S. Hrg. 111–706

EXAMINING THE FILIBUSTER

HEARINGS

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

April 22, 2010; May 19, 2010; June 23, 2010; July 28, 2010; and September 22 and 29, 2010

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EXAMINING THE FILIBUSTER: HISTORY OF THE FILIBUSTER 1789–2008

THURSDAY, APRIL 22, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in Room SR-301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Udall, Bennett, McConnell, Chambliss, Alexander, and Roberts.

Staff present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Abbie Platt, Republican Professional Staff; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The hearing will come to order.

First, I would like to acknowledge the fact that Senator Bennett is planning to be here but he will be a little late. So Senator Alexander is taking over the ranking position until Senator Bennett gets here.

I thank my colleagues for being here. We will do opening statements and then we will go to the witnesses.

So I want to thank everyone for coming. I want to thank Senator Bennett, of course, and my other colleagues for participating in the hearing. I especially want to thank two people. One is Senator Robert C. Byrd, who could not be here today, but I want to thank him for his interest in our hearing and for the statement he is submitting for the record. As we know, he is sort of the guardian of the Senate and the Senate Rules, and Senator Byrd has shown an active role here.

At the other end of the spectrum, the person who really encouraged me and convinced me that it was a good idea to have a series of hearings on this issue is Senator Tom Udall of Mexico. He has not been here quite as long as Senator Byrd but we know that he has the tremendous potential to be one of the people so knowledge-

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able about how the Senate works and he is already an outstanding Senator.

This is the first in this series of hearing by the Rules Committee to examine the filibuster. It is a topic we hear a lot about from our constituents, from our colleagues, from the press. That is because filibusters and cloture motions have escalated in recent year to unprecedented levels.

In the first half of the 20th Century filibusters and filibuster threats were relatively rare events. From the 1920s through the 1950s, an average of about ten cloture motions were filed per decade, and of course, not every cloture motion is to cut off a filibuster.

That number almost tripled to 28 during the 1960s, the era of controversial civil rights legislation. But after that, things really started to take off. A total of 358 cloture motions were filed in the 1990s and from 2001 to 2009 there were 435 cloture motions filed.

Clearly the filibuster has changed over the years. Not only is it used a lot more now but the threat of filibusters has become an almost daily fact of life in the Senate, influencing how we handle virtually everything debated on the Senate floor.

The filibuster used to be the exception to the rule. In today's Senate, it is becoming a straitjacket. So especially during the last decade there has been a lot of interest and concern and frustration from both parties about where we are in terms of getting things done in the Senate.

There are many people saying we need to change the rules to make it easier to get cloture or to handle Senate business efficiently. Four such Senate resolutions have been introduced in this Congress including one by our Rules Committee colleague, Senator Udall, which we will hear about at future hearings.

Others say we should not change the rules. As chairman of the Rules Committee, I intend to take a thoughtful, thorough approach to this topic.

Since I joined the Senate in 1999, I have seen the use of filibuster continue to increase under both Republican and Democratic majorities. So it is not just one party doing it. In 2005 we had a near crisis over the so-called nuclear or constitutional option, a crisis that ended when a bipartisan group of senators came together to find a middle ground.

The truth is both parties have a love-hate relationship with the filibuster depending on if you are in the majority or in the minority at the time. But this is not healthy for the Senate as an institution. The last Rules Committee hearing on the filibuster was on June 5, 2003, under then Chairman Trent Lott. A resolution was proposed by Majority Leader Frist to amend the Standing Rules of the Senate to allow a simple majority of 51 votes to end debate on judicial nominees.

In reflecting on the substance of that hearing, it is clear that our statements on whether or not to change the cloture rule usually coincided with whether or not we were in the majority or the minority.

I was a member of this Committee in 2003 as were many of my colleagues here, both Democrat and Republican. Not surprisingly the words we spoke then might not reflect how we feel today when our majority and minority roles are reversed.

I am sure my colleagues could quote us opposing filibuster reform just as I could quote them in favor of such reform. But that is not the point of these hearings.

The fact is that all of us on both sides of the aisle struggled with the same questions. What does the Constitution say about ending debate or allowing unlimited debate in the Senate? What does it say about how Senate rules can be changed? What are the rights of the majority; what are the rights of the minority? When does respect for the rights of the other members of this body become a disregard for the needs of the majority of Americans to have us act?

We all know that those of us in the minority in one Congress will be in the majority in another and vice versa. What we seek is a path towards civility, deliberation, and consensus that eventually at the proper time leads to the best decisions we can make collectively for our country.

Only by carefully exploring these issues can we answer the question: should we change the Senate rules and if so, how and when. Knowing the history of debate in the Senate and the efforts to limit it is the first step.

So we are starting our hearings today with an examination of the history of the filibuster from 1789 to 2008. We will start at the beginning. What does the Constitution say about the Senate? Since there was no procedural rule to cut off debate for most of the 19th century, how did that affect decision-making in the Senate? What eventually prompted adoption of the cloture rule in 1917 that for the first time in the Senate allowed Senators by a two-thirds supermajority to vote and end debate?

Our witnesses will describe how the cloture rule and the filibuster were used during the 20th Century in debates on civil rights and the push for filibuster reform in the 1970s that lowered the threshold for cloture to 60 votes.

Finally, we will hear about the modern era of the Senate, including the impact of filibusters and cloture motions in every decade since the 1970s as the use of the filibuster escalated drastically.

Our historical overview will end in 2008 before the start of the current Congress. Today's hearing will establish a common understanding for future hearings and discussions. I hope that informs members of this Committee, the Senate and the public at large about the development of the filibuster and efforts of the Senate over more than two centuries to manage it and deal with its consequences.

In our next hearing we will look at the filibuster in this Congress, examining issues such as whether it is more difficult for the Senate to complete its regular business now than in previous eras and the impact of the filibuster on other branches of government.

In subsequent hearings, we will hear about proposals for changes in Senate rules related to the filibuster and consider what kinds of changes, if any, are needed.

I hope all of us on this Committee come to these hearings with an open mind, willing to consider the ideas and suggestions presented to us. I look forward to listening to our witnesses who have come to share their knowledge and experience with us.

Now with the permission of the members, we are very honored to have Leader McConnell with us and I would turn to him to make the first statement.

OPENING STATEMENT OF THE HONORABLE MITCH MCCONNELL, A U.S. SENATOR FROM KENTUCKY

Senator MCCONNELL. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here and make some observations about this extremely important topic.

Before giving my prepared comments, I would point out that I believe it was Washington. It certainly was one of our founders who was quoted as saying at the constitutional convention the Senate was going to be like the saucer under the tea cup, and the tea was going to slosh out and cool off, and the Senate, he anticipated, would be a place where passions would be reined in and presumably progress would be made in the political center.

It seems to me if you look back over the 200-year history of our country, the Senate has certainly forced solutions to the middle and most observers would argue that has been good for the country.

We read the newspapers and I think understand what these hearings are about. Some members of the Democratic conference would like to eliminate the Senate's long-standing tradition of the freedom to debate and amend legislation.

This in turn would eliminate the requirement that controversial legislation achieve more than just a bare majority support here in the Senate. It probably comes as no surprise to anyone that I am not in favor of such a proposal. I never have been, including more challengingly, of course, when I was in the majority.

The reason is best described by one of our Senate colleagues who once wisely said the following, "Let us clearly understand one thing. The Constitution's framers never intended for the Senate to function like the House of Representatives. The Senate was intended to take the long view and to be able to resist, if need be, the passions of the often intemperate House. Few, if any, upper chambers in the history of the western world have possessed the Senate's absolute right to unlimited debate and to amend or block legislation passed by a lower house. I have said that, as long as the Senate retains the power to amend and the power of unlimited debate, the liberties of the people will remain secure."

That, of course, was Senator Byrd. He delivered those remarks in 1997. He was right then and he is right again when he reaffirmed his belief in those principles this year.

Here is what he wrote in a dear-colleague letter, quote, "I believe that efforts to change or reinterpreted the rules in order to facilitate expeditious action by a simple majority are grossly misguided. The Senate is the only place in government where the rights of a numerical minority are so protected. Majorities change with elections. A minority can be right. A minority's views can certainly improve legislation. Extended deliberation and debate are essential to the protection of liberties of a free people." That was Robert Byrd this year.

Now why are some in Senator Byrd's own party proposing to disregard his counsel? The most disingenuous thing I have heard is

that the Senate's rules must be changed so the, quote, "democratic process" will work.

I submit that the effort to change the rules is not about democracy at all. It is not about doing what a majority of the American people want. It is about power.

If it were truly about doing what a majority of Americans wanted, the Democratic majority in the Senate would not have muscled through a health spending bill that a majority of Americans opposed and opposed by very wide margins.

When the bill finally passed the Senate by the narrowest of margins, 39 percent of Americans favored it while 59 percent opposed it. Other surveys had similar results.

So this was not about giving the majority of Americans what it wanted. It was about power. That is what this is about. It is about a political party or a faction of a political party that is frustrated that it cannot do whatever it wants whenever it wants precisely the way it wants to do it. That is what this is about.

So rather than throw out 200 years of Senate tradition and practice and throw away the very principles of which Senator Byrd has reminded us, I would like to suggest a less radical and more productive solution to those who would like the Senate to function differently.

First, at the risk of sounding like Yogi Berra, the virtue of a supermajority requirement for legislation is that a bill that passes enjoys supermajority support, which helps ensure that most Americans will actually support it.

When the Democratic majority has reached out to the minority, which does not mean trying to pick off a few Republicans, we have had success. I hope we can have another one with the financial regulatory reform bill and in other areas, but that requires the majority to meet us in the middle.

My second suggestion is not run the Senator floor like the House. The Senate's tradition of freedom to amend has been a lot less free over the last few years.

Take a look at this chart and you will see, if I can see it, you will see that since assuming control of the Senate the Democratic majority has been engaged in what my friend the majority leader once called a very bad practice.

And according to CRS it has been engaging in it to an unprecedented extent. What I am talking about is the majority repeatedly blocking Senators in the minority from offering amendments by filling out the so-called amendment tree.

As you can see, the practice of filling up the amendment tree has gone up dramatically in the last three years. All majority leaders have done it occasionally, but this majority has done it to an unprecedented extent.

Senator Frist did it 12 times in four years. By contrast, Senator Reid has done it more than twice as often, 26 times in a little over three years. In fact, the current majority has blocked the minority from offering amendments almost as often as the last five majority leaders combined.

I would say to my friends in the majority I know why, because members are complaining about having to cast tough votes. They really hate it. And the leader of the majority is always pounded

upon. I remember having a similar experience when we were in the majority. Members coming up and saying why do we have to cast all these tough votes. Of course, the only way to avoid that is to shut the minority out by filing up the tree and filing cloture.

So if the Democratic majority wants to generate inflated cloture vote numbers for political purposes, well, go ahead and keep treating the minority as if they were serving in the House.

But if you truly do not like all the cloture votes, then let your colleagues in the minority offer amendments. True, there may be some votes you would rather not cast, but that is not anything new.

What is new is the unprecedented extent to which the majority is avoiding have to vote on amendments. As my good friend the majority whip likes to say, if you do not like fighting fires, then do not become a fireman; and if you do not like casting tough votes, then do not run for the U.S. Senate. That is Senator Durbin.

Finally some of the testimony states that one's view of the filibuster depends on where one sits. It is true that I opposed filibustering judicial nominees; we opposed that when we were in the majority. But I opposed doing so when I was in the minority as well, that is, filibustering judges. And I opposed doing so regardless of who was in the White House.

During the Clinton Administration, I put my votes where my mouth was and repeatedly voted with my Democratic colleagues to advance a nominee, to invoke cloture, if you will, when a minority of those in my party would not consent to do so, even though I opposed the nominee and later voted against him or her. Not surprisingly, I was also against my Democratic colleagues not giving President Bush's judicial nominees an up or down vote.

In short, I was against expanding use of the filibuster into an area in which it traditionally—traditionally—had not been used. One can agree with that view or not. But it is one thing to disagree with expanding the use of the filibuster into a non-traditional area regardless of who is the President and who is in the minority.

It is another thing to be for expanding the filibuster into judicial nominations when one is in the minority, but to turn around and urge it its elimination altogether when one is in the majority.

When it comes to preserving the right to extended debate on legislation, Republicans have been surprisingly consistent. On January 5, 1995, after having just been voted into the congressional majority for the first time in 40 years, Senate Republicans walked onto the Senate floor to cast their first vote. It was on Senator Harkin's proposal to sequentially reduce the cloture requirement to a simple majority. This is right after Republicans took control of both the House and the Senate for the first time in 40 years. We were a rambunctious and a new majority.

Even though it was in our short-term legislative interest to support Senator Harkin, all Republicans, every single one, voted against his proposal, every single one. So did the current vice president, the current Senate Majority Leader and not surprisingly, the current Senate president pro tem. That was the right position in 1995, and it is the right position today.

In sum, the founders purposefully crafted the Senate to be a deliberate, thoughtful body. A supermajority requirement to cut off

the right to debate ensures that wise purpose. Eliminating it is a bad idea.

Mr. Chairman, I want to thank you for allowing me to give my thoughts on this at the beginning of the hearing, and I wish you well. I think this is an important subject, and I commend you for holding the hearings.

Chairman SCHUMER. Thank you, Mr. Leader, and you are welcome at any time to take part in what will be a series of hearings on this issue.

Senator Udall.

OPENING STATEMENT OF THE HONORABLE TOM UDALL, A U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Schumer, and thank you for your kind statements in your opening and thank you for holding this hearing.

Filibuster reform is an issue that has received a great deal of attention recently. Today's hearing as well as future hearings will allow us to take a rational and deliberative approach to reforming not just the filibuster but, other rules that are hampering this body. Today is about looking at our past, but also provides guidance for the future.

Critics of reforming the filibuster argue that it will destroy the uniqueness of the Senate. They say it will turn the Senate into the House of Representatives.

But today we will hear that the filibuster has been amended over the years, and this body not only survived the reforms, but was better for them. We will hear from our witnesses about the creation of the cloture rule in 1917 and the history of its reforms over the many decades.

I would like to focus on one part of that history. In the 1940S and 1950s, the civil rights debate was raging in the Senate and a minority of Senators opposed to the legislation were regularly using the filibuster as a weapon of the obstruction.

In 1953, a bipartisan group of Senators decided they had had enough. Led by my predecessor, New Mexico's Clinton Anderson, they attempted to reform the filibuster. Article 1 Section 5 of the Constitution states that each house may determine the rules of its proceedings.

As such, Anderson argued that any rule adopted by one Senate that prohibits a succeeding Senate from establishing its own rules is unconstitutional. But this is precisely what Rule 22 does.

Currently we are operating under rules approved by a previous Senate that require an affirmative vote of two-thirds of Senators to end a filibuster on any rules change.

Anderson's argument became known as the constitutional option, which I believe is very different from the nuclear option. On the first day of Congress in 1953, Anderson moved that the Senate immediately consider the adoption of rules for the Senate of the 83rd Congress.

His motion was tabled, but he introduced it again at the beginning of the 85th of Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice President Nixon, who was presiding over the Senate.

Nixon understood the inquiry to address the basic question, do the rules of the Senate continue from one Congress to the next. Noting that there had never been a direct ruling on this question from the chair, Nixon stated, and I quote, "Any provision of the 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 rules under which it desires to proceed is, in the opinion of the chair, unconstitutional." End quote.

Despite Nixon's opinion, Anderson's motion again was tabled. Anderson raised the constitutional option once more at the start of the 86th Congress, this time with the support of more than two dozen Senators. But to prevent Anderson's motion from receiving a vote, Majority Leader Johnson came forward with his own compromise.

He proposed changes to Rule 22 to reduce the required vote for cloture to two-thirds of Senators present and voting.

As our witnesses will discuss, this was not the last change to the filibuster rule. Reform efforts have continued and occasionally succeeded since 1959. The constitutional option has served as a catalyst for change. As the junior Senator from New Mexico, I have the honor of serving in Clinton Anderson's former seat, and I have the desire to continue his commitment to the Senate and his dedication to the principles that in each new Congress the Senate has the constitutional right to determine its own rules by a simple majority vote.

It is time again for reform. There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedure should not be one of them.

We should not limit our reform efforts to the filibuster, but look at all the rules. We can, and should, ensure that minority rights are protected and that the Senate remains a uniquely deliberative body but we must also ensure it is a functional body, regardless of which party is in the majority.

Thank you again, Mr. Chairman. I am looking forward to these very important hearings.

Chairman SCHUMER. Senator Alexander.

OPENING STATEMENT OF THE HONORABLE LAMAR ALEXANDER, A U.S. SENATOR FROM TENNESSEE

Senator ALEXANDER. Thanks, Mr. Chairman. Thanks for having the hearing.

President Lyndon Johnson called the Republican minority leader, Everett Dirksen every afternoon at 5 PM not for any particular reason. That was the kind of relationship that they had even though Senator Dirksen had fewer Republican Senators on his side then than Senator McConnell has today.

Why did he do that? The civil right bill, Senator Udall mentioned the civil rights bills provided maybe an answer to that. I think it is because the President knew that not only did he need to get the civil rights bills passed—he had already passed one when he was majority leader—but in 1964 and 1968 he needed to get the country to accept them.

We have seen with health care debate that, as soon as it was passed by a bare majority, suddenly all over the country there is a campaign to repeal it. Lyndon Johnson I think wanted to avoid that in an even more controversial set of legislations.

So he had the bills written in 1964 and 1968 in the Republican leader's office. He had to get 67 votes to pass those bills. That was inefficient. A Democratic majority could have pushed it through but maybe the founders were wise to say that there ought to be a process here of checks and balances in Washington, that in this big constitutionally decentralized country that we need, when we make big changes, to present the American people with something in which they have confidence.

I think of the financial reform bill today. Senator Chambliss is working on that. We need certainty in our country in financial matters. I cannot think of a better way to do it than for the President to come out with a large number of Republicans and Democrats and say, okay, we are going to rewrite the rules and these are going to be the rules for the next five or ten years because we have a consensus on it. I think that would be important to the world. It might be the tipping point in terms of helping the economy get going again.

So the majority has a choice. Do we ram it through or do we get consensus? Alexis de Tocqueville wrote the book that most Americans think is the best book on the American democracy, and in it he saw two great threats down the road to the American democracy. He wrote this in the 1830s as a very young man.

One was Russia. He was awfully right about that. The other was what he called the tyranny of the majority. He wondered how a purely democratic country would work, whether it would overrun the ideas of the minority. That is why we have the United States Senate, to provide those checks and balances.

Senator Schumer talked about the number of times the minority obstructs legislation. We in the minority could say it another way. We could say that is the number of times the majority has tried to cut off our right to debate, our right to offer amendments which is the essence of the Senate.

The only thing different about the Senate is the almost absolute right of unlimited debate and unlimited amendment, and if you get rid of that, you get rid of the Senate.

Senator Reid's book, the Majority Leader, Chapter 7, that he wrote recently. This is what he said about the Republican majority leader.

"I could not believe Bill Frist was going to do this. He decided to pursue a rules change," said Senator Reid, "that would kill the filibuster for judicial nominations. Once you open that Pandora's box, it is just a matter of time before a Senate leader who could not get his way on something moved to eliminate the filibuster for regular business as well and that simply put would be the end of the United States Senate."

It would be, and I think it is very helpful to have the history here. Before we get bogged down in different rules and different current events, I think we need to understand what James Madison meant when he talked about a fence, a necessary fence against the danger of passion in the country of the Democratic majority.

Senator Byrd's comments in his orientation comments to new Senators in 1996. "Let us clearly understand one thing. The Constitution's framers never intended the Senate to function like the House of Representatives."

I saw in the newspaper it said a third of the Democratic Senators today are in their first term. I am sure for a new Senator full of vim and vigor the idea is let us get things moving, let us get things going.

But we saw in the so-called nuclear option a few years ago when Republicans tried to do just exactly what Senator Udall said, cooler heads prevailed and said we do not want to do that. I do not want to create a Senate that is incapable of requiring a consensus on major issues so the country will have confidence in what is being done in Washington.

Senator Byrd said in his letter on February 23rd of this year, I hope the Senators will take a moment to recall why we have extended debate and amendments. The Senate is a place in government where the rights of a numerical minority are protected. Minorities change with elections. A minority can be right and minority views can certainly improve legislation.

Mr. Chairman, I ask unanimous consent since my time is now up to include the record Chapter 7 of Senator Reid's book, called The Nuclear Option. I think it provides a useful perspective, and I would like to include in the record also the remarks of Senator Byrd at the orientation of new Senators. He used to do that every time. He has not been able to do it the last couple of times. But it is a remarkable expression of understanding of why we have a Senate and why we require a consensus instead of a majority. I bought enough copies for every member of the Committee if they would like to have one.

Thank you, Mr. Chairman, for holding the hearing.

Chairman SCHUMER. Thank you, and I thank you for the statement.

Would Senator Roberts, Senator Chambliss like to make opening statements? Senator Roberts was here first and then Senator Chambliss.

Senator ROBERTS. Thanks to the thoughtful and careful Chairman of the Committee for holding this hearing to examine the role of the Senate and the legislative process. I am currently in my third term as a Senator.

Chairman SCHUMER. Excuse me. Without objection, Senator Alexander's additions will be added to the record.

Senator ALEXANDER. Thank you.

Chairman SCHUMER. Sorry to interrupt.

[The information follows:]

OPENING STATEMENT OF THE HONORABLE PAT ROBERTS, A U.S. SENATOR FROM KANSAS

Senator ROBERTS. No problem. I am currently in my third term as a Senator. Before this, I served in the House of Representatives for eight terms for 16 years as the Congressman for Kansas's big First District.

We were in the minority for so many years my main role was to set picks for the Chairman during basketball contests. We Repub-

licans never got to get the ball to shoot but we were always instructed to pass it.

Chairman SCHUMER. If the gentleman would yield. He was the best "pick setter" that I have ever come across in my 59 years of playing basketball.

Senator ROBERTS. I have retired as a result of that as a matter of fact.

[Laughter.]

Chairman SCHUMER. But as such I have had first-hand experience in both the houses of Congress, their rules and their respective constitutional roles. I might add two years as administrative assistant for Frank Carlson, who was a great friend of Clinton Anderson of New Mexico, and basically 12 years as an aid to my predecessor in the House. So as bucket toter or a staff member I think I pretty well covered the waterfront.

This hearing is about more than the filibuster. It seems to me it is about the institutional role of the Senate and its function in the legislative process.

It is clear that the founding fathers intended to create a system of checks and balances. The legislative upon the executive. The judicial upon the legislative. And even within the Congress, the Senate upon the House.

I served as a Congressman in both the majority and the minority. I can testify that the majority is better. I can testify firsthand that the House is the institution for the will of the majority.

However, I think it is useful to highlight some recent trends in the House operations in order to distinguish the importance of the Senate.

From the 104th Congress to the 109th, a period of 12 years, the percentage of bills brought to the floor with an open amendment rules range from 58 percent in the 104th to 19 percent in the 109th, with an average over the entire period of about 41 percent, almost 50.

By contrast, the number of bills with open amendment rules on the floor in the 110th Congress was 14 percent and one percent, one percent as of March 19 in this year in the current Congress with an average of seven and half percent overall in three years and four months.

So as the open amendment process atrophies in the House, the percentage of closed rules has inevitably soared. In the 104th Congress to the 109th, the percentage of bills brought to the floor with closed rules range from 14 percent in the 104th to 32 percent in 109th with an average over the period of 22 and a half percent.

By contrast, the number of bills with closed rules on the floor in the 110th Congress was 36 percent and then an unprecedented 31 percent as of March 19 as of this year in the current Congress with an average between the two of 33 and a half percent.

These numbers, Mr. Chairman, demonstrate the level of cooperation in the House has dropped precipitously, if not off the cliff. It is most striking because public opinion polls are overwhelmingly opposed to the legislation coming out of the Congress if you believe the polls and you think that is important.

I understand fully that the motivation of individual members and their agenda or their ideology plays an important role, and dif-

ferent parties think obviously in regards to the importance of legislation or the agenda and that public polls should be considered but certainly should not be the deciding factor.

But in its most recent average of polling data from different sources, Real Clear Politics, that is an outfit that is an independent nonpartisan polling institute, shows that nearly 53 percent of Americans are opposed to the recently passed Health Care Reform bill and only 40 percent roughly are in favor of it.

I know that either party would explain if we could explain it more they would be for it; and the other party would say if you explain it more, more would be against it. I understand that.

But at any rate, only 40 percent roughly were in favor of it. We could discuss other controversial proposals that have happened in the past. The American people oppose like the cap and trade, immigration, federal bailouts, deficit spending.

But it might be easier to sum it all up in a real clear politics average of polls on whether Americans feel the country is headed in the right direction. The most recent poll average shows that almost 60 percent of Americans think we are on the wrong track. Only 37 percent roughly think we are on the right track.

There is a clear disconnect at least publicly or in the image and the polling between what is being pursued and what the American people want.

To whom can the American people turn when the House majority runs rough shod over the minority and public opinion. You can go back to the New Deal or you can go back to the Great Society or you can go back to eight years under Eisenhower or you can go back to any period of history and say the same kind of thing.

The answer is the Senate. The founding fathers had the foresight to create an institution that was based not on majority rule but where each state regardless of size or population had two Senators to speak out on their behalf. It is that power to speak, the right to unlimited debate that is the hallmark of this body.

The 63rd article from the federalist papers attributed to James Madison explains the necessity of the Senate as an institution that, quote, "sometimes be necessary as a defense to the people. What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions. Popular liberty might then have escaped the indelible reproach of decreeing to the same citizenry the hemlock on one day and statues on the next."

I might also indicate, Mr. Chairman, that if you erect a statute on one day you might find a lot of pigeons on the next day.

I know, Mr. Chairman, I have several other comments to make. Perhaps I should simply insert that in the record or, if the Chairman grant me, I would try to expedite this very quickly. It is the Chairman's call.

Chairman SCHUMER. The gentleman's time is the extended.

Senator ROBERTS. The filibuster is the essence of the Senate. It is not a tool of obstructionism or dysfunction. It is meant to foster greater consultation, consensus and cooperation between the parties. It is a means for the minority to make its voice heard and to contribute to debate and amend legislation before the Senate.

In this way, it is impossible to abuse the filibuster because it is an expression of the people against majority's attempt to shut them out of the process. Only in the House does the majority take all. And as the numbers show, the majority appears to be taking, if not devouring, more and more in the last few years. It is disheartening to see some members of the Senate, often new and unaccustomed to culture of comity and compromise, attempt to rewrite the rules of this chamber to be more like the House.

Cloture is an instrument to cut off debate when the majority is not interested in compromise. From the 107th to the 109th Congress, there were an average of 57 cloture motions filed per Congress. In the 110th Congress alone there were 152. That is 152 instances of the majority seeking to cut off debate.

It is a 267 percent increase over the average over the previous three Congresses. Of those 152 cloture motions, 97 were filed the moment the question was raised on the floor. That is nearly 64 percent cloture motions were filed before a debate was even allowed to take place. The average for the previous three Congresses was 29 percent.

We need to consider, Mr. Chairman, the times the majority brought a bill to the floor and used a parliamentary tactic called filling the tree to prevent the minority from offering amendments.

From the 99th to the 109th Congress, a period of 22 years, the majority filled the tree a total of 36 times, averaging a little over three per Congress. This contrasts sharply with 110th to the present Congress, a period of roughly three years and four months in which the majority filled the tree 26 times with an average of 13 times per Congress.

We could go on and on with other instruments that have been used by the majority to circumvent regular order in the past and in the present, stifle the majority, and force unwanted legislation on the people.

They include the abuse of the reconciliation process. Mr. Chairman, I remember trying to get order to introduce and explain in one minute an amendment that you offered and that was passed in the Finance Committee, trying to point out it was bipartisan and having agreement other than members shouting regular order when I reached the end of my comments, and yet it was defeated on a party line vote.

That is just not right. It really is not right. Both of us agreed on the merits of the proposal and yet during reconciliation that was not possible, at any rate by bypassing the Committee through the use of the Rule 14 and the use of the amendments between the houses also known as ping-pong instead of conference committees to resolve differences in the legislation.

I might add as a conferee on the farm bill there were 61 members. I think I would have preferred ping-pong at that particular moment.

The filibuster, the right of unlimited debate is synonymous with the Senate. It is what the founders intended. I have several quotes from current members and I think we have already had the intent of that so I will skip through that, except for Senator Kennedy who on May 5, 2005, said, "The Senate rules have allowed the minority to make itself heard as long as necessary to stimulate debate and

compromise and even to prevent actions that would undermine the balance of powers or that a minority of Senators strongly oppose on principle. In short, neither the Constitution nor Senate rules nor Senate precedents nor American history provide any justification for selectively nullifying the use of the filibuster."

Chairman SCHUMER. Thank you, Senator Roberts.

Senator Chambliss.

OPENING STATEMENT OF THE HONORABLE C. SAXBY CHAMBLISS, A U.S. SENATOR FROM GEORGIA

Senator CHAMBLISS. Thank you very much, Mr. Chairman. Thanks for holding this hearing. I am pleased to have the opportunity this morning to address the need to protect the fundamental role of this sacred legislative body.

Our Nation's history is not only riddled with evidence of the intent of the framers to preserve the intended differences and structural or procedural design of the House and the Senate but also examples of our government's lawmaking powers where these differences have preserved and had protected the voice of the minority.

There are those that may argue that the creation of the filibuster is not so rooted in the framers design of this institution but rather evolved over the early course of our history unintentionally.

While some evidence may infer such an argument about the technical evolution of the filibuster and the Senate rules, the concept of a single legislative branch divided among two houses in electoral duration, representative composition, and rule-making procedure could not have been more prevalent or purposefully on the minds of our founders and later historical giants of the Senate. These things all the filibuster serves to protect.

Having begun my tenure in the United States Congress as a member of the House of Representatives and now serving my second term in the Senate, I am both sorely and fondly aware of the differences and legislative process between both houses of Congress.

One of the certainties of the Senate body is a frustration of the majority in the minority's right to protect from a repressively enacted agenda at complete disregard of the minority will.

Dysfunctional, gridlocked, stymied are often unavoidable characterizations of a majority's inability to move a one-sided partisan agenda through this legislative body without impediments.

However, it is these legislative hurdles that are the reason this body is regarded as a guardian of checks and balances, and separation of powers. Any reform effort which attempts to weaken the protections of minority rights and further enable fast-tracked legislating threatens not only the balance of our bicameral design but also the separation of powers within a single party majority among executive and legislative branches.

It is no secret that the filibuster can be the majority's greatest enemy and a minority's best friend. Yet it is most important to remember this when the political winds shift, and once majority party finds itself in the minority.

There are a few party purists on the hypocrisy of blaming the other side of the aisle for obstructionism or a party of no. But we

must strive to see past a polarizing politics and recall that both sides serve in an institution that was designed for purposes of balance, that but for the flaws of impetuous men, limitations would not be necessary, that rules to govern how we govern protect the rights of those we are sent here to represent.

In the face of misguided calls for reform of Senate procedure, I am often reminded not only of Madison's description of the need for the Senate to service as an anchor of government but also that of Jefferson's exclamation that that government which is best governs least.

And I would yield the rest of my time to Senator Roberts if he wants to enter his quotes, Mr. Chairman, or I would yield back to you, whichever your prefer.

Chairman SCHUMER. I think I prefer you yielding back to me. But we will add anything Senator Roberts wishes to add for the record.

Senator ROBERTS. Mr. Chairman, I would just say, and this is a personal statement. I did not write this out. But if you look back in the history of the House Agriculture Committee, the sometimes powerful House Agriculture Committee, you will find Stenholm Roberts amendments so prevalent probably more of those than any other in 20 years, and then we had the revolution and all of a sudden it was Roberts Stenholm. There was the difference.

Charlie and I worked together. He was a great Democrat Congressman, and I have never used the word "Democrat". He was just a great Congressman. I will not say how he referred to me.

But at any rate we knew on the Ad Committee we either had to hang together or hang separately. I think that was the way I tried very hard to represent Kansas.

Came to the Senate. There were some trying times in House when we had the bank and the restaurant and the post office and all of that, and I understand all of that, and it became very partisan.

But you come to the Senate and I must admit in this last year its been terribly frustrating. I serve on the Health Committee. I serve on the Finance Committee. You know about the jurisdiction of those Committees. You know the hours we put in. I even put them in when I had pneumonia.

And eleven amendments on rationing, could never get them done, never made an order. Always some parliamentary situation. Tried on reconciliation. Could not get there.

It is a situation where those of us in the minority who have worked in the past both in the majority and in the minority have come to feel that we have been shut out.

I know that other people feel the same way when they have been in that kind of situation. But suiting up for the ball game and the coach never sends you in, that is something that you do not like to see.

So from my standpoint I would really hope that we would, regardless of what we do in terms of alleged reform, let us see what lurks behind the banner of reform or if you wave that banner, you can be hoisted on your own petard.

Chairman SCHUMER. Thank you, Senator.

Let me just say before we go to our witnesses, there is large frustration on both sides and we are trying to handle these hearings in not a partisan way but in a way to try to break through that, and each side has legitimate concerns, very lofty concerns by my four colleagues here.

They are a little less lofty when you realize things like the Marine Mammal Commission is filibustered, members to that, members to the Tennessee Valley Authority (TVA) board of directors, the member of the Farm Credit Bureau Administration even after they passed out of Committee by unanimous votes.

So there is frustration on both sides, and maybe these series of hearings, and that is what we are going to have, can break through that.

I understand yours. I think you understand ours. But to just continue in this direction, I think, will not make any of us more effective Senators, more effective Senators. So that is the purpose of the hearing.

And you still set good picks.

I am now going to call on our witnesses and introduce them.

Our witnesses today are Dr. Sarah Binder. She is a Senior Fellow at the Brookings Institution, as well as Professor of Political Science at George Washington University where she specializes in Congress and legislative politics. She is the author of several books including, Stalemate: Causes and Consequences of Legislative Gridlock.

Dr. Gregory Wawro is an Associate Professor in the Political Science Department at Columbia University. He is the co-author of the book, Filibuster:: Obstruction in Lawmaking in the U.S. Senate. He did his undergraduate work at Penn State and received a PhD at Cornell.

Dr. Dove, someone we all know and welcome back, has served as Senate Parliamentarian for 13 years and now holds the title of Parliamentarian Emeritus of the Senate, and is a Professor at GW Graduate School of Political Management, and counsel to the law firm Patton Boggs.

Dr. Stanley Bach was Senior Specialists in Legislative Process for the Congressional Research Service for over 25 years. Since retiring, he served as a consultant in parliamentary development and legislative strengthening programs to governments around the world. A 2005 paper he authored on the rules of procedure for nationalist assemblies was used in Iraq.

I thank the witnesses for being here. I thank them for listening to our statements which I think again were heart-felt but also well done. You may each proceed. I think we will proceed from my left to my right. So you may begin Ms. Binder. Your entire statements will be read into the record. If you could try to limit your comments to five minutes. I am not going to be quite as lenient with you as I was with Senator Roberts. Each has seven minutes, excuse me, seven minutes.

STATEMENT OF SARAH A. BINDER, DEPARTMENT OF POLITICAL SCIENCE, GEORGE WASHINGTON UNIVERSITY

Ms. BINDER. Thank you, Chairman Schumer, Ranking Member Alexander, members of the Committee. I appreciate the opportunity to testify today about the filibuster.

I want to offer three arguments. First, historical lore says the filibuster was part of the original design of the Senate. Not true. When we scour early history, we discover that the filibuster was created by mistake.

Second, we often call the 19th Century Senate a Golden Age of the deliberation but the Golden Age was not so golden. Senate leaders the 1840s were already trying to adopt a cloture rule but most such efforts to bar the filibuster were themselves filibustered.

Third, creation of the cloture rule in 1917 was not a statement of the Senate's love of supermajority rules. Instead it was the product of hard-nosed bargaining with an obstructive minority. Short-term, pragmatic politics shaped contests to change Senate Rules.

Allow me to elaborate. First on the origins of the filibuster, we have many received wisdoms about the filibuster. Most of them turn out not to be true. The most persistent myth is that the filibuster was part of the founding fathers constitutional vision for the Senate. It is said the upper chamber was designed to be a slow moving deliberative body that cherished minority rights.

In this version of history, the filibuster was a critical part of the framers' Senate. But when we dig into history of Congress, it seems the filibuster was created by mistake. The House and Senate rule books in 1789 were nearly identical. Both rule books included what is known as the previous question motion. The House kept their motion. Today it empowers a majority to cut off debate. The Senate no longer has that rule.

What happened to that rule? In 1805 Vice President Aaron Burr, freshly indicted for murdering Hamilton, was presiding over the Senate and he offered this advice. He said something like this.

You are a great deliberative body but a truly great Senate would have a cleaner rule book and yours is a mess. You have lots of rules that do the same thing. And he singles out the previous question motion.

Today we know a simple majority in the House uses the motion to cut off debate but in 1805 neither chamber used the rule that way. Majorities were still experimenting.

And so when Aaron Burr said, "Get rid of the previous question motion," the Senate did not think twice. When Senators met in 1806, they dropped the motion from the rule book. Why? Not because Senators we think in 1806 sought to protect minority rights and extended debate. They seemed to get rid of the rule by mistake because Aaron Burr told them to.

Once the rule was gone, Senators still did not filibuster. Deletion of the rule made possible the filibuster because the Senate had no rule to cut off a majority by debate. It took several decades until the minority exploited lax limits on debate leading to the first real live filibuster in 1837.

Second, the not so Golden Age of the Senate. Conventional treatments of the Senate glorified the 19th Century as the Golden Age.

We say filibusters were reserved for great issues of the day and that all Senators cherished extended debate.

That view I think misreads history in several ways. First, there were very few filibusters before the Civil War. Why so few? First, the Senate operated by majority rule. Senators expected matters would be brought to a vote. Second, the Senate did not have a lot of work to do in those years so there was plenty of time to wait out the opposition. Third, voting coalitions in this early Senate were not nearly as polarized as they would later become.

That changes by mid-century. The Senate grew larger, more polarized. It had more work to do. And people started paying attention to it. By the 1880s almost every Congress began to experience at least one bout of obstructionism over civil rights, election law, even appointment of Senate officers, not all of these great issues of the date.

There is a second reason the Senate was not in a Golden Age. When filibusters did occur, leaders tried to ban them. Senate leaders tried and failed repeatedly over the course of 19th and early 20th Centuries to reinstate the previous question motion.

More often than not, Senators gave up on their quest for filibuster reform when they saw that opponents would kill it by filibuster because it would put the majority's other priorities at risk.

Instead, leaders adopted innovation such as the unanimous consent agreements, a fallback for managing a chamber prone to filibuster.

Third, the adoption of cloture. Why was reform possible a 1917 when it had eluded leaders for decades and why did the Senate choose a supermajority cloture rule rather than simple majority cloture?

