary part of our system of representative government by design. For our democracy to properly function, the American people must be able to monitor elected officials and hold them responsible for their decisions. Accordingly, the Court has repeatedly emphasized that democracy requires elected officials to be answerable to voters for their policy choices.⁶⁷ Indeed, in the Court's words, “freedom is most secure if the people themselves . . . hold their federal legislators to account for the conduct of their office.”⁶⁸

⁶⁷ See Jane Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 742-45 (2004) (surveying “accountability-reinforcement cases”); see, e.g., *Cook v. Gralike*, 531 U.S. 510 (2001); *Printz v. United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.”); *New York v. United States*, 505 U.S. 144, 168 (1992) (invalidating federal “commandeering” provision because “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished”); *Missouri v. Jenkins*, 495 U.S. 33, 69 (1990) (“In our system ‘the legislative department alone has access to the pockets of the people’ . . . for it is the Legislature that is accountable to them and represents their will.”).

⁶⁸ *Cook*, 531 U.S. at 528.

On their face, by tying today's Senate to the procedural preferences of a Senate long past, the Senate Rules disrupt "the direct line of accountability" that is supposed to exist "between the National Legislature and the people who elect it."⁶⁹ The people, no matter how much they may dislike the current Senate Rules, are left without effective recourse. The officials responsible for the rules are, of course, no longer in office. The current representatives are in a disadvantaged position vis-à-vis the Senate past – their ability to respond to their constituent's current desires is greatly frustrated.

Moreover, by insulating the 60-threshold cloture rule from amendment, the Senate Rules perpetuate the accountability problems now posed by the filibuster itself. As I have explained in earlier testimony,⁷⁰ today's filibusters blur who is responsible for the Senate's failure to address problems. Voters are left to wonder: Should we fault the majority for failing to override the filibuster or should we hold the minority responsible for obstructing the majority's will? Who is truly to blame?

Similarly, a successful filibuster prevents senators from engaging in genuine decision-making. Rather than being forced to take a stand on a particular policy, senators cast a procedural vote concerning whether to invoke cloture and end debate. When cloture fails and a substantive vote is never taken, constituents are left to guess how their representatives would have voted on the underlying policy matter, thereby furthering the information deficits that already plague the electorate.⁷¹

Blunting accountability is arguably the most constitutionally-problematic feature of the modern filibuster because it impairs the most important check on government power – the voters. The Senate Rules, if legally binding, not only force the current filibuster rules to continue, thereby continuing the accountability concerns that follow from it, they also diffuse responsibility for the Senate's procedural problems – thus adding another way for senators to avoid blame. This result takes us far from the democracy our Framers envisioned.

III. The Senate's Overlapping Term Structure Cannot Justify Unconstitutional Entrenchment.

There is, primarily, one defense offered to justify binding future Senates to the Senate Rules – the notion that the Senate's overlapping term structure justifies entrenchment because there are no past or future Senates, just one continuous Senate. As Professor Aaron-Andrew

⁶⁹ *Id.*

⁷⁰ *Hearing on Examining the Filibuster: History of the Filibuster 1789-2008 Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010) (testimony of Mimi Marziani & Diana Lee, Brennan Center for Justice at NYU School of Law), available at http://rules.senate.gov/public/?a=Files.Serve&File_id=a36a886b-dcaa-4290-a8c8-cb737fb16938.

⁷¹ See Schacter, *supra* n. 67, at 756 ("One need not demean the broad public to say that research has overwhelmingly indicated that many voters simply don't know very much about legislative policy or politics.") & n.90 (citing variety of studies). Even worse, today's filibusters are often silent affairs, making it even harder – if not impossible – to discern who is behind the obstruction. This routine lack of transparency diffuses legislative accountability even further.

Bruhl forcefully argues in his recent law review article on the topic, however, the Senate's structure cannot defend entrenchment of the Senate Rules.⁷²

To start, there is no reason to believe that the Framers intended for the structural differences between the Senate and the House to reduce the scope of the Senate's rulemaking power. The Senate's overlapping terms were principally meant to stabilize the institution by ensuring greater predictability of its membership. The Framers hoped that this stability would inspire confidence in the U.S. government, thereby strengthening our international image and curbing domestic corruption.⁷³ But, there is *no* evidence that the Framers also wished that the Senate's rules be insulated from change.⁷⁴ Instead, the Framers expressly granted each chamber the same continuous power to establish their procedural rules.