First, the conditions for reform. After several unsuccessful efforts to create a cloture rule in the 1900s, we get a perfect storm of March 1917. A pivotal issue, a President at the bully pulpit, a very attentive press, a public engaged in that fight for reform.

At the outset of World War I, Republican Senators successfully had filibustered President Wilson's proposal to arm merchant ships, leading Wilson in March that year to famously brand obstructionists, quote, a little group of willful little men.

He demanded the Senate create a cloture rule, and the press dubbed the rule a war measure, and the public (with all due respect) burned Senators in effigy around the country.

Adoption of Rule 22 occurred because Wilson and the Democrats framed that rule as a matter of national security. They fused procedure with a policy and they used the bully pulpit to shame Senators into reform.

Second, why did Senators select a supermajority rule? A bipartisan committee met that year to negotiate the form of the rule. Five of six Democrats wanted a simple majority rule. One Republican wanted a supermajority rule. One Republican wanted no rule.

So negotiators cut a deal. Cloture would require two-thirds of Senators voting. Opponents promised not to block the proposal and supporters promised to give up on their own plan for simple majority cloture, a proposal that had the support of roughly 40 Senators. The cloture rule was then adopted 76 to three.

We can draw at least three lessons from this history. First, the history of extended debate in the Senate belies the received wisdom that the filibuster was an original constitutional feature of the Senate. The filibuster is more accurately viewed as the unanticipated consequence of an early change in Senate rules.

Second, there are conditions that can lead a bipartisan supermajority to agree to change the rules. However, the minority often holds the upper hand in these contests, given the high barrier to reform imposed by Senate rules.

Third, and finally, Senators in 1917 chose a supermajority cloture rule because a minority blocked more radical reform. Short-terms pragmatic considerations almost always shape the contest over Senate rules.

Thank you.

[The prepared statement of Ms. Binder follows:]

Chairman SCHUMER. Thank you, Ms. Binder.

Mr. WAWRO.

STATEMENT OF GREGORY J. WAWRO, ASSOCIATE PROFESSOR, DEPARTMENT OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY

Mr. WAWRO. Chairman Schumer, Ranking Member Alexander and members of the Committee. I appreciate the opportunity to participate in this hearing and contribute to the discussion of history of the filibuster.

I have been asked to discuss the period from 1917 to 1975 a critical period in history of the filibuster that is book-ended by two major reforms in the Senate the first being the adoption of the cloture rule in 1917, which has been very ably discussed by Professor Binder—and the second being the reform in the 1975 that lowered the cloture threshold to three-fifths of the Senate.

During this period, the use and perception of filibusters in the Senate changed significantly. Prior to this period, parliamentary obstruction was viewed as less than legitimate, and Senators rarely resorted to it. Between 1917 and 1975, the filibuster became deeply embedded in the fabric of the institution and became accepted by Senators as a legitimate tactic for shaping the course of law making.

Filibusters expanded in scope and number and were employed by a broad range of Senators on an ever widening array of legislation. Still, it is important to keep in mind that filibusters remained relatively few in number when compared to the contemporary Senate.

Three important qualitative changes in the use of filibusters occurred during this period. The first was the use of the filibuster to inhibit repeatedly and systematically the passage of a specific class of legislation, namely, civil rights reform.

The second was the development of the strategy of using filibusters to consistently block efforts to reform rules concerning filibusters. The third was the extension of filibusters to Supreme Court nominations.

I will focus on the first two changes in my statement today but would be happy to discuss the third if any Committee members have questions about it.

While filibusters undoubtedly altered the course of law making in important ways, it cannot be said that they rendered the Senate dysfunctional during this period. Despite the quantitative and qualitative expansion in the use of the filibuster, the Senate still managed to enact significant legislation addressing some of the most pressing problems of the day.

Evidence indicates that Senators generally built larger coalitions in support of legislation in order to preempt the use of filibusters. The substantial ideological overlap that existed between the parties at this time in part made it easier to build larger coalitions.

Nevertheless, the adoption of the cloture rule, Rule 22, in 1917, which required two-thirds of Senators present and voting to end debate, did not make it necessary to legislate by supermajorities. Although the percentage of significant laws that were passed with fewer than two-thirds coalitions in favor declined, many pieces of significant legislation were enacted by fairly narrow majorities in the decades following the reform.

Opponents of a bill did not always resort to filibustering nor was it assumed that cloture would have to be invoked routinely on significant and controversial legislation—with civil rights bills constituting the key exception.

Even when minorities conducted filibusters, it was not always necessary to invoke cloture since proponents could engage opponents in a war of attrition to wear them down, forcing them to relent and allow legislation to move forward.

As such, majorities that fell short of two-thirds but felt more intensely about legislation than the relevant minority could generally still manage to change policy. This is the key difference between the impact of the filibuster during the period in question and the impact of the filibuster in the contemporary Senate.

The extreme demands on both the agenda of the Senate and the personal schedules of individual Senators mean that it is no longer a viable strategy to fight extended wars of attrition to overcome an obstructive minority.

Although the filibuster was used relatively infrequently during this period, its repeated use against civil rights legislation prompted numerous attempts to change Rule 22 to lower the threshold required for cloture. In fact, the passage of civil rights reform became deeply entwined with cloture reform.

By the 1950s it had become virtually a biennial ritual to attempt cloture reform at the beginning of a new Congress. Only three attempts to change Rule 22 were successful however.

The first occurred in 1949 when the Senate adopted a compromise proposal that allowed for the application of cloture to any measure, motion, or matter pending before the Senate, excepting a motion to take up a rules change in exchange for raising the threshold for invoking closure to two-thirds of the entire membership.

Prior to this reform, it was not clear that cloture was even applicable to several important items of Senate business, including nominations.

The second reform occurred in 1959 when the Senate adopted a resolution that changed the cloture threshold to two-thirds present

and voting, permitted cloture to apply to rules changes, and explicitly affirmed in the rules that the Senate was a continuing body.

The third reform occurred in 1975 when the cloture threshold was changed to three-fifths of the Senate membership. However, two-thirds of the chamber would still be necessary to invoke cloture on a proposal to change the rules.

During the many attempts to reform Rule 22, opponents of reform resorted to strategies of obstruction to inhibit the attempts, taking advantage of the fact that resolutions to change the rules themselves could be filibustered. Thus reform efforts often involved attempts to establish precedents via rulings from the chair that would enable a simple majority to invoke cloture on proposed rules changes at the beginning of a Congress.

The only time that such a precedent was established was during the reform attempt of 1975 but the precedent was reversed a few days later by a vote of the Senate as part of a compromise.

To conclude, it is generally accepted that the contemporary Senate has become a supermajoritarian institution. The foundation for the supermajority Senate was laid with the adoption of the cloture rule in 1917 and its refinement in 1975. However, between 1917 and 1975 the Senate did not have the supermajoritarian character that is has today.

Neither the use of filibusters nor the use of the cloture was a part of the Senate's day-to-day functions. However, toward the end of this period, the stage was set for filibusters and cloture voters to become routine in the Senate, marking a fundamental and profound change in the operation of the institution.

Thank you, Mr. Chairman. I look forward to the Committee's questions.

[The prepared statement of Mr. Wawro attached]

Chairman SCHUMER. Thank you, Mr. Wawro.

Mr. Dove.

STATEMENT OF ROBERT B. DOVE, PARLIAMENTARIAN EMERITUS, U.S. SENATE

Mr. DOVE. Thank you, Mr. Chairman and members of the Committee. I am particularly pleased to be here with Professor Binder. We both teach classes at George Washington. I use her text in my class and I tell my students that the reason that I want them to read the text and to read her conclusions are that I so profoundly disagree with them. I think they should see both sides of it.

But I am not an opponent of the Senate filibuster. The reason that I am not I think comes from the three periods that I worked for United States Senate. First from 1966 to 1986, I was in the Senate parliamentarian's office working first under the parliamentarian who hired me, Floyd Riddick, and then under Murray Zweben, and then the final six years of that period I was the parliamentarian.

In that period of 20 years, I must say my views on the filibuster changed, and they were probably as influenced by anyone as much as by Floyd Riddick. Floyd Riddick was a student of the Senate. He came to found the Daily Digest in the 1940s, became assistant parliamentarian in 1951, and was the reason I was at the Senate.

I had done my PhD under the same professor at Duke that he had worked under. I feel like I was schooled at his knee as he talked about what was happening with the filibuster in that period. Some very interesting things were happening with regard to the filibuster in that period.

The year after I came the Vice President of the United States, Hubert Humphrey, and the Senator from South Dakota at that time, George McGovern, came up with a strategy to change the filibuster rule, a strategy which would involve the Vice President ruling that a resolution which had not yet been adopted would be enforced by the chair, a resolution to change the filibuster rule, and it would be enforced on the basis that a point of order against it had been tabled.

I did not see the logic of the situation at the time but I must say I was young and I really thought this was a way of cutting the Gordian knot, a phrase that Senator Javits used on the floor, and was secretly behind it. The parliamentarian was not, and the Vice President was not ruling based on the advice of the parliamentarian.

The Vice President did so rule. The Vice President was overturned by the Senate so that attempt came to naught.

Two years later in 1969 in the final days of Vice President Hubert Humphrey's time as Vice President, he came up with another way of changing Rule 22. He said from the chair that if a cloture motion was voted on, quote, at the beginning of the Congress which had never had any significance in the Senate in the past and the vote was by majority, that he would rule that cloture had been invoked on a rules change, and he so rule. And once again the Senate overturned him. So that attempt came to naught.

Then in 1975 Vice President Nelson Rockefeller together with Senator Walter Mondale of Minnesota and Senator Pearson of Kansas managed to do what Vice President Hubert Humphrey and Senator McGovern had tried to do only they did it successfully this time or I would say semi-successfully.

Yes, the Vice President ruled that the resolution could not be debated and for days the Senate had no debate but it had votes, and the only way the Vice President was able to shut that down was to start refusing to recognize Senators.

I had some qualms about that at the time. Evidently the Vice President had qualms about that because he came back two weeks afterward to apologize to the Senate for refusing to recognize Senators. But of course at that point it was a little late. The rule had been changed.

What I saw after that was that a significant minority of the Senate feeling that they have been crushed in an illegitimate fashion began to look for holes in the cloture rule. There were holes in the cloture rule. They were demonstrated in 1977 in a filibuster on the Natural Gas Act and it was not until 1979 that the cloture rule was amended to end those holes by putting an overall cap on the post cloture period of 100 hours and then later in the mid-80s a 30-hour cap.

Those changes basically were pursued and achieved in the normal course of things. What I remember about the filibuster are two instances. One was a fight very soon after the 1975 filibuster rule

had been changed. A fight over a Senate seat from New Hampshire. A fight between John Durkin and Louis Wyman.

And having just changed the filibuster rule to make it 60, there was the view that the Democrats who then have controlled 62 seats in the Senate would probably be able to ram through the seating of John Durkin with their 62 votes and cloture but they were not because three Democrats went off the reservation and refused to vote with them.

So that election contest ended with the seat being declared vacant. A new election occurring which John Durkin, the Democrat, won. And I will contrast that with the fight in the House over that McCloskey seat from Indiana when basically the Democrats rammed through the seating of someone that the Republican minority felt was being illegitimately seated and I frankly the scars of that lasted for years.

I like the Senate of 1975 which refused to do that to seat John Durkin better than what the House did with the McCloskey seat.

[The prepared statement of Mr. Dove follows:]

Chairman SCHUMER. Thank you, Mr. Dove.

Last but not least, Mr. Bach.

STATEMENT OF STANLEY I. BACH, RETIRED, SENIOR SPECIALIST IN THE LEGISLATIVE PROCESS, CONGRESSIONAL RESEARCH SERVICE

Mr. BACH. Thank you, Mr. Chairman, Senator Bennett, and members of the Committee. It is a great pleasure and honor to be back before the Committee after an absence of many years and particularly to be in this company. I have great respect for the scholarship of Professor Binder and Professor Wawro. And as for the gentleman to my immediate right he said that he learned at Dr. Riddick's knee. I think I can say that most of what I know about the Senate I learned at Bob Dove's knee when I was just a boy. So I am particularly happy to be in the company of my teacher.

Much of what I was going to talk about already has been covered in one way or another in the statements that have already been made, so I can abbreviate some of that.

Basically what I want to do is to focus on the more recent period in Senate history and essentially to remind members of this Committee of some developments and trends with which I am sure you already are familiar.

First as has been noted, since the mid-70s, there have been three formal changes in Rule 22 and no changes since. The 1975 adoption of the current requirement to invoke cloture of three-fifths of the Senators duly chosen and sworn has been mentioned as has the amendment that came four years later to impose a 100-hour cap on post cloture consideration.

Before then and since, there has always been the limit of one hour of debate per Senator after cloture has been invoked, but during the period after 1975, we saw the growth of what became known as the post cloture filibuster which led to the imposition of the cap on consideration as well as on debate 100 hours of post-cloture consideration.

Then in 1985, I think as part of the resolution to authorize television coverage of the Senate's floor proceedings, the 100-hour cap

was reduced to a 30-hour cap. In a sense that was the dog that did not bark. The 1985 amendment to Rule 22 evoked very little controversy, very little contention, probably because between 1979 and 1985 the Senate had never actually used all 100 hours. In fact, when I retired from CRS in 2002, the Senate had not at that point actually used all of the 30 hours that are available under the current rule. I understand that is no longer the case but it had been as of the early years of this decade.

In addition, there have been a several important developments affecting the Senate's precedents and practices that I do want to touch on briefly. Bob Dove mentioned the 1977 debate on the natural gas deregulation bill. I sort of cut my teeth on Senate procedure by trying to explain to myself everything that had happened to that bill.

In the course of the Senate's consideration of that bill, a series of rulings were made which vested considerably more power and discretion in the hands of the presiding officer.

Much of this has become less relevant today because of the 100-hour and then the 30-hour cap on post-cloture consideration, but under those precedents the presiding officer actually was empowered to rule as dilatory such matters as amendments, certain motions, quorum calls, points of order, and appeals of rulings of the chair.

So it was really quite an extraordinary moment. Fortunately it has not been necessary to invoke those precedents very often since.

In regard to changes in practice, I would want to emphasize two developments. One is the greater incidence of cloture motions and votes in relation to the motion to proceed.

The second is the greater incidence of cloture motions and votes in connection with the three motions that can be necessary for the Senate to send a bill to conference with the House.

Let me give you a few numbers. With regard to the motion to proceed, from 1983 through 2006, there was an average of eight cloture motions per year filed on motions to proceed.

During the following two years, 2007 and 2008, that average jumped from about eight to about 30 per year. That is a significant development by anyone's reckoning.

I do not have similar data with respect to the motions to go to conference. All I can say is that at the beginning of this new millennium my colleagues and I at CRS were aware that these three normally routine steps that typically were taken by unanimous consent could, if required, be taken as three separate motions, each of which would be fully debatable under the Senate's rules.

We wondered if and when this storm cloud on the horizon would actually break over the Senate and I think we have begun to see that happen.

Now let me draw your attention briefly to two tables in my prepared statement on pages 8 and 10. The table on page 8 documents the number of cloture motions that have been filed in the Senate. If you compare the 1960s with the 1980s and then with the current decade—which is not yet over and so the data for which remains incomplete—the number of cloture motions filed in the Senate jumped from 28 in the 1960s to 207 during the 1980s to more than

435 during the present decade—one cloture motion for every member of the House of Representatives.

Another way of slicing reality is to look not at the number of cloture motions filed and voted on, but on the number of discrete items of legislative and executive business that provoked one or more cloture motions because, as you know, you can have multiple cloture motions on a bill in addition to the cloture motions on the motion to take up the bill, on the motions to send it to conference, on the conference report, and so on.

That is addressed briefly in the table on page 10. Again if we compare the same three decades of the 1960s, the 1980s, and the current decade, the number of items of business that gave rise to one or more cloture motions grew from 16 in the 1960s to 91 in the 1980s to 223 during the decade that is not yet completed.

Mr. Chairman, I think there is a lot to be said for a bicameral legislature in which somewhat different decision rules are associated with each house.

The House of Representatives, as Senator Roberts has emphasized, is unquestionably a majority-rule institution. In the House there is really not much need for the majority to compromise with the minority if the majority is sufficiently unified to provide 218 votes from among its own membership. Nor for that matter is there much incentive for the minority to work with the majority if the alternative is an effective campaign issue that the minority thinks it can use to become the new majority after the next election.

If I can conclude with one further thought, Mr. Chairman, the dynamics of the Senate obviously are different, so but let me ask a not entirely rhetorical question, and that is, why do Senators filibuster? If the purpose and intent of a filibuster is to exercise a minority veto over legislation or a nomination or whatever, then I think defending recent practice is, in my view, an up-hill climb.

If, on the other hand, the objective of filibustering or the threat of filibustering is to give the majority an incentive to take better account of policy interests and preferences that it might if the majority were left solely to its own devices, then I think filibustering becomes much easier for me to justify.

So as the members of this Committee think about the subject of today's hearing and ask where do we go from here or is there anything that we need to do about this, I think a useful starting point is to ask whether the usual purpose of filibusters today is more balanced legislation or no legislation at all.

Thank you very much.

[The prepared statement of Mr. Bach follows:]

Chairman SCHUMER. Thank you. I just want to thank our four witnesses. This hearing is a little different than the ones we usually have in that we went into a lot of history. I think it was great and helpful.

Let me begin with a few questions. I am going to try to limit the questions to five minutes each because we do have a vote at noon.

The first question I guess is for Mr. Bach. Using your distinction which I think is a valid one, could you draw a distinction between filibusters of nominees because you cannot really compromise the nominee per se as opposed to filibusters on legislation? One of the things that frustrates us is that just about every nominee, I named

some of them before, even when they pass out of Committee by unanimous vote are filibustered.

Mr. BACH. You start with the easy one, Mr. Chairman. The last time I was in this room was to attend the 2003 hearing on S.Res 138 which the Committee then reported.

There are two distinctions I think to be drawn between filibustering on legislative business and filibustering on nominations. First, as you say, you cannot compromise on a nomination. So I think the threat of filibustering a nomination becomes particularly important because what you want to try to do is to use your influence before the President actually submits the nomination. You want that negotiation to occur in advance.

The other difference in a sense makes filibustering on nominations more justifiable than filibustering bills because the bill you enact today you can amend or repeal tomorrow. If you discover you made a mistake on a bill you live with that mistake only as long as it takes for the Congress and the President to recognize it.

When you confirm a judicial nominee, on the other hand, it is an appointment during good behavior and that can last for decades. It is essentially impossible to remedy a mistake on a judicial nomination whereas you can remedy mistakes on legislation much more easily.

Chairman SCHUMER. Right. That cuts against your first point.

Mr. BACH. Yes.

Chairman SCHUMER. To Mr. Wawro and Mr. Dove. So there was a period in 1975 where the chair ruled and that held. And then I think one mentioned that the actual resolution that was passed had so many holes in it that people were required—can you fill us in a little more particularly, Professor Wawro, but I would like to hear from Mr. Dove too, about those few days. You called it, I do not know, I think Mr. Dove said it was more than a few days, between the ruling of the chair initially and the actual rule that was passed.

Mr. WAWRO. I have the exact dates in my written statement. The resolution in question was Senate Resolution 4, and by this time, as I said in my statement, there was essentially a biennial ritual where senators tried to pass cloture reform by seeking rulings from the chair to invoke cloture by a majority.

Prior to this reform attempt, there had not been a committed majority in the Senate who wanted to establish a precedent that would enable majority cloture on a rules change.

When the precedent that was established, it was established by a very narrow vote, 51 to 42. My reading of the situation is that after the precedent was established that Senators were concerned about what they had done and it was an unanticipated result to an extent.

There was a filibuster that ensued after the precedent had been established that tried to prevent the resolution from moving forward. It was several days later. I do not recall the exact date that but a compromise was worked out whereby the cloture would be changed to three-fifth of the Senate except for a rules change which still required two-thirds of the Senate. But the Senate did actually go through the exercise of reversing the precedent and then voting for cloture by a supermajority.

Chairman SCHUMER. In a sense that is because they had buyers' remorse?

Mr. WAWRO. That is my reading of the situation. There was also some concern about how long the filibuster that followed the establishing of the precedent would have lasted.

Chairman SCHUMER. Mr. Dove and Mr. Bach, just your comments on that brief period.

Mr. DOVE. The majority leader at the time was Senator Mike Mansfield, and he had a lot of questions frankly about what was happening on the Senate floor. It was on his suggestion that the Senate backup and by unanimous consent in effect undo what they had done and then do it in the normal course of things.

There was indeed a feeling that perhaps what the Senate had done had some problems.

You said holes in the rule they adopted.

Chairman SCHUMER. I think you mentioned that.

Mr. DOVE. The holes were not in the rule they adopted. The holes were in the rule as it existed because just changing the number, that is all they did in 1975 was change the number, had nothing to do with the fact that if you wanted after cloture to extend the time you could do it very easily through votes, through having amendments read, and it was two Democratic Senators, Senators Abourezk of South Dakota and Metzenbaum of Ohio who demonstrated what two Senators could do on natural gas filibuster as they filed I believe 800 amendments. And after a week of either voting or quorum calls, they had used about three minutes of their one hour and it was clear that post-cloture filibuster could go on for months.

Chairman SCHUMER. You agree with Mr. Dove. I see you are nodding your head, Mr. Bach. I do not want to go over my time.

Mr. BACH. What Mr. Dove is pointing to are the elements of the post-cloture filibuster which then were the impetus for the imposition of the consideration caps that came in 1979 and 1985.

I also think a point that deserves emphasis is that a number of the changes in the cloture rule that have taken place have been the result of compromise: change in one direction combined with change in another direction. I think what happened in 1975 affected the question of who was going to have how much leverage in the negotiations for the compromise that eventually resulted.

Chairman SCHUMER. Thanks. I want to thank the witnesses. I just want to say because I will not speak again that it is clear from the history that some people try to say the filibuster is fixed, unchanging, going way back if not from the Constitution from the early days, and that is clearly not so. Your testimony makes that very clear.

Senator Bennett.

Senator BENNETT. I am a late arrival. If either of my colleagues wants to go ahead first I will be happy to yield to either one of them.

Senator ROBERTS. Unless you would rather we go first.

Senator BENNETT. I am always ready to speak. You know that. It is in a Senator's genes.

Chairman SCHUMER. Senator Bennett.

Senator ROBERTS. I have already gone way over my time as described by the chairman. So please.

Senator BENNETT. All right. It is probably a good thing that Senator Roberts and I are sufficiently separated by space so we will not be confused for one being the other. We each get recognized as the other as we walk these hollowed halls.

I have been fascinated by the historical review and have a little bit of history of my own to put here because my father was a Senator from 1951 through 1974. So the change you are talking about occurred just after he left the Senate. All the time he was here it was two-thirds of the Senators present and voting.

The maneuvering to influence the outcome had to do with how many Senators you could keep off the floor as much as it did with how many people you could get to vote the way you wanted. Many times that was part of the legislative strategy.

We know it is going to embarrass you if you vote this way or that way and you can accomplish what we want by not showing up and that will be less embarrassing to you back home with your constituents.

So I think the rule change that said it is a constitutional supermajority of all the Senators duly sworn is a step in the level of accountability for one's position with respect to a piece of legislation. So I would applaud that change on that basis.

Mr. Bach, I am interested in your dichotomy here which I agree with that if it is used strictly for obstruction, it is different than if it is used to try to get a bipartisan solution, and without getting into any of the details of where we are right now, I will say that in this present Congress we have seen examples of both where it was used absolutely to stop a piece of legislation and it was used absolutely to force the majority to come to the table in an effort to get a good piece of legislation.

I will not fill in the gaps of the kind of legislation am talking about. But I would like your reaction. You are political junkies or you would not be teaching political science wherever it is you are.

My experience is that there is a political price to be paid either way. That is, that a party that decides we are going to use the filibuster simply for obstruction runs a political risk of being punished by the voters who say we do not like that or can reap a political benefit when voters say we want you to stop this at all costs, and it becomes a political strategic decision on the part of the leader of the minority party.

Do we run the risk of losing the approbation of the people by being seen as obstructionist or do we gain the approbation of the people by being seen as principled and standing up against a bad piece of legislation?

So that ultimately the public will make the decision and punish or reward the party on its strategic decision to use the filibuster and therefore the filibuster becomes a significant weapon, two edged sword if you will, in the arsenal of politicians that gives it, in my view, a kind of legitimacy as something that should stay in the rules.

I would like your reactions to that particular view.

Ms. BINDER. I would answer your question this way, the question really who pays the cost for obstruction or with perceived obstruc-

tion, I typically say that majorities tend to be blamed for failure to govern rather than minorities feeling the cost of public concern.

Having said that, it may depend quite a bit on what issue is at stake and how much the public is paying attention, and on a highly charged issue in a period where partisans tend to divide, majority party members or partisans tend to blame the minority for blocking and partisans of the minority tend to blame the majority for trying to cut off the minority.

Of course that is the problem we face in the Senate today on very highly charged issues. Stepping back though, more often than not it does seem that majorities are quite often blamed for failure to govern.

Senator BENNETT. Thank you.

Chairman SCHUMER. Time is up but we will let them answer.

Senator BENNETT. Yes, any others?

Mr. BACH. Senator Bennett, I take your point. There will be instances, I am sure, where it is politically advantageous to be Horatio at the bridge, trying to kill legislation entirely.

I do not think that is going to happen very often though; take the health care debate or the current debate over financial regulation.

If you ask the American people if they are satisfied with the status quo, in both cases they will probably say no. So there is underlying support for some kind of legislation, and I think that even when the intent of a filibuster is the kill, it very often may be caste in terms of an attempt to get the majority to compromise.

And the problem that we have from the outside is that we are not really able not being able really to judge the merits of the arguments from each side, the minority saying that the majority refuses to compromise, and the majority claiming that the minority asks too much.

We cannot judge that unless we are in the room when these discussions are going on. What I think we can say is that this is what the media will report as partisan bickering and that does not serve the reputation of the Senate well.

Mr. WAWRO. If I could give a political sciencey answer to your question, I do not think we have a very good answer to this question because, despite all of the research that have been devoted to the filibuster, we lack in-depth studies about how it plays out in the court of public opinion. We do have surveys that go back to the 1930s that ask questions about filibusters and filibuster reform but we do not have the kind of systematic analysis that I, as a political scientist, would like to see to reach a definitive conclusion about who really pays the price in a very general sense.

Senator BENNETT. Thank you very much.

Chairman SCHUMER. Senator Udall.

Senator UDALL. Thank you, Senator Schumer.

Back in 2005 Senator Hatch wrote an article and I want to just quote a portion of that and get our first two witnesses opinion, maybe to the two parts of it.

He said in the article, "The Senate exercises its constitutional authority to determine its procedural rules, either implicitly or explicitly. Once a new Congress begins, operating under existing laws implicitly adopts them by acquiescence. The Senate explicitly deter-

mines its rules by formally amending them, and then the procedure depends on its timing. After Rule 22 has been adopted by acquiescence it requires 67 votes for cloture on a rules change. Before the Senate adopts Rule 22 by acquiescence, however, ordinary parliamentary rules apply and a simple majority can invoke cloture and change Senate rules."

And then he says in conclusion.

"Both conservative and liberal legal scholars agree that a simple majority can change Senate rules at the beginning of the new Congress." end quote.

I am wondering, Professor Binder and Wawro, do you have an opinion on Senator Hatch? Do you agree with Senator Hatch on that point?

Ms. BINDER. I think the answer comes down to how the Senate itself interprets that power. As the debates in 1975 played out over whether the Senate is a continuing body or not, we see votes both ways.

We have seen a majority endorse precisely the position of Senator Hatch in 2005, and we have seen perhaps a buyers' remorse stepping back from that once everyone understands the implications of living in a Senate where a majority can do that. It is clearly technically feasible and it has been politically feasible but the questions at any given moment is the Senate willing to take that vote again.

Senator UDALL. So basically what you are saying is that it is a constitutional issue and then the Senate determines constitutional issues, the Senate itself as a body determines that constitutional issue?

Ms. BINDER. Yes, because the Constitution says the House and Senate shall adopt their own rules.

Senator UDALL. Yes, Article I Section 5 of the Constitution says each house may determine the rules of its proceedings. So it all flows from out of that.

Ms. BINDER. Yes, and the question is in the Senate at any given time is a majority willing to endorse that interpretation of the rules.

Senator UDALL. There is nothing in the Constitution about a filibuster or the Rule 22 provision, things like that.

Ms. BINDER. Correct.

Senator UDALL. Please.

Mr. WAWRO. I would just say one of the great dilemmas of democratic institutions is that it is important to have rules that constrain the behavior of individuals who are members of those institutions but members of those institutions can change their own rules.

The Senate did put in its rules a provision that explicitly affirmed that it is a continuing body. The Senate did this as part of a compromise that reformed rules concerning the filibuster. But if the Senate wanted to change its rules with respect to that provision, it can do that.

There may be some issues with the parliamentary maneuvering that might be necessary to make such a change and some concerns about departures from Senate tradition that this might entail. But

the Senate has in its power to make the decision itself over what its rules are at any given moment.

Senator UDALL. By a majority vote?

Mr. WAWRO. By a majority vote simply because the Senate operates on the basis that precedents can be established by simple majorities to fill in gray areas in the rules—aspects of procedure that are not clearly established either in the Constitution or in the Senate's rules. All you need is a majority vote to be able to do that.

Senator UDALL. Let me ask you both one additional question on a long-standing constitutional principle and that principle is that one Congress cannot bind a subsequent Congress.

The simple example could be that you do it in terms of rules or you do it in terms of a piece of legislation and say in the legislation we pass that no future Congress can change this law unless you have 75 votes. That is a long-standing constitutional principle, is it not?

Ms. BINDER. I am not a constitutional scholar. So I would probably send that to Mr. Dove.

Senator UDALL. I want to ask him a different question.

Ms. BINDER. I will answer it as a political scientist. The chamber has the right to set its rules. Sometimes rules get entrenched because the rules themselves cause a barrier to changing them. It is not unconstitutional to create a barrier that is very hard to overcome.

Chairman SCHUMER. One more question.

Mr. DOVE. Could I answer that?

Senator UDALL. Yes.

Mr. DOVE. Because I helped right the Congressional Budget Act of 1974 which binds the Senate in spite of the fact that it is not re-adopted every Congress. If your premise is correct, that that Congress in 1974 had no right to bind the Congress of today, then the whole reconciliation process is gone.

Senator UDALL. It is not my premise. It is in Supreme Court cases repeated over and over and over again.

Mr. Bach, do you have an opinion on that? And please on any of the things said earlier.

Mr. BACH. There is an interesting and tricky problem here which is a problem of both principle and practice.

In the House of Representatives as many of you know, one of the things the House does on the first day of the new Congress is to adopt its rules. But that leaves this question: under what rules does the House debate the resolution to adopt its rules?

This is not a problem in current practice because it has all become routinized. But there was a day especially back in the 19th Century when the House could go on for days and days to elect a speaker which it would do before adopting its rules.

As I recall, the precedents of the House try to deal with this by saying that the House is then governed by general parliamentary law, just as Senator Hatch referred to ordinary parliamentary rules.

Well, I would really enjoy finding the book which tells me what general parliamentary law is or what the ordinary parliamentary rules are. Roberts Rules? Mason's Rules? Whose rules? So you run into a logical problem: how are you going to conduct the delibera-

tions over what the rules of the House or the Senate will be if they are adopted anew at the beginning of a Congress?

Senator UDALL. They do not seem to have much problem in the House. Thank you for your courtesies, Senator Schumer.

Chairman SCHUMER. No. My pleasure. The question I am just going to ask and leave out hanging there is to Mr. Dove. Maybe he can answer it for the record.

You mean the Senate could not undo, that we are bound to the Budget Reconciliation Act? It keeps going from Senate to Senate if we do not change it but let us say and you can answer this in writing, all of you. Let us say the Reconciliation Act, the Senate by 51 votes said we are undoing it? What would happen?

Mr. DOVE. Of course they can do that but they have not done anything about either reconfirming it or trying to change it since 1974.

Chairman SCHUMER. It is a different issue though according to Senator Udall's question if they tried to change, it as opposed to it continuing without an attempt to change it. Right?

Mr. DOVE. Certainly they can change it, yes.

Chairman SCHUMER. Senator Alexander.

Senator ALEXANDER. Thank you, Mr. Chairman.

Mr. Bach, unless the majority believes the minority is willing to kill a bill, how can it persuade the majority to take it seriously in changing the bill? When you said a filibuster might be all right if you are only going to do it to improve the bill but the way you get the attention of the majority is to say, if you do not, we will kill it.

Mr. BACH. This is the issue that Senator Bennett raised earlier, what is the minority's true intention, to kill or to compromise.

Senator ALEXANDER. How are you going to determine that? That is just a matter of human nature.

Mr. BACH. No one on the outside can determine that. That is a question that only Senators can determine in looking at what they and their colleagues are doing.

Senator ALEXANDER. But is it not a fairly simple rule of human nature that if you do not think I am serious you are not going to pay any attention to me.

Mr. BACH. Yes, it is.

Senator ALEXANDER. We all know that. Look at the financial reform bill debate right now. Forty-one Republicans have signed a letter saying, you know, we might filibuster this if you do not let us have some participation in making it a better bill.

If the Democrats think there is no chance to we will do that—the only reason we think we are getting a chance at some participation is they think we might actually do that.

So, Ms. Binder, your view, well, let me read this again. Senator Reid said, the majority leader, when talking about 2005 which has been mentioned a couple of times, Bill Frist was pursuing a rules change that would kill the filibuster for judicial nominations. Once you open that Pandora's box, it was just a matter of time before a Senate leader who could not get his way on something moved to eliminate the filibuster for regular business as well, and that, simply put, would be the end of the United States.

Do you disagree that?

Ms. BINDER. The planned of the 2005 use of the constitutional option were quite different than the other options.

Senator ALEXANDER. Do you agree or disagree with Senator Reid?

Ms. BINDER. I am not sure how quite to answer that one. It is clearly within the power of the Senate to reform by ruling as opposed to changing the rules.

Senator ALEXANDER. So you agree there is nothing unconstitutional about having filibusters, right?

Ms. BINDER. Correct.

Senator ALEXANDER. But we are going down the basic function of the Senate and Senator Reid, a majority leader, been here a long time, says, this is the end of the Senate if we change the filibuster rule.

Do you not disagree with that? I mean the whole point of your testimony seems to me to be is that the filibuster is bad for the Senate.

Ms. BINDER. The point of my testimony is to point out that the filibuster was not an original constitutional feature. That it has been changed and that the majorities have struggled with minorities over time to put supermajority rules in place.

Senator ALEXANDER. I heard that but you characterized it all as obstructionism instead of protection of minority rights. Did you think it would have been a good idea in 2005 for President Bush to be able to put just a steady series of super conservative judges on the court without the Democrats being able to slow that down?

Ms. BINDER. I thought at the time that the proposed use of nuclear constitutional option to reinterpret precedent was the wrong way to use the nuclear option.

Senator ALEXANDER. So you opposed changing the filibuster in 2005?

Ms. BINDER. Through the mechanisms that were proposed at the time which would be reinterpret Rule 22 in a way that did not match up with the actual language of Rule 22.

Senator ALEXANDER. But you wrote an article, did you not, saying filibusters are a great American tradition in 2005?

Ms. BINDER. That was the title put on by the editor.

Senator ALEXANDER. I have that happen to me too. It just seems to me your testimony is very much at variance with that of Senator Byrd's though about the Senate, Senator Reid's thought about the Senate, and that may be fine but you think they are wrong as a matter of history, and my sense is that you see anything other than a majority view as obstructionism.

Ms. BINDER. On the first, we disagree about how history is read. I read it differently than Senator Byrd.

Senator ALEXANDER. Mr. Dove, if the filibuster were ended, what would be the way in which the Senate then could continue to protect minority rights?

Mr. DOVE. It could not.

Chairman SCHUMER. On that note we would go to Mr. Roberts.

Senator ROBERTS. Well, if it could not, we would be in a hell of a shape, and the reason I say that is that I was interested in Bob Dove's reference to the situation in the State of Indiana back in the 1980s where Frank McCloskey was the incumbent and Rick McIn-

tyre was the challenger. The secretary of state of Indiana certified Mr. McIntyre as the duly elected member from that district.

However, when it came time to seat him, he was denied that and the matter was referred to the House Administration Committee of which I was a member, and a subcommittee was sent to Indiana to see if they could not come up with the precise number of votes that would determine the election.

Mr. Leon Panetta, who got his first experience in covert activities, was the Democrat leader and Mr. Bill Thomas, who had a reputation of certainly stating his opinion, was the minority representative.

As soon as Mr. McCloskey went ahead in the recount, the exercise was terminated and it was decided that Mr. McCloskey had won. Mr. Thomas brought back several voters who were not counted, stood them in the House Administration Committee room and tried to point out that this was a very severe violation of the rights of the State of Indiana and certainly Mr. McIntyre.

That really caused a ruckus and Republicans were wearing buttons at that times saying thou shalt not steel. The speaker at that time, Tip O'Neill said you will not wear these buttons on the floor of the House which we did anyway.

My remarks were such that I said I will take off my button now so I can speak but, and then went into my not tirade but certainly my point of view.

That meant that we left the dock of the secretaries of state all over the country declaring who would be the winner and who would not, and that the House Administration Committee, if the vote were close enough, less than one percent, or one percent, the committee would decide that, and obviously the majority would declare the majority candidate the winner.

Then came Idaho and Idaho had a very close vote and the Republican lost and the Democrat won, and I was appointed to go to Idaho along with a member of California to recount the election.

I made the suggestion to Bob Michael and to Billy Pitts at that particular time his stalwart assistant that that was not what we should do as a party. That if we left the dock of secretaries of state determining elections, we were in deep water indeed and that that would not be in the best interest of the House, and so we denied or we declined to go, and obviously the Democrat won and we had quite a discussion as to why Mr. Roberts did not want to go to California by some of our stalwarts.

Basically we walked out of the House of Representatives, and we walked out for several days. That was not a good thing and it also led to elections of leadership in the House who basically said we were declaring war on the majority.

I am not sure that was a good thing. As a matter of fact, I am very sure that was not a good thing but that is what happened and it got into a very partisan kind of situation to say the least. I would not want to see that happen in the Senate of the United States.

Mr. Dove, the current majority of 59 members is the largest held by either party in over 30 years. I think I am right. Is that correct?

Mr. DOVE. The answer is yes.

Senator ROBERTS. Would you say that those Congresses with smaller majorities were more or less functional than the current Congress?

Mr. DOVE. Okay. To me all Congresses are functional. The Senate rules are perfect, as I was told by Floyd Riddick; and if they are all changed tomorrow, they are still perfect.

So I do not want to start qualifying Congresses by being functional but I do emphasize the difference in the fight over the New Hampshire seat and the Indiana seat and say it was the filibuster that saved the Senate from what the House did with the McCloskey seat.

Senator ROBERTS. Already you have gotten to my point that I was trying to bring up.

Chairman SCHUMER. Time has expired, Pat.

Senator ROBERTS. I thought you would say that as a matter of fact.

Chairman SCHUMER. I know that people would like to do other questions but this type of hearing does lend itself to written questions because lots of these are historical. So on behalf of the Rules Committee, I am going to first thank our witnesses for their presentations this morning.

They have certainly helped us better understand the history of the Senate as it relates to the filibuster and I want to thank my colleagues on the Rules Committee who were here today. This is really a good opening hearing.

We will continue on the subject including getting to more specific proposals Senator Udall and others have those for future hearings.

The record will remain open for five business days for additional statements and questions from Rules Committee members. And since there is no further business before the Committee, the Committee is adjourned subject to the call of the chair.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

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Senator Robert F. Bennett
Opening Statement
Senate Rules Committee Hearing
April 22, 2010

Thank you Mr. Chairman.

While we were preparing for this hearing my staff came across a report put together by an organization called the Democratic Study Group - an organization of Democrats who served in the House of Representatives.

The report is titled "A Look at the Senate Filibuster."

The first page has a large graph on it that is meant to demonstrate that "The Use of the Senate Filibuster Has Exploded in Recent Years."

It goes on to lament the burdens imposed by the filibuster describing its use as "epidemic" and "undemocratic."

It then lists a number of bills passed by the Democratic majority in the House that were either "blocked or watered down" because of the "obstruction" made possible by the filibuster.

Now these are all arguments that we have been hearing a lot of recently but the most interesting thing about this report is the date on it.

This report was released in June 1994.

And since this hearing is supposed to give us a historical perspective let's look back at the history of those times for a moment.

In June 1994 the Democrats had 258 Members in the House.

They had 57 Senators.
And there was a Democrat in the White House.

Then, as now, the only impediment to total domination of the policy process by the Democrats was the Senate Rules that give the minority a voice.

Then, as now, some Democrats were frustrated by this impediment and wanted to remove it so there would be no restraint on their ability to move their agenda.

What happened next?

The Senate did not change its rules but there was an election that Fall.

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In that election, the Democrats lost 54 seats in the House and their majority for the first time in 40 years.

They lost 9 seats in the Senate, and their majority in this body.

Now as we sit here in the Spring of 2010 we have to ask ourselves - will our colleagues in the majority learn from that history or will they be doomed to repeat it?

I can appreciate the frustrations of the current majority.

I understand why they would want to be able to move their agenda without having to make any compromises or work with the minority at all.

But our system does not work that way.

Governing in a democracy is hard. It's meant to be that way.
If the Founding Fathers wanted governing to be easy they wouldn't have set up the system they did.
They would have given us a King or Dictator instead of three branches of government and a bi-cameral legislature.

The whole purpose of this division of power, this creation of checks and balances, was to ensure that no single branch, no single force, no single majority, could unilaterally impose its will on the country.

Yes, they provided for elections so the government would reflect the will of the people but they also feared the "tyranny of the majority" that could ensue if a temporary majority were able to impose its will without check or balance.

To impose these checks and balances they divided power amongst three separate branches of government and then divided the legislative branch into two separate houses.

I understand these divisions of power can make it hard to move an agenda and that it would be easier if we just eliminated these checks and balances.

It would be easier but it would also be wrong.

And it would be an abandonment of the principles that have served this body and this country well for over 200 years.

I have served in this body in both the majority and the minority.

When I was in the majority, I had to work with Members of the minority. I couldn't get everything I wanted and it took me a lot longer to get compromises then I would have liked.

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When, as now, I have served in the minority, Members of the majority have had to work with me.

While I may have been frustrated by this necessity when I was in the majority, I am grateful for it now that I am in the minority.

I expect my colleagues who are now frustrated may one day be grateful – from my perspective I hope they feel grateful very soon.

The American people want us to get things done but they also want us to work together.

They do not want one party – either party – to be able to do whatever it wants without restraint and without any check or balance.

In this body, the minority has a voice.

The filibuster ensures that voice, and the millions of citizens we represent, will be heard.

I would encourage my colleagues in the majority to listen to that voice, instead of trying to silence it.

If they don't listen they may discover that citizens have other means of making themselves heard and come November, history may be repeating itself.

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Statement of U.S. Senator Robert C. Byrd
Senate Committee on Rules and Administration

"Examining the Filibuster:
History of the Filibuster 1789 – 2008."

April 22, 2010

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Mr. Chairman,

I have long revered the rules and precedents of this body, but I have also championed reforms when I thought them necessary. In 1975 as Senate Majority Whip, I sponsored changes to Rule XXII, reducing the threshold for cloture from two-thirds of Senators "present and voting," to three-fifths of Senators "duly chosen and sworn." In 1979 as Senate Majority Leader, I sponsored additional changes to clarify the intent of Rule XXII, and to eliminate post-cloture filibusters. In 1986 as Senate Minority Leader, I sponsored further changes, reducing post-cloture debate from 100 hours to 30 hours. In 2007, I authored a change to Rule XXVIII, to make it more difficult to include new matter that had not been debated in either house of Congress in a conference report, by requiring sixty votes.

I have tried to achieve these ends by working within the Senate rules. I am not for circumventing the rules, nor am I for changing the rules as an option of first resort. Having served in the Senate for more than fifty years, and served in both the majority and minority, I know that majorities change. Senators who advocate for rule changes today may have to live under those changes in the minority tomorrow. We should remain open to changes in the Senate rules, but not to the detriment of the institution's character or purpose.

The filibuster is a powerful tool, and it ought to be invoked only in the most extraordinary circumstances. Senators, to a degree, have abused their right to debate, objecting to routine business and exhausting the patience of their colleagues. But before we get all steamed up, demanding radical changes to the Senate rules, let's read the rules and make sure we understand what we are talking about.

In recent months, we have seen measures introduced in the U.S. Senate – one to gradually reduce the threshold for cloture to a simple majority, and another to require the Senate to adopt its rules anew at the beginning of each Congress. There is also the procedural gambit advocated by some, to have the Vice President assume the chair, and to have a majority codify his ruling to do away with the filibuster. These are not new proposals, and the arguments for them are as old as the cloture rule.

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It does not take much imagination to decry long-winded speeches and obstruction and advocate for changes to the rules. It does take time and experience to understand the rules and how they bolster the historical significance of the Senate.

I oppose cloture by a simple majority, because I believe it would immediately destroy the uniqueness of this institution. In the hands of a tyrannical majority and leadership, that kind of emasculation of the cloture rule would mean that minority rights would cease to exist in the U.S. Senate.

The U.S. Senate is not the U.S. House of Representatives, and was never intended to function like the House. The Senate is a forum of the states, where regardless of size or population all states have an equal voice. One must also realize that a majority of states may not actually represent a majority of opinion in the country. In the Senate, states like West Virginia are equal to states like California, Texas, and New York. Yet, without the protection of unlimited debate, small states like West Virginia might be trampled underfoot.

Take away the right of unlimited speech by the representatives of the people, and one tampers with the fundamental checks and balances forged by the framers.

I hope Senators will take a moment to recall why the devices of extended debate and amendments are so important to our freedoms. The Senate is the only place in government where the rights of a numerical minority are so protected. Majorities change with elections. A minority can be right, and minority views can certainly improve legislation. As U.S. Senator George Hoar explained in his 1897 article, "Has the Senate Degenerated?", the Constitution's Framers intentionally designed the Senate to be a deliberative forum in which "the sober second thought of the people might find expression."

During my tenure in Congress, I have witnessed bitter fights over Vietnam and McCarthyism. In the decades before that, I remember Senators denouncing the New Deal as socialism and communism. Bitter partisan periods in our history are nothing new.

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If something seems wrong with the Senate from time to time, we, the members, might try looking in the mirror. Additional efforts toward civility and patience, and accommodation on both sides, may do us more lasting good than any actual change in the rules. There is no challenge we must confront that dwarfs the challenges our predecessors faced. If they found a way forward without damaging the Senate's ultimate purpose, I am confident that we can too.

If the Senate rules are being abused, it does not necessarily follow that the solution is to change the rules. Senators are obliged to exercise their best judgment when invoking their right to extended debate. They also should be obliged to actually filibuster, that is go to the Floor and talk, instead of finding less strenuous ways to accomplish the same end. If the rules are abused, and Senators exhaust the patience of their colleagues, such actions can invite draconian measures. But those measures themselves can, in the long run, be as detrimental to the role of the institution and to the rights of the American people as the abuse of the rules.

Extended deliberation and debate – when employed judiciously – protect every Senator, and the interests of their constituency, and are essential to the protection of the liberties of a free people.

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Testimony of Sarah Binder
Senior Fellow, The Brookings Institution
Professor of Political Science, George Washington University

Before the
Committee on Rules
U.S. Senate
April 22, 2010

Chairman Schumer, Ranking Member Bennett, and members of the Committee. My name is Sarah Binder. I am a senior fellow at the Brookings Institution and a professor of political science at George Washington University. I appreciate the opportunity to testify today about the history of the filibuster.

I want to offer three arguments today about that history.

First, historical lore says that the filibuster was part of the original design of the Senate. Not true. When we scour early Senate history, we discover that the filibuster was created by mistake. In fact, we owe the origins of the filibuster to procedural housekeeping in 1806 on the advice of Vice President Aaron Burr. In cleaning the rules, the Senate deleted the one rule that could have been developed into a powerful rule for ending debate. It took several decades before senators realized that they could exploit lax limits on debate to block measures they intensely opposed. But once filibustering took root, Senate leaders lacked the rule they needed to limit debate.

Second, we often say that the 19th century Senate was the "golden age" of Senate deliberation. But the golden age was not so golden. There were relatively few filibusters before the Civil War, as senators expected matters to be brought to a vote. And when senators did start to filibuster in the mid 19th century, Senate leaders grappled with lax limits on debate and several times sought to amend Senate rules. But most such efforts to bar the filibuster were themselves filibustered.

Third, creation of the cloture rule in 1917 was not a statement of the Senate's love for supermajority rules. A substantial portion of the majority party favored a simple majority cloture rule. Some minority party members preferred a supermajority cloture rule, and others preferred no rule at all. Under pressure from the president at the bully pulpit, a bargain was struck: Opponents of reform promised not to block the rule change, and proponents of reform promised not to push for a simple majority rule. The two-thirds threshold, in other words, was the product of hard-nose bargaining with an obstructive minority. Short-term, pragmatic politics shape contests to change Senate rules.

My testimony will elaborate these three points.

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Testimony of Sarah Binder
Senior Fellow, The Brookings Institution
Professor of Political Science, George Washington University

Before the
Committee on Rules
U.S. Senate
April 22, 2010

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First, historical lore says that the filibuster was part of the original design of the Senate. Not true. When we scour early Senate history, we discover that the filibuster was created by mistake.

Second, we often say that the 19th century Senate was a golden age of deliberation. But the golden age was not so golden: Senate leaders by the 1840s were already trying to adopt a cloture rule. But most such efforts to bar the filibuster were filibustered.

Third, creation of the cloture rule in 1917 was not a statement of the Senate's love for supermajority rules. Instead, it was the product of hard-nose bargaining with an obstructive minority. Short-term, pragmatic politics shape contests to change Senate rules.

Allow me to elaborate on these three points.

1. Origins of the filibuster[1]

We have many received wisdoms about the filibuster. However, most of them are not true. The most persistent myth is that the filibuster was part of the founding fathers' constitutional vision for the Senate: It is said that the upper chamber was designed to be a slow-moving, deliberative body that cherished minority rights. In this version of history, the filibuster was a critical part of the framers' Senate.

However, when we dig into the history of Congress, it seems that the filibuster was created by mistake. Let me explain.

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[1] The following discussion is largely drawn from Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution Press, 1997).

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The House and Senate rulebooks in 1789 were nearly identical. Both rulebooks included what is known as the "previous question" motion. The House kept their motion, and today it empowers a simple majority to cut off debate. The Senate no longer has that rule on its books.

What happened to the Senate's rule? In 1805, Vice President Aaron Burr was presiding over the Senate (freshly indicted for the murder of Alexander Hamilton), and he offered this advice. He said something like this. You are a great deliberative body. But a truly great Senate would have a cleaner rule book. Yours is a mess. You have lots of rules that do the same thing. And he singles out the previous question motion. Now, today, we know that a simple majority in the House can use the rule to cut off debate. But in 1805, neither chamber used the rule that way. Majorities were still experimenting with it. And so when Aaron Burr said, get rid of the previous question motion, the Senate didn't think twice. When they met in 1806, they dropped the motion from the Senate rule book.

Why? Not because senators in 1806 sought to protect minority rights and extended debate. They got rid of the rule by mistake: Because Aaron Burr told them to.

Once the rule was gone, senators still did not filibuster. Deletion of the rule *made possible* the filibuster because the Senate no longer had a rule that could have empowered a simple majority to cut off debate. It took several decades until the minority exploited the lax limits on debate, leading to the first real-live filibuster in 1837.

2. The Not-So-Golden Age of the Senate

Conventional treatments of the Senate glorify the 19th century as the "golden age" of the Senate: We say that filibusters were reserved for the great issues of the day and that all senators cherished extended debate. That view misreads history in two ways.

First, there were very few filibusters before the Civil War. Why so few filibusters? First, the Senate operated by majority rule; senators expected matters would be brought to a vote. Second, the Senate did not have a lot of work to do in those years, so there was plenty of time to wait out the opposition. Third, voting coalitions in the early Senate were not nearly as polarized as they would later become.

All that changed by mid-century. The Senate grew larger and more polarized along party lines, it had more work to do, and people started paying attention to it. By the 1880s, almost every Congress began to experience at least one bout of obstructionism: for instance, over civil rights, election law, nominations, even appointment of Senate officers—only some of these "the great issues of the day."

There is a second reason that this was not a golden age: When filibusters did occur, leaders tried to ban them. Senate leaders tried and failed repeatedly over the course of the 19th and early 20th centuries to reinstate the previous question motion. More often than not, senators gave up their quest for reform when they saw that opponents

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would kill it by filibuster-- putting the majority's other priorities at risk. Unable to reform Senate rules, leaders developed other innovations such as unanimous consent agreements. These seem to have been a fallback option for managing a chamber prone to filibusters.

3. The adoption of cloture

Why was reform possible in 1917 when it had eluded leaders for decades? And why did the Senate choose *supermajority* cloture rather than *simple majority* cloture?[2]

First, the conditions for reform. After several unsuccessful efforts to create a cloture rule in the early 1900s, we saw a perfect storm in March of 1917: a pivotal issue, a president at his bully pulpit, an attentive press, and a public engaged in the fight for reform. At the outset of World War 1, Republican senators successfully filibustered President Wilson's proposal to arm merchant ships—leading Wilson in March of 1917 to famously brand the obstructionists as a "little group of willful men." He demanded the Senate create a cloture rule, the press dubbed the rule a "war measure," and the public burned senators in effigy around the country.

Adoption of Rule 22 occurred because Wilson and the Democrats framed the rule as a matter of national security. They fused procedure with policy, and used the bully pulpit to shame senators into reform.

Second, why did senators select a *supermajority* rule? A bipartisan committee was formed to negotiate the form of the rule. Five of the six Democrats supported a simple majority rule; one Republican supported a supermajority rule, and one Republican preferred no rule. Negotiators cut a deal: Cloture would require 2/3rds of senators voting. Opponents promised not to block or weaken the proposal; supporters promised to drop their own proposal for simple majority cloture—a proposal supported by at least 40 senators. The cloture rule was then adopted, 76-3.

4. Conclusions

We can draw at least three lessons from this history:

First, the history of extended debate in the Senate belies the received wisdom that the filibuster was an original, constitutional feature of the Senate. The filibuster is more accurately viewed as the unanticipated consequence of an early change to Senate rules.

Second, reform of Senate rules is possible. There *are* conditions that can lead a bipartisan supermajority to agree to change Senate rules. The minority has often held the

[2] On the politics of amending Rule 22 in 1917, in addition to Binder and Smith (1997), see Gregory Koger, "Filibuster Reform in the Senate, 1913-1917," in *Party, Process, and Political Change in Congress*, V. 2, David Brady and Mathew McCubbins, Eds. (Stanford University Press, 2007), pp. 205-25; see also Gregory Wawro and Eric Schickler, *Filibuster* (Princeton University Press, 2006).

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upper hand in these contests, however, given the high barrier to reform imposed by inherited Senate rules.

Third, and finally, the Senate adopted a *supermajority* rule not because senators were uniformly committed to the filibuster. Senators chose a 2/3rds rule because a minority blocked more radical reform. Short-term, pragmatic considerations almost always shape contests over reform of Senate rules.

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The Filibuster and Filibuster Reform in the U.S. Senate, 1917–1975

Testimony Prepared for the Senate Committee on Rules and Administration

April 22, 2010

Professor Gregory J. Wawro

Columbia University

Acknowledgments: Much of the discussion in this testimony is based on joint research with Professor Eric Schickler. Lucas Leeman provided valuable research assistance in the preparation of this testimony.

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Filibusters from 1917 to 1975

From 1917 to 1975, the use and perception of filibusters in the Senate changed significantly. Prior to this period, parliamentary obstruction was viewed as less than legitimate and senators rarely resorted to it. During this period, the filibuster became deeply embedded in the fabric of the institution and—for better or worse—became accepted by senators as a legitimate tactic for shaping the course of lawmaking. Toward the end of the period, filibusters expanded in scope and number, and were employed by a broad range of senators to an ever-widening array of legislation.

While numerous intense filibusters were conducted during this period, they were relatively few in number when compared to today's Senate. Although numbers of filibusters only tell part of the story, they are helpful for understanding the evolution of parliamentary obstruction. Figure 1 displays data on the numbers of filibusters that occurred in the 27th to the 102nd Congress.[1]

Statistically, filibusters occurred in the immediate post-cloture period at the same rate as in the years preceding the reform. The 60th–64th Congresses (1907–1917) averaged 2.4 filibusters per congress, while the 65th–69th Congresses (1917–1927) averaged 4.6 filibusters per congress, but this is not a statistically significant difference. It was not until the 1960s that the number of filibusters began to trend sharply upward. Matthews (1960) argues that norms of reciprocity and institutional loyalty helped to prevent senators from engaging in widespread filibustering through the mid-20th century. However, as the Senate moved into the late 1960s, these norms seemed to be losing their effectiveness in preventing senators from exploiting their prerogatives more fully, setting the Senate on a course where filibusters against legislation of any significance would become routine.

While the quantitative changes in the number of filibusters during most of the period are not particularly noteworthy, several important qualitative changes in their use occurred. One of the most important innovations in the use of the filibuster was its repeated and systematic application to inhibit the passage of a specific class of legislation—namely civil rights reform. In 1922, the first filibuster of a civil rights measure in the post-cloture period occurred when the Dyer Anti-Lynching Bill was obstructed and eventually pulled from consideration. It would not be until the mid-20th century, however, that civil rights legislation would become the main target of filibusters and, consequently, that the filibuster would become so closely associated with the obstruction of civil rights reform. While it is difficult to know with certainty whether civil rights reforms considered prior to the 1960s had committed majorities in favor of them, it is undeniable that such reforms became the first type of legislation where filibusters were perennially anticipated.

[1] The data on filibusters discussed here are taken from a Congressional Research Service memorandum written by Richard Beth (1994). It is generally accepted as the most reliable data set containing measures of filibusters over the Senate's history. Determining what is and is not a filibuster is a difficult task, especially for earlier congresses where senators were often reluctant to admit when they were engaging in parliamentary obstruction. Although instances of obstruction can be found as far back as the early years of the Senate, the first notable filibuster in the chamber did not occur until the 27th Congress. The series ends with the 102nd because data for more recent congresses have yet to be systematically gathered.

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A second important innovation concerned the development of the use of the filibuster to block efforts to reform rules concerning filibusters. While obstruction had been used prior to 1917 to inhibit proposed rules changes, filibusters of rules changes—whether actual or threatened—became a central part of the strategy to obstruct civil rights legislation in the mid-20th century. When frustrated proponents of civil rights reform tried to make it easier to change the rules to invoke cloture, these efforts themselves were often frustrated by filibusters.

A third important innovation concerned the extension of filibusters to Supreme Court nominations. The first widely acknowledged filibuster of a nominee to the high court occurred in 1968, when Lyndon Johnson attempted to elevate Abe Fortas to the position of chief justice. Three other filibusters followed quickly on the heels of the Fortas filibuster, as the nominations of Clement Haynsworth and G. Harold Carswell went down to defeat in 1969 and 1970, and William Rehnquist's nomination for the position of associate justice was filibustered briefly but unsuccessfully in 1971. Although it does not appear that the nominations of Fortas, Haynsworth, and Carswell would have succeeded had they not been filibustered, this marked an important expansion in the scope of the use of the filibuster by helping to establish the legitimacy of the obstruction of judicial nominations.

The Impact of Filibusters

Binder and Smith (1997, Ch. 5) present compelling evidence that filibusters had significant impact on policy outcomes between 1917 and 1975 (see also Burdette 1940). They uncovered 16 instances during this period where filibusters defeated legislation that appeared to have majority support in the Senate and House, as well as the support of the president. Although more difficult to gauge systematically, filibusters—either actual or threatened—undoubtedly forced substantial changes to legislation in order to bring it to a final vote. [2] In particular, Binder and Smith convincingly argue that meaningful civil rights reform would have occurred earlier were it not for the Senate's supermajority cloture requirements. Yet it cannot be said that the filibuster rendered the Senate dysfunctional during this period. The Senate still managed to enact significant legislation addressing some of the most pressing problems of the day. While the filibuster without question caused numerous headaches for proponents of particular bills and altered the course of lawmaking, generally senators were able to forge compromises that enabled the Senate to meet the legislative demands placed upon it by the polity.

While there was often great hue and cry over the use of filibusters in the period of 1917—1975, part of the reason for this was that filibusters remained a departure from the normal legislative routine. Because they were used so infrequently, they had yet to become fully accepted as part of the price that the Senate paid for permitting extended debate.

[2] The Civil Rights Act of 1957 is a notable example (Caro 2002).

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The Use and Effectiveness of the Cloture Procedure

At the time of its adoption, the reform to Senate Rule XXII was widely perceived by both the press and politicians as an effective tool for dealing with filibusters. Since that time, however, close observers of the Senate are nearly unanimous in the assessment that the 1917 reform was largely symbolic and had only a marginal—if any—substantive impact on the way the Senate conducted its business in the decades that followed the reform. Some critics of Rule XXII have argued that the cloture procedure was too cumbersome (Byrd 1988, 124, Baker 1995, 46, White 1968, 60–61, 64, Rogers 1926, 177, Luce 1922, 295 Haynes 1938, v. 1, 420), while others noted the infrequency of its use as an indicator of its ineffectiveness (Oppenheimer 1985, 398; Baker 1995, 46). From the 66th to the 86th Congresses (1919–1960), only twenty-three cloture votes took place, and of those, only four were successful.[3] Between 1927 and 1962, the Senate had an unbroken string of fourteen unsuccessful cloture votes.

But therein lies a puzzle: if the 1917 reform did not arm senators with a practicable weapon against obstruction, why did senators not move more quickly to alter the cloture rule to make it easier to invoke? Why did the public outrage that served as a catalyst for the 1917 reform not reemerge in the years that followed if filibusters remained such a problem?

Wawro and Schickler (2006) argue that the 1917 reform was more than symbolic and did mark a change in the way that the Senate conducted its business. Their argument is that the cloture rule lent predictability to the legislative process in the sense that if a legislative entrepreneur built a supermajority coalition in favor of a bill, then he could convince would-be obstructionists to stand down, since he could credibly claim to have the votes to invoke cloture. Wawro and Schickler present evidence on variation in coalition sizes and improved efficiency in the appropriations process to support the view that legislative entrepreneurs used the two-thirds threshold as a target when building coalitions in support of significant legislation. This seems especially to be the case in lame-duck sessions of Congress, when the constitutionally-mandated adjournment date gave a particular advantage to filibustering senators. Thus, part of the reason that senators employed cloture so rarely was because they built larger coalitions that—in theory—could have invoked cloture if they felt they had to, thus preempting filibusters.

It is important to point out, however, that the 1917 rule did not make it necessary to legislate by supermajorities. Although the percentage of significant laws that were passed with fewer than two-thirds coalitions in favor declined, many pieces of significant legislation were enacted by fairly narrow majorities between 1917 and 1946. Opponents of a bill did not always resort to filibustering, nor was it assumed that cloture would have to be invoked routinely on significant and controversial legislation—with civil rights bills constituting the key exception. Even when minorities conducted filibusters, it was not always necessary to invoke cloture to pass obstructed legislation. Bill supporters could still engage the minority in a war of attrition—as they did in the pre-cloture era—

[3] Cloture was invoked for the first time in the history of the rule on the Versailles Treaty in November 1919. However, the treaty ultimately was defeated in the Senate.

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to wear them down and bring legislation to a final vote.[4] As such, majorities that fell short of two-thirds but felt more intensely about legislation than the relevant minority could generally still manage to change policy. This is the key difference between the impact of filibusters during the period in question and the impact of the filibuster in today's Senate.

Although senators rarely resorted to the procedure, an important change in senators' attitudes regarding their willingness to vote for cloture occurred between 1917 and 1975. In earlier congresses in this period, senators expressed a reluctance to vote for cloture, even when they were in favor of an obstructed item. Cloture presented a departure from the Senate's tradition of unlimited debate, and senators were clearly concerned about the implications of using cloture, both for the way the Senate conducted its business generally and for how it might limit their own influence in the legislative process. Toward the end of the period, these reservations gave way as senators viewed cloture as more essential to accomplishing their legislative goals.

Reform of Rule XXII

In the decades that followed the 1917 reform of Rule XXII, numerous proposals to strengthen the cloture rule and to limit the use of filibustering tactics were introduced. These included proposals for majority cloture, for imposing time limits on debate, and for establishing germaneness requirements for amendments. None of these proposals made much headway in the Senate until the 81st Congress (1949–1951). By the late 1940s, it had become clear that civil rights legislation had become a particular target for filibusters, and thus cloture reform became closely entwined with civil rights reform. In the 80th Congress, President Pro Tem Arthur Vandenberg (R–MI) made explicit a key limit to the cloture rule as adopted in 1917 when he issued a ruling as presiding officer that cloture could be applied only to a "measure" and not to the motion to proceed to consideration of said measure (*Congressional Record* 1948, pp. 9602–9604). Bill opponents, therefore, could filibuster a motion to proceed to consideration, leaving supporters without a formal mechanism to end debate on the motion.

In 1949, the Senate reformed Rule XXII to make cloture applicable to a motion to proceed. Interestingly, a ruling from the chair played a role in enacting the reform. Senator Richard Russell (D–GA) raised a point of order against an attempt to apply cloture to the motion to take up the reform proposal. Vice President Alben Barkley rejected the point of order, arguing that the Senate would not have adopted the cloture rule in the first place if it did not intend the rule to apply to motions to proceed, since that would have rendered the rule completely ineffectual. However, the Senate upheld Russell's appeal of Barkley's decision, in part because many senators were concerned about how reversing Vandenberg's earlier ruling might weaken the integrity of Senate procedure. The Senate eventually adopted a compromise proposal that allowed for the application of

[4] For example, both the Emergency Tariff Bill in 1921 and the Fordney-McCumber Tariff Bill in 1922 encountered filibusters yet both were passed without successful cloture votes and with fewer than two-thirds voting in favor. The former failed to become law because of a veto, however.

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cloture to any measure, motion or other matter pending before the Senate—excepting motions to take up a rules change—in exchange for raising the threshold for invoking cloture to two-thirds of the entire membership.

In the years following the 1949 reform, senators continued to introduce proposals to reform Rule XXII to make it easier to invoke cloture and defeat filibusters. Starting in the early 1950s, reformers focused on a different strategy for changing the cloture rule, seeking to take advantage of the unique context surrounding the opening of a new congress and use rulings from the chair to make it possible to change existing rules without invoking cloture. This strategy involved challenging the notion that the Senate was a continuing body and asserting that senators should not be bound by existing rules at the beginning of a new congress, which would enable senators to adopt new rules by a simple majority.[5]

At the beginning of the 83rd Congress (1953–1954), a group of senators led by Clinton Anderson (D–NM) moved to consider the adoption of new rules. Their intention was to maintain the status quo for all rules save Rule XXII, which they sought to change to permit majority cloture. After several days of debate, the Anderson motion was decisively tabled on a vote of 70-21. Anderson made a similar motion at the beginning of the 85th Congress (1957–1958). Although the proposal had more support this time, winning a sympathetic advisory opinion from Vice President Richard Nixon regarding the constitutionality of Rule XXII, it did not have the votes to overcome a motion to table, which succeeded 55-38.

Anderson again offered his motion at the opening of the 86th Congress, although this time it was in competition with a reform proposal put forward by Majority Leader Lyndon Johnson (D–TX) that permitted cloture to apply to rules changes and lowered the threshold to two-thirds present and voting, while explicitly affirming in the rules the Senate's status as a continuing body. Johnson's proposal was co-sponsored with other leaders in both the Democratic and Republican parties and had broad appeal. Johnson succeeded in having Anderson's motion tabled, 60-36, and his resolution survived amendments that would have reduced the cloture threshold further, would have eliminated the language regarding the continuing nature of the Senate, and would have required germaneness in debate. The Senate adopted Johnson's resolution in its original form by a vote of 72-22 (see *CQ Almanac,* 1959, pp. 212–214).

The adoption of reform in 1959 did not put an end to efforts to change the cloture rule. Indeed, it was becoming a biennial ritual for senators to attempt cloture reform when the Senate convened in a new congress. During the 1960s, numerous proposals were introduced to lower the cloture threshold and reformers continued to seek rulings from the chair that would enable adoption of their proposals by avoiding the supermajority constraints imposed by Rule XXII. Vice Presidents were intimately involved in these debates as presiding officers, but resisted attempts to persuade them to issue rulings on whether or not it was unconstitutional to require two-thirds to invoke cloture on proposals to change the rules at the beginning of a congress. The precedent of the Senate was for the presiding officer to submit constitutional questions to the full Senate for decision, rather than rule

[5] Historically, the Senate has been accepted as a continuing body because only one-third of its membership is elected every two years. This means that, unlike the House of Representatives, the Senate does not organize itself anew and adopt a new set of rules each time a new congress convenes.

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on such questions himself. At the end of the decade, however, Vice President Hubert Humphrey appeared to break with this precedent by issuing a ruling on the question as to whether Rule XXII violated the right of a majority, allegedly implied by the Constitution, to change the rules of the Senate. At the opening of the 91st Congress (1969–1971), Humphrey ruled that if only a majority—not two-thirds—of those present and voting agreed to limit debate on a proposal to change the rules at the beginning of a congress, then the chair would rule that cloture had been invoked (*Congressional Record*, January 15, 1969, p. 920). Humphrey followed through with his ruling after the Senate voted 51-47 to invoke cloture. However, Humphrey's decision was appealed, and the Senate voted 53-45 to reverse it, maintaining the status quo that two-thirds was necessary to end debate on a proposed rule change (U.S. Congress. Senate. Committee on Rules and Administration 1985, 25–29).

Reform efforts continued into the 1970s, as proposals focused on reducing the cloture threshold to a three-fifths supermajority. During a prolonged debate over rules changes at the beginning of the 92nd Congress (1971—1972), Jacob Javits (R–NY) appealed the decision of the chair that a two-thirds majority was necessary to invoke cloture on a rules change, but the appeal was defeated 55-37 on a tabling motion.

Reformers finally succeeded in changing Rule XXII in 1975, but not without a prolonged and convoluted parliamentary battle. The debate centered on Senate Resolution 4, which proposed to lower the cloture threshold to three-fifths present and voting. The resolution drew a filibuster, prompting James Pearson (R–KS), a co-sponsor of the measure, to make a motion on February 20 stating that the rules change was a constitutional issue arising under Article I, Section 5 and "superseded the rules specifying that the Senate is a continuing body" as well as the existing cloture rule. He moved that if a majority voted in favor of his motion to end debate on the motion to proceed to the consideration of Senate Resolution 4, the chair would immediately move that question (i.e., the question on the motion to consider, not on the actual adoption of the resolution) (*Congressional Record*, February 20, 1975, p. 3835). Majority Leader Mike Mansfield (D–MT) raised a point of order against Pearson's motion. However, Mansfield's point of order was subject to a tabling motion that would have precluded debate, and if the tabling motion was approved, it would have indirectly established a precedent for majority cloture. Vice President Nelson Rockefeller submitted Pearson's motion and Mansfield's point of order to the Senate for decision, which had the effect of empowering the Senate to invoke cloture on Senate Resolution 4 by a majority vote. After some debate, the Senate voted to table Mansfield's point of order against Pearson's motion, 51-42. This was arguably the first instance in the chamber's history in which a majority of the Senate voted to establish a precedent that would enable cloture by majority vote, although at the time senators disagreed about the impact of the vote on Senate procedure. Nevertheless, the vote did not translate immediately into a victory for the reformers. Senator James B. Allen (D–AL) raised a point of order that Pearson's motion was complex and therefore, under Senate rules, should be divided into parts for debate and voting. The vice president ruled that the motion was divisible, and then Allen proceeded to filibuster the separate parts ("Reformers Lose Chance to Modify Filibuster," *Congressional Quarterly Weekly Report*, February 22, 1975, p. 412). No appeal or vote took place on this ruling.

Several days later, a compromise was reached that would require three-fifths of the chamber to invoke cloture, rather than three-fifths of those present and voting as was originally proposed. Two-

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thirds of the chamber would still be necessary to invoke cloture on a proposal to change the rules. An essential part of the solution to the impasse involved a reversal of the February 20 vote to table Mansfield's point of order, thereby eliminating the precedent that had presumably been established for majority cloture. The Senate voted to reconsider the tabling motion on February 26 by a vote of 53-38, rejected the motion itself 40-51, and then sustained the point of order by a 53-43 vote ("Senate Close to Accord on Filibuster Change," *Congressional Quarterly Weekly Report*, March 8, 1975, p. 502). The opponents of the original proposal forced its supporters to follow the existing procedures under Rule XXII and invoke cloture by a two-thirds vote on the compromise proposal, which they did on a set of two votes with identical 73-21 tallies. The opponents of cloture reform clearly thought it important to attempt to prevent a precedent for majority cloture from remaining on the books. Reform supporters—who were divided on the question of majority cloture itself (as opposed to three-fifths cloture)—thought it better to accept this compromise than to attempt to defeat Allen's filibuster by pushing for ever-more restrictive precedents. Some reformers denied that the February 20 precedent for majority cloture had been reversed, implying that they might employ this tactic in future reform efforts. The compromise was adopted as part of the Senate rules by a vote of 56-27 on March 7.[6]

The period 1917–1975 was book-ended by landmark reforms regarding filibusters. Although there were numerous attempts to reform the cloture rule after it was established in 1917, it was not until 1975 that reformers finally succeeded in reducing the size of the majority formally required to end debate. Toward the end of this period, reformers repeatedly challenged existing supermajority provisions in the Senate rules. Several attempts were made to alter precedents regarding the continuing nature of the Senate and the constitutionality of Rule XXII, but except for the precedent established and then reversed in 1975, floor majorities were not willing to embrace such an approach. The major reforms to the cloture rule in 1949 and 1975 followed a similar pattern: proponents of reform sought rulings from the chair to circumvent existing supermajority requirements, the opponents of reform signaled their intensity on the issue by filibustering but eventually relented when a compromise was reached that strengthened the cloture rule but fell short of majority cloture.

The Tracking System

Any discussion of institutional changes relevant for the filibuster should include mention of the tracking system devised and implemented by Senators Mike Mansfield and Robert Byrd (D–WV) in the early 1970s. This system allows for obstructed bills to be placed on a separate legislative "track" for later consideration, enabling the Senate to move relatively quickly and smoothly to other matters

[6] See Wawro and Schickler 2006, 266–268; Koger and Noel 2009; Gilmour 1995 for more detail. Although it did not involve a direct amendment to Rule XXII, the Budget and Impoundment Control Act of 1974 has relevance for the history of the filibuster and cloture rule reforms, since the Act afforded filibuster protection to budget measures that other kinds of measures do not enjoy. In particular, debate on budget measures is strictly limited and they are not subject to the supermajority provisions of Rule XXII.

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(Binder and Smith 1997; Ornstein 2003). The advantage of this system is that it can reduce the collateral damage of filibusters, and thereby lessen the negative externalities associated with obstruction. But it also means that senators can filibuster an item without having to take and hold the floor in the traditional manner, enabling them to engage in the so-called "silent filibuster".

Some have attributed the dramatic rise in the use of filibusters to the adoption of the tracking system. The argument here is that the tracking system, by enabling silent filibusters, has made obstruction costless in the sense that senators no longer have to forgo other activities while filibustering. But Wawro and Schickler (2006) argue that the tracking system is more of a symptom than a cause of the increase in filibusters that began during the 1970s. The Senate's agenda has become so crowded and senators' individual schedules have become so packed that it has become impractical to fight filibusters as wars of attrition. The slightest delay can wreak such havoc that the preferred strategy has become to build supermajority coalitions that have the ability to invoke cloture in anticipation of filibusters, or pull items from consideration that are unable to attract supermajority support.

Public Opinion on Filibusters and Cloture Reform

During the attempts to change the cloture rule in the 1940s—1960s, polls sought to gauge public opinion regarding the filibuster and the Senate's supermajority requirements. In surveys in 1947, 1949, 1950, 1963, and 1964, The Gallup Poll asked similar questions concerning knowledge of filibusters and support for reducing the cloture threshold. Although opinions on the topic must be interpreted with considerable caution given the potentially limited knowledge that survey respondents have of Senate procedure, the surveys consistently indicated that more respondents were in favor of reducing the cloture threshold to a simple majority than were in favor of keeping it at a two-thirds supermajority. This contrasts with similar polls conducted in the first decade of the 21st century, which indicate that a majority favors maintaining supermajority cloture requirements in the Senate (Wawro and Schickler 2010).

Conclusion

The preponderance of evidence indicates that the contemporary Senate has for all intents and purposes become a supermajoritarian institution. That is, with rare exception, the Senate cannot act unless supermajorities can be formed to invoke cloture and thereby bring business to a final up-or-down vote. The seeds of the supermajority Senate were planted with the adoption of the cloture rule in 1917. However, from 1917–1975, the Senate did not have the supermajoritarian character that is has today. Neither the use of filibusters nor the use of the cloture rule was a part of the Senate's day-to-day functions. However, toward the end of this period, the stage was set for filibusters and cloture votes to become routine in the Senate, marking a fundamental and profound change in the operation of the institution.

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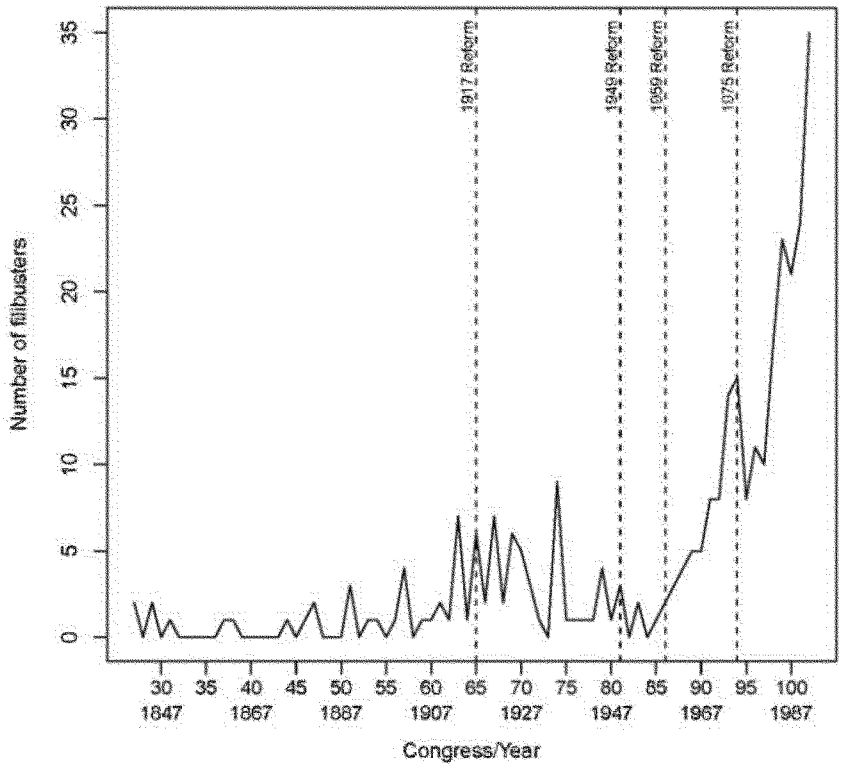
Figure 1: Time Series Plot of Filibusters, 27th–102nd Congress



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Defending the Filibuster

Robert B. Dove

Testimony before the Senate Committee on Rules and Administration

Introduction

I. The recent headlines scream out: "Senate's Abuse of Filibuster Rule Threatens Democracy"[1], "A Dangerous Dysfunction"[2], "Filibuster Abuse: Founding Fathers Didn't Plan It This Way"[3], "Filibuster, Gone Rogue: A Senate Rule That Cripples Our Democracy"[4] and a Harvard Crimson op-ed cried, "Tyranny of the Minority"[5].

The past year's Republican filibuster of the health reform proposals of President Obama and the Congressional Democrats and the struggles to reach the 60-vote super-majority necessary to overcome this tactic have moved the filibuster and associated Senate parliamentary tactics to center stage. As has occurred from time to time in the Senate's history, frustrated majorities and their constituencies, as well as observers in the academia, the media, and the Congress itself, have demanded the elimination of "unlimited debate" in the Senate.

It sometimes seems that one cannot explain or analyze the filibuster without mentioning three figures-- two Jeffersons and a Washington. Nearly all descriptions of the practice reference the probably apocryphal story of George Washington, explaining to Thomas Jefferson, just back from France, that the Senate was included in the federal design to serve the same function as the saucer into which he poured his hot coffee to cool.[6]

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1 *Mercury News* (San Jose, CA) editorial "Senate's Abuse of Filibuster Rule Threatens Democracy" , January 28, 2010

2 Paul Krugman, "A Dangerous Dysfunction", New York Times op-ed, December 21, 2009

3 *Patriot-News* (Harrisburg, PA) editorial "Filibuster Abuse: Founding Fathers Didn't Plan It This Way" , February 16, 2010

4 *Star-Ledger* (Newark, NJ) editorial ""Filibuster, Gone Rogue: A Senate Rule That Cripples Our Democracy"" , January 10, 2010

5 Clay Dumas, *Harvard Crimson* (Cambridge, MA) op-ed "Tyranny of the Minority" , February 17, 2010

6 From its earliest known sources, the liquid is sometimes reported as tea., sometimes as coffee. According to Sen. Robert Byrd, the story's first known appearance is in an 1871 letter from constitutional law professor Francis Lieber to Ohio Representative and later President James A. Garfield. [Congressional Record, April 24, 2006]. According to the Jefferson Encyclopedia on the Monticello website: "...To date, no evidence has surfaced that such a conversation actually took place. The earliest known appearance of this story is in *Harper's New Monthly Magazine* in 1884 ... It was repeated by M.D. Conway in his *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph*, first published in 1888. Since then, the story has appeared many times in print, usually

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The Senate's smaller size, longer terms, and state-wide constituencies all predispose the Senate to be a more moderate, measured body less impacted by the shifting winds of public opinion. The filibuster, although not created by the framers themselves, grew out of the independent precedents and procedures evident in the Senate from the outset, which themselves grew out of the Constitutional design for the Senate. For example, the very first Senate assured that its presiding officer (the Vice-President of the United States) would be a weak one, in clear contrast to the powers of the presiding office of the House of Representatives, the Speaker.

At least as often, when describing the filibuster and its history, commentators refer not to Thomas Jefferson, but to Jefferson Smith, the fictional senator played by the great Jimmy Stewart in his romantic portrayal of the filibuster in the 1939 film, "Mr. Smith Goes to Washington" (Senate Majority Leader Alben Barkley called it "silly and stupid," and asserted that it made the Senate look like "a bunch of crooks." According to the official Senate website, "Years later, producer Frank Capra alleged that several senators had actually tried to buy up the film to prevent its release."[7]

Even the most renown academic examination of the filibuster, the widely acclaimed landmark "Politics or Principle" written by Sarah Binder and Stephen Smith in 1997 ,couldn't get past the second sentence of Chapter One without invoking "Mr. Smith Goes to Washington."[8] And, a mere six paragraphs later, Jefferson and Washington are cooling their favored beverage.[9] Even Sen. Tom Harkin, in February 2010, introducing S. Res. 416, rules change aimed at squashing the filibuster, invoked Jimmy Stewart's character on the Senate floor only seven paragraphs into his speech.[10] And, Washington and Jefferson, sipping their coffee from the saucer popped up a few short minutes later.

Even gridlocked and perhaps dysfunctional, as it frequently is, failing to overcome the extreme partisan political polarization which plagues it today, the Senate, nonetheless, remains unique among the world's legislatures.

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prefaced by the phrase, "the story goes..." or something similar. There is no definitive proof that this story is not true. However, one possible indication that it is apocryphal is the fact that, to all appearances, Jefferson was not against the idea of a bicameral legislature. He wrote to the Marquis de Lafayette in 1789, "...for good legislation two houses are necessary..." [http://wiki.monticello.org/mediawiki/index.php/Senatorial_Saucer#_note-2]

7 U.S. Senate Website

8 Politics Or Principle: Filibustering in the United States Senate, Sarah A. Binder & Steven S. Smith, Brookings Institution Press, p. 1

9 Politics Or Principle: Filibustering in the United States Senate, Sarah A. Binder & Steven S. Smith, Brookings Institution Press, p. 4

10 Senator Tom Harkin, Congressional Record, February 11, 2010, pg. S571

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Famed 19th Century British Prime Minister William Ewart Gladstone is often cited by those seeking to describe the nature of the U.S. Senate. He called the body "the most remarkable of all the inventions of modern politics."

The Senate, which represents not only the people of the United States, but it's fifty sovereign states, is most clearly characterized by two features, the right of its members to unlimited debate and the right to offer amendments practically without limit.

While few outside of the Senate itself would still label it the "world's greatest deliberative body", it remains a symbol of respect for the rights of the minority in a democratic system of government. In the Senate, no minority can be silenced for long. The views of a minority, even a minority of one, can be heard in the Senate, and can, at the very least, have its legislative proposal raised and voted upon. Most importantly, the majority in the Senate is not handed the "keys to the bulldozer".

Carl Marcy, who then served as Sen. J. William Fullbright's Chief of Staff on the Senate Foreign Relations Committee (he served in that post for 18 years), in a commentary written for the republication in 1968 of Lindsay Rogers' 1926 classic "*The American Senate*", put it this way: "The institution of the Senate changes, and yet it remains the same. It is the institution nearest to the pure democracy that was found in the town meetings of New England. The Senate is on occasion exasperating, petty, or mean, but, on other occasions, great. It is indeed the culminating institution in the democratic form of government which Winston Churchill described as 'the worst form of government except all those other forms that have been tried.' Members of the Senate cherish their rights and prerogatives. They feel, as Gibbon wrote in the "*History of the Decline and Fall of the Roman Empire*", that the 'principles of a free constitution are irrevocably lost when the legislative power is nominated by the executive.'"[11]

In the Preface to "*The American Senate*", Rogers argues the key link between the Senate's super-majority requirements and the separation of powers: "The Senate is the only American institution so organized and articulated as to exert any supervision over the executive, and this function would be impossible were the rules to provide for closure [cloture]..." He goes on: "My view then, shortly stated is this: The undemocratic, usurping Senate is the indispensable check and balance in the American system, and only complete freedom of debate permits it to play this role... Adopt closure [cloture] in the Senate, and the character of the American government will be profoundly changed."[12]

Now, let's remind ourselves where the right to unlimited debate-- the practice and the use or abuse of that right which has come to be called "filibuster"comes from. Although this is sometimes misunderstood or misstated, the right of unlimited debate in the Senate is not contained in the Constitution, neither is any prescription for cloture, or the ending of debate. The Constitution does, however, in Article I Section 5, state that, "Each house may

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11 The American Senate, Lindsay Rogers. Commentary by Carl Marcy, p. lxxix

12 The American Senate, Lindsay Rogers.1926. Pp. viii-ix

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determine the rules of its proceedings..."

Senate Rule XIX states: "When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent..."

This rule combined with the absence in the Senate rules of a "previous question motion" (that is a motion to end debate and vote on the matter before the body in normal parliamentary procedure) means that Senators have the right of unlimited debate.

Actually, the Senate's original rules did contain a motion for the previous question. The 1789 rules stated "The previous question being moved and seconded , the question for the chair shall be: 'Shall the main question now be put?' and if the nays prevail, the main question shall not be put."[13] The rule, seldom used, was eliminated in 1806, at the suggestion of outgoing Senate President Aaron Burr.[14]

From that point on the perceived "unlimited debate" of the Senate became a fact and along with it the possibility of the use of that right for purposes of obstruction.

Walter Oleszek in his excellent book on procedure, "*Congressional Procedures and the Policy Process*" quotes Sen. Orville Platt (R-CT) speaking on the Senate floor in 1893: "There are just two ways under our rules by which a vote can be obtained. One is by getting unanimous consent-- the consent of each senator-- to take a vote at a certain time. Next comes what is sometimes known as the process of 'sitting it out', that is for the friends of a bill to remain in continuous session until the opponents of it are so physically exhausted that they can not struggle any longer."[15]

In 1917, the Senate adopted Rule XXII which for the first time provided for a process known as "cloture". This process created a way in which debate in the Senate could be brought to an end. The rule required a two-thirds vote to end debate. Each senator "post-cloture" would be allowed to speak for up to one hour. Over the next 46 years, the Senate managed to invoke cloture on only five occasions.[16]

In 1975, as part of a compromise, the number of votes required to invoke cloture was reduced from 2/3 of senators voting to 3/5 of all senators. This is the famed 60 vote super-majority required to end debate in the current Senate. As part of the compromise, however, the 2/3 threshold for ending debate was retained for changes in the Senate rules. This difference very significantly raises the bar for changing rules in the Senate.

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13 Senate Procedure and Practice, 2nd edition. Martin B. Gold, pp. 48

14 "A Critique of the Senate Filibuster", Roy Ulrich, Huffington Post, May 2, 2009

15 Sen. Orville Platt, Congressional Record, September 21, 1893, pg. 1636

16 U.S. Senate Website

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Majorities are frequently frustrated by the pace of the Senate and the difficulty of enacting the majorities agenda. With that frustration sometimes comes a demand to destroy the filibuster. The forces on the attack against the filibuster and in its defense have a way of switching sides as the majority power shifts. That is not to say that there are not principled adherents on both sides. However, just the recent examples of 2005-2006 when in the face of Democratic filibusters of ten of President Bush's federal circuit court nominees, most Republicans were prepared to eliminate the filibuster in order to get their way and confirm the nominations. Most Democrats opposed that effort and rose to defend the filibuster. Fast-forward to 2009-2010 and a series of Republican filibusters against the major elements of President Obama's legislative agenda. Now, the voices demanding an end to filibusters are on the Democratic side of the aisle, and there are no takers among the Republicans. They are defending the right to unlimited debate and amendment.

The filibuster has been used by both parties. Vice-President Joseph Biden, a long-time member of the Senate, has observed, "'Most people would agree that the United States Senate has never acted as consistently as they have to require a supermajority, that is 60 votes, to get anything done. That's a fundamental shift. I was there for 36 years. I don't ever recall it being abused and used as much as it has now."[17] The question is whether the solution to addressing that use or abuse is by tearing down 200 years of Senate history and tradition and throwing the protections of the minority and the underlying principles of checks and balances and separation of powers away in the process.

It has become the fashion in academia and the public media, as well, to view the filibuster as strictly a tactic of obstruction and as an affront to the sacrosanct majority rule. Nearly forgotten or simply dismissed is the role which extended debate has played in the moderating role of the Senate as "saucer" intended by the framers in requiring minority participation and the protection of the Senate's role as a counterweight to an otherwise unchecked executive.

If the filibuster is swept away, what becomes of the Senate of the Founders, of Madison's "necessary fence" against the danger of an overzealous majority in the nation?

Madison wrote in Federalist #51 (some think it was Hamilton) that "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt a primary control on the government; but experience has taught mankind the necessity of auxiliary precautions... "[18]

Detractors like Sen. Harkin will argue, as he did in the Senate on February 11, 2010,

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17 Vice President Joseph Biden, Face the Nation, February 14, 2010

18 James Madison, Federalist #51. February 6, 1788

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"James Madison would be appalled by the current abuse of the filibuster to impose minority rule. Proponents of the filibuster regularly quote the oft told story of George Washington's description to Thomas Jefferson." [There it is again.] "...At issue is a fundamental principle of our democracy-- rule of the majority in a legislative body. As Alexander Hamilton noted in the Federalist Papers, 'The fundamental maxim of republican government... requires that the sense of the majority should prevail."[19]

But, the founders established a series of Madison's "auxiliary precautions" as checks and balances many of which do not strictly adhere to majority rule precepts. They feared unfettered majorities. For example, the Connecticut Compromise, itself, set up a Senate which disproportionately represents the smaller states without regard to "one man- one vote ideals" and the electoral college created in the Constitution does not even assure that a minority cannot elect the President of the United States as they did in 2000. (No matter how Florida is counted, no one denies that Al Gore received more votes in the nation than George Bush).

Lindsay Rogers in *"The American Senate"* expresses it well, "It is worthwhile stressing these intentions of the framers, for one must understand clearly the nature of the system they desired in order to appreciate the present-day importance of the Senate. This importance is quite different from that contemplated by the architects of the Constitution, but its results, nevertheless, from their arrangements to prevent 'an unjust combination of the majority'."[20]

Even for the nation's media, their attitudes about the filibuster tend to be situational, but in our view the *New York Times* got it right in March 29, 2005 editorial opposing the so-called "nuclear option" (in fairness, we'll later quote them in opposition to the filibuster): "Senators need only to look at the House to see what politics looks like when the only law is to win at any cost. The Senate, of all places, should be sensitive to the fact that this large and diverse country has never believed in government by an unrestrained majority rule."[21]

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19 Senator Tom Harkin, Congressional Record, February 11, 2010, pg. S571

20 The American Senate, Lindsay Rogers.1926. p. 16

21 *New York Times* editorial "Walking in the Opposition's Shoes" , March 29, 2005

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STATEMENT ON FILIBUSTERS AND CLOTURE

HEARING BEFORE THE SENATE COMMITTEE ON RULES AND ADMINISTRATION MARCH 25, 2010

STANLEY BACH

Mr. Chairman and Senators, I was pleased and a bit surprised by your invitation to participate today in your hearing on filibusters and cloture in the Senate. For the record, I joined the Congressional Research Service in 1976; when I retired in 2002, I had been Senior Specialist in the Legislative Process for the preceding 14 years. In fairness, I must add that, since retiring, I have not immersed myself in the daily details of congressional life, certainly in comparison with how much they pre-occupied me before my retirement. I am pleased to report, Mr. Chairman, that there is life after Congress.

Let me first congratulate you, Mr. Chairman, for having scheduled this hearing. I needn't belabor the critical importance of filibusters and cloture to the Senate. Their importance is especially well understood by the Senators serving on this committee, so many of whose members now have or have had party leadership responsibilities for arranging the business of the Senate and bringing it to a timely resolution. Should there be any doubt, however, all one needs to do is to take note of all the newspaper and magazine articles that claim that some bill will require 60 votes for the Senate to pass it. That's not true, of course; it's merely a short-hand way of saying that it will require 60 votes for the Senate to have an opportunity to pass the bill by a simple majority vote. Such claims, however, do illustrate how what once was an unusual and extreme recourse to the right of extended debate has now become a routine aspect of daily Senate life.

I'm sure that the members of this committee, and especially those who are attorneys, will recall the famous statement of Justice Oliver Wendell Holmes in Northern Securities Co. vs. United States, 193 U.S. 197 (1904), that "great cases, like hard cases, make bad law." Holmes went on to explain that "great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

There have been instances in which the Senate has changed its floor procedures in the heat of the moment and without the benefit of prior consideration by this committee. I have in mind, for example, what sometimes was called the "Hutchison precedent" affecting opportunities to legislate on general appropriations bills, and the so-called "FedEx precedent" affecting the matters that Senators could include in a conference report

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without exceeding the scope of the differences submitted to conference. In both cases, as I recall, the Senate set these precedents by overturning rulings of the Chair on appeal. In both cases, the Senate later vitiated the effect of the precedents to restore, more or less, the status quo ante. And in both cases, I suspect, at least some of the Senators who voted to establish those precedents probably did not have in mind the longer-term consequences their decisions had for the Senate.

I understand that I can contribute best to the Committee's deliberations by providing some background and context on the history of the cloture rule and then on recent trends, practices, and precedents relating to filibusters. I do not for a moment believe that I have anything to say on these two subjects that is not already known to the members of this Committee. Nonetheless, I hope I can offer some reminders of the Senate's history and current practices that may assist the Committee in its deliberations.

DEV ELOPMENT OF THE CLOTURE RULE

For more than a century, Mr. Chairman, the Senate operated without a cloture rule or any other rule of general applicability by which Senators could vote to end a debate.

Drawing on the practices of the British Parliament and the Continental Congress, the first rules that the Senate adopted, in 1789, did provide for a motion for the previous question. However, this should not be understood to be the same motion that the House uses regularly to end the debate on a measure and preclude further amendments to it. Instead, as this Committee's own *Senate Cloture Print* (S. Prt. 99-95; 99th Congress, 1st Session) from 1985, puts it, the motion "was used to avoid discussion of a delicate subject or one which might have injurious consequences" (p. 11). The effect of the Senate's previous question motion was to remove the pending measure from further floor consideration at that time, not to bring it to a vote. In any event, the motion was used only three times before it was dropped from the Standing Rules in 1806. (In this section of my statement, I draw heavily on the *Senate Cloture Print* for facts, but not for interpretations.)

During the course of the 19th Century, there were occasional calls for the Senate to adopt the previous question as we now know it. In 1841, Henry Clay made such a proposal. Not surprisingly, John Calhoun opposed it strenuously, and nothing came of it. In that year, the House first adopted its one-hour rule. Clay proposed the same for the Senate but, again, unsuccessfully. Stephen Douglas also proposed that the Senate institute the previous question motion in 1850, and other Senators made the same or related proposals in the 1860s and 1870s. In 1883, the Committee on Rules, a forerunner of this Committee, included the previous question as part of a general recodification of the Senate's rules, but the Senate struck that provision on the floor.

Certain motions were made non-debatable and, from time to time, debate limits were imposed temporarily, as on debate in secret session during the Civil War and on appropriations bills beginning in the 1870s. In 1870, the Senate agreed to its first rule for imposing a five-minute limit on debate during the call of the Calendar in the Morning Hour under Rule VIII (a procedure that the Senate no longer uses). Interestingly, the Senate appears to have decided in 1868 that the motion to proceed no longer would be

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debatable. If so, that decision was relatively short-lived because, in 1881, the Senate adopted an order imposing a 15 minute time limit for debating any motion to proceed that was offered during the remainder of the session.

I recall encountering contentions that the right of unlimited debate was part of the Founders' conception of, or plan for, the Senate, and that it was understood to be an integral part of the Senate's procedures from the time it first met. This is by no means clear, however. Scholars have sought in vain for evidence to support such claims. In their book on *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution Press, 1997), Sarah Binder and Steven Smith, two highly regarded students of the Congress, examined these claims and concluded instead (at p. 20) that "what is known about the framers' views on legislative procedure suggests quite the opposite, namely, that empowering a minority to veto the preferred policies of the majority would produce undesirable legislative outcomes. Neither the framers nor the early senators expected that filibusters would be invented for obstructive purposes or that more than a majority would be needed for the passage of measures...."

Not having examined the historical record with equal care, I can't endorse or contradict their conclusion. However, they have made me skeptical of claims that unlimited debate was woven into the intended fabric of the Senate. On the other hand, it does not necessarily follow that, before the Civil War at least, most Senators did not think of extended if not unlimited debate as a natural characteristic of the Senate. The membership and the workload of the Senate then were much smaller, so the Senate could afford to endure longer debates on bills that everyone recognized to be of true national importance. Although, as I have mentioned, there were some proposals to amend the Senate's rules to limit debate, I suspect that there were many long debates that were not then thought to be filibusters, even though that is what we would be very likely to call debates of the same length today.

When I was a boy, I learned about the Hayne-Webster debates, not the Hayne or Webster filibusters. Yet Senators such as Webster sometimes would give speeches that lasted for hours on end and then would be resumed on the following day. Think back if you will to legislation such as the Missouri Compromise of 1820 and the Kansas-Nebraska Act of 1854. Can anyone doubt that bills of comparable importance would be filibustered in the contemporary Senate? In his *Disquisition on Government*, John Calhoun propounded a theory of concurrent majorities to defend the proposition that no legislation detrimental to slavery should be imposed on the Southern states. But I don't recall that a pillar of his position was the right of Senators to filibuster by debate. Instead, it may be that most Senators, most of the time, simply accepted long debates as being part of the Senate's way of doing business.

Whatever the truth of the matter, during the closing years of the 19th Century, Senators became more concerned about the use of procedural tactics to delay or prevent the final disposition of matters, especially by what we now would call filibusters, so they began to agitate for rules changes to prevent filibusters or mitigate their effects. In 1890, Senator Aldrich made what probably was the first proposal for a cloture rule, and other Senators followed suit in 1893. All their proposals were for imposing cloture by simple

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majority vote. The Senate did not adopt any of these proposals. In fact, Aldrich's 1890 resolution may have been the first proposal to check filibusters that succumbed to a filibuster.

In 1915, the Committee on Rules reported a resolution for cloture by a vote of two-thirds of the Senators present and voting. It was much the same proposal that the Senate adopted two years later, following the famous, or infamous, and successful filibuster on the Armed Ship Bill that led President Wilson to call on the Senate to amend its rules. The effect of the 1917 cloture rule was restricted in that it applied only to the pending measure; cloture could not be invoked on nominations or on motions to proceed to legislation. However, the exact form of the new rule probably made little difference because, as I shall document later in my statement, the Senate did not attempt to invoke it very often at all during the next four or five decades.

The 1917 rule remained unchanged until 1949, when it was amended to permit cloture to be invoked on a pending motion or other matter, not only on a pending measure. The effect was to make it possible the Senate to invoke cloture on nominations as well as on motions to proceed. However, cloture was not permitted on propositions to change the Senate's rules, including, of course, the cloture rule. At the same time, the majority needed to invoke cloture was raised from two-thirds of the Senators present and voting to two-thirds of the entire Senate. Ten years later, the latter change in Rule XXII was revoked while, for the first time, cloture was permitted on amendments to the Senate's rules. (The Senate also added what is now paragraph 2 of Rule V, which states 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.")

Then, beginning in 1975, came the series of three amendments to the cloture rule with which Senators and contemporary observers of the Senate are most likely to be familiar.

First, in 1975, the majority required for invoking cloture was changed from two-thirds of the Senators present and voting to three-fifths of the Senators duly chosen and sworn. This change has made it easier to invoke cloture by reducing the required majority from a maximum of 67 (assuming all Senators vote and there are no vacancies in the Senate) to a minimum of 60 (again assuming there are no Senate vacancies). Under the revised rule, if a Senator fails to vote on a cloture motion, that has the same effect as if the Senator votes against cloture. As part of the compromise that allowed the Senate to make this change in Rule XXII, the previous requirement – two-thirds of the Senators present and voting – was retained for "any measure or motion to amend the Senate rules." The purpose and effect was to ensure that Senators would not find it easier to invoke cloture on proposals to amend Rule XXII in order to make it still easier to invoke cloture in the future. (It is worth noting that, as I understand it, the two-thirds requirement applies only to formal amendments to the Senate's standing rules, and not to either free-standing Senate resolutions or to bills and other resolutions that include one or more provisions that qualify as rule-making provisions.)

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Second, in 1979, the rule was amended primarily to impose a one-hundred hour cap on post-cloture consideration of the measure or matter on which cloture had been invoked. Before and since, Rule XXII has stated that, under cloture, no Senator may speak for more than one hour on the measure or matter being considered. That one-hour limit applied to debate but not to time consumed by other proceedings, especially quorum calls and rollcall votes and the time required to read amendments. Thereafter, Senators took increasing advantage of this distinction between "debate" and "consideration" to engage in what became known as post-cloture filibusters. The 1979 rules change was designed to control post-cloture delay by imposing the one-hundred hour limitation on all post-cloture proceedings.

Then third, in 1986, at the same time the Senate authorized television coverage of its floor sessions, the cap on post-cloture consideration was reduced from one hundred to thirty hours. What I remember most vividly about that change in Rule XXII, Mr. Chairman, was how little debate there was on it and how little controversy it engendered – especially in comparison with the intense controversy that arose in 1975, both over the merits of amending the cloture rule and over the strategy advanced for securing a vote on the proposed amendments. I suppose that, by 1986, Senators who envisioned themselves participating in filibusters concluded that thirty hours of time for post-cloture consideration was sufficient for their needs. As it was amended in 1986 and as it presently stands, Rule XXII is internally contradictory in that it allows a maximum of one hour per Senator for debate under cloture, but it also provides for a maximum of only thirty hours for post-cloture consideration, including debate, for all Senators. However, the Senate has been able to live comfortably with this inconsistency because the Senate has not often consumed all the time available under the post-cloture cap on consideration, whether it was the original one hundred hours or the current limit of thirty hours. (In fact, I don't believe that the full 30 hours had ever been consumed by the time I retired from CRS in 2002. I'm advised that it has happened on occasion since then.)

From time to time since 1986, there have been calls for making further change in Rule XXII, either directly or indirectly. What was most important was what the Senate did not do in 2003, in response to majority frustration at the difficulties it was experiencing in securing Senate floor votes to confirm some of the President's judicial nominations. What became known as the "nuclear option" was a strategy to change the Senate's established precedents regarding debate on nominations by creating a new precedent that would have precluded or foreshortened future filibusters on judicial confirmations. Whatever the merits of the claims and counter-claims may have been, wiser heads prevailed, and the Senate avoided opening the door to making other changes in the Senate's procedures effectively by simple majority vote and without having to invoke Rule XXII.

CHANGES IN SENATE PRACTICE AND PRECEDENT

The changes in Rule XXII that I've summarized were of obvious importance. But of equal or even greater importance, I believe, have been several changes in the Senate's practices and precedents. In fact, it becomes difficult to know whether changes in practice provoked the changes in the rule and precedents, or whether the changes in Rule XXII and the precedents for interpreting and applying it in turn created incentives for subsequent

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changes in practice. I believe there has been a strong interactive effect in which changing practices have stimulated changes in the rule and in Senate precedents which in turn have stimulated additional changes in practices, and so on.

Filibusters once were matters of considerable drama, not only because of their relative rarity, but because they sometimes involved round-the-clock sessions, with media reports of Senators sleeping on cots near the Chamber and tempers becoming ragged as day turned into night and, worse yet, night turned back into day. Although "Mr. Smith Comes to Washington" is hardly an accurate depiction of the Senate in session, certainly some of the civil rights filibusters of the 1960s were very different from the much more routinized and much less inconvenient filibusters of today.

One reason for that change was the development of the practice of scheduling the Senate's business along several tracks. No longer did the filibuster on one bill necessarily delay Senate action on everything else. Instead, the Senate typically has agreed, explicitly or implicitly, in recent decades to limit the effect of a filibuster to the measure or matter in question, while allowing other, less contentious business to be conducted during other times of the day or week. That development made filibustering less demanding on all Senators. That was the good news. The bad news was that the same development may have made Senators more willing to filibuster because doing so demanded less of their time and energy, imposed fewer demands on their colleagues, and interfered less with the ability of the Senate to conduct other business.

In this context, let me touch in passing on calls for the Senate to revert to the good old days (or the bad old days, depending on your point of view), and for the leadership to keep the Senate in session around the clock in order to exhaust filibustering Senators. Suffice it to say that the burden falls on a bill's supporters to make a quorum; otherwise, its opponents need only suggest the absence of a quorum and either force 51 or more of the bill's supporters to drag themselves to the floor at 3:00 a.m., or whenever the quorum call take place, or force the Senate to adjourn until the time already fixed for its next sitting.

In short, it's probably fair to say that the Senate's more accommodative scheduling practices have made it easier for the body to cope with the rising number of filibusters and filibuster threats, while at the same time reducing the costs incurred by Senators engaging in the filibusters or threatening them. With more legislation to consider than the floor schedule can easily accommodate, there is a natural tendency for the majority party leadership to give priority to bills that will impose limited and more or less predictable demands on the Senate's time. Reasonable as that practice may be, it also seems likely that it has increased the potency of filibuster threats. And, of course, these threats can take the form of holds, which I believe are likely to persist in one form or another, regardless of whatever formal procedural requirements or barriers the Senate tries to impose on them.

Many observers believe that it was no coincidence that the years following the 1975 change in Rule XXII – the amendment that reduced the requirement for cloture (in most cases) from two-thirds of the Senators present and voting to three-fifths of the Senators

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duly chosen and sworn – also witnessed a larger number of post-cloture filibusters. Senators more often adopted tactics such as demanding that long amendments be read and insisting on rollcall votes and frequent quorum calls in order to extend the length of time that a measure or matter remained before the Senate even after the Senate had invoked cloture on it. It certainly is reasonable to infer that Senators who opposed making it easier to invoke cloture reacted to the 1975 rules change by taking advantage of tactics that made the cloture procedure less effective in bringing measures or matters to final votes on the Senate floor.

The 1979 rules change that imposed the one-hundred hour cap on post-cloture consideration was an obvious response to the effectiveness of post-cloture filibustering. The Committee also will bear in mind the precedents that the Senate had set two years earlier, during a highly contentious filibuster of a natural gas deregulation bill. During the course of that filibuster, the Senate set a series of precedents that limited the effectiveness of post-cloture filibusters by increasing the powers and discretion of the Presiding Officer when the Senate is proceeding under cloture. Perhaps the most important of these decisions required the Presiding Officer to take the initiative under cloture to rule out of order, or even decline to entertain, amendments that were out of order on their face — for example, amendments that were non-germane or dilatory – without Senators first having made point of orders to that effect from the floor. The Presiding Officer also was empowered to rule other matters out of order as dilatory. It has rarely, if ever, been necessary since then for a Presiding Officer to invoke such precedents, but they did — and do — limit the ways in which Senators can consume valuable time after the Senate has voted for cloture.

Perhaps another reaction to reducing the majority required for cloture and limiting opportunities for post-cloture delay was an increase in filibusters on motions to proceed, a subject to which I'll return. As the Committee fully understands, Senators can, under most circumstances, filibuster the motion to proceed to the consideration of a bill, and it may be necessary to invoke the cloture procedure with respect to that motion, even before the Senate actually takes up the bill which then is subject to a second and separate filibuster. And even more recently, of course, we have seen a new inclination to filibuster, or threaten to filibuster, what previously had been the once-routine motions required for the Senate to send a bill to conference with the House.

FREQUENCY OF FILIBUSTERS AND CLOTURE VOTES

The most important trend and change in practice has been the recent marked increases in the number of cloture motions filed and the number of cloture votes. That having been said, I should immediately emphasize that data on cloture motions and votes are, at best, an imprecise surrogate for data on the numbers of filibusters.

There is no objective standard to identify a filibuster. In that sense, a filibuster is somewhat like pornography; we may have trouble setting out criteria for making a positive identification, but we think we know one when we see one. How much debate has to take place before we are justified in concluding that a filibuster is taking place or has taken place? For the Senate to devote a week to debating a major tax bill would seem both

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reasonable and responsible. For the Senate to devote as much time to debating a bill to re-name a Federal office building would strike most of us as satisfactory evidence of a filibuster.

Certainly the number of cloture votes in a Congress is not equal to the number of filibusters. One reason is that devices such as holds, which are implicit threats to filibuster, cannot give rise to cloture motions because a motion or measure has to be under consideration by the Senate before cloture can be filed, and the very purpose and effect of a successful hold is to prevent the matter in question from being called up or made subject to a motion to proceed. Yet, as every Senator here today knows so well, the threat of a filibuster can be every bit as effective as a filibuster itself in affecting the Senate's floor agenda and inducing substantive changes in legislation. This makes it impossible to do more than guesstimate the impact of filibustering on the Senate. So much of that impact takes the form of adjustments and accommodations that floor leaders, committee chairmen, and other Senators make when confronted with the threat or the fear of a filibuster that has not yet taken place and that may never take place.

Another and equally obvious and serious problem for the student of the Senate is that there has not been one cloture motion for each filibuster. Some filibusters have not provoked a single cloture motion; other filibusters have been the subject of multiple cloture votes. Some cloture motions have been filed before there was any real evidence that a filibuster was in progress or on the Senate's doorstep. There even have been cases in which cloture has been filed primarily in the hope of triggering the germaneness requirement on amendments that applies under cloture, and not for the purpose of limiting further debate. Yet even with these reservations, the frequency of cloture motions and cloture votes is the best and really the only surrogate for the frequency of filibusters, however defective a surrogate it may be.

So the Committee may be interested in the following decade-by-decade data that Richard Beth, my friend and former colleague at CRS, has made available to me to include in this statement:

	Number of Cloture Motions	
	Filed	Agreed to
67th-71st Congresses, 1921-1931	11	3
72nd-76th Congresses, 1931-1940	4	0
77th-81st Congresses, 1941-1950	12	2
82nd-86th Congresses, 1951-1960	2	0
87th-91st Congresses, 1961-1970	28	4
92nd-96th Congresses, 1971-1980	166	43
97th-101st Congresses, 1981-1990	207	54
102nd-106th Congresses, 1991-2000	358	92
107th-111th Congress (1st sess.), 2001-2009	435	175

These data speak for themselves, loudly and eloquently. Nonetheless, allow me to belabor the obvious.

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According to this Committee's own invaluable print on the *Senate Cloture Rule*, the first cloture vote, and the first time cloture was invoked, occurred in 1919, two years after the cloture rule first was adopted. Interestingly enough, that first vote concerned the Treaty of Versailles, an item of executive business. During the next four decades – in the 1920s, 1930s, 1940s, and 1950s – Senators filed a combined total of 29 cloture motions, considerably less than one each year on average. During the same period, there were only 22 cloture votes. By contrast, during the 1960s, there were roughly as many cloture motions (28) and votes (26) as during the previous four decades combined. All but a handful of those votes in the 1960s dealt with civil rights legislation; one of the few exceptions was an unsuccessful attempt to invoke cloture on the nomination of Associate Justice Abe Fortas to become Chief Justice.

Then the numbers of cloture motions exploded so dramatically that the change has to be described as qualitative, not merely quantitative. The number of cloture motions almost sextupled during the 1970s compared with the 1960s. That number increased again in the 1980s, and then jumped once more, this time by more than 170 percent, between the 1980s and the 1990s. Compare, for example, the 96th Congress of 1979-1980 and the 110th Congress of 2007-2008, both of which concluded in presidential elections. The 96th Congress witnessed 33 cloture motions filed, of which 10 were agreed to; in the 110th Congress, 145 motions were filed, of which the Senate agreed to 61. During the latter Congress, the Senate approved almost twice as many cloture motions as had even been filed during the earlier Congress.

In light of these data, I do not see how we can fail to conclude that the Senate is a different place today than it was when William White wrote of the Senate as the "Citadel" and when Lyndon Johnson as Majority Leader doled out the "Johnson treatment." At one time, filibusters generally were reserved for matters of obvious national importance, and cloture motions usually were filed only after an extended period of debate already had taken place. During the 1960s, filibusters attracted national attention, not only because of the importance of the issues involved, but also because filibusters were fairly unusual happenings. Today, by stark contrast, filibusters and cloture votes have become almost a routine part of the Senate's floor procedures. In the Senate today, filibusters and cloture motions have become almost trivialized.

Furthermore, we also have witnessed cloture motions being filed sooner than in decades past. There even have been instances in which a cloture motion has been filed as soon as the Standing Rules permitted—that is, immediately after the measure or matter in question was laid before the Senate for consideration. The argument in defense of that practice is that, in each such instance, there was no doubt that a filibuster was about to begin, so there was no point in having the Senate devote hours or days to demonstrating that fact before testing the will of the Senate by a cloture vote. Not surprisingly, on the other hand, opponents of such cloture motions have disclaimed any intention to filibuster and have asked how other Senators possibly could know their intentions before debate even began.

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As I mentioned earlier, I recall that there have been instances (though I cannot cite specific examples today) in which cloture was filed not primarily to end debate, but largely in order to impose a germaneness requirement on amendments. In fact, most Senators on this Committee will be aware of proposals to allow the Senate to impose a germaneness requirement by, I believe, a three-fifths vote without also imposing the debate limitations under cloture, to apply either to any bill or only to general appropriations bills.

In addition to looking at trends in the numbers of cloture motions filed and the number of times cloture has been invoked, we also can ask a related question: how many distinct items of Senate business have involved one or more cloture votes? An item of business is a bill, resolution, treaty, or nomination. The same item of business may give rise to cloture motions on, for example, a motion to proceed, an amendment, the vote on final passage, a conference report, or other procedural actions. So following is a decade-by-decade breakdown, also compiled by Dr. Beth of CRS, of the number of items of business that resulted in one more cloture motions being filed:

	Items of Legislative and Executive Business Provoking One or More Cloture Motions
67th-71st Congresses, 1921-1931	9
72nd-76th Congresses, 1931-1940	3
77th-81st Congresses, 1941-1950	11
82nd-86th Congresses, 1951-1960	2
87th-91st Congresses, 1961-1970	16
92nd-96th Congresses, 1971-1980	67
97th-101st Congresses, 1981-1990	91
102nd-106th Congresses, 1991-2000	174
107th-111th Congress (1st sess.), 2001-2009	223

Again we see a sharp increase from the 1960s to the 1970s, and then still further increases during the three decades that have followed. Of the almost 600 items of business that elicited one or more cloture motions between 1921 and 2009, almost exactly two-thirds of them arose since 1991. While it remains untrue that it requires 60 votes to get anything done in the Senate, it is becoming less and less untrue. And, perhaps ironically, I understand that, in an innovation that largely post-dates my time on Capitol Hill, the Senate sometimes has transformed this short-hand mischaracterization into the truth by entering into unanimous consent agreements requiring 60 votes for the Senate to take certain actions that otherwise would have required only a simple majority. In other words, in these cases, the Senate has accepted the vote threshold required to invoke cloture without all the other procedures, requirements, and prohibitions that come with the cloture procedure.

Notwithstanding the limitations of using data on cloture motions and votes to measure the frequency of filibusters, the data I have presented above document a

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remarkable change in how the Senate has done its business—or perhaps more to the point, in the lengths to which the Senate has had to go as it has attempted to do its business.

Finally, Mr. Chairman, let me comment briefly on motions to proceed. As I already have reminded the Committee, these motions have not always been subject to cloture motions. Furthermore, even after it became possible to invoke cloture on a motion to proceed, it rarely was necessary to do so. That has been changing. Majority Leaders of both parties have had to rely more on motions to proceed, which Senators have been increasingly willing to filibuster, or make credible threats to filibuster, because it has become more difficult to bring up major bills by unanimous consent. In turn, this combination of developments has increased the importance of holds and led to efforts to reform, regulate, or end the practice.

Dr. Beth has provided me with data on cloture motions filed on motions to proceed for the 13 Congresses beginning with the 98th (1983-1984) and carrying through the end of the 110th (2007-2008). During 24 of those 26 years, cloture motions were filed each year on an average of about eight motions to proceed each year. Is that a lot or a little? Well, during the last of the 13 Congresses, the 110th, the same average jumped to more than 30 per year. As investment advisors always are quick to point out, past performance is no guarantee of future results. Even so, if this recent development is an indication of what the future holds, it would seem to raise legitimate questions about why any Senator would wish to take on the burden of the Majority Leadership!

CONCLUDING OBSERVATIONS

Bicameralism as we know it in the United States tends to slow down the legislative process. The rules of the Senate tend to slow it down even more by preventing the majority party from working its will at a time of its choosing. In that sense, it might be said that filibustering makes the Senate, and the Congress, less efficient than it otherwise might be. But that argument is too simple because it equates efficiency with speed, and it's the easiest thing in the world to make mistakes quickly. No, a legislative body that produces policy decisions that have been developed and scrutinized with care, and that attempt to reflect the varied and sometimes complex preferences and interests of our society, is more likely to merit being called efficient.

I think there's a lot to be said for a bicameral legislature in which somewhat different decision-making rules are associated with each house. The House of Representatives is unquestionably a majority-rule institution. Especially in this period of high intra-party agreement and high inter-party polarization, the majority party usually can work its will (although it's not always easy, as this week's heath care reform votes attest). The result can be that there's not much need for the majority to compromise with the minority, and not much incentive for the minority to work with the majority if the alternative is an effective campaign issue that the minority hopes it can use to become the new majority.

Why do Senators filibuster? If their purpose and intent is to exercise a minority veto, then defending recent practice becomes, in my view, an uphill climb. If, on the other

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hand, the objective of filibustering, or threatening to filibuster, is to give the majority an incentive to take better account of policy interests and preferences that otherwise would be insufficiently reflected in new legislation, then filibustering becomes much easier for me to justify. So as the members of this Committee ask themselves whether the Senate needs to change its rules or practices, I think a useful starting point is to ask whether the usual purpose of filibusters is more balanced legislation or no legislation at all.

Thank you, Mr. Chairman, for affording me this opportunity to testify today. I will be pleased to contribute to the Committee's work in whatever ways I can.

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Submitted for the Record
Senator Lamar Alexander
(Senator Reid's Book)

SEVEN

THE NUCLEAR OPTION

PEACEABLE AND PRODUCTIVE are not two words I would use to describe Washington in 2005.

I just couldn't believe that Bill Frist was going to do this.

The storm had been gathering all year, and word from conservative columnists and in conservative circles was that Senator Frist of Tennessee, who was the Majority Leader, had decided to pursue a rules change that would kill the filibuster for judicial nominations. And once you opened that Pandora's box, it was just a matter of time before a Senate leader who couldn't get his way on something moved to eliminate the filibuster for regular business as well. And that, simply put, would be the end of the United States Senate.

It is the genius of the founders that they conceived the Senate as a solution to the small state/big state problem. And central to that solution was the protection of the rights of the minority. A filibuster is the minority's way of not allowing the majority to shut off debate, and without robust debate, the Senate is crippled. Such a move would transform the body into an institution that looked just like the House

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of Representatives, where everything passes with a simple majority. And it would tamper dangerously with the Senate's advise-and-consent function as enshrined in the Constitution. If even the most controversial nominee could simply be rubber-stamped by a simple majority, advise-and-consent would be gutted. Trent Lott of Mississippi knew what he was talking about when he coined a name for what they were doing: the nuclear option.

And that was their point. They knew—Lott knew—if they trifled with the basic framework of the Senate like that, it would be nuclear. They knew that it would be a very radical thing to do. They knew that it would shut the Senate down. United States senators can be a self-regarding bunch sometimes, and I include myself in that description, but there will come a time when we will all be gone, and the institutions that we now serve will be run by men and women not yet living, and those institutions will either function well because we've taken care with them, or they will be in disarray and someone else's problem to solve. Well, because the Republicans couldn't get their way getting some radical judges confirmed to the federal bench, they were threatening to change the Senate so fundamentally that it would never be the same again. In a fit of partisan fury, they were trying to blow up the Senate. Senate rules can only be changed by a two-thirds vote of the Senate, or sixty-seven senators. The Republicans were going to do it illegally with a simple majority, or fifty-one. Vice President Cheney was prepared to overrule the Senate parliamentarian. Future generations be damned.

Given that the filibuster is a perfectly reasonable tool to effect compromise, we had been resorting to the filibuster on a few judges. And that's just the way it was. For 230 years, the U.S. Senate had been known as the world's greatest deliberative body—not always efficient, but ultimately effective.

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There had once been a time when the White House would consult with home-state senators, of either party, before sending prospective judges to the Senate for confirmation. If either senator had a serious reservation about the nominee, the nomination wouldn't go forward. The process was called "blue slips." The slips were sent to individual senators. If the slips didn't come back, there was a problem. The Bush White House ignored the blue-slip tradition, among many other traditions, and showed little deference to home-state senators.

We realized that if they were not going to adhere to our blue slips or entertain any advice from us, then they were trying to subvert the minority's ability to perform its advise-and-consent function under the Constitution. It was clear that Bush and Karl Rove were going to try to load all the courts—especially the circuit courts of appeals, because you can't count on Supreme Court vacancies. And most of the decisions are made by circuit courts anyway, so it could be said that they are the most important judicial nominees of all.

We Democrats made a decision that since the White House was ignoring the Constitutional role of the Senate, then we were going to have to delay some of the more extreme nominees. Be cautious and look closely was the byword. One rule we tried to follow was that if all Democrats on the Judiciary Committee voted no on a nominee, then we would say, "Slow down."

The Republicans immediately complained that they had never filibustered Clinton's judges, a claim that simply wasn't true. Frist himself had participated in the filibuster of the nomination of Judge Richard Paez, which at the time had been pending in the Senate for four years. When Senator Schumer had called him on it on the Senate floor, Frist had stammered to try to find a way to explain how their use of the filibuster was legitimate and ours wasn't. And more-

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over, it was a disingenuous claim. The reason the Republicans didn't deploy the filibuster that often when Clinton was President is that they had a majority in the Senate, and they had simply refused to report more than sixty of President Clinton's judicial nominees out of committee, saving them the trouble of a filibuster. In any case, the U.S. Senate had never reached a crisis point like this before.

In the early part of 2005, I hadn't wanted to believe it was true, and felt confident that we could certainly avoid it. We make deals in the Senate, we compromise. It is essential to the enterprise. I was determined to deal in good faith, and in a fair and open-minded way. "What I would like to do is say there is no nuclear option in this Congress," I said on the floor one day, "and then move forward." Give us a chance to show that we're going to deal with these nominees in good faith and in the ordinary course. And if you don't think we are fair, you can always come back next Congress and try to invoke the nuclear option. Because it would take a miracle for us to retake the Senate next year.

Did I regret saying this? No. Because at the time I believed it, and so did everyone else.

And in any case, we had confirmed 204, or 95 percent, of Bush's judicial nominations. It was almost inconceivable to me that the Republicans would debilitate the Senate over seven judges. But the President's man, Karl Rove, was declaring that nothing short of 100 percent confirmation rate would be acceptable to the White House, as if it were his prerogative to simply eliminate the checks-and-balances function of the Senate. Meanwhile, we were at war, gas prices were spiking, and we were doing nothing about failing pensions, failing schools, and a debt-riven economy. Where was our sense of priorities?

I had been pressing Majority Leader Bill Frist in direct talks

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for a compromise—one in which Democrats prevented the confirmation of some objectionable judges and confirmed some that we didn't want to confirm, all in the interest of the long-term survival of the Senate. But I had been getting nowhere. Those talks had essentially ceased by the end of February. And then Senator Frist began advertising that he was aggressively rounding up votes to change the Senate rules, and Republican senators, some quite prominent, began to announce publicly that they supported the idea. Pete Domenici of New Mexico. Thad Cochran of Mississippi. Ted Stevens of Alaska. Orrin Hatch of Utah. I was so disappointed that they were willing to throw the Senate overboard to side with a man who, it was clear, was becoming one of the worst Presidents in our history. President Bush tried at any cost to increase the power of the executive branch, and had only disdain for the legislative branch. Throughout his first term, he basically ignored Congress, and could count on getting anything he wanted from the Republicans. But from senators who had been around for a while and had a sense of obligation to the institution, I found this capitulation stunningly shortsighted. It was clear to me that Frist wanted this confrontation, no matter the consequences.

And as the weeks and months passed, it dawned on me that Frist's intransigence was owed in no small part to the fact that he was running for President. Ending the filibuster so that extremist judges could be confirmed with ease had become a rallying cry for the Republican base, especially the religious right. In fact, Senator Frist would be the featured act at "Justice Sunday," a raucous meeting at a church in Louisville on the last Sunday in April that was billed as a rally to "Stop the Filibuster Against People of Faith."

This implied, of course, that the filibuster itself was somehow anti-Christian. I found this critique, which was becoming common

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in those circles, to be very strange, to say the least. Democratic opposition to a few of President Bush's nominees had nothing whatsoever to do with their private religious beliefs. But that did not stop James Dobson of Focus on the Family of accusing me of "judicial tyranny to people of faith."

"The future of democracy and ordered liberty actually depends on the outcome of this struggle," Dobson declared from the pulpit at Justice Sunday.

So the battle lines were drawn.

All the while, very quietly, a small group of senators had begun to talk about ways to avert the looming disaster.

Earlier in the year, Lamar Alexander, the Republican junior senator from Tennessee, had gone to the floor and given a speech that hadn't gotten much notice in which he had proposed a solution. Since under Senate rules a supermajority of sixty votes is required to end a filibuster, and the makeup of the Senate stood at fifty-five in the Republican caucus and forty-five in the Democratic, Alexander had suggested that if six Republicans would pledge not to vote to change Senate rules and six Democrats would pledge to never filibuster judicial nominees, then we could dodge this bullet. This would come to be known as "the Alexander solution."

Of course, this was an imperfect solution—if the minority, be it Democratic or Republican, pledged to never use the filibuster, then you were de facto killing the filibuster anyway and may as well change the rules. But Alexander's thinking was in the right direction. In fact, I had begun talking quietly to Republican senators one by one, canvassing to see if I could get to the magic number six as well, should Frist press a vote to change the rules. If he wanted to go that way, maybe we could win the vote outright, without having to forge a grand compromise.

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I knew we had Lincoln Chafee of Rhode Island. So there was one. I thought we had the two Mainers, Olympia Snowe and Susan Collins. I thought we had a good shot at Mike DeWine of Ohio. We had a shot at Arlen Specter of Pennsylvania. Maybe Chuck Hagel of Nebraska. I knew we had a good shot at John Warner of Virginia. Warner, a former Marine and secretary of the Navy, was a man of high character. When Oliver North ran as a Republican against Senator Chuck Robb in 1994, Warner crossed party lines to campaign all over Virginia against North. I also felt that Bob Bennett of Utah would, at the end of the day, vote with us.

But these counts are very fluid and completely unreliable. It would be hard to get and keep six. We were preparing ourselves for a vote, but a vote would carry great risk.

As it turned out, Alexander's chief of staff was roommates with the chief of staff of the freshman Democratic senator from Arkansas, Mark Pryor. Pryor, whose father before him had served three terms in the Senate, had been worrying over a way to solve this thing. His chief of staff, a gravelly voiced guy from Smackover, Arkansas, named Bob Russell, got a copy of Alexander's speech from his roommate and gave it to Pryor. Alexander's idea of a bipartisan coalition got Pryor thinking, and he sought out the Tennessean and began a quiet conversation about it.

At the same time, Ben Nelson of Nebraska, one of the more conservative Democrats in the Senate, began having a similar conversation with Trent Lott. At some point they became aware of each other's efforts, and one day in late March, Pryor approached Nelson on the floor to compare notes.

Lott and Alexander would quickly drop out of any discussions. Such negotiations without Bill Frist's knowledge proved too awkward, particularly for Alexander, who was a fellow Tennessean. And

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even though there was antipathy between Lott and Frist over the leadership shake-up in 2002, Lott backed away as well.

But others were eager to talk.

Knowing what was at stake, John McCain and Lindsey Graham began meeting sub rosa with Pryor and Nelson. They would go to a new office each time, so as not to arouse suspicion. These four would form the nucleus of what would become the Gang of Fourteen, the group of seven Republicans and seven Democrats who would eventually bring the Senate back from the brink. Starting early on in their negotiations, Pryor and Nelson came to brief me on their talks, and I gave my quiet sanction to the enterprise. Senator Joe Lieberman came to me and said that he was going to drop out of the talks. I said, "Joe, stay, we might be able to get it done. It's a gamble. But stay and try to work something out."

Each meeting would be dedicated to some aspect of the problem, and there was a lot of back and forth about what would be the specific terminology that could trigger a filibuster. Someone, probably Pryor, suggested "extraordinary circumstances," and that's what the group would eventually settle on. What that meant is that to filibuster a judicial nominee, you'd have to have an articulable reason. And a good reason, not just fluff. Slowly, they were joined by others. Ben Nelson approached Robert Byrd to ask if he would join the effort. No one cares more about the Senate than Byrd, and he agreed, anything to preserve the rules. John Warner was the same way, and it may have been Warner's presence in the negotiations that would serve as the biggest rebuke to Frist. Ultimately, seven Republican senators would step away from their leader, in an unmistakable comment on his recklessness.

Meanwhile, the drumbeat for the nuclear option was intensifying in Washington, and was beginning to crowd out all else. James

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Dobson said that the faithful were in their foxholes, with bullets whizzing overhead. In mid-March, Frist had promised to offer a compromise of some sort. A month later, nothing. In mid-April, I was with the President at a White House breakfast and took the opportunity to talk with him about it. "This nuclear option is very bad for the country, Mr. President," I said. "You shouldn't do this."

Bush protested his innocence. "I'm not involved in it at all," he said. "Not my deal." It may not have been the President's deal, but it was Karl Rove's deal.

A couple of days later, Dick Cheney spoke for the White House when he announced that the nuclear option was the way to go, and that he'd be honored to break a tie vote in the Senate when it was time to change the rules. The President had misled me and the Senate.

And that was the second time I called George Bush a liar.

The first time was over the nuclear waste repository located at Yucca Mountain, in my home state of Nevada. I have successfully opposed this facility with every fiber in me since I got to Washington, as it proposes to unsafely encase tons of radioactive waste in a geological feature that is too close to the water table, crossed by fault lines, unstable, and unsound. And Yucca Mountain posed a grave danger to the whole country, given that the waste—70,000 tons of the most poisonous substance known to man—would have to be transported over rail and road to the site from all over America, past our homes, schools, and churches. Not a good idea. President Bush committed to the people of Nevada that he was similarly opposed to Yucca Mountain, and would only allow it based on sound science. Within a few months of his election, and with a hundred scientific studies awaiting completion, Bush reversed himself. When one lies, one is a liar. I called him a liar then, and with his obvious duplicity

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on the nuclear option revealed by the Vice President's pronouncement, I called the President a liar again.

I then met again with Mark Pryor and Ben Nelson. I knew that they were trying to close a deal with the Gang of Fourteen. I was afraid to tell them to stop, and afraid to go forward. But I patted them on the back and off they went.

"Make a deal," I told them.

BY THIS TIME, Bill Frist had been in the Senate for a decade. An affable man and a brilliant heart-lung transplant surgeon, he had been two years into his second term when Majority Leader Trent Lott had heralded Senator Strom Thurmond on his one hundredth birthday in early December 2002 by saying that if Thurmond's segregationist campaign for the presidency in 1948 had been successful, "we wouldn't have all these problems today." The uproar over Lott's comments had wounded the Majority Leader, and just before Christmas the White House had in effect ordered that Frist would replace Lott and become the new Majority Leader, the first time in Senate history that the President had chosen a Senate party leader.

As Majority Leader, Frist had almost no legislative experience, and always seemed to me to be a little off balance and unsure of himself. For someone who came from a career at which he was consummate, this must have been frustrating. When I became Minority Leader after the 2004 election, I obviously got to watch Frist from a closer vantage point. My sense of his slight discomfort in the role only deepened. In negotiations, he sometimes would not be able to commit to a position until he went back to check with his caucus, as if he was unsure of his own authority. Now, anyone in a leadership position who must constantly balance the interests of several dozen

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powerful people, as well as the interests of the country, can understand the challenges of such a balancing act. And to a certain extent, I was in sympathy with Frist. But my sympathy had limits. What Frist was doing in driving the nuclear-option train was extremely reckless, and betrayed no concern for the long-term welfare of the institution. There are senators who are institutionalists and there are senators who are not. Frist was not. He might not mind, or fully grasp, the damage that he was about to do just to gain short-term advantage. I reminded him: We are in the minority at the moment, but we won't always be. You will regret this if you do it.

By this time, the Senate was a swirl of activity. More senators were taking to the floor to declare themselves in support of the nuclear option or issue stern denunciations. Senator Byrd gave a very dramatic speech excoriating Frist for closely aligning his drive to the nuclear option with the religious right's drive to pack the judiciary. And he insisted that Frist remain on the floor to hear it. "My wife and I will soon be married, the Lord willing, in about sixteen or seventeen more days, sixty-eight years," Byrd said. "We were both put under the water in that old churchyard pool under the apple orchard in West Virginia, the old Missionary Baptist Church there. Both Erma and I went under the water. So I speak as a born-again Christian. You hear that term thrown around. I have never made a big whoop-de-do about being a born-again Christian, but I speak as a born-again Christian.

"*Hear me,* all you evangelicals out there! *Hear me!*"

Byrd was in his eighth term in the Senate, and before that had served three terms in the House. He has been in Congress about 25 percent of the time we have been a country. So his testimony carried great power.

Negotiations among the Gang of Fourteen continued feverishly.

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Not even a panicked Capitol evacuation in early May could stop them. An unidentified plane had violated the airspace over Washington, and the Capitol had to be cleared in a hurry, but McCain, Pryor, and Nelson continued talking nonetheless.

Joe Lieberman of Connecticut came to me again, concerned. Talks had gotten down to specific judges, and the group was trying to hammer out a number that would be acceptable to confirm. Senator Lieberman was worried that our side might have been giving away too much, and that in his view the group was in danger of hatching a deal that would be unacceptable to Democrats. He wanted to drop out. I told him again that he couldn't. The future of the country could well depend on his participation.

"Joe, I need you there," I told him. "Help protect us."

ONCE THE EXISTENCE of the Gang of Fourteen became known, once a ferocious scrutiny became trained on them, the group started to feel an even more determined sense of mission. They realized that they were doing something crucial, and loyalty to party became less important than loyalty to the Senate and to the country, at least for a little while.

And until the day that a deal was struck, the Republican leader's office boasted that no such deal was possible.

As if to underscore this point, and see his game of chicken through to the end, Frist actually scheduled a vote to change Rule XXII of the Standing Rules of the Senate for May 24.

The Democratic senators came to see me and told me that they had completed a deal to stop the nuclear option. They had done it. I told Pryor, Nelson, and Salazar, "Let's hope it works." It did. And on the evening of May 23, 2005, the brave Gang of Fourteen, patri-

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ots all—Pryor of Arkansas, McCain of Arizona, Nelson of Nebraska, Graham of South Carolina, Salazar of Colorado, Warner of Virginia, Inouye of Hawaii, Snowe of Maine, Lieberman of Connecticut, Collins of Maine, Landrieu of Louisiana, DeWine of Ohio, Byrd of West Virginia, and Chafee of Rhode Island—signed a Memorandum of Understanding, in which they allowed for the consideration of three of the disputed judges, and tabled a couple more. Personally I found these judges unacceptable, but such is compromise. The deal that was struck was very similar to that which I had proposed to Bill Frist months before.

As Frist and I were just about to discuss the Gang of Fourteen deal before hordes of gathered press, Susan McCue, my chief of staff, pulled me aside and said, "Stop smiling so much. Don't gloat."

I didn't gloat, but I was indeed smiling. I couldn't help it.

IT HAD BEEN an eventful year as we headed into the summer of 2005. The August recess was going to be a welcome break, and I wanted to go home. I needed to see Searchlight, the desert, the mountains.

One night during the recess, Landra and I had had dinner in Boulder City and then drove back home, about thirty-five minutes. I wanted to catch a baseball game and I couldn't get the TV to work right, which happens frequently in Searchlight. I reached for something on the night table, and the next thing I knew I was on the floor. Landra came running to see what had happened. The pillows from the bed had softened my landing, and I was okay. But Landra was asking a lot of questions. As I climbed back into bed, she brought me an aspirin and some water. "I'm fine, nothing hurts," I said.

"Just take it," she insisted. "An aspirin can't hurt you."

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I heard her making telephone calls in the next room, so I got out of bed. "Who are you calling at this hour?" I asked.

"Dr. Anwar wants you to come see him tonight."

I talked to Javaid Anwar, a longtime friend. I told him I was fine, and that I'd come see him in the morning. I heard a knock on the back door, and welcomed the Searchlight volunteer ambulance service. I assured them I was just fine and thanked them for coming, and told them I wasn't going anywhere. I was back in bed when there came another visitor, Brian McGinty, the head of my Capitol police detail. "How are you doing, Senator?" he asked. "Your wife's a little worried about you, and she thinks you should see the doctor tonight." I talked to two of my sons, Rory and Key, who had been called by Officer McGinty. My boys said they were coming to Searchlight.

"No," I said, relenting. "I'll just come up to Vegas."

Landra had outmaneuvered me and, reluctantly, I drove to town at 11:30 that night, where I would meet my two devoted friends, Ikram Khan and Javaid Anwar. Dr. Khan is a prominent surgeon and a member of the board of governors of the United States military medical schools, and Dr. Anwar is a well-known internist. We'd all been close friends for thirty years.

What I experienced is called a transient ischemic attack, or more colloquially, a "warning stroke," the doctors told me. It's a fleeting phenomenon, lasting just a few seconds, and it has no lasting effects. "Don't worry about it, sometimes these things just happen," the Sunrise Hospital neurologist said. But back in Washington, Admiral John Eisold, the Capitol physician, told me that to be safe I had better go see one of the foremost neurologists in the world, a doctor by the name of Thomas DeGraba. This was his area of specialty. Dr. DeGraba ran me through a battery of cognitive drills to test my

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memory, giving me a list of words or telling me a story and asking me to repeat everything back to him. He said, "I don't think things just happen. This had to happen for some reason. I'm going to try to find what it is." He put a heart monitor on me for twenty-four hours—nothing unusual. So he decided to put the monitor on for two weeks, and instructed me that if anything "feels funny" around my heart, I was to push a little button on the monitor and this would be transmitted to a facility in Maryland, which would record what was going on with my heart. After a couple of days, I did feel a few funny sensations—no pain, more that my heartbeat just jumped a little bit. Dr. DeGraba called me the next day and said, "I told you it was something that caused your problem. Things don't just happen. Once in a while, you have an arrhythmic heartbeat, where the beat is irregular." He said anytime that happens, it tends to pool blood at one of the lower parts of the heart, and when you pool blood, it tends to clot. "It just threw a small clot up into your brain," he said. He prescribed me some medicine to take care of it.

THE EXCITEMENT WAS OVER, and it was time to get back to work.

Just before Congress would reconvene after Labor Day, a disaster that many had predicted for decades befell New Orleans. The catastrophic Hurricane Katrina leveled a staggering swath of the Gulf Coast, killing more than a thousand in Louisiana and swamping the Big Easy, making the city uninhabitable in many areas and causing its population to have to disperse far and wide.

As images of misery spread around the world from New Orleans, the federal response was sluggish and incompetent in the extreme.

Many of us never thought we would live to see the day when tens

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of thousands of our fellow citizens would be left for nearly a week to fend for themselves without food, without water, and stranded on rooftops. But there it was. Under President Clinton, FEMA had been a well-oiled machine. And now this.

Katrina would come to be a defining moment for an administration so hidebound by ideology and so hardwired to distrust the role of government that it didn't understand what its job was in the face of catastrophe. It was also a moment of tragic clarity for the American people on the competence of their government.

As former House Speaker Newt Gingrich said at the time, "If we can't respond faster than this to an event we saw coming across the Gulf for days, then why do we think we're prepared to respond to a nuclear or biological attack?"

Of the disaster, President Bush would later say, "I wasn't satisfied with the federal response," as if the federal response were someone else's responsibility.

THAT FALL, a matter of some urgency for Democrats was getting to the bottom of the failure of our intelligence agencies in the run-up to the Iraq War. We simply had to learn how what we thought had been the case in Iraq had been so wrong. Our future security depended on our ability to learn from our mistakes.

The White House did not share our desire to learn what had happened and why, nor did its Republican enablers in the Congress. They were stonewalling us because they knew—as some of us were beginning to think—that the war was based on trumped-up evidence.

But it was simply objective fact that our intelligence agencies and the executive branch had given Congress information that was not true. Saddam Hussein did not have weapons of mass destruction

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or the capability to deploy them against American citizens. He certainly did not have the capacity to produce nuclear weapons, and we clearly know he had no connection to the horrific events of September 11, 2001.

Whether you support or oppose the war in Iraq, like or dislike President Bush, believe we should stay in Iraq indefinitely or pull out our troops right now, it was clear we needed to get to the bottom of our intelligence failures in the lead up to the war with Iraq, so that we might not repeat them in the future. This was not about placing blame or having heads roll, it was about ensuring that our most important policy decisions were based on hard facts. We cannot win the war on terrorism fighting blind. We must make sure that the deficiencies in our intelligence-gathering systems are corrected before we are forced to make any other decisions that might needlessly cost American lives and dollars.

The cost of bad intelligence is high. For more than two years, Jay Rockefeller of West Virginia, the top Democrat on the Intelligence Committee, had pressed the committee chairman, Pat Roberts of Kansas, to investigate the misuse of intelligence in advance of the war. An investigation had commenced but had not been completed. It was past time—long past time—for the so-called Phase II intelligence investigation to be completed. At each turn, promises were made and never fulfilled. These broken pledges simply reflected a lack of desire to do any oversight on the Bush administration, period.

It was extremely disheartening to me that the Senate had abdicated its Constitutional responsibility to perform oversight on the executive branch. No matter which party controls the White House, our federal government depends on the sunlight of oversight to ward off the corruption that unchecked power fosters. The founding fa-

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thers were very wise to give Congress this check on the executive branch. But the Republican Congress was asleep at the switch.

Senator Rockefeller had grown increasingly frustrated by the intransigence of the Republicans. By the middle of October, he was fed up. I went to Jay and asked him what I could do to help. The American people deserved answers from their government, and this Congress was not going to provide them. That much was plain. Rockefeller called me a few nights later and said, "I don't care what you do, but do something. This is a stall coming directly from the Vice President. Roberts takes his orders from Cheney every day."

The announcement that Special Prosecutor Patrick Fitzgerald would file charges against Vice President Cheney's Chief of Staff Scooter Libby for obstruction of justice in the Valerie Plame affair was the last straw. Scooter Libby was the first sitting White House staff member to be indicted in 130 years. These were serious charges, and the Libby indictment provided a window into how the administration manufactured and manipulated intelligence in order to sell the war in Iraq and attempted to destroy those who dared to challenge its actions.

We now know that within hours of the terrorist attacks on 9/11, senior Bush administration officials recognized that these attacks could be used as a pretext to invade Iraq, which had been a long-established goal of neoconservatives within the administration. In the months and years that followed the terrorist attacks, George Bush's cronies engaged in a pattern of manipulation of the facts and retribution against anyone who got in their way, as they made the case for attacking Iraq.

Playing upon the understandable fears of Americans after September 11, the White House raised the specter that, left unchecked, Saddam Hussein could soon attack America with nuclear weapons.

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Obviously their nuclear claims were wholly inaccurate. Claims about Saddam's nuclear capabilities were false from the start, and were known to be false well before the invasion. The invasion of Iraq was the worst foreign policy blunder in our nation's history, but those falsehoods were even more troubling.

This sad story was repeated when the same people attempted to make a case linking Saddam to al Qaeda. Vice President Cheney told the American people, "We know he's out trying once again to produce nuclear weapons and we know he has a long-standing relationship with various terrorist groups, including the al Qaeda organization." Once again, this assertion was completely false and is discredited by the public record.

There was another pattern of behavior from the White House that I found abhorrent. Time and again it had attacked and discredited anyone who dared to raise questions about its preferred course.

For example, when Army Chief of Staff General Eric Shinseki said that several hundred thousand troops would be needed in Iraq, his military career came to an end. When the director of the National Economic Council, Larry Lindsey, suggested before the invasion that the cost of this war would approach $200 billion, his career in the administration came to an end (we are now at $800 billion and counting). When the UN chief weapons inspector, Hans Blix, challenged conclusions about Saddam's WMD capabilities, the administration pulled out his inspectors. When Nobel Prize winner and International Atomic Energy Agency head Mohamed ElBaradei raised questions about the White House's claims of Saddam's nuclear capabilities, the administration attempted to discredit him and remove him from his post. When ambassador Joe Wilson stated in a *New York Times* op-ed that there was no attempt by Saddam to acquire ura-

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nium from Niger, the administration, led by the Vice President, launched a vicious and coordinated campaign to demean and discredit him, going so far as to expose the fact that his wife worked as a covert CIA agent.

All the while, there was no Congressional oversight from the Republican Congress whatsoever. And we still had not gotten key questions answered: How did the Bush administration assemble its case for war against Iraq? Who did Bush administration officials listen to and whom did they ignore? How did senior administration officials manipulate or manufacture intelligence presented to the Congress and the American people? What was the role of the White House Iraq Group or WHIG, a group of senior White House officials tasked with marketing the war and taking down its critics?

It was time the Senate did its job and demanded answers.

On the evening of October 31, Dick Durbin of Illinois, Chuck Schumer of New York, and Debbie Stabenow of Michigan were in my office, and we were talking over the situation, when we decided to consider the dramatic step of taking the Senate into closed session to force the issue. Invoking Rule XXI is seldom done, and almost never without consulting the other side first. But in this case, if Bill Frist knew that we planned to force the majority to answer for its refusal to investigate disastrous prewar intelligence, he'd easily be able to prevent us from doing it. It was nighttime, and most of my staff had already left, but we reached Martin Paone in his car on the way home. Marty is the longtime secretary for the Democrats in the Senate, and is encyclopedic about rules and floor strategy. Having never invoked Rule XXI before, I asked him how it was done. Simple, he said. Make a motion and get a second, and the presiding officer is required to clear the gallery and close the session. Marty cautioned that the greatest consideration should be how it might af-

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fect my relationship with Bill Frist. Frist, he said, would be likely to regard it as a breach of etiquette.

Maybe. But Bill Frist had threatened the nuclear option. And he'd gone to South Dakota and campaigned against Tom Daschle. And then he had bragged about it afterward. Now *those* were breaches of etiquette. And it was just a fact that Frist and his caucus were more determined to cover for the administration than seek the truth about the needless war in Iraq.

We would invoke Rule XXI. The oversight process in the Senate would no longer be hijacked by the administration. The American people would get answers they deserved on why we got into the war in Iraq. It would take unprecedented action, but it had to be done.

The next morning, I spoke to the members of the Democratic leadership team. These days most political moments are choreographed events, planned and scripted, with people on each side of the aisle knowing exactly what the other is going to do. For this to work, it couldn't be one of those moments. So on the morning of November 1, only a handful of senators and staff knew what the day would bring.

I went about the day normally, including having lunch with the Democratic caucus. As much as it pained me, I simply could not tell them what I was about to do. When lunch ended, I stepped onto the Senate floor and began my speech on the failure of the Senate to investigate President Bush's and Vice President Cheney's intelligence failures. During the speech, I noticed the press gallery and staff sections filling out. Obviously, word was spreading that something was about to happen, because several Republican senators began hurrying to the floor, clustering in the back of the chamber.

Jon Kyl of Arizona tried to get the floor. "Would the senator

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yield?" he asked, over and over. I ignored him, and continued my speech.

Finally, the speech reached its culmination when I pounded my hand on the podium and said, "I demand on behalf of the American people that we understand why these investigations are not being conducted, and in accordance with Rule XXI, I now move the Senate go into closed session."

Dick Durbin sprang to his feet and seconded the motion. And with that, the sergeant at arms cleared the chamber. I knew the punch had landed. The results of the action speak for themselves. In the closed session, the Senate agreed that the Intelligence Committee would complete the Phase II investigation as soon as possible. Democrats had freed the committee, and a vital process that had been stalled for months was suddenly begun again.

Republicans were incredibly angry, Frist especially.

While the closed session was proceeding, Frist, steam coming out his ears, talked to the press outside. "About ten minutes ago or so, the United States Senate has been hijacked by the Democratic leadership!" he announced. Never, he said, have "I been slapped in the face with such an affront to the leadership of this grand institution!"

Huh. Now he was concerned with the grand institution? After what he had tried to do with the nuclear option?

When we struck our deal to restart the investigation and the Senate resumed regular session, someone told me of Frist's comment. And to be perfectly honest, the fact that he had taken this personally bothered me some. This had nothing to do with Bill Frist. This was about the Senate's Constitutional obligations. The more I considered this comment, the more irksome I found it to be.

As I spoke to the press, a reporter asked me about what Frist had said. I paused before answering.

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"It's a slap in the face to the American people that this investigation has been stymied."

My anger began to rise, and I was in danger of giving back to Frist what he had given to me, when Chuck Schumer lightly touched me on the back. I stopped, and addressed my fellow senators in the leadership. "Do you, my colleagues, want to say anything?" I asked.

"You said it all," Schumer answered.

IT HAD BEEN a bitterly divisive year, and 2006 wouldn't be any better. As the midterm election came into focus, it became clear that this would not be a run-of-the-mill election, one in which you want your side to win "just because." This was an election to begin the rollback of the gross excesses of the administration of George W. Bush. This was an election to do nothing less than restore our Constitutional balance of powers.

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Remarks by U.S. Senator Robert C. Byrd at the Orientation of New Senators

December 3, 1996

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Remarks by U.S. Senator Robert C. Byrd at the Orientation of New Senators

December 3, 1996

Good afternoon and welcome to the United States Senate Chamber. You are presently occupying what I consider to be 'hallowed ground.'

You will shortly join the ranks of a very select group of individuals who have been honored with the title of United States Senator since 1789 when the Senate first convened. The creator willing, you will be here for at least six years.

Make no mistake about it, the office of United States Senator is the highest political calling in the land. The Senate can remove from office Presidents, members of the Federal judiciary, and other Federal officials but only the Senate itself can expel a Senator.

Let us listen for a moment to the words of James Madison on the role of the Senate.

'These [reasons for establishing the Senate] were first to protect the people against their rulers: secondly to protect the people against the transient impression into which they themselves might be led. [through their representatives in the lower house] A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of government most likely to secure their happiness, would first be aware, that those charged with the public happiness, might betray their trust. An obvious precaution against this danger would be to divide the trust between different bodies of men, who might watch and check each other . . . . It would next occur to such a people, that they themselves were liable to temporary errors, through want of information as to their true interest, and that men chosen for a short term, [House mem-

The following address was given by Senator Robert C. Byrd (West Virginia) during the orientation of new Senators in December 1996. At the request of Senator Edward M. Kennedy (Massachusetts), the remarks were published in the January 7, 1997 edition of the *Congressional Record*.

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bers], . . . might err from the same cause. This reflection would naturally suggest that the Government be so constituted, as that one of its branches might have an opportunity of acquiring a competent knowledge of the public interests. Another reflection equally becoming a people on such an occasion, would be that they themselves, as well as a numerous body of Representatives, were liable to err also, from fickleness and passion. *A necessary fence against this danger would be to select a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose against impetuous councils.* [emphasis added]

Ladies and gentlemen, you are shortly to become part of that all important, 'necessary fence,' which is the United States Senate. Let me give you the words of Vice President Aaron Burr upon his departure from the Senate in 1805. 'This house,' said he, 'is a sanctuary; a citadel of law, of order, and of liberty; and it is here--it is here, in this exalted refuge; here, if anywhere, will resistance be made to the storms of political phrensy and the silent arts of corruption; and if the Constitution be destined ever to perish by the sacrilegious hand of the demagogue or the usurper, which God avert, its expiring agonies will be witnessed on this floor.' Gladstone referred to the Senate as 'that remarkable body--the most remarkable of all the inventions of modern politics.'

This is a very large class of new Senators. There are fifteen of you. It has been sixteen years since the Senate welcomed a larger group of new members. Since 1980, the average size class of new members has been approximately ten. Your backgrounds vary. Some of you may have served in the Executive Branch. Some may have been staffers here on the Hill. Some of you have never held federal office before. Over half of you have had some service in the House of Representatives.

Let us clearly understand one thing. The Constitution's Framers never intended for the Senate to function like the House of Representatives. That fact is immediately apparent when one considers

the length of a Senate term and the staggered nature of Senate terms. The Senate was intended to be a continuing body. By subjecting only one-third of the Senate's membership to reelection every two years, the Constitution's framers ensured that two-thirds of the membership would always carry over from one Congress to the next to give the Senate an enduring stability.

The Senate and, therefore, Senators were intended to take the long view and to be able to resist, if need be, the passions of the often intemperate House. Few, if any, upper chambers in the history of the western world have possessed the Senate's absolute right to unlimited debate and to amend or block legislation passed by a lower House.

Looking back over a period of 208 years, it becomes obvious that the Senate was intended to be significantly different from the House in other ways as well. The Constitutional Framers gave the Senate the unique executive powers of providing advice and consent to presidential nominations and to treaties, and the sole power to try and to remove impeached officers of the government. In the case of treaties, the Senate, with its longer terms, and its ability to develop expertise through the device of being a continuing body, has often performed invaluable service.

I have said that as long as the Senate retains the power to amend and the power of unlimited debate, the liberties of the people will remain secure.

The Senate was intended to be a forum for open and free debate and for the protection of political minorities. I have led the majority and I have led the minority, and I can tell you that there is nothing that makes one fully appreciate the Senate's special role as the protector of minority interests like being in the minority. Since the Republican Party was created in 1854, the Senate has changed hands 14 times, so each party has had the opportunity to appreciate firsthand the Senate's role as guardian of minority rights. But, almost

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from its earliest years the Senate has insisted upon its members' right to virtually unlimited debate.

When the Senate reluctantly adopted a cloture rule in 1917, it made the closing of debate very difficult to achieve by requiring a super majority and by permitting extended post-cloture debate. This deference to minority views sharply distinguishes the Senate from the majoritarian House of Representatives. The Framers recognized that a minority can be right and that a majority can be wrong. They recognized that the Senate should be a true deliberative body--a forum in which to slow the passions of the House, hold them up to the light, examine them, and, thru informed debate, educate the public. The Senate is the proverbial saucer intended to cool the cup of coffee from the House. It is the one place in the whole government where the minority is guaranteed a public airing of its views. Woodrow Wilson observed that the Senate's informing function was as important as its legislating function, and now, with televised Senate debate, its informing function plays an even larger and more critical role in the life of our nation.

Many a mind has been changed by an impassioned plea from the minority side. Important flaws in otherwise good legislation have been detected by discerning minority members engaged in thorough debate, and important compromise which has worked to the great benefit of our nation has been forged by an intransigent member determined to filibuster until his views were accommodated or at least seriously considered.

The Senate is often soundly castigated for its inefficiency, but in fact, it was never intended to be efficient. Its purpose was and is to examine, consider, protect, and to be a totally independent source of wisdom and judgment on the actions of the lower house and on the executive. As such, the Senate is the central pillar of our Constitutional system. I hope that you, as new members will study the Senate in its institutional context because that is the best way

to understand your personal role as a United States Senator. Your responsibilities are heavy. Understand them, live up to them, and strive to take the long view as you exercise your duties. This will not always be easy.

The pressures on you will, at times, be enormous. You will have to formulate policies, grapple with issues, serve the constituents in your state, and cope with the media. A Senator's attention today is fractured beyond belief. Committee meetings, breaking news, fundraising, all of these will demand your attention, not to mention personal and family responsibilities. But, somehow, amidst all the noise and confusion, you must find the time to reflect, to study, to read, and, especially, to understand the absolutely critically important institutional role of the Senate.

May I suggest that you start by carefully reading the Constitution and the Federalist papers. In a few weeks, you will stand on the platform behind me and take an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic; to bear true faith and allegiance to the same; and take this obligation freely, without any mental reservation or purpose of evasion; and to well and faithfully discharge the duties of the office on which you are about to enter: So help you God.'

Note especially the first 22 words, 'I do solemnly swear that I will support and defend the Constitution of the United States against all enemies foreign and domestic . . .'

In order to live up to that solemn oath, one must clearly understand the deliberately established inherent tensions between the 3 branches, commonly called the checks and balances, and separation of powers which the framers so carefully crafted. I carry a copy of the Constitution in my shirt pocket. I have studied it carefully, read and reread its articles, marveled at its genius, its beauty, its symmetry, and its meticulous balance, and learned something new

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each time that I partook of its timeless wisdom. Nothing will help you to fully grasp the Senate's critical role in the balance of powers like a thorough reading of the Constitution and the Federalist papers.

Now I would like to turn for a moment to the human side of the Senate, the relationship among Senators, and the way that even that faced of service here is, to a degree, governed by the constitution and the Senate's rules.

The requirement for super majority votes in approving treaties, involving cloture, removing impeached federal officers, and overriding vetoes, plus the need for unanimous consent before the Senate can even proceed in many instances, makes bipartisanship and comity necessary if members wish to accomplish much of anything. Realize this. The campaign is over. You are here to be a Senator. Not much happens in this body without cooperation between the two parties.

In this now 208-year-old institution, the positions of majority and minority leaders have existed for less than 80 years. Although the positions have evolved significantly within the past half century, still, the only really substantive prerogative the leaders possess is the right of first recognition before any other member of their respective parties who might wish to speak on the Senate Floor.
Those of you who have served in the House will now have to forget about such things as the Committee of the Whole, closed rules, and germaneness, except when cloture has been invoked, and become well acquainted with the workings of unanimous consent agreements. Those of you who took the trouble to learn Deschler's Procedure will now need to set that aside and turn in earnest to *Riddick's Senate Procedure.*

Senators can lose the Floor for transgressing the rules. Personal attacks on other members or other blatantly injudicious comments

are unacceptable in the Senate. Again to encourage a cooling of passions, and to promote a calm examination of substance, Senators address each other through the Presiding Officer and in the third person. Civility is essential here for pragmatic reasons as well as for public consumption. It is difficult to project the image of a statesmanlike, intelligent, public servant, attempting to inform the public and examine issues, if one is behaving and speaking in a manner more appropriate to a pool room brawl than to United States Senate debate. You will also find that overly zealous attacks on other members or on their states are always extremely counterproductive, and that you will usually be repaid in kind.

Let us strive for dignity. When you rise to speak on this Senate Floor, you will be following in the tradition of such men as Calhoun, Clay, and Webster. You will be standing in the place of such Senators as Edmund Ross (KS) and Peter Van Winkle (WEST VIRGINIA), 1868, who voted against their party to save the institution of the presidency during the Andrew Johnson impeachment trial.

Debate on the Senate Floor demands thought, careful preparation and some familiarity with Senate Rules if we are to engage in thoughtful and informed debate. Additionally, informed debate helps the American people have a better understanding of the complicated problems which besiege them in their own lives. Simply put, the Senate cannot inform American citizens without extensive debate on those very issues.

We were not elected to raise money for our own reelections. We were not elected to see how many press releases or TV appearances we could stack up. We were not elected to set up staff empires by serving on every committee in sight. We need to concentrate, focus, debate, inform, and, I hope, engage the public, and thereby forge consensus and direction. Once we engage each other and the public intellectually, the tough choices will be easier.

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I thank each of you for your time and attention and I congratulate each of you on your selection to fill a seat in this August body. Service in this body is a supreme honor. It is also a burden and a serious responsibility. Members' lives become open for inspection sand are used as examples for other citizens to emulate. A Senator must really be much more than hardworking, much more than conscientious, much more than dutiful. A Senator must reach for noble qualities--honor, total dedication, self-discipline, extreme selflessness, exemplary patriotism, sober judgment, and intellectual honesty. The Senate is more important than any one or all of us--more important than I am; more important than the majority and minority leaders; more important than all 100 of us; more important than all of the 1,843 men and women who have served in this body since 1789. Each of us has a solemn responsibility to remember that, and to remember it often.

Let me leave you with the words of the last paragraph of Volume II, of *The Senate: 1789-1989*: 'Originally consisting of only twenty-two members, the Senate had grown to a membership of ninety-eight by the time I was sworn in as a new senator in January 1959. After two hundred years, it is still the anchor of the Republic, the morning and evening star in the American constitutional constellation. It has had its giants and its little men, its Websters and its Bilbos, its Calhouns and its McCarthys. It has been the stage of high drama, of comedy and of tragedy, and its players have been the great and the near-great, those who think they are great, and those who will never be great. It has weathered the storms of adversity withstood the barbs of cynics and the attacks of critics, and provided stability and strength to the nation during periods of civil strife and uncertainty, panics and depressions. In war and in peace, it has been the sure refuge and protector of the rights of the states and of a political minority. And, today, the Senate still stands--the great forum of constitutional American liberty!'

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Testimony of

MIMI MARZIANI & DIANA LEE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Submitted to the

U.S. SENATE COMMITTEE ON RULES & ADMINISTRATION

For the hearing entitled

EXAMINING THE FILIBUSTER: HISTORY OF THE FILIBUSTER 1789-2008

April 22, 2010

Mr. Chairman and members of the subcommittee:

Over the last decade, it has become increasingly evident that Senate procedures have been used to prevent substantive decision-making rather than to promote deliberation and debate, as intended. Recently, this troubling trend has reached a breaking point – we are now dealing with a difference in degree that has become a difference in kind. We applaud the decision of this committee to explore this issue and to contemplate appropriate reform.[1]

Today, witnesses will discuss the filibuster's history. You will learn that our country's Framers intended that majority voting be used to conduct regular Senate business.[2]

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[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. Mimi Marziani is counsel and Katz Fellow at the Brennan Center. Diana Lee is a researcher at the Center and special assistant to the Center's executive director.

[2] After witnessing frequent gridlock in the Continental Congress due to the numerous supermajoritarian requirements imposed by the Articles of Confederation, the Framers decided that a supermajority vote was appropriate only in seven, extraordinary situations – which they specifically listed in the Constitution. The Constitution also specifies that a simple majority "shall constitute a Quorum to do Business." Article I, Section 3, Clause 4 provides further support. That clause, which states that the Vice President "shall have no Vote, unless [the Senate] be equally divided," necessarily assumes majority voting rules. The Federalist Papers also illustrate the Framers' commitment to majoritarianism. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 29 STAN. L. REV. 181, 239-241 (1997); SARAH BINDER & STEVEN SMITH,

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Witnesses will explain that the Senate has a variety of structural features meant to facilitate deliberation – such as its smaller size, longer terms, older members, and egalitarian

structure.[3] An absolute right to unlimited debate, by contrast, is not part of the constitutional design.[4]

Witnesses will also describe the Senate's devolution into an increasingly partisan institution with a decreasing commitment to comity.[5] This change in culture, coupled with scarce floor time, has created incentives to filibuster – most Senators, especially those in the minority party, now calculate that the benefits of filibustering far outweigh its costs.[6] Predictably, the use of filibusters spiked. In the 110th Congress, for instance, 70 percent of major legislation was affected by filibuster.[7] In the modern Senate, for the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary.[8]

Finally, you will learn of the centuries-old fight to curb abusive dilatory tactics through reform of the Senate's Rules.[9] Witnesses will explain that scholars, Senators, and several Vice-Presidents have long argued that the Senate Rules – by expressly imposing the rules upon future Senates, including the requirement of a two-thirds vote to amend the rules – unconstitutionally binds each new Congress.[10] This, in effect, improperly entrenches the

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POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 30-33 (1997); *see also* THE FEDERALIST NO. 22, at 119-121 & NO. 75, at 415-417 (Alexander Hamilton) (Barnes & Noble Ed., 2006); THE FEDERALIST NO. 58, at 326-237 (James Madison) (Barnes & Noble Ed., 2006).

[3] U.S. Constitution. Art. 1, Sec. 3; STEVEN SMITH & GERALD GAMM, *The Dynamics of Party Government in Congress*, *in* CONGRESS RECONSIDERED 144-145 (8th Ed. 2008).

[4] *See* BINDER & SMITH, *supra* n. 2, at 29-39.

[5] *See* BARBARA SINCLAIR, *The New World of U.S. Senators*, *in* CONGRESS RECONSIDERED 2-5 (9th Ed. 2009).

[6] *See* SINCLAIR, *supra* n. 5, at 6-8; *see also* BINDER & SMITH, *supra* n. 1, at 15-19.

[7] SINCLAIR, *supra* n. 5, at Table 1-2.

[8] Historically, policy-makers assumed that 51 votes would be enough to pass even the most contentious legislation. For instance, in a December 8, 1964 memo concerning the Medicare bill, Mike Manatos wrote to Lyndon Johnson's campaign director "…if all our supporters are present and voting, we would win by a vote of 55 to 45." Memorandum by Mike Manatos to Larry O'Brien (Dec. 8, 1964), *available at* http://voices.washingtonpost.com/ezra-klein/obriencropped.jpg. Franklin Roosevelt's notorious attempt to pack the Supreme Court provides another example. Then-U.S. Attorney General Homer Cummings voiced publically that the administration's position was "promising" when he learned of 53 supportive votes. *See* JEFF SHESOL, SUPREME POWER 300 (2010). By contrast, a recent *New York Times* article reported, "[t]o get the 60 votes needed to pass their bill, Democrats scrapped the idea of a government-run public insurance plan." Robert Pear, *Negotiating to 60 Votes, Compromise by Compromise*, N.Y. TIMES, Dec. 20, 2009.

[9] *See* Martin Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. L. & PUB. POL'Y 205, 217-60 (2004); *see also* Fisk & Chemerinsky, *supra* n. 2, at 209-213.

[10] *See* Gold & Gupta, *supra* n. 9, at 217-60; Fisk & Chemerinsky, *supra* n. 2, at 246-52; Aaron-Andrew Bruhl, *Burying the 'Continuing Body' Theory of the Senate*, IOWA L. REV. (forthcoming) (manuscript at 29-32), *available at* http://ssrn.com/abstract=1427456; *see also* Senator Tom Udall, Speech on the Senate Floor (Jan. 25, 2010), *available at* http://tomudall.senate.gov/files/documents/Speeches/TheConstitutionalOption.pdf; Senator Orrin Hatch, *Crisis Mode: A Fair and Constitutional Option to Beat the Filibuster Game*, NAT'L REV., Jan. 12, 2005, *available at* http://old.nationalreview.com/comment/hatch200501120729.asp.

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supermajority vote now required by Senate Rule XXII to evoke cloture and force a substantive vote.

While it is important to understand the filibuster's complicated history, it is imperative to recall the larger picture of what is at stake. The current system – dictated by the constant threat of filibuster – blunts legislative accountability to voters. The Committee should look beyond the filibuster's affect on specific legislation or on the relative strength of political parties to assess its impact on the core democratic value of accountability. Our Constitution is ordained and established by "We the People" and our government is "a government of the people."[11] To properly exercise our right to choose, voters must be able to weigh the choices made by legislators. A dysfunctional system marked by gridlock, paralysis and minority vetoes makes genuine choice impossible.

Political Accountability is a Core Democratic Value

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government. . . .[12]

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. We do this by voting and through other forms of political participation – for instance, by speaking out in favor or in protest of government action, by lobbying elected officials, and by asking the courts to check unlawful governmental activity when it harms us. Indeed, this is why our Constitution protects political expression so completely: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[13]

The Supreme Court has repeatedly emphasized that democracy requires elected officials to be answerable to voters for their policy choices.[14] *Cook v. Gralike*, a 2001 case challenging a Missouri constitutional provision requiring that a so-called "scarlet letter" label be used to

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[11] McCulloch v. Maryland, 17 U.S. 316, 404-05 (1819) ("The government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").
[12] THE FEDERALIST NO. 51, at 288 (James Madison) (Barnes & Noble Ed., 2006).
[13] Roth v. United States, 354 U.S. 476, 484 (1957).
[14] *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) (discussed below); 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.").

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identify federal candidates who had opposed legislative term limits, provides one example.[15] There, a unanimous Court invalidated the provision. Justice Kennedy, writing in concurrence, pinpointed the accountability problem created by Missouri's law:

> [F]reedom is most secure if the people themselves . . . hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. . . . Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it.[16]

Accountability mechanisms ensure that our representatives fulfill their duty to act for the broader public good rather than for personal or partisan gain.[17] Accountability likewise ensures the consent of the governed; without it, government loses its legitimacy.[18] For these reasons, "[a]ll theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy."[19]

The Modern Filibuster Blunts Legislative Accountability

The Senate's current system, marked by constant filibustering, undermines legislative accountability in a number of ways. To start, 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.[20] Moreover, as we saw in the recent debate over

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[15] 531 U.S. 510 (2001).
[16] *Id.* at 528.
[17] *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256-60 (2009) (explaining importance of legislative accountability within paradigms of legal realism and pluralism theories).
[18] *See* Frances Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 159 (2006).
[19] Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 44 (2003).
[20] Schacter, *supra* n. 14, at 757 ("Oue need uot 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).

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health care reform, a relentless focus on procedure can overshadow more important discussion about substance.[21]

Even worse, today's "stealth" or "phantom" filibusters[22] are often silent, private affairs. No longer do filibustering Senators take the floor and speak until they are physically unable to filibuster any longer.[23] Now, a filibuster typically begins when a Senator or group of Senators signals their intent to filibuster – which can be done by a private conversation with the majority leader or by quietly placing a bill or nomination on hold. Given the modern Senate's scarce floor time, this threat is usually enough to table the disputed issue until the dissenting Senators cave or until there are definitely enough votes to invoke cloture.[24] Accordingly, in any given situation, it can be very difficult – if not impossible – to discern who is behind the obstruction. This routine lack of transparency diffuses legislative accountability even further.

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We encourage you to continue this searching assessment of the functioning of the Senate. Public trust in government rises and falls based, in part, on how decisions are made. As this Committee works to remedy this situation, we hope that you consider the ways in which Senate dysfunction harms our democracy and focus on solutions that advance democratic values.

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[21] *See, e.g.*, David Herszenhorn & Robert Pear, *Democrats Consider New Moves for Health Bill,* N.Y. TIMES, March 17, 2010, at A18, *available at* http://www.nytimes.com/2010/03/17/health/policy/17health.html ("As lawmakers clashed fiercely over major health care legislation on the House floor, Democrats struggled Tuesday to defend procedural shortcuts they might use to win approval for their proposals in the next few days."); Janet Hook & Noam Levey, *Democrats May Use Shortcut to Pass Healthcare Overhaul,* L.A. TIMES, March 17, 2010, *available at* http://www.latimes.com/features/health/la-na-obama-health17-2010mar17,0,6631846.story?page=1 ("In the face of Republican attacks Tuesday, leading Democrats defended a controversial endgame maneuver that would allow them to pass the Senate version of a healthcare overhaul without taking a direct vote on the legislation's most divisive provisions.").

[22] *See* Fisk & Chemerinsky, *supra* n. 2, at 200-09 (describing creation of modern, "stealth" filibuster); David Repass, *Make My Filibuster*, N.Y. TIMES, March 2, 2009, at A23, *available at* http://www.nytimes.com/2009/03/02/opinion/02RePass.html ("The mere threat of a filibuster has become a filibuster, a phantom filibuster. Instead of needing a sufficient number of dedicated senators to hold the floor for many days and nights, all it takes to block movement on a bill is for 41 senators to raise their little fingers in opposition.").

[23] In the 1960s, as a response to repeated civil rights filibusters, then-majority leader Mike Mansfield developed a "two-track system" for handling floor debate. Unlike filibusters of the past, which delayed all Senate business during the course of any prolonged debate, the new system limited the time to debate filibustered legislation, thereby allowing new business to continue. This change, in turn, eliminated the type of all-night debate sessions famously depicted in *Mr. Smith Goes to Washington*. Over time, the filibuster evolved from this two-track system into the phantom affair it is today. *See* BINDER & SMITH, *supra* n. 2, at 185-186; Fisk & Chemerinsky, *supra* n. 2, at 201.

[24] *See* SMITH & GAMM, *supra* n. 3, at 232 ("In today's Senate, the threat of a filibuster is usually sufficient to keep a bill off the floor."); CONG. RESEARCH SERVICE, FILIBUSTERS AND CLOTURE IN THE SENATE 22-23 (2003) (describing typical responses to filibuster threats); Fisk & Chemerinsky, *supra* n. 2, at 204-05 (same); Sarah Binder & Thomas Maun, *Slaying the Dinosaur: The Case for Reforming the Senate Filibuster*, 13 BROOKINGS REV., Summer 1995, at 44 ("The mere threat to filibuster is enough to block action on legislation potentially favored by a sizable majority.").

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April 21, 2010

The Honorable Charles E. Schumer
Chairman, Committee on Rules & Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer:

Enclosed please find a statement for the Committee's hearing "Examining the Filibuster: History of the Filibuster 1789-2008," scheduled for April 22, 2010 at 10:00AM.

Common Cause respectfully requests that the attached written statement by Emmet J. Bondurant, Esq. be included in the hearing record on behalf of Common Cause. Mr. Bondurant is a member of the National Governing Board of Common Cause.

Regards,

Stephen Spaulding
Law Fellow
sspaulding@commoncause.org
202-736-5713

Archibald Cox
Chairman Emeritus

John Gardner
Founding Chairman

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Written Testimony of Emmet J. Bondurant, Esq.
Member, Common Cause National Governing Board

Hearing: "Examining the Filibuster: History of the Filibuster, 1789-2008"
United States Senate Committee on Rules and Administration

April 22, 2010

On behalf of Common Cause, our members, and our supporters across the United States, we thank the Committee for the opportunity to provide this written testimony on the history of the filibuster. Common Cause strongly supports reform of the filibuster to put an end to obstruction and minority vetoes in the United States Senate.

Filibusters, as a parliamentary tactic, were unknown at the time the Constitution was adopted. Nor was there any "right" of unlimited debate under the rules adopted at the first sessions of both the Senate and the House of Representatives immediately after the ratification of the Constitution in 1789.[1] A majority of either house could end debate and bring a measure to a final vote on a motion for the previous question.

Since 1789, the rules of the House have consistently provided for a limitation on debate by moving the previous question. Under the current Rules of the Senate, debate cannot be limited without (a) unanimous consent or (b) the adoption of a cloture motion, which requires a vote of a supermajority of at least 60 Senators.

Senate Rule XXII provides:

> 22.2 Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time ***a motion signed by sixteen Senators, to bring to a close the debate upon any measure*** ... is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, ... he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

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> "Is it the sense of the Senate that the debate shall be brought to a close?" ***And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present*** and voting – then said measure...shall be the unfinished business to the exclusion of all other business until disposed of.

The democratic principle of majority rule in the Constitution does not apply in the Senate. Majority rule has been replaced with minority rule. Instead of rule by the majority, Rule XXII gives forty one senators, who may be elected from states having as little as 11% of the U.S. population, a veto power over all legislation.

Filibusters were unknown at the time of the adoption of the Constitution. Filibusters had been prohibited in the English Parliament since 1604, when the Parliament adopted the "previous question" as a rule of parliamentary procedure. The Rules of the Second Continental Congress (adopted on May 10, 1778) incorporated the previous question motion from English parliamentary practice.[ii] The first rules adopted by the Senate on April 16, 1789, immediately after ratification of the Constitution, "provided for the accepted parliamentary practice of 'moving for the previous question,' which, if passed by a simple majority, would bring the main issues to a vote without further debate."[iii]

The Senate's previous question rule was invoked ten times during that seventeen-year period, from 1789 until 1806, that the rule remained in effect.[iv] The previous question rule was, however, eliminated in 1806, apparently at the suggestion of former Vice President Aaron Burr. In his farewell address in 1805, Vice President Burr observed that the rule was unnecessary, having been invoked only once during his four-year term as Jefferson's Vice President (1801-1805). In the revision to the rules of the Senate in 1806, Rules VIII and IX of the 1789 Senate Rules were eliminated and replaced by a new Rule VIII that omitted any reference to the previous question.

Thirty-five years elapsed before the elimination of the previous question motion from the rules of the Senate had any effect. The first filibuster in the U.S. Senate did not occur until 1841 – more than fifty years after the Constitution was adopted.

Filibusters were rare during the 19th and the first three quarters of the 20th Century. There were a total of only sixteen filibusters prior to 1900 and an additional seventeen filibusters between 1900 and 1917 when the predecessor of the current Senate filibuster rule was adopted.[v]

After two filibusters in 1915 and 1917 over key Wilson Administration proposals related to World War I, President Wilson refused to call a special session of Congress until the rules of

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the Senate were amended to provide for a method to end filibusters. The Senate responded in March 1917 by adopting the predecessor of the current cloture rule.

The purpose of the 1917 cloture rule was not to *protect* the right of a minority in the Senate to block legislation by engaging in unlimited debate, but to fill the gap in the Senate rules by giving the Senate some power to limit debate for the first time since 1806. Instead of reinstating the previous question rule under which the Senate had operated from 1789-1806, the Senate adopted a new rule under which two thirds of the Senators present and voting (which at the time could have been as few as 19 Senators – i.e., two thirds of a quorum of 25 of 48 Senators) could end debate on a motion for cloture.[vi]

The adoption of Rule XXII in 1917 had only a very limited in effect in ending filibusters, and it was adopted only four times between 1917 and 1927. Then, between 1931 and 1964, the Senate invoked cloture only twice.

The 1917 Senate filibuster rule was amended in 1949, 1959, 1975, and 1979.[vii] Prior to 1959, the rules of the Senate did not permit cloture on a motion to change the Senate rules. In 1959, the Senate amended Rule XXII to require a two-thirds quorum vote, rather than 60 votes, to close debate on a motion to change the rules. In 1975, Rule XXII was amended to fix at three-fifths of Senators duly chosen and sworn (60 votes), the *minimum* number of votes required to pass a motion for cloture instead of two thirds of a quorum.

It is impossible for a majority of Senators to amend Rule XXII because of the double whammy created by the combination of Rule V, which declares the rules of the Senate to be continuing, and the requirement in Rule XXII that debate on any proposal to amend the rules of the Senate cannot be ended without a two thirds vote of Senators present. Members of the Senate have repeatedly attempted to impose limits on debate since 1841, when Henry Clay's proposal to restore the previous question rule was defeated by the threat of a filibuster.

What was once a trickle of filibusters has now become a flood of crisis proportions that has engulfed Congress and made it virtually impossible for the majority or either party in Congress to get anything done over the objections of the minority party in the Senate. In the 30 years after the adoption of the cloture rule in 1917 (1918-1949), there were 60 filibusters (an average of 2 per year), and a total of 27 filibusters (an average of 1.4 per year) during the next 20 years (from 1950-1969).

In the last 20 years, however, the filibuster has become the primary weapon of choice of the minority party in the Senate to create gridlock in Congress by preventing the passage of significant legislation by the majority. The number of *formal* cloture motions has increased by 100% in the last three years alone (since 2006).[viii] In this 111th Congress, there have been 89 motions for cloture – triple the number of filibusters that occurred in the entire 20-year period between 1950 and 1969. The 111th Congress is well on its way to match or eclipse the 139

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motions filed in the 110th Congress (2007-2008), and has already surpassed the entire number of cloture motions filed in the 109th Congress (2005-2006).

Defenders of Rule XXII argue that the filibuster promotes compromise and protects the interests of the minority of voters living in the less populated states. However, the interests of the minority of voters living in the small states are already protected by Senate representation that is far out of proportion to their population. The Senate filibuster rule magnifies the disproportionate representation of the less populous states by giving a minority of Senators from those states an absolute veto power over legislation that has passed the House and is favored by a majority of Senators. This is not the way our representative democracy was intended to work. Giving a minority in the Senate a veto power over the will of the majority does not promote compromise; it promotes gridlock.

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[i] "The House of Representatives has always had the previous question motion. From 1789 to 1880, it was in the same form as that provided by the early rules of the Senate, namely: 'Shall the main question now be put?'..." Remarks of Senator Paul Douglas, 103 Cong. Rec. 56677 (daily ed. May 9, 1957).

[ii] *XI Journals of Congress*, 1774-1789, 533 at 534-35 (1908).

[iii] *See* Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 88 POL. SCI. Q., 419, 420 (1968). "From 1789 to 1806, debate on a bill could be ended instantly by a majority of Senators present through the adoption of an undebatable motion calling for the previous question." Irving Brant, *Absurdities and Conflicts in Senate Rules are Outlined*, WASHINGTON POST (Jan. 2, 1957) (reprinted in 103 Cong. Rec. 17 (1957)).

[iv] *See* Remarks of Senator Robert M. Byrd, 151 Cong. Rec. S5485 (daily ed. May 19, 2005); *but see* Remarks of Senator Paul Douglas, *The Previous Question in the Senate*, 103 Cong. Rec. S6669-88 (daily ed. May 9, 1957) (reporting that the previous question motion was invoked four times between 1789 and 1806); Remarks of Senator Paul Douglas, 107 Cong. Rec. S242-56 (daily ed. Jan. 5, 1961).

[v] Democratic Study Group, *A Look at the Senate Filibuster*, DSG Special Report No. 103-28, at p. 5 (June 13, 1994).

[vi] *See* Byrd, *supra* note iv, at S5485.

[vii] *See id.*

[viii] The number of formal cloture motions drastically understates the actual impact of Rule XXII on the legislative process. "A credible threat that forty-one senators will refuse to vote for cloture ... is enough to keep [a] bill off the floor. The Senate leadership simply delays consideration of a bill until it has the sixty votes necessary for cloture. ... [T]he stealth filibuster eliminates the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster *is* a filibuster ... and is largely silent [and] invisible." Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 203 (1997).

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Senate Committee on Rules and Administration
Hearing on Examining the History of the Filibuster, 1789 – 2008
Questions for the Record from Senator Tom Udall

Questions for Stanley Bach

Q. A clause in Senate Rule V, added in 1959 as part of a political compromise, states that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Rule XXII requires an affirmative vote of two-thirds of Senators voting to invoke cloture on a rules change. Taken together, these two rules effectively bar a majority of the Senate from ever being able to reach a vote to amend or adopt its rules, thus preventing it from exercising its constitutional right under Article I, section 5.

In testimony before the United States Senate Judiciary Committee, Subcommittee on the Constitution, several constitutional law scholars agreed that the entrenchment of Senate rules is unconstitutional (S. HRG. 108–227, May 6, 2003).

At that hearing, Northwestern University Law School Professor Steven Calabresi stated:

> "The Senate can always change its rules by a majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that, Acts of parliament derogatory to the power of subsequent parliaments bind not…". Thus, to the extent that the last Senate to alter Rule XXII sought to bind this session of the Senate its action was unconstitutional."

Similarly, in submitted testimony for the same hearing, Professor John McGinnis of Northwestern Law School and Michael Rappapport of University of San Diego School of Law wrote:

> "We write to express our opinion, based on several years of research, that the Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, an entrenchment of the filibuster rule, or of any other legislative rule of law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional. … Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching it."

Do you believe these constitutional scholars are correct in their understanding of entrenchment of the Senate rules?

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Answer: This question is best addressed to lawyers and specialists in constitutional law. I am neither. That said, I do not find either statement, standing alone, to be persuasive. Both consist of opinions and assertions, but lack the requisite evidence and argument to support them.

The exception is Professor Calabresi's reference to Blackstone's Commentaries. I presume that Blackstone had in mind the British House of Commons, all of whose members have terms of office that expire at the same time. In principle, therefore, a House of Commons, like the U.S. House of Representatives, that convenes for the first time after an election may have an entirely different membership from the preceding House. For Blackstone to stand as authority for Professor Calabresi's conclusion, I would want to know how both would respond to the argument that the authors of the Constitution deliberately and knowingly created a Senate with staggered terms of office, such that roughly two-thirds of its membership does not change from one election to the next. So in the case of the Senate, is it a question of one legislature binding its successor, or a legislature binding itself? Does the very constitutional structure of the Senate suggest that the "ancient principle of Anglo-American constitutional law" was not expected to apply to the Senate, which then may have been unique in the history of Anglo-American constitutional law?

I think the question also may, by implication, claim too much. Adopting and amending its rules are not the only things that the Constitution authorizes and, by implication, directs the Senate to do.

What if I were to re-formulate the second and third sentences of the question as follows: "Rule XXII requires an affirmative vote of three-fifths of Senators voting to invoke cloture on a bill. Taken together, these two rules [i.e., Rules V and XXII] effectively bar a majority of the Senate from ever being able to reach a vote to amend or pass a bill, thus preventing it from exercising its constitutional responsibilities under Article I, section 8, and others"? Adopting and amending its own rules is not the only thing, and arguably not the most important thing, that the Constitution empowers and expects the Senate to do. If filibusters are unconstitutional because they impede the Senate in its efforts to exercise its authority under section 5 of Article I to adopt or amend its rules, then why are filibusters constitutional when they impede the Senate's efforts to exercise its equally or more important authority under Article I, especially section 8, to legislate on matters committed to it and the House of Representatives?

I would urge maintaining a distinction between two separable issues that the two quotations raise. First, is a Senate rule constitutional if it prevents the Senate from amending or repealing another of its rules by simple majority vote at any time during the course of a single Congress—that is, between one Senate election and the next? And second, is the same rule constitutional if, it already having been adopted, it prevents the Senate from amending or repealing it by simple majority vote after the next Congress convenes?

In Professor Calabresi's statement, his first two sentences seem to address the first issue, but he then turns to the second one. The statement of Professors McGinnis and Rappaport, on the other hand, does not seem to distinguish between the two issues. When they claim, for instance, that "the Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate," do they mean to imply that a simple majority of Senators have the

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same constitutional right to amend any Senate rule today that they would have when the Senate re-convenes after the next election? If so, does that mean that, to them, the whole "continuing body" argument is beside the point?

Now let's assume that the arguments of the three professors convince all Senators. What might Senators do to implement their belief that Rule XXII in its present form cannot be in force when the Senate convenes after the next election (even if Senators accept that Rule XXII in its present form is constitutional during the remainder of the current Congress)?

It probably would not suffice for the Senate to repeal Rule V because many Senators probably would contend, with considerable historical evidence at their disposal, that the 1959 rules change merely codified something that Senators already had thought to be true. Nor would it be advisable for the Senate to amend Rule V to have it provide instead that the Senate's rules do not carry over from one Congress to the next. If amended in that way, Rule V would make it clear that, by its own terms, it would not govern the Senate after the next election. And second, if the new Senate chose to be bound by the amended version of Rule V, that interpretation would leave the Senate with no rules at all when newly-elected or re-elected Senators present themselves to take their oath of office.

Essentially the same problems would arise if the Senate were to adopt a resolution or rules change this year providing that the Senate's rules lapse at the date and time set by the Constitution for the Congress to convene following the next election. (This assumes it would be possible to invoke cloture on such a proposition.) It would be up to the newly-convened Senate to decide whether or not to be bound by that resolution or rules change. And in doing so, it would be making an all-or-nothing choice: accept all of the rules that had governed the Senate, or accept none of them.

I see no way in which the present Senate could hand over to the Senate in the next Congress the existing set of Senate rules, except for amendments that eliminate filibusters or permit majority cloture, while at the same time contending that the Senate meeting this year cannot bind the Senate that will meet next year.

It bears emphasizing that eliminating filibusters or super-majority cloture requires more than deleting one or more provisions of the Senate's standing rules; it requires changes in or additions to the rules.

There is no rule stating that Senators may filibuster (notwithstanding references to "the filibuster rule" by Professors McGinnis and Rappaport). Instead, there are no rules stating that, as a general matter, Senators may not filibuster. Filibusters are possible because the Senate's standing rules, and especially Rule XIX, do not impose generally applicable limits on the number of speeches by all Senators or the length of speeches by individual Senators that can be made on a debatable question. To preclude filibusters, the Senate would have to amend its rules to impose such limits or to enable it to do so by majority vote as the need arises (for example, by introducing the previous question as that motion is known today in the House of Representatives). Alternatively, to permit cloture by simple majority vote, the Senate would

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have to amend Rule XXII not only by eliminating the three-fifths and two-thirds requirements, but by inserting a provision in their place to permit cloture by simple majority vote.

I have two more comments relevant to this question.

First, I would not under-estimate the potential problems the Senate would face if it convened after an election with the understanding that it was not bound by the rules that had governed the Senate during the previous year. As I noted during the April 22 hearing, the Senate would have to decide how it would consider, debate, amend, and vote on proposed rules when it had no rules governing, *inter alia*, consideration, debates, amendments, or voting. It may be said that this is precisely the situation the House of Representatives faces every two years before it adopts its rules. That is true, but it also is true that the "opening day" procedures of the House have become routinized. At present, it is well-accepted and established what proceedings in the House are to precede adoption of its rules. The most significant of these proceedings are the election of the Speaker and, since 1923, that never has taken more than one vote; although the election itself is contested, the procedures for conducting it are not.

The situation in the Senate would be quite different and, as a practical matter, the majority party could, with the cooperation of the presiding officer, do whatever it wanted. Not only could it adopt whatever rules on all matters that it wished by forcing them to a vote with no debate or as little debate as it wished to entertain, it also could deflect all challenges to its proposals and actions by declining to entertain, or immediately voting to table, any amendments, points of order, or appeals relating to the rules it decides to impose on the Senate.

Finally, the question as posed leaves us with another question: how is the constitutionality of Rule XXII, or any attempt to change it, to be decided? There seem to be essentially two possibilities. First, the Senate could resolve it by majority vote—either by voting on a constitutional point of order that the presiding officer submits for its decision, or by upholding or overturning a ruling made by the presiding officer. However, it is hard to imagine that any such action by the Senate majority would not be perceived as tainted—as an exercise of situational constitutionalism or a constitutionalism of convenience—with the majority rebuked for attempting to disguise a grab for power with self-serving references to constitutional arguments of questionable merit that many members of the majority had rejected themselves when they had been in the minority.

The alternative is to discover a way to present the issue of filibusters and super-majority cloture to the Supreme Court. Assuming that all threshold issues, such as standing, can be addressed, it is my impression that, historically, the Supreme Court has been reluctant to super-impose its judgment on that of either house as it exercises its rule-making power. So the Court might well defer to the Senate, and the Senate, on sober reflection, might not want it to do otherwise, for fear, for example, that the Court might be less than impressed with the ways in which the Senate (and the House) so consistently circumvent the constitutional requirement that a "majority of each [house] shall constitute a quorum to do business."

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Q. If Rule VIII of the Standing Rules of the Senate was amended to make motions to proceed non-debatable, or specified a two hour maximum period of debate, how do you feel this would impact the protection of minority rights in the Senate? How would it impact the ability of the Senate to proceed to a bill or nominee? How would it impact the use of "holds"?

Answer: I do not think that such an amendment, in either form, would significantly undermine minority rights in the Senate.

It is true that we can differentiate in principle between debate on the merits of a bill and debate on whether the Senate should spend its time considering that bill at the time the majority leadership proposes to bring it before the Senate. But it also is true, I believe, that this difference largely disappears in practice, and that the arguments and incentives that cause Senators to support or oppose the filibuster on a bill are the same ones that are most important to Senators when they decide to support or oppose a motion to consider the bill.

If so, and Senators are better able to judge this than I am, then permitting a filibuster on a motion to proceed really is nothing more than giving a bill's opponents two bites at the same apple. So long as Senators remain able to filibuster the bill itself, I see no compelling reason why they also should be able to filibuster the motion to take up the bill. By precluding that preliminary filibuster, the Senate would save time without fundamentally affecting the minority's ability to attack a bill by filibustering it.

I have heard it said that refusing unanimous consent to consider a bill strongly encourages its supporters to address the concerns of its opponents at a relatively early stage of the legislative process. Agreements also can be discussed while the Senate is transacting other business, and agreements can be reached more easily off the Senate floor than while the Senate is considering the bill on the floor.

Probably so, but agreements reached in this way also are beyond effective accountability. In the Senate today, minority party Senators have complained that the majority refuses to compromise and wants everything its own way, while majority party Senators have complained that the minority asks too much and that its idea of a compromise is for the majority to adopt the minority's policy alternative. If compromises are hammered out while the Senate is considering a bill, even if during quorum calls or meetings off the floor, the interested public would at least have a better basis for evaluating the parties' respective complaints.

With regard to nominations, the proposed change in Rule VIII, in either form, should make little or no difference. A motion made in legislative session that the Senate go into executive session for the purpose of considering a specific nomination (or treaty) is not debatable.

Unless something has changed quite recently, it is true that a motion made while the Senate is in executive session to consider a different or subsequent nomination (or treaty) is debatable. However, there normally should be no need for such a motion. Instead, a Senator can make a non-debatable motion in executive session that the Senate return to legislative session and then, once the Senate has agreed to that motion, he or she can make a second non-debatable

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motion that the Senate return to executive session to consider that different or subsequent nomination. So there should not be a need under the Senate's current procedures for a debatable motion to take up any item of executive business.

The likely effect on holds of an amendment, in either form, to Rule VIII is, in my judgment, more difficult to predict. If we think of a hold as a standing objection to any unanimous consent request to take up a certain bill, then limiting or prohibiting debate on motions to proceed should radically undermine the value of holds because they no longer could carry the implicit threat of filibusters on motions to proceed.

However, I can imagine a Senator saying to the Majority Leader that, even though he or she no longer can prevent consideration of a bill by putting a hold on it, that Senator just might not be able to go along with all the unanimous consent requests—for example, to waive the reading of amendments and to agree that further proceedings under a quorum call be dispensed with—on which the Senate relies so much every day. So the Majority Leader still might think it wise to give sympathetic consideration to the Senator's request to defer floor consideration of the bill to which he or she objects.

In other words, either amendment to Rule VIII probably would reduce the potency of a hold on a specific bill, but it would not reduce the capacity of any Senator to disrupt the conduct of Senate business, whatever the Senator's reason for doing so. And that is a capacity that any Majority Leader needs to take into account when deciding what bills to propose for floor consideration.

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Q. If the affirmative vote requirement for cloture in Rule XXII were changed from "three-fifths of the Senators duly chosen and sworn" to "three-fifths of the Senators present and voting," would this still preserve minority rights, but also shift some of the burden to the minority to prevent cloture?

Answer: Such a change in Rule XXII should make it somewhat easier to invoke cloture and, to that extent, reduce the potency of filibusters and filibuster threats.

As the rule now stands, the burden rests entirely on the supporters of cloture to provide the requisite 60 votes if there is no more than one formal vacancy in the Senate. The effect on the outcome of a cloture vote is the same if a Senator votes against cloture or if the Senator fails to vote either way.

If the rule were amended to require only the affirmative votes of three-fifths of the Senators present and voting, a quorum being present, it would be theoretically possible for 31 Senators to invoke cloture—that is, if only the barest quorum, 51 of 100 Senators, voted, cloture would be invoked if 31 of the 51 voted for the motion. However, this is a theoretical possibility only. Although I don't have convenient access to the data, I would be surprised if more than a handful of Senators who are not incapacitated normally fail to vote on cloture motions.

If the partisan division in the Senate were 55-45, for example, and if all 55 majority party Senators voted for cloture, those 55 votes would constitute three-fifths of the Senators present and voting only if 91 or fewer Senators voted (91 x 0.6 = 54.6 or 55 votes). In this situation, nine minority party Senators would have to miss the vote for the majority to provide from within its own ranks the majority required to invoke cloture. If, on the other hand, only three minority party Senators failed to vote (which I think is a much more plausible hypothetical), 59 votes would be required for cloture (97 x 0.6 = 58.2, or 59 votes). And if two majority party Senators failed to vote, so the majority could supply only 53 votes for cloture, 12 minority party Senators would have to miss the vote for the majority to invoke cloture without any minority party support (88 x 0.6 = 52.8, or 53 votes).

The effect of the suggested rule change, therefore, probably would be more than negligible but less than substantial.

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Senate Committee on Rules and Administration
Hearing on Examining the History of the Filibuster, 1789 – 2008
Questions for the Record from Senator Tom Udall

Questions for Sarah Binder:

Q.

Several critics have stated that if the Senate returned to using the previous question motion to limit debate, it would make the Senate no different than the House of Representatives or that it is contrary to the intent of the founders. How would you respond to that?

A.

If the previous question motion were to be readopted into the formal rules of the Senate, we cannot predict with certainly all of the effects. The potential for unintended consequences looms large when changing institutional rules. That said, we can be certain of the following:

First, it is certainly not contrary to the intent of the founders for the Senate to act by majority rule. In fact, delegates to the Constitutional Convention in 1787 largely sought to avoid the stalemate caused by supermajority requirements that had been endemic in the Confederation Congress (the government created under the Articles of Confederation in the 1780s). Framers of the Constitution knew full well how difficult the legislative process had been under the Articles of Confederation, and they were eager to avoid such mistakes in the new Congress. This meant a preference for majority rule (as delineated in the *Federalist Papers*, and a concerted effort to empower the new Congress to be able to set its own rules and to revise them as needed (leading to the inclusion of Article 1, Section 5, of the Constitution empowering both chambers to select their own rules). Much of what we know about the legislative process on the floor of the Senate over much of the 19th century was that majorities were expected to be able to work their will.

Second, I think it is helpful to bear in mind that the absence of a previous question motion is not the sole difference between the House and the Senate. Even if the Senate were to reinstate the previous question motion, other structural elements of the Senate would remain the same and would continue to distinguish the House and Senate: Six year terms for senators, staggered Senate elections, broader state-wide constituencies for senators compared to narrow constituencies for House members (at least for states with more than one representative), higher minimum Senate age, and of course severe malapportionment. Given these structural differences—differences that would likely affect both the Senate's agenda and the policy and political interests of its members—it would be difficult to say that the Senate would be no different than the House. Keep in mind, after all, that the framers of the Constitution sought out these structural differences to ensure that the Senate could keep a check on the populous and potentially rash lower chamber. The framers did not anticipate that the filibuster would emerge to keep the two chambers from converging into similar institutional forms.

Q.

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In Senator Bennett's opening statement, he states that:

> "The whole purpose of this division of power, this creation of checks and balances, was to ensure that no single branch, no single force, no single majority, could unilaterally impose its will on the country. Yes, they provided for elections so the government would reflect the will of the people but they also feared the "tyranny of the majority" that could ensue if a temporary majority were able to impose its will without check or balance.
>
> To impose these checks and balances they divided power amongst three separate branches of government and then divided the legislative branch into two separate houses. I understand these divisions of power can make it hard to move an agenda and that it would be easier if we just eliminated these checks and balances. It would be easier but it would also be wrong. And it would be an abandonment of the principles that have served this body and this country well for over 200 years."

Do you view the filibuster as a "check and balance" that the founders imposed to prevent the "tyranny of the majority"? Why or why not?

How would you respond to Senator Bennett's statement that amending Rule XXII, the filibuster rule, would "be an abandonment of the principles that have served this body and this country well for over 200 years?"

A.

I do not view the filibuster as a "check and balance" imposed by the founders to prevent tyranny of the majority. As I detail in my submitted testimony, both chambers adopted a similar set of rules in 1789. The House kept the one key rule that later it allowed majorities to cut off debate with dispatch. The Senate dropped its version of the rule in 1806 (which had not yet been developed into a majority cloture rule), on the grounds that the chamber had little use for an additional rule of that sort. Filibusters emerged three decades later when party conflict between Democrats and Whigs heated up, and majorities found themselves without a rule for cutting of debate by majority vote. There is nothing constitutionally-original nor sacrosanct about the filibuster. It is an accident of history that became embedded in the lore and practices of the Senate.

I disagree respectfully with Senator Bennett that amending Rule 22 would be an "abandonment of the principles that have served this body and this country well for over 200 years." Rule 22 has been amended five times over the course of the 20th century after adoption of the cloture provisions in 1917. These changes to Senate rules are detailed in Table 1-1 of Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the U.S. Senate* (Brookings Institution Press, 1997). Changes to Rule 22 have in one or way or another limited senators' debate rights under Rule 22, generally making it easier for the Senate to cut off debate. For example, the Senate amended Rule 22 in 1975 to lower the threshold for invoking cloture from a 2/3rds to 3/5ths requirement. In 1986, the Senate amended Rule 22 to reduce the post-cloture debate cap to 30 hours. In other words, it is possible to amend Rule 22 and remain consistent with the principles that have guided the Senate over its history.

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Q.

Several critics portray the current attempts to reform the Senate rules as a "power grab" and claim that Democrats are trying to abolish the filibuster. However, many Senators recognize the need to protect minority rights in the Senate, and it is unlikely that a majority of Senators would ever vote to completely end the filibuster. Many Senators simply want reform – to preserve the rights of the minority, but to curb the abuse of the rules.

Do you believe that the current Senate Rules can be modified to make the Senate a more efficient body, but still protect the views of the minority? Do you have any recommendations for such changes?

Is there any rationale for the current cloture requirement of "three-fifths of the Senators duly chosen and sworn," other than it being a political compromise that was reached in 1975?

A.

The Senate could adopt changes to Rule 22 that would enhance the majority's ability to manage the legislative process, and yet still protect the views of the minority. There are numerous ways in which such changes might be achieved. First, the threshold for invoking cloture might be lowered, perhaps gradually being ratcheted down over a series of days. That change would improve the majority's ability to make legislative progress, but would protect the minority's ability to use extended debate to make its case and to try to move public opinion to its side. Second, the Senate might consider changes to Rule 22 that would limit the number of motions that are deemed "debatable" and thus subject to Rule 22. For instance, the Senate could consider converting the motion to proceed outside the morning hour into a non-debatable motion, so that cloture would not be required to call for a vote on the motion to proceed. Similarly, the Senate might consider combining the three motions related to going to conference (motion to disagree with the House, motion to appoint conferees, motion to go to conference) and convert them into a single non-debatable motion. The minority would still retain its right to filibuster amendments, measures, and nominations, but the majority would be granted a modicum of enhanced control over the management of the Senate's agenda. Third, the Senate might consider adopting a "fast-track" procedure for consideration of nominations in executive session—just as it often does for the consideration of trade agreements and as provided for under the Congressional Budget Act for consideration of the budget resolution and reconciliation bills. Such steps would make it harder for senators to place holds on nominations, as the majority leader could move to consideration of a nomination without securing unanimous consent of the Senate.

I conclude with consideration of the nature of the cloture threshold adopted in 1975. Your question asks whether there is any rationale for the particular threshold chosen of three-fifths of senators duly chosen and sworn. The selection of 60 votes was essentially a political compromise—between supporters of reform (some of whom preferred a majority requirement) and opponents of reform who preferred to retain the Senate's 2/3rds requirement. Bearing in mind that the creation of the 60 vote requirement was part of a larger compromise over reform of

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Rule 22, it is fair to say that the 60 vote requirement was outcome of senators' negotiations over the provisions of Rule 22.

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Senate Committee on Rules and Administration
Hearing on Examining the History of the Filibuster, 1789 – 2008
Questions for the Record from Senator Tom Udall

Questions for Robert Dove:

Q. Much of your testimony is in defense of the filibuster and cautions that "if the filibuster is swept away, what becomes of the Senate of the Founders, of Madison's 'necessary fence' against the danger of an overzealous majority." But many Senators recognize the need to protect minority rights in this body, and it is unlikely that a majority of Senators would ever vote to completely end the filibuster. Many Senators simply want reform – to preserve the rights of the minority, but to curb the abuse of the rules. Do you believe that the current Senate Rules can be modified to make the Senate a more efficient body, but still protect the views of the minority? Do you have any suggestions for doing so?

Q. At the hearing, I asked you about the principle that one legislature cannot bind its successors. I think there was some confusion about my question. My question was primarily about the entrenchment of the Senate Rules. A clause in Rule V, added in 1959 as part of a political compromise, states that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Rule XXII requires an affirmative vote of two-thirds of Senators voting to invoke cloture on a rules change. Taken together, these two rules effectively bar a majority of the Senate from ever being able to reach a vote to amend or adopt its rules, thus preventing it from exercising its constitutional right under Article I, section 5.

In testimony before the United States Senate Judiciary Committee, Subcommittee on the Constitution, several constitutional law scholars agreed that the entrenchment of Senate rules is unconstitutional (S. HRG. 108–227, May 6, 2003).

At that hearing, Northwestern University Law School Professor Steven Calabresi stated:

> "The Senate can always change its rules by a majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that, Acts of parliament derogatory to the power of subsequent parliaments bind not…". Thus, to the extent that the last Senate to alter Rule XXII sought to bind this session of the Senate its action was unconstitutional."

Similarly, in submitted testimony for the same hearing, Professor John McGinnis of Northwestern Law School and Michael Rappapport of University of San Diego School of Law wrote:

> "We write to express our opinion, based on several years of research, that the Constitution does not permit entrenchment of the filibuster rule against change by

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> a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, an entrenchment of the filibuster rule, or of any other legislative rule of law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional. … Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching it."

Do you believe these constitutional scholars are correct in their understanding of entrenchment of the Senate rules? If not, why not?

Answers from Robert Dove

At the outset of the 83rd Congress, Sen. Clinton Anderson (D-NM) offered a resolution on the Senate floor which stated, "In accordance with Article I, Section 5 of the Constitution which declares that 'Each House may determine the rules of its proceedings...', I now move that this body take up for immediate consideration the adoption of rules of the Senate of the Eighty-Third Congress."[1]

Sen. Anderson was asserting the argument which had previously been raised unsuccessfully from time to time, that under the cited clause of the Constitution, the Senate could adopt new rules at the beginning of each or any Congress and that the "old" rules of the Senate were no longer in force.

This argument runs counter to the view that the Senate is a continuing body and has been since the first senators were sworn in 1789, because roughly 2/3 of its membership is always seated (only 1/3 of the seats are up for election in each Congressional election). As the Senate's parliamentarian from 1964-1974, Dr. Floyd Riddick, one of the foremost experts on the Senate's rules, said:

> " The first thing that the proponents for change tried to do, was to establish a basis for change. I don't think there's any question but what most people have always conceded that the Senate was a continuing body, certainly in certain respects. There's always, unless they've died or a catastrophe should occur, two-thirds of the Senate membership duly elected and sworn, because only one-third of the senators go up every two years for reelection. So, for certain purposes, there's never been any question, I don't believe, in anybody's mind, but what the Senate was a continuing body. The proponents for change began to try to differentiate between the Senate as a continuing body in some respects and with regard to changes in the

[1] Congressional Record, January 3, 1953, pg. S11.

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> rules. It was argued pro and con that since the bills all die at the end of a Congress you begin a new Congress *de novo*, and therefore it should be in order to change the rules at the beginning of each new Congress, because the Constitution specifically specifies that each house shall make its own rules."[2]

Opening the floor debate, Senate Majority Leader Robert Taft (R-OH), referring back to the Senate's very first filibuster in 1841 which had raised the issue of the Senate as a continuing body, quoted one of his his Ohio predecessors, Sen. William Allen (D-OH), who had argued:

> "...[To the assertion that this was a new Senate... There was no such thing as a new Senate known to the Constitution of this Republic. They might as well speak of a new Supreme Court."[3]

In the end, the Anderson resolution was tabled by the Senate on a 70-21 vote.[4] The issue, however, was to rise again (and will likely be debated at the outset of the 112th Congress.) We will discuss the issue in greater depth in a later chapter.

Anderson tried again four years later at the beginning of the 85th Congress. This time his motion was table by a 55-38 vote in the Senate on January 4, 1957.[5]

Yet again, as the 86th Congress began, Sen. Anderson tried again to convince the Senate that a simple majority could rewrite its rules at the start of a "new" Senate. Once again the Senate rejected the Anderson's motion, this time 60-36.[6] This effort, however, in 1959, led to a compromise put forward to Senate Majority Leader Lyndon Johnson. The Senate returned the cloture rule to 2/3 present and voting thus making it easier to attain.

Johnson was able to convince the defenders of Rule XXII that they faced a change in that rule designed by liberals if they agree to his compromise.[7]

At the same time, in an effort to put to rest the question of rewriting the Senate rules every two years, the Senate adopted the 2nd paragraph of Rule V which states, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[8]

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[2] Floyd M. Riddick, Senate Parliamentarian, Oral History Interviews, Senate Historical Office, Washington, D.C., 1979.
[3] Congressional Record, January 6, 1953, pg. S198.
[4] Congressional Record, January 7, 1953, pg. S232.
[5] Congressional Record, January 4, 1957, pg. S215.
[6] Congressional Record, January x, 1959, pg. S207.
[7] Politics or Principle? Filibusters in the United States Senate, Sarah A. Binder and Stephen S. Smith. Brookings Institution Press, 1997.
[8] U.S. Senate website

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A particularly extensive battle took place in 1967 at the outset of the 90th Congress led by Sen. George McGovern.

McGovern offered a resolution which stated, "…[U]nder Article I, section 5, of the Constitution, which provides that a majority of each House shall constitute a quorum to do business, and each House may determine the rules of its proceedings, I move that debate upon the pending motion to proceed to the consideration of S. Res. 6 be brought to a close…"[9] S. Res. 6 was a was a proposal to change the rules to provide for cloture by a vote of 3/5 of senators duly elected and sworn.

The Senate sustained a point of order raised by Sen. Everett Dirksen, the Minority Leader, against the the McGovern resolution and then by a large margin refused to end debate on the rules change.

Senate Majority Leader Mike Mansfield declared, "We decided by an overwhelming vote that the uniqueness of this body should be maintained; that reflection and deliberation should be assured of all proposals from whatever quarter."[10] Lindsay Rogers, in the introduction to the reprint of his classic "The American Senate" concluded that "the attempt in the first session of the 90th Congress to amend Rule XXII was a dismal failure."[11]

These victories for the defenders of the filibuster and the enshrinement of the continuation of the Senate's rules in the Senate rules themselves did not, however, as we well know, end this debate. In fact, some celebrated commentators such as Martin B. Gold and Dimple Gupta, in the Harvard Journal of Law and Public Policy, credited efforts to adopt simple majority cloture-- what they call "the constitutional option" with driving Senate rules ever closer to that goal. They wrote, "… Over two centuries, the Senate's constitutional rulemaking power has been exercised in a variety of ways to change Senate procedures. As Senate parliamentary process further evolves, this power plainly will be exercised again." [12]

The historical pattern has been unmistakable. The Senate has remained firmly loyal to the principle of unlimited or, at least, "extended" debate. At times when this right has been systematically abused, the Senate, to cool the passions of those enraged by the abuses and to protect the existing rules of the continuing Senate, have compromised and reformed the filibuster and Rule XXII.

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[9] Congressional Record, January 18, 1967, pg. S918.
[10] The American Senate, Lindsay Rogers. Johnson Reprint Corp., 1968, p. xv.
[11] Ibid
[12] The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster, Martin B. and Dimple Gupta. Harvard Journal of Law & Public Policy, Volume 28, Issue 1, 2004.

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Senate Committee on Rules and Administration
Hearing on Examining the History of the Filibuster, 1789 – 2008
Questions for the Record from Senator Tom Udall

Questions for Gregory Wawro:

Q. You state in your testimony that, "the preponderance of evidence indicates that the contemporary Senate has for all intents and purposes become a supermajoritarian institution." Do you think that was the intent of the framers? If not, can you elaborate on what you think their intent was for the Senate within the larger framework of our government?

A. I do not think that the framers intended the Senate to be a supermajoritarian institution. There is ample evidence from the writings of the framers and the deliberations during the constitutional convention that the framers did not envision the Senate regularly legislating via supermajorities as it does today.

Ultimately, however, I do not believe that arguments for or against the maintenance of supermajority requirements in the Senate can be resolved convincingly by consulting the intent of the framers. The framers do not provide clear guidance on the question of whether they would *object* to the supermajority Senate, and both sides of the debate can find support in the Constitution itself and in the Federalist Papers.

Those who oppose supermajority requirements can point to the fact that the Framers generally believed that the majority should rule and favored supermajoritarian provisions only under special, carefully delineated circumstances. Those who favor supermajority requirements can point to the system of checks and balances that the framers established and argue that this system clearly mitigates against pure majority rule. The Senate plays a unique role in this regard since representation in the body is not proportional. Senators were supposed to represent states as part of the unique system of federalism adopted by the framers. The decision that Senators would be elected by state legislatures was intended to reinforce this, but also to establish a buffer between senators and the electorate—again an attempt to mitigate against direct majoritarian democracy.

A great deal has changed since the adoption of the Constitution that raises questions about how the framers would view the contemporary Senate. Senators are no longer indirectly elected, and while the system of federalism is still in place, an immense amount of policy-making authority has shifted away from the states and to the federal government. Thus, federalism functions quite differently from what the framers had envisioned. Given these changes, one could argue that a Senate that requires supermajorities to legislate is consistent with the framers' view that the Senate would provide a check on the more populist House. Further, since the framers provided that each chamber of Congress would determine its own rules, if a chamber wants to adopt supermajority provisions that are not in conflict with other provisions of the Constitution, it is within its right to do so.

The framers adhered to some of the noblest principles ever held by designers of a governing system. But they were also not above compromise. One of the main reasons that we have a Senate in the first place is because of a compromise. The resolution of the current problems with

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the supermajoritary Senate will have to be resolved by compromise, and both those in favor and against reform—regardless of the support that they can draw from the framers—must be willing to engage each other in a spirit of compromise if any progress is to be made.

Q. You discuss in your testimony the efforts of Senators Anderson and Pearson to reform the filibuster by arguing that the Constitution guaranteed the right of a majority of Senators to adopt the rules. Quoting Senator Pearson, you state that, "Article I, section 5 superseded the rules specifying that the Senate is a continuing body as well as the existing cloture rule." Although the changes to the filibuster were eventually done through the regular cloture process, do you think the argument that only a majority was necessary to end debate on a rules change, made by senators such as Anderson, Humphrey, Pearson, and Mondale, helped to persuade the Senate to reform the rule?

I do not think that—in the abstract—the argument regarding a majority's ability to change the rules was what persuaded the Senate to change the rule. This argument had been put forward by reformers on numerous occasions and it had not produced change before 1975. However, I do think that when a majority demonstrated that it had the votes to establish a precedent that would enable a majority and not two-thirds to invoke cloture on a proposal to change the rules, this prompted those in the minority to support a compromise that led to the adoption of the reform. While constitutional issues are of course important, in my view reform of Rule XXII has occurred only when those who oppose reform become genuinely convinced that a majority has the votes to establish precedents that would significantly curtail the use of filibusters and possibly impose majority cloture in the Senate.

Q. Several critics of filibuster reform have stated that if the Senate changed the cloture rule, it would make the Senate no different than the House of Representatives. How would you respond to that assertion?

A. First, we would need to know what specific change is proposed. The most extreme proposal would involve providing for majority cloture on any measure, motion, or other matter before the Senate. This would be close to the previous question motion that exists in the House. But even with a reduction of the cloture threshold to a simple (or constitutional) majority, the rule could allow space for the minority to participate and be heard. For example, the amount of time provided for post-cloture debate could be increased.

Even with majority cloture, important differences between the House and Senate would remain. If the Senate only changed the rule to reduce the threshold for invoking cloture, senators would presumably retain their right of recognition, which House members do not have. Nor would the Senate have a general germaneness rule as does the House. Both of these unique features of the Senate grant its members (whether in the minority or the majority) extremely wide latitude to participate in debate, deliberation, and lawmaking to a degree that House members do not enjoy. While majority cloture would potentially reduce the value of the right of recognition, a commitment to it would be an important protection for the minority.

The system of proportional representation and staggered elections for Senate seats would also

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mitigate against the Senate becoming just like the House. Since every state is equally represented in the Senate, it is entirely possible that a majority of senators will represent a minority of the country. Suppose that a party controls majorities in both the House and the Senate, but an election produces a change in partisan control in the House. Since only one third of the Senate stands for reelection every two years, it is possible that the party that lost the House will maintain a majority in the Senate. These two examples demonstrate that the math of representation is highly complex, even without considering how the parties may or may not precisely represent majorities and minorities in the electorate. In the end, if the electorate does not like how the current majority is ruling, they can choose to vote the members of that majority out of office.

Q. Many Senators recognize the need to protect minority rights in the Senate, and it is unlikely that a majority of Senators would ever vote to completely end the filibuster. Many Senators simply want reform – to preserve the rights of the minority, but to curb the abuse of the rules.

Do you believe that the current Senate Rules can be modified to make the Senate a more efficient body, but still protect the views of the minority? Do you have any recommendations for such changes?

> A: The current Senate rules can be modified to enhance efficiency and protect the views of the minority. What is crucial is that senators maintain the right of recognition and that the Senate does not adopt a general germaneness requirement similar to what currently exists in the House. The Senate was able to function largely as a majoritarian body even in the absence of a cloture rule for almost all of the 19th century because senators adhered to norms of cooperation and exercised restraint in the use of the filibuster. This was possible because the Senate was a close-knit body, but also because the norms were reinforced by credible threats to change the rules to curtail the use of obstruction. While the current governing context mitigates against members of the Senate reestablishing the "close-knittedness" that once characterized the institution, senators should work to promote mutual trust among each other, regardless of ideological position or party. Rules reform would help, but problems will remain unless there is a fundamental change in the culture of today's Senate.
>
> The instances when Rule XXII has been reformed are marked by compromise. In the current debate, a potential for compromise has emerged concerning at least two issues. Senators opposed to cloture reform have expressed grave concern over the use of the tactic known as "filling the amendment tree." In their view, this has severely curtailed their ability to play a consequential role in lawmaking in the Senate. A compromise reform package could include restrictions on the use of this tactic in exchange for a reduction of the cloture threshold (say to 55 senators) and/or the elimination of the possibility of filibustering the motion to proceed (but allowing filibusters on a measure or nomination itself). Another possible compromise would involve eliminating the use of filibusters against nominations entirely.

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An unorthodox approach that may render reform more appealing would be to include sunset provisions in whatever changes are proposed. Senators are understandably reluctant to change a central feature of their institution. This reluctance is enhanced by concerns over getting locked into institutional changes that may make senators worse off in the future. Sunsetting such changes could help alleviate these concerns. The length of the period before the reforms would expire would have to be long enough so that the minority party can believe that there is a reasonable chance that they will become the majority party and thereby enjoy the benefits of reform that accrue to the majority.

While there appears to be room for compromise, if past reform attempts offer any lessons, it is doubtful that reform will happen unless those opposed to changes believe that something more severe will be done by establishing precedents through rulings from the chair. Thus, in order to promote compromise, proponents of reform may have to demonstrate that they are committed to change, are willing to pursue rulings from the chair, and have the votes to establish precedents in support of reform.

Q: Is there any rationale for the current cloture requirement of "three-fifths of the Senators duly chosen and sworn," other than it being a political compromise that was reached in 1975?

A: There is no rationale for setting the current cloture requirement at three-fifths. There is evidence that the original threshold of two-thirds established in 1917 was on average the size that coalitions had to be to overcome obstruction in the absence of a cloture rule. But the current threshold of three-fifths is entirely arbitrary. Some may argue that 60 votes virtually guarantees bipartisanship, but this assumes that two parties accurately represent the diversity of positions of the American public. Throughout most of the 20th century, significant legislation has typically been enacted by majorities that are much larger than the three-fifths induced by the cloture rule. Thus, it would appear that a formal rule is not generally necessary to force legislators to pursue bipartisan agreement.

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EXAMINING THE FILIBUSTER: THE FILIBUSTER TODAY AND ITS CONSEQUENCES

WEDNESDAY, MAY 19, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, , at 10:10 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Byrd, Durbin, Udall, Bennett, Alexander, and Roberts.

Staff present: Jean Parvin Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Our hearing will come to order, and I will begin with my opening statement while we wait for Senator Klobuchar.

I want thank everyone for coming. I want to thank my good friend, Ranking Member Bennett, who has been just an invaluable and fair member of this committee, not only under my Chairmanship, but long before it.

I also want to especially thank Senator Byrd for his continued interest and participation in these hearings. His dedication of leadership, his unsurpassed knowledge of the Senate Rules and procedures have benefitted us all and we are really very, very fortunate that he will be joining us later in the hearing. So I ask unanimous consent that when Senator Byrd arrives, he be permitted to read his opening statement without objection.

Now, we have here as one of our distinguished witnesses the former Senator from Oklahoma and Republican Whip, Don Nickles, a friend of both of ours. He served for 24 years admirably in this body. We welcome you, Senator Nickles, and thank you for having your time with us.

Second, there is no former living Senator who can give us more insight into the evolution of the filibuster and the cloture rule than our first witness, who we are so honored to have, and that is former Vice President and former Senator Walter Mondale. As everyone knows, he was 42nd Vice President of the United States. He served two terms in the Senate representing Minnesota.

In early 1975, Senator Mondale, together with Senator Byrd, successfully led the bipartisan debate which resulted in amending

Senate Rule 22, the cloture rule, to reduce the number of Senators needed to invoke cloture. The Senate first determined it could change its own rules by a simple majority, and voted three times to set that precedent. Reaction to that precedent, which was later rescinded, resulted in a compromise. The Senate agreed to move from two-thirds of the Senators present and voting to the current 60-vote threshold for cloture that still exists, as we all know, today.

In 1977, Mr. Mondale, as Vice President, serving also as President of the Senate, and Majority Leader Robert Byrd played a crucial role in shutting down the post-cloture filibuster of a natural gas deregulation bill. This action became the main catalyst for efforts in 1979 to limit post-cloture debate time.

There is a great deal of debate between those who believe that under the Constitution, a majority of the Senate can change its rules and those who disagree. Today, we will see a glimpse of the Senate at a time when it did face and vote on that very issue, and it is very important to look at it because it hadn't happened before.

This is the second in a series of hearings by this committee to examine the filibuster. The purpose is to listen and learn so that we can later consider whether the Senate should make any changes in its rules and procedures, and if so, which ones. I have not settled on nor ruled out any course of action myself, but as Chairman of the Rules Committee, I believe we need to fully and fairly assess where the Senate is today and whether we can make it better.

One thing is certain, however. In recent years, the escalating use of the filibuster has drastically changed the way the Senate works. Our first hearing on April 22 explored the history of the filibuster. We now focus on the filibuster today and its consequences for the Senate, for all three branches of government, and ultimately for the American people.

We learned in our first hearing that the use of filibusters has reached unprecedented levels. The chart to my right, prepared from facts supplied by the Congressional Research Service, shows that the use of cloture motions has escalated rapidly in recent Congresses. Cloture motion counts are useful because they represent a response to filibuster tactics, actual filibusters, threats, or realistic expectations of them.

During the first period which you see here, from 1917 to 1971, there was an average of 1.1 cloture motions filed per year. The next period is from 1971 to 1993, where there was an average of 21 filibusters per year. In the period from 1993 to 2007, that number increased by almost a third to an average of 37 cloture motions per year. And then we come to the 110th and the beginning of the 111th Congress. We are now averaging more than 70 cloture motions per year. That is an average of two per week when we are in session.

Before I call on the rest of my colleagues for their statements, I want to highlight a few statistics about where we stand with our legislative, executive, judicial branches, and the filibuster. In the legislative branch, not every bill that passes the House could or should pass the Senate. But as we know, members of the House have been complaining regularly and rapidly, at least on our side of the aisle, that its bills stall out in the Senate, and the numbers indicate there is some truth to that. According to the statistics

maintained by the Senate Library, there have been 400 bills passed by the House in this Congress that have not been considered by the Senate. Of those, 184 passed by voice vote. Another 149 passed with the majority of House Republicans voting yes on a roll call vote, indicating a high degree of bipartisan support, at least for those over 300 bills.

The filibuster is also creating problems for the executive branch. For example, for fiscal year 2010, half of all non-defense spending, $290 billion, was appropriated without legal authority because Congress hadn't reauthorized the programs. Dozens of Presidential appointments are also being delayed or blocked from floor consideration. Many of these were approved unanimously by both Democrats and Republicans in committee and are stuck on the executive calendar because of holds. That means executive agencies don't have the leadership and expertise to do their jobs well. Key national priorities are also being undermined. Even nominees to important national security positions are unreasonably delayed by holds and filibuster threats in this Congress. This is dangerous at a time when we need a Federal Government using all its resources to fight terrorism and protect our country.

And finally, there is the judicial branch. Today, 102 Federal judgeships are vacant, a problem which has consequences for Americans from all walks of life, direct or, more likely, indirect. President Obama has submitted nominations to fill 41 of those. More than half, 24, have been reported out of the Judiciary Committee yet languish on the calendar. Of those, 20 were approved by the Judiciary Committee with bipartisan, often unanimous, support. What is holding them up? Too often, it is the threat of a filibuster by one or a few Senators. It is true that the Senate increasingly scrutinizes judicial nominations. I myself opposed some of President Bush's nominations to the bench. However, at this point in George Bush's Presidency, the Democratic minority Senate had confirmed 52 Federal circuit and district court judges, but today, the Senate has approved only 20 of President Obama's, even when candidates have strong bipartisan committee support. So without enough judges to staff the Federal judiciary, businesses and individuals alike may feel pushed to give up or settle rather than wait years for their day in court.

These are but a few examples of the consequences of the filibuster. So I hope today's hearings help inform members of this committee, the Senate, and the public at large about the use of the filibuster and how it affects our government and our nation today.

I look forward to listening to our witnesses, and now I am going to turn over the podium, of course, to, again, a man for whom I have the utmost respect as both a Senator and as a person, Robert Bennett.

OPENING STATEMENT OF THE HONORABLE ROBERT F. BENNETT, A U.S. SENATOR FROM UTAH

Senator BENNETT. Thank you very much, Mr. Chairman. I appreciate your chart. Maybe you want to leave it up there, because I am going to have a comment or two.

Chairman SCHUMER. Great.

Senator BENNETT. I appreciate your holding this series of hearings and the opportunity to offer some introductory remarks. The majority has chosen to focus on what it believes to be the abuse of the filibuster by the minority, but these hearings have also revealed how the Majority Leader can abuse the rules of the Senate to limit debate and amendment.

At our first hearing, we saw how the leadership tactic of filling the tree to prevent consideration of amendments really works, and you referred to the Congressional Research Service, Mr. Chairman. We went there, as well, and they have a report to which I will be referring that talks about how the Majority Leader can use the tactic of filling the tree in order to avoid allowing the minority to offer amendments, and we go back 25 years, that is to 1985, when the Majority Leader was Bob Dole and document the number of times that the Majority Leader, from Dole to Byrd to Mitchell to Dole to Lott to Daschle to Frist to Reid have used this tactic. We have studied the abuses of the Senate rules by the majority, that is, the use of Senate Rule 14 to bypass regular order and avoid committee consideration, and the decreasing time between the introduction of a matter and the filing of a cloture petition.

Here are some of the statistics, and we go back to the numbers you show on your chart. During the 109th Congress, Rule 14 was used a total of 11 times. In the 110th Congress, that number grew to 30. CRS reveals that since January of 2007, the majority has filed cloture the same day that the matter was offered to the Senate, so that cloture was filed prematurely. Before there was even any threat of a filibuster, a cloture petition that would end up in that large bar that is at the end of your chart was filed before the minority had even an opportunity to make any comment.

Here is the pattern. The current Majority Leader has used this tactic at a rate more than double that of his predecessor and five times as often as the last five Majority Leaders combined. So you have all of that building up to the time where now we have a situation where either Rule 14 or the filing of a cloture petition and filling the tree occurs immediately in order to make sure the minority does not have any opportunity to offer any amendments.

This has gone unnoticed by the media. I am interested to track the media. They were very, very much opposed to filibuster when the Republicans were in charge, very much defending it as a tool of truth and wisdom once the Democrats got in charge—or the other way around, depending on which side of the media——

Chairman SCHUMER. No, no, no. You were right the first time.

Senator BENNETT [continuing]. Okay. Whichever it might be. And so these hearings are very valuable to let us look at this thing and I appreciate very much the willingness of Vice President Mondale and Senator Nickles to come give us their views on this matter and look forward to hearing what they have to say.

Chairman SCHUMER. Thank you. All I would say, and I emphasized this at our first hearing, this is not—there is plenty of blame to go around, if it is blame. Systems changed because of the actions of both parties, and the actions seem to switch when each party is in the minority or the majority. And the question is, for the good of the Senate over a longer period of time, should we change anything. But you are certainly right to bring up what you bring up,

Senator Bennett, and I think it should contribute constructively to the debate.

Senator BENNETT. Thank you. I ask unanimous consent that the CRS memoranda to which I referred be made a part of the record.

[The information of Senator Bennett submitted for the record]

Chairman SCHUMER. Without objection.

Usually, I like to let everybody give opening statements, but we have the Vice President and Senator Nickles waiting. What is your pleasure, Senators Alexander and Roberts? Do you want to make a couple of brief remarks?

Senator ALEXANDER. How about one minute?

Chairman SCHUMER. Great. Whatever you need.

Senator ALEXANDER. I don't know if Senator Roberts can speak for one minute.

Senator ROBERTS. Well, I plan to, as usual, shine the light of truth into darkness. That may take a minute and a half.

[Laughter.]

OPENING STATEMENT OF THE HONORABLE LAMAR ALEXANDER, A U.S. SENATOR FROM TENNESSEE

Senator ALEXANDER. Mr. Chairman and Senator Bennett, thank you for the hearing and we look forward to hearing the former Vice President and colleagues and Senator Nickles.

I would only say two things. One is, it is interesting to me how the Chairman defines a filibuster. A filibuster by his definition is anytime the majority seeks to cut off debate or to stop the minority from offering amendments. In Senator Nickles's testimony, he points out that between January 2007 and April 2010, cloture was filed 141 times on the same day a matter, measure, or motion was brought to the Senate floor. So the Senate is supposed to be defined by the capacity for virtually unlimited debate or unlimited amendment, so if you count filibusters by saying these bad Republicans who happen now to be in the minority have filibustered, the definition of a filibuster is any time we try to shut the Republicans up.

Well, that happened when the Republicans were in charge, and I can vividly remember Senator Byrd's words to me in our first class, and he will be here to speak for himself. He said, sometimes, the minority may be right.

And as we reflect back upon the time when President Bush was here and the Republicans were in charge of the Congress, maybe our Democratic friends would think that maybe they were right about privatizing Social Security. They used the filibuster to prevent President Bush and the Republican Party from privatizing Social Security. They might say that the country is better off after the great recession because they used the filibuster. Maybe they were right. They slowed down and prevented a whole number of other important measures, from tort reform to the appointment of conservative judges. Maybe they were right.

So I think we should not define filibuster by the number of times the majority seeks to cut off debate, and I think we ought to recognize Senator Byrd's advice that sometimes the minority may be right.

Thank you, Mr. Chairman.

Chairman SCHUMER. Senator Roberts.

OPENING STATEMENT OF THE HONORABLE PAT ROBERTS, A U.S. SENATOR FROM KANSAS

Senator ROBERTS. Thank you, Mr. Chairman.

At the last hearing, we detailed—and thank you for your leadership on this—the marked decline on open amendment rules in the House and the soaring increase in the closed amendment rules for legislation brought up before that body. To whom can the American people turn when the House majority runs roughshod over the minority and the wishes of the public? That is the Senate. The Framers of the Constitution certainly intended that.

There is a temptation, I think, on the part of some members in this chamber to make the Senate more like the House, to do away with the procedures and the precedents intended to foster compromise and comity.

Since 2007, there has been an unprecedented rise in the parliamentary tactics by the majority to circumvent what we call regular order, and that data is indisputable. I encourage anyone interested in the subject to witness the trend over the last three-and-a-half years that is characterized by an increase in the Rule use of 14 to bypass committees, a decrease in the use of conference committees to resolve legislation, and a drastic rise in the use by the Majority Leader of a tactic called filling the tree, which prevents the minority from offering amendments. The use of filling the tree is more than double that of the previous leader and exponentially greater than the norm of the last decade.

I think these trends are alarm bells. Some critics charge the minority with obstruction and point to the number of cloture motions filed in the last three-and-a-half years as evidence of, quote, filibustering. The use of cloture, which is an instrument to cut off debate, does not really correlate with objections from the minority. A great many cloture motions, far more than in any previous Congress, are filed the moment the question is raised on the floor. Thus, debate is cut off before it can even begin.

Worse yet, there seems to be a growing inclination intentionally to conflate the term filibuster with holds. Everybody knows holds are an informal process by which a Senator submits notice that they object to a unanimous consent request. Typically, a hold is used to prevent a nomination or a piece of legislation from passing the chamber without debate or a recorded vote. A hold does not prohibit the Majority Leader from bringing a question to the floor.

I would like to reiterate in closing—over my two minutes, I apologize to the Vice President and to Senator Nickles—the framers of the Constitution had the foresight to create an institution that was based not on majority rule, but where each State, regardless of size, had two Senators to speak out on their behalf, to debate, and to offer amendments. For anyone who doubts that this is what the Framers intended, I encourage them to revisit the Federalist Papers Number 10, attributed to James Madison. He states, "Complaints are everywhere heard that the public good is disregarded in the conflicts of rival parties and that measures are too often decided not according to the rules of justice and the rights of the minority party, but by the superior force of an interested and overbearing majority," and that is true whether it is Republicans or Democrats.

Mr. Chairman, the filibuster is an indispensable tool for controlling the effects of partisanship and factionalism because it compels the majority, regardless of party, to meet the minority and the American people in the center in order to forge a national policy that is based on consensus instead of discord. When Don Nickles came up to shake my hand, who has been a longtime friend, he said, what is happening? And I said, this place is broken. Help.

With that, Mr. Chairman, I thank you very much, and I apologize to the gentlemen who are waiting patiently.

Chairman SCHUMER. I think your concluding lines would find favor with the majority of Senators, whatever our diagnosis is, and that is the reason we are having these hearings.

Senator Durbin, our Democratic Floor Leader.

OPENING STATEMENT OF THE HONORABLE RICHARD J. DURBIN, A U.S. SENATOR FROM ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman. It is good to see the Vice President and I thank all of you who are here to testify today.

I am completing a book now which is a biography of Mike Mansfield and his tenure as the Majority Leader and there was an interesting early chapter there in 1963, when there was a debate in the Senate over the Satellite Communications Act and Wayne Morse initiated a filibuster against the Satellite Communications Act. It became a celebrated cause because the Democratic majority was split. The Southern Democrats, who had argued you should never cut off debate, because they didn't want to go to the civil rights votes, were in a quandary because they wanted to move to the satellite bill and it meant that they had to cut off debate, vote cloture against Wayne Morse's filibuster on the satellite bill.

Ultimately, they made the decision to go forward and over 70 Senators voted for cloture to stop the filibuster by Wayne Morse. That is an interesting footnote, but the closing sentence was, I thought, the most memorable part. It was the fifth time in the history of the Senate there had ever been a motion for cloture, 1963, the fifth time.

And so this institution which we are a part of and which respects the rights of minorities within the institution has functioned throughout its history respectful of minorities, but has not gone to the extremes we have now reached where we are now using the cloture motions and filibusters as commonplace. So we have gone beyond deliberation to somewhere near deadlock. For some, that complements their political philosophy. They don't want the Senate to do anything, and I guess that is an approach that can be served by this use of the rules. But I don't think it serves our purpose in society at large or our purpose in this nation, where we are expected to deliberate but to decide.

In the last six weeks, I can tell you what our business has been. We spent one entire week in the Senate debating on whether we would extend unemployment compensation by four weeks. We spent the next week in the Senate debating five nominees, all of whom passed with more than 60 votes. So there clearly was very little controversy associated with them. And now we are on our fourth week on the Wall Street reform bill, which we hope to invoke cloture on this afternoon. At this pace, there are so many

major issues facing this nation and the Senate that cannot be considered. I think it is part of a strategy. Unfortunately, the rules complement that strategy and benefit that strategy.

Now, I have been on the other side of this argument, as well. I was a whip when we were in the minority position with 45 votes and I needed to find 41, when necessary, to stop cloture. So I know that you have to look at this from both sides of the perspective.

But I do believe that we have reached a point now where the American people are losing faith in this institution and I don't think, whatever our purpose may be, that if that is the ultimate result, that we are serving our democracy. We have got to find a reasonable way to respect the minority but to stop what I think is clearly a destined gridlock for this great institution.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Durbin.

And now, I will ask unanimous consent that my introductory remarks be added to the record, because we have someone far better at introducing the Vice President.

[The prepared statement of Chairman Schumer submitted for the record]

Chairman SCHUMER. So we would ask Senator Klobuchar and, of course, Vice President Mondale to take their seats at the table. Senator Klobuchar.

INTRODUCTION OF HON. WALTER F. MONDALE BY THE HONORABLE AMY KLOBUCHAR, A U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, members of the committee, Senator Nickles.

It is such an honor to be here to introduce the Vice President. As you can imagine, he is revered in our State, and you should know that my first job in Washington was as an intern, and my first assignment as his intern was to do a furniture inventory of all of the Vice President's furniture as well as his staff's. It was a project that took two weeks. I wrote down the serial numbers of every piece of furniture, and I can tell you that I tell students, take your internship seriously, since that was my first job in Washington and this was my second job in Washington.

[Laughter.]

Senator KLOBUCHAR. I will also tell the members of the committee that nothing was missing——

[Laughter.]

Senator KLOBUCHAR [continuing]. So you have a very honorable witness here with you.

You think about the Vice President's career and everything he has done, the crusading Attorney General in Minnesota, a leader in the United States Senate, a Vice President who really defined the role of the modern Vice President, the Ambassador to Japan. When I was there recently, they referred to him in Japanese, which I will not attempt, as "The Big Man," he was so respected when he was in Japan. And he made that very courageous decision when Paul Wellstone tragically died to have to take up the mantle for our party with only a week remaining in the election. And while

he was not successful, he handled it, as he has done everything in his life, with such civility and such dignity.

One part of his biography that is often overlooked that you will hear about today is when he was in the Senate, frustrated with the lack of getting things done, as Senator Durbin so eloquently spoke about, and decided to take on the power structure. It is really an amazing story, and he was, in fact, successful—maybe not successful enough, as we see where we are right now, but at that time, he made a major change, and so I am sure he will enlighten the committee with his stories and knowledge, and it is my honor to introduce the Vice President.

Chairman SCHUMER. Vice President, your entire statement will be added to the record, and you may proceed as you wish.

STATEMENT OF HON. WALTER F. MONDALE, DORSEY AND WHITNEY LLP, MINNEAPOLIS, MN

Mr. MONDALE. Thank you, Senator Klobuchar, for your kindness in introducing me today. We are very proud of Amy in Minnesota, and from what I understand, the nation shares that pride today, and I am honored that she would be present with me at the commencement of this hearing.

Mr. Chairman, I am very grateful to the committee for conducting these hearings on the need to reform the rules to protect debate and deliberation, so central to the unique role of the U.S. Senate, while removing flaws in the procedures that experience has proven fuel obstruction and paralysis.

Perhaps I was asked to testify because of my involvement in the successful bipartisan battle to reform Rule 22 in the 94th Congress, where we reduced the number of members required to invoke cloture from a maximum of 67 to 60. At about the same time, led by Senator Byrd, we changed the post-cloture rules so that at a time certain following cloture, the Senate would have to vote on the underlying measure, because we were developing at that time a post-cloture filibuster technique which led to endless delay.

My cosponsor, Jim Pearson from Kansas, a Republican, and I called up our proposal at the very opening of Congress. Our strategy was based on the constitutional right of the Senate to propound its own rules by a majority vote. Vice President Rockefeller, ruling from the Chair, supported our position. The Majority Leader, Mike Mansfield, a wonderful human being and leader, appealed the Chair's initial ruling, an appeal we then successfully moved to table on a non-debatable motion.

In that long and sometimes bitter fight—I think we were on the floor for a month or more—the Senate on three separate occasions voted to sustain the constitutional option, the principle that a majority vote could change the rules. After the sense of the Senate became clear, Mike Mansfield and Bob Byrd, also with Russell Long, working with the Republican leadership, reached the negotiated compromise that I just outlined, and those are basically the rules that govern the Senate today.

As we completed that process, an argument occurred about whether the Senate, in reaching the compromise rules, erased the effect of the majority-vote motions to table that I referred to earlier. I think Senator Cranston said it best when he said, "Uphold-

ing the [eventually successful]Mansfield point of order only adds one tree to a jungle of precedents we reside in. But above and beyond that jungle stands the Constitution, and no precedent can reverse the fact that the Constitution supercedes the rules of the Senate that the constitutional right to make its rules cannot be challenged."

At about the same time, Senator Byrd, who was the key leader in these rules reforms, said that at any time that 51 Senators are determined to change the rule and have a friendly presiding officer, and if the leadership joins them, that rule can be changed and Senators can be faced with majority cloture.

That constitutional precedent remains today. Some argue that the rules themselves require a two-thirds vote for any amendment, but as I said earlier, I think the Constitution answers that question: a determined majority can change the rules.

We took that bold step in 1975 to reduce the cloture requirement because we had become paralyzed. We were in a ditch in the Senate and many of us saw an abuse of the rules. Jim Allen of Alabama was a rules wizard. He had a coterie of allies who began the march toward what we see today, the use of cloture to paralyze the Senate, preventing it from acting on any issue that a motivated minority might seek to block. The constitutional remedy was invoked by majority rule in 1975, and the compromise was adopted by a large bipartisan vote.

While the circumstances then differ in detail from what you confront today, fundamentally, what we see now is the logical extension of the paralysis we faced then. The Senate, in fact, has evolved into a super-majority legislative body. The ever-present threat of filibuster has greatly enhanced the ability of a single Senator, simply through a hold on a nominee or a measure, to prevent any consideration and to do so secretly. Many members of the Senate have said that this body is in crisis. Many scholars have said that the crisis is more severe than it has ever been before.

I am heartened to see, particularly among newer members of the Senate, and I hope in the Senate at large, that there is a growing demand for rules reform, and I hope these rules will be ready for adoption at least by the beginning of the next session.

Let me just mention two suggestions that I have. One, weaken the power of holds by making a motion to proceed either non-debatable or debatable for a limited number of time, say, two hours. This change has been suggested many times over the years, but today's Senate demonstrates how badly it is needed. The rules should provide that the consideration of any nominee or the debate on any measure can begin –begin, not end-by a traditional motion to proceed requiring only a majority vote.

Secondly, I would hope that the joint leadership could shape a reformed Rule 22, as we did in 1975, that would reduce the number of Senators required for cloture from the present 60 to, say, somewhere between 58 and 55. There is no magic number. You will notice I do not want to get rid of the filibuster, but as I will argue, I think we need a different number.

Then, we tried to find the line that would assure deliberation and prevent debilitation. The number 60 worked for us then, but in this harshly partisan Senate of today, I believe it is a hill too

high. However, it would worry me to reduce the cloture requirement all the way down to a simple majority to end debate. It might be more efficient, but the Senate has a much higher calling. It must ventilate tough issues. It must protect the integrity of our courts. You must shape the fundamental compromises reflecting our Federal system. And at times of great passion, you must help us find our way, lead us forward, and hold us together.

I served in the Senate during the most perilous times of executive abuse, when wars were begun and escalated, when funds were spent or withheld, when civil liberties and civil rights were under assault—all with little public awareness; and no accountability to the legislative branch—and it was only when basically here in the Senate that Senators stood up and used their special stature that we began to make a change. And that is why I don't want to get rid of the filibuster entirely.

Ironically, however, the use of that right as now practiced threatens the credibility of the Senate and its procedures and, I think, adds to the incivility that we discuss. The filibuster should not be used to frustrate the very purpose of the Senate procedures, to foster discussion, even extended discussion, to enhance public understanding.

The constitutional authority to advise and consent found in the Senate for Presidential nominations is one of the Senate's most important responsibilities. Yet there can be no consent without debate and there can be no debate if a minority of Senators, even a single Senator, can bar the Senate from giving its consent. Under the same constitutional provisions that give the Senate the power to change Rule 22 by majority vote, it can change its procedures for bringing nominations to the floor.

The Senate's leadership should have the authority, sustained by a majority and a ruling of the presiding officer, if necessary, to bring nominations to the Senate. In addition, the Senate's leadership has the ability to suspend until a particular nomination has been resolved the two-track system that has permitted more filibusters, in effect if not in name.

One of the things we did back in 1975, in addition to reducing the number required for cloture, was to institute the two-track system. So the old idea that if you wanted to filibuster, you had to get on the floor and make a spectacle of yourself, "Mr. Smith Goes to Washington," and the whole nation and the world can see what you were doing had been replaced by a more subtle, silent filibuster that allowed for more efficiency in getting the huge backlog of Senate business conducted, but it had a negative side effect because it reduced almost all public attention and public responsibility for instituting filibusters and now the holds that, in my opinion, are based upon the filibuster.

I am going to submit the rest of my testimony for the record, but let me just close with one statement. When the restored Old Senate Chambers were dedicated here some years ago, I think Howard Baker was selected to speak at those ceremonies for the Republicans and Tom Eagleton was selected to speak for the Democrats. And Senator Eagleton pointed out the unique and even sacred role that the Senate has in sustaining the values and the laws and the unity of our country.

He said, "Here in this room has been sheltered the structural side of our democratic government for decades. The government's life force, what makes it work and endure, is our capacity to accommodate differences and to find a way beyond parochial, partisan, and ideological concerns to live together as a free nation." I think that is the Senate's unique role, and that is why the work of this committee and the decisions of the Senate on how it will conduct itself are so crucial to our future. Thank you.

[The prepared statement of Mr. Mondale submitted for the record]

Chairman SCHUMER. Thank you, Mr. Vice President. That was outstanding testimony. You described better than I have heard in a paragraph why people don't stand up and debate the way they did when Jimmy Stewart, which is a question all of our constituents ask us all the time.

Now, we have a little bit of time issues here. Senator Nickles, I believe you have to leave by 11:15. If you wouldn't mind, Mr. Vice President, because I know you were going to stay—no, stay where you are, if you don't mind—maybe we can have, with the committee's permission, Senator Nickles do his testimony, and then we will ask them questions together. Is that okay with everybody?

Thanks. Okay, so let me introduce Senator Nickles briefly. Well, we all know Senator Nickles. He was an outstanding leader here for 24 years, Republican Whip, and played a major role in many different pieces of legislation. It is very kind of you to come and give us your views. Without objection, your entire testimony will be read in the record and you can proceed as you wish.

STATEMENT OF HON. DON NICKLES, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, THE NICKLES GROUP, WASHINGTON, DC

Mr. NICKLES. Mr. Chairman, thank you very much, and I appreciate your accommodation. I think the world of the Senate. I spent 24 years in this institution. I love the Senate. I even served on this committee for a short period of time, and I think, as Senator Durbin, you called it a great institution. It is a great institution. I was with Senator Cochran this morning and he called it a very special place, and it is a very special place.

I sometimes participated in indoctrinating new Senators, or newly-elected Senators, and I would usually tell them, the Senate is special for a couple of reasons, but amongst legislative bodies, it is really special because unlike the House and unlike most parliament procedures, members of the Senate have unlimited debate and unlimited opportunities to offer amendments. Sometimes the rules curtail that, and I kind of shudder when that happens because that infringes on what really distinguishes the Senate as being such a unique body.

So rules of the Senate, and I heard Senator Mondale talk about the abuse of the rules, but the abuse of the rules can go both ways. And certainly if the rules are used to abort debate, not shut down debate, but just eliminate debate or eliminate amendments, I find that offensive to the traditions of the Senate. Some of the proposals that some people are talking about really would alter the Senate in a way that makes the Senate much more like the House of Representatives, and that would be a serious, serious error.

I know many of you had the pleasure of serving in the House as well as the Senate. I did not. But I really beg you not to turn the Senate into a legislative body that is very comparable to the House. Granted, you can do a lot of things. You can do a lot of things very quickly. You can do a lot of things with very limited debate and with the majority vote. That is not the Senate that I served in for 24 years and it is not the tradition of the Senate and it wouldn't be good for the country. It wouldn't be good for the legislative process, either.

Our forefathers showed great wisdom and our leaders in the past, including Senator Mondale and others that have worked to develop the rules, and the rules aren't perfect, but they can be abused. I think cloture, by its very nature is somewhat abusing the process. It is being used way too much and there are way too many, quote, "filibusters," but I would really question what is a filibuster. I can only remember a few filibusters in my career.

I do remember laying on a cot at night just off the Senate floor when we are going on and on and on shortly before Christmas, having other members talking about cussing those—not talking about cussing, they were cussing members of the Senate who were keeping us here so close to Christmas—it probably sounds familiar to what you all were hearing this past Christmas season—because I was involved in it. That was over a nickel-a-gallon gasoline tax, I think, in 1982, and it was very contentious.

But we didn't have many filibusters in that period of time. This growing explosion of filing cloture—cloture, the whole idea was to limit debate and limit amendments, but unfortunately, now, cloture is being used to shut off debate and shut off clotures. There is a big difference. And when cloture is used to shut off debate and shut off amendments prematurely, that is wrong. There is a right way to legislate and a wrong way to legislate, and if you are curtailing individual Senators' ability to offer amendments prematurely—and I say prematurely, and that is a judgment call.

I know the bill that is on the floor of the Senate—and I was working with Senator Durbin, I wanted to see his amendment—I was worried, would this get in before cloture was filed. And I am sure that there are hundreds of amendments that are pending right now that many members and other people are saying, boy, I hope that gets in before cloture is filed because it is going to knock our amendment off, and that will probably be a determining factor whether you get cloture.

But I compliment Senator Dodd and I compliment Senator Reid. At least you had the bill on the floor and it was debated. It was amended. Democrats and Republicans did get to offer amendments. That is a healthy change. We used to do that all the time. We used to have authorization bills on the floor, subject to amendments, so Democrats and Republicans could offer a lot of amendments before cloture would come down. And now, cloture is being pulled—I call it a quick-draw cloture. It is being filed way to quick, way too often.

A couple of other comments I will make that are the same thing, and I have heard both Senator Alexander and Senator Roberts and Senator Bennett mention, and that is Rule 14(b), bypassing the committee process. And I am well aware of the fact that we did it at times when Republicans were in control. But it is happening on

an accelerating basis. The rate that that is happening now is accelerating.

What does that mean? It means we don't go through committee markup. That means the bill is usually written in the Leader's office. Well, I was in leadership for 14 years. I had my hands on a lot of pieces of legislation that we were involved in. But bypassing the committee, in my opinion, is a mistake. Committees in general usually have bipartisan markups where members are able to massage and legislate.

I think the health care bill that Senator Baucus marked up with Senator Grassley, they had hundreds of amendments. That was done well in committee. It wasn't done well afterwards, in my opinion. Then it went to the Leader's office. That is not the Senate working its will. Bypassing the committee process is dangerous. The same thing, whether there is energy legislation. When you have major pieces of legislation, it is very important it go through the committee process, let all members on the committee who have experience and expertise be able to amend it, to massage it, to work on it, as well as on the floor.

And the same thing would apply to filling the tree. And again, I know Republicans did it, but I know it is also happening on a much more rapid pace today. That is a serious mistake. That is a serious infringement on a Senator's ability to be able to offer amendments and to be able to debate. And I think when we did it, looking back, I think we made a mistake.

So any time that the Senate by the use of rules, filling the tree, bypassing committee or filling cloture prematurely and denying Senators the opportunity to debate or amend, in my opinion, curtails the Senate from being the great tradition, the great legislative body, the great deliberative body which is so crucial to passing positive, good, bipartisan legislation.

Lowering the threshold required for cloture, in my opinion, as well, would be a mistake, because that is a threshold that almost by definition requires bipartisan involvement. It requires some cooperation. You lower that, you increase the tendency or the likelihood for basically the dominant party at the time to steamroll, and that, in my opinion, is not good for the process and it is not good for the American people.

I think the rules can be adjusted, but maybe adjusted more by—maybe I will take an example, Senator Mondale's comments when you talk about maybe changing the time on motion to proceed. For the most part, we didn't have filibusters on motions to proceed in the past and you shouldn't in the future. Just having an agreement with the majority and minority to say, we won't filibuster the motion to proceed as long as you give us ample time to debate and amend. And as long as that understanding is there, we won't filibuster the motion to proceed. You could eliminate lots of those cloture petitions. You could save two or three days on debating a motion to proceed and actually be amending a bill and make real progress. That is just a suggestion.

Mr. Chairman, thank you.

[The prepared statement of Mr. Nickles submitted for the record]

Chairman SCHUMER. Well, thank you, and I think just putting your testimony and Vice President Mondale's next to one another

is great because it shows that there are some different points of view, but there is a need to fix the system and some areas where we can agree. There is often difference in interpretation as to what is causing all of these problems, but as I just said to Senator Bennett, maybe there is a way we can come up with a bipartisan way to fix things, that deals with both sides' legitimate complaints.

The first question I have is for—and I know Senator Udall just got here late. He has been instrumental, by the way, in having these hearings and leading them and he wants to give an opening statement. Because of our time constraints, what I would like to do is just give you some extra time when your question period occurs, if that is okay.

Senator UDALL. That would be great, Mr. Chairman. Thank you.

Chairman SCHUMER. Okay. My first question is to Senator Mondale—Vice President-slash-Senator-slash-great American Mondale. The nub of this debate, not in terms of how to fix it but whether we even can fix it, is the contrast of the Constitution, the Article I, the Senate 'shall make its own rules,' versus the rule that is now in place in terms of having a majority of the Senate be elected before you can change the rules, two-thirds, and you mentioned what Senator Cranston said. Was there much debate back in 1975 about the contrast of those two positions? Could you just elaborate a little more, because that is going to be the nub of the issue if we should attempt to change anything. Even if, say, Senator Bennett and I were to agree on what changes could occur, another Member who wouldn't agree could still force us back into that conundrum.

Mr. MONDALE. Yes, there was intense debate. One of the key elements of the debate was between our position that the Constitution conferred upon the Senate the ability to change its rules by a majority vote, at least at the opening of the session—so I read the rule as not limited to that, but that is why I say "at least"—and some of the opponents who said everything is controlled by Rule 22 as inherited and it can only be amended under those rules, the Senate is a continuing body, and the other arguments that you have all heard again and again.

So that issue was totally vented. That was the issue contained in the motion to table, which we tabled, and our argument was, as Senator Cranston put it so well, as Bob Byrd pointed out during this debate, that a majority of the Senate with a cooperating presiding officer and leader could invoke majority cloture on its own. In other words, the constitutional power was there. That was very much at the heart of the debate.

We argued that if the Framers wanted the Senate to have a higher voting requirement to change the rules, it would have provided it, because in five or six places in the Constitution, such as confirmation, treaty ratification, and some other measures, it provides specifically that two-thirds of the Senate are required. So we think there are a lot of strong arguments for the majority vote principle that we made and sustained in that debate.

Chairman SCHUMER. Would you want to comment on that, Senator Nickles?

Mr. NICKLES. Just a couple of comments. One, I served—since I have been in town, leadership has changed in the Senate six times. With Senator Mondale, in that period, the Democrats controlled

both Houses for decades. And now you have much more volatile leadership changes, and I can tell you, if you read past comments from Democrats and Republicans, their vantage point and viewpoint changes whether they are in the majority or the minority.

Chairman SCHUMER. Absolutely.

Mr. NICKLES. Long-term, I think 60 is a very good number and I would hate to think the Senate would reduce that number. And Senator Alexander alluded to it. President Bush had control of both Houses. If the Senate would have moved to a majority number, say 51, there was no limit what could have been passed.

The Senate having a higher number, having 60—and I like 60. I think maybe 67 might have been too high. Sixty is a pretty good number. It makes the majority work with the minority and——

Chairman SCHUMER. But do you think we could change it based on the Constitution?

Mr. NICKLES. No, I am not——

Chairman SCHUMER. Should we want to?

Mr. NICKLES. Well, one, I think it would be a disastrous mistake——

Chairman SCHUMER. Right.

Mr. NICKLES [continuing]. A disastrous mistake for the Senate if you want the Senate to be a deliberative body, if you want the Senate to be different from the House.

Chairman SCHUMER. Right.

Mr. NICKLES. If you want a majority body where 51 individuals can ram things through, that is not the Senate I know and love.

Chairman SCHUMER. I am not asking about 60. I mean, let us just take the motion to proceed. Do you think the Senate could change that rule by a majority vote? Let us say Senator Bennett and I agreed that was the right thing to do in exchange for you not being able to fill the tree in certain ways.

Mr. NICKLES. I think——

Chairman SCHUMER. Do you think we could do that?

Senator BENNETT. I would stipulate that that agreement is hypothetical.

[Laughter.]

Mr. NICKLES [continuing]. I think what would be much preferable, instead of changing the rules, would be to have basically a caucus agreement, Democrats and Republicans saying, we are not going to filibuster motions to proceed. In exchange, we expect time and amendment opportunities. Don't shut us out. Don't fill the tree. Let us legislate like we should. I think you can do that with a handshake without amending the rules.

We are a continuous body. The rules do continue into the next time. I know if you went into January and said, oh, under the Constitution, we are going to rewrite the rules, somebody would say, the existing rules are still in existence. The officers of the Senate are still in existence. And so to do that, you are going to have to have 60 votes to get there, or 67, actually——

Chairman SCHUMER. Sixty-seven.

Mr. NICKLES [continuing]. Sixty-seven to amend the rules. I would prefer, instead of amending the rules, I would urge you not to get in that battle.

One, I would expect, even predict, that the viewpoint is going to change after November, what threshold you would want. I would just encourage you—like I said, it has changed six times since I have been up here. It will change again. Sixty is a good number. It works.

And people say the Senate doesn't work. Senator Roberts said the Senate is broken. There are a lot of things that are broken about the Senate, but you don't have to change the rules of the Senate to fix it. A lot of it could be done—Harry Reid—I was Republican Whip and Harry Reid was Democrat Whip for six years. We got along very well. We never had a problem, never had a problem. And I can't help but think leadership working together, maybe the whole caucuses working together, saying, wait a minute. This is getting carried away.

One Senator shouldn't be able to place holds on people forever. And people think holds stop all these nominations. No. All it does is say, I wish to be consulted. Consult him to say, now we are bringing up the nominee, and if you want to block the nominee, get prepared to speak because we are going to stay on the nominee until we are finished. People have a right to be notified. The Senate operates a lot on unanimous consent. Individual Senators have the right to be notified before you bring up the nominee or the bill so I can participate in the debate. That makes sense. But they don't have a blanket right to stop everybody indefinitely forever.

So the hold, the perception of the hold, I think, has been greatly blown out of proportion. I hope that we don't get in the tradition of filibustering judicial nominees. That came up in the last few years. I think that was a mistake. I mean, the tradition was, we had big debates over Judge Bork and Judge Thomas and really not so much on—on some nominees, but we still allowed a majority vote and I am glad that we did.

Chairman SCHUMER. Thank you.

Senator Bennett? I mean, there are so many questions, but we want to move on here. This is such very good testimony.

Senator BENNETT. Thank you very much, and thanks to both of you for your insightful comments.

I, as a relatively new member of this body at the time, remember a situation where President Clinton sent up a nominee that some members of our conference didn't like. We didn't have enough votes at the time, even though we were in the majority, we didn't have enough votes to defeat the nominee because there were some Republicans that would go with the Democrats and the nominee would get 51 votes. And the question came up, well, let us filibuster. We have got 41 who are opposed. Let us filibuster. Senator Lott, the Majority Leader, said, absolutely not. The tradition in the Senate is you do not filibuster judges. And my colleague from Utah, Senator Hatch, the Chairman of the Judiciary Committee, said the Leader is absolutely correct. Under no circumstances do we filibuster judges. And so some of the others who were making this case said, oh, all right.

And making your point, Senator Nickles, Senator Hatch said, the time will come when we will have a President, and if we filibuster their judge with their President, they will then have the precedent to filibuster our President's proposal for judgeship. And when

Miguel Estrada came before the Senate and Senator Daschle, as is his right under the rules, changed the precedent, we saw a sea change in the way things were done around here.

And that was the point at which I discovered that precedents trump the rules. Precedents are easy to change when they are different than the rules, but the precedent that you don't filibuster judges got changed, and now, Mr. Chairman, you have heard the exchange on the floor. When a Republican was going to filibuster a Democratic judge proposed by President Obama and some of our Democratic colleagues started quoting back to us our own statements that we said, no, you don't filibuster judges, Senator McConnell, as the Leader, said, I made that statement, I believe that statement, but you changed the rules and we are now operating under your rules.

I don't know quite how we rewrite some of the rules to fit some of the precedent of comity that we had, but that is the problem we are facing. Under the rule, you can, indeed, file a cloture petition the same day the bill comes down and you can fill the tree immediately.

And I remember Senator Byrd doing that as Chairman of the Appropriations Committee on the first supplemental bill when I got here brand new as a freshman Senator, and the Republicans raised a huge outcry about how unfair that was and backed him down, not with votes, but simply the strength of their argument. And I remember very clearly—you remember the things when you are a freshman Senator—when Senator Byrd more or less apologized to the Republicans and said, no, we will allow amendments. We will allow this to happen. And he backed away from it and the filled tree—I wasn't smart enough to know how they did it under the rules, but the filled tree somehow went away and we went ahead with this.

So even in the relatively brief time I have been here, I have seen a sea change as we have moved from the kind of circumstance you describe, Senator Nickles, where people sit down and work it out on the basis of precedent and comity behind the scene, to a situation where the rule is taken to the extreme, and once it is, whichever party does it, then enables the other party to do it back when the control in the Senate changes.

I have no questions for you, just that comment, listening to the two of you and your experience and then adding my own experience, that we should be very, very careful as we proceed in these waters because we can mess things up pretty badly, and even under the present rule, if we are not careful.

Thank you, Mr. Chairman.

Mr. NICKLES. Senator Bennett, if I could just make one comment, a lot of this could change if you had several Senators on both sides who said, you know what? I am always going to protect your right to offer amendments if you will always protect my right to offer amendments. If you have enough Senators do that, then cloture is not invoked the first time or two. There was even a tradition when I was first elected that some Senators wouldn't vote for cloture the first time or two, just because on that very principle. They always thought we should have maybe a little more debate and a little more amendments. And if you had more debate and more amend-

ments, a lot of the hostilities and partisan fever goes away. People get pent up.

I am not aware of how many amendments are pending or are going to be shut off on the financial bill, but I know there are a lot. But at least the bill has been on the floor and it has had some amendments. I love seeing authorization bills, and as a former Senator, I loved having an authorization bill on the floor subject to amendment. And I, frankly, even liked the idea that we didn't have a germaneness requirement. So you could be on a bill and offer something totally out of the ballpark, even have a little fun that way. And it is all right to have a little fun. You should have some fun. And you can express yourself that way instead of being so bottled up and so restricted that you never get a chance to offer your amendment. That increases the partisan tensions dramatically.

Chairman SCHUMER. I know you have to go, Senator Nickles, but we thank you for your testimony.

Mr. NICKLES. Mr. Chairman, thank you very much.

Chairman SCHUMER. Thank you for being here.

We are going to continue the questioning with the Vice President, and Senator Udall, you can make an opening statement as well as ask some questions.

Senator UDALL. Senator Nickles, is it 11:15 you have to leave?

Chairman SCHUMER. Yes.

Senator UDALL. Because you have two minutes here. I would just like to——

Mr. NICKLES. Absolutely.

Senator UDALL. Senator Schumer asked you the question about the constitutional option, and you are a lawyer, is that correct?

Mr. NICKLES. No.

Senator UDALL. Oh, you are not? Okay. Okay. Well, then no wonder you evaded the question, then.

[Laughter.]

Mr. NICKLES. I would think——

Senator UDALL. But do you have an opinion? I mean, he basically was asking, you know, he gave a hypothetical and Senator Bennett said he wouldn't stipulate to it, but the problem we have today that you are describing, and you said it very well, you said several times there are way too many filibusters. That is your quote. The filibuster is being used too many times. I mean, that is what we are seeing over and over again.

To change that, the key is, as Vice President Mondale said, to be able to move with 51 votes and be able to do it as a majority under the Constitution. Do you have an opinion on that? The Constitution says in Article I, Section 5, each House may determine the rules of its proceedings, and the vote by 51 votes at the beginning of a Congress. Do you have an opinion on that?

Mr. NICKLES [continuing]. Yes. I think it would be a disaster if you did it.

Senator UDALL. Well, no, but can you do it?

Mr. NICKLES. Well, one, you still are operating the rules under—it is a continuous body. You don't have 100 percent of the Senate——

Senator UDALL. Well, your answer is then no, I think.

Mr. NICKLES. That would be correct.

Senator UDALL. Yes. Okay. I understand the continuous body——

Mr. NICKLES. I could give you a longer answer——

Senator UDALL. No, no. I don't need a longer answer——

[Laughter.]

Senator UDALL [continuing]. Because it is 11:15.

[Laughter.]

Mr. NICKLES. I appreciate it.

Senator UDALL. I wanted to try to see if I could get an answer from you directly, and I understand the continuous—not to cut you off and not to be impolite in any way. I want to let you leave at 11:15, as you agreed.

Mr. NICKLES. I appreciate it. Thank you.

OPENING STATEMENT OF THE HONORABLE TOM UDALL, A U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you.

Thank you, Chairman Schumer, very much. Before I ask the Vice President a couple of questions, I just want to say a few things. To me, today's hearing is not about examining the current use of the filibuster, but the abuse of the filibuster. We would not need to examine the filibuster if it were used sparingly and judiciously, as Senator Nickles talked about. Unfortunately, both parties in recent years have shown their willingness to use it as a tool of obstruction rather than a means to extend debate.

One of the main reasons I ran for the Senate is because I saw the world's greatest deliberative body turning into a graveyard of good ideas. After over a year of observing this body in action, or in many cases lack of action, it is clear that we are in danger of becoming just that.

Last month, this committee held its first hearing on the filibuster. It focused on the evolution of the filibuster throughout the history of the Senate. At that hearing, several of my senior colleagues on the other side of the aisle spoke about the need to preserve the filibuster in its current form. They argued that it is embedded in the Senate's tradition of unlimited debate, that any attempt to reform it is simply a short-sighted power grab by a frustrated majority.

But I believe my colleagues are missing the point. I had been speaking for months about reforming the Senate rules, not just the filibuster, to make this a better institution. I am not approaching this effort with disrespect for this body's traditions. I hope that by reforming our rules, we can restore some of the collegiality and bipartisanship that our Founders intended for the Senate.

And let me make clear, I don't necessarily think that the current three-fifths requirement to achieve cloture is wrong. What is wrong is that only three current members of the Senate, Senator Byrd, Senator Inouye, and Senator Leahy, have had the opportunity to vote on Rule 22, which was last changed in 1975. What is truly wrong with our rules is that they have become entrenched against change, something our Founders never intended.

I am very happy, Vice President Mondale, to see you here today because you were one of the leaders of filibuster reform back in 1975, and I know you believe, as I do, that each Senate has the

constitutional right to change its rules by a majority vote, and you state that very clearly in your testimony.

The Senate of 1975 thought that the filibuster was being abused, but the more recent Senates have demonstrated a whole new level of destruction, with Senators from both sides of the aisle increasingly using it as a weapon of partisan warfare. It is time to reform our rules, and as I have said many times, I will hold this view whether I am a member of the majority or the minority. There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedures should not be one of them.

Now, Vice President Mondale——

Chairman SCHUMER. Great, and thank you, and now you may ask your question.

Senator UDALL. Thank you, Senator Schumer. Thank you, Mr. Chairman.

Vice President Mondale, you heard Senator Nickles talk about the idea that any change in the filibuster is going to dramatically change the Senate, that the Senate is going to become like the House, and we heard this in our last hearing. Several critics of filibuster reform have stated that if the Senate changed the cloture rule, changed it in any way, it would make the Senate no different than the House of Representatives.

As a former member of this body, how would you respond to that assertion in terms of your experience that you went through and what you observe today with regard to the Senate?

Mr. MONDALE. I don't want the Senate to become the House. I want it to be the unique body that it has always been.

Senator UDALL. And I agree with you on that.

Mr. MONDALE. When we adopted these rules in 1975 reducing the number needed for cloture, what we heard from the opposition was just that, that you are going to change the Senate away from what it has been, and now today what I am hearing is 60 is just about right. Well, that is a transformation in viewpoint from what we heard back then.

The rules have changed since the beginning of this Senate. At first, there was no filibustering going on. Then they went to the—it was just move the previous question. Then there were several decades where there was no way of closing off debate. And then in the middle of World War I, when Wilson couldn't get the Senate to even supply materials to fight the war, he gave a bitter speech and the Senate bent and adopted the two-thirds rule.

And then it came to our time and we were paralyzed. We couldn't get anything done unless everyone agreed to it. And so we changed the rule with a broad cross-section of support. Because of the rulings of Vice President Rockefeller, we changed the rules to what they are now, and I think that worked for us. It worked for us in those times. But what we have now is a harsh partisanship that scholars—I know they are going to testify later here—say that the situation now is, in terms of abuse of power, in terms of paralysis, is worse and different than it has ever been, and I believe that is true.

The number of filibusters that were cited in the charts shown before, the use of holds, which we haven't yet discussed today, it has

been done before, but the pervasiveness of the strategy of holds now holds up hundreds of nominations. The government can't get going. On any number of measures, often