Indeed, imagine if that first Senate had adopted permanent rules of proceeding when it first met on March 4, 1789 – at a time when the Senate represented 11 states.⁷⁵ The result today would be ludicrous. The first states' outdated procedural preferences would control the other 39 states which had either not yet ratified the Constitution or were not yet in existence. It is hard to believe that the “continuing body” theory could justify that outcome.

Moreover, there are serious practical inconsistencies with the “continuing body” defense.⁷⁶ In many ways, the Senate does not act like a continuing body – instead, it treats the start and finish of the two-year congressional term as a significant event. The most notable, perhaps, is that pending bills – even those that have been passed by the House and approved by Senate committees – die at the end of each Congress. Similarly, pending nominations cannot survive the end of a term, but must be resubmitted by the President to the next Congress.⁷⁷ And, the Senate's power to confine non-members for contempt is typically limited to a legislative session. Even at its farthest reach of authority, the Senate can never confine someone for longer than a congressional term.⁷⁸

Finally, even assuming that the Senate is a “continuing body” in some meaningful way, this alone cannot justify entrenchment of the Senate Rules. To assume that today's Senate shares an identity with yesterday's Senate does not explain why the Senate has the power to commit *itself* for perpetuity. The Senate, as an agent of the people, derives its power from those it represents. As Professor Bruhl recognizes, this truth raises key questions about the scope of the Senate's authority:

⁷² Bruhl, *supra* n. 42. The discussion here owes much to his persuasive analysis.

⁷³ See THE FEDERALIST NO. 62 (Barnes & Noble Ed., 2006) (J. Madison); Vik D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1118 (1988). As James Madison concluded, “[n]o government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.”

⁷⁴ The notable exceptions are those few procedural requirements that are set by constitutional mandate, like the provision specifying that a majority constitutes a quorum. See Bruhl, *supra* n. 42, at 1443 & n.145.

⁷⁵ See *Origins and Development*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Meeting_Places_Quarters.htm (last visited Sept. 17, 2010).

⁷⁶ See Bruhl, *supra* n. 42, at 1444-1456 for a detailed exposition of these arguments.

⁷⁷ *Id.* at 1445 (citing MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 154–55 (2004)).

⁷⁸ *Id.* at 1448-54.

[D]oes it extend to making [self-binding] commitments? I would say no. The [Senate’s] principals . . . *have* a way of making political commitments. The principals do this through making and amending a constitution. The Senate, through its commitment to a set of rules that are not laid down in the Constitution, has arrogated that constitutive power to itself.⁷⁹

In today’s democracy, voters grant fresh representative authority to the Senate each election cycle. With each new Congress, there are new members in the Senate who represent new interests and new constituents. There is no reason to believe that voters – who, each election, select representatives to address this country’s current and future problems – intend to allow the Senate to bind itself to, perhaps archaic, procedural rules. After all, self-binding raises all of the same problems with democratic representation and legislative accountability raised by entrenchment – threats to democracy which ultimately harm the people themselves.

As this testimony has set forth, the Senate has wrestled with its rules governing debate and cloture for over a century. Again and again, senators have agreed that a simple majority of the Senate has the constitutional authority to cut off debate and vote to amend the Rules at the start of a new Congress, notwithstanding any contrary traditions or provisions within the Rules themselves. For the reasons explained above, their position is undoubtedly correct. The Senate has continual constitutional authority to “determine the Rules of its Proceedings.” Under the constitutional principle prohibiting legislative entrenchment, the Senate cannot trap future Senates under supermajority barriers to change. Entrenchment not only impermissibly detracts from the Senate’s own power and violates anti-entrenchment principles, it also blunts legislative accountability. In this way, the current Senate Rules disrupt one of the most important checks on government power – the voters’ ability to hold their representatives responsible for their legislative actions.

⁷⁹ *Id.* at 1430 (emphasis added).

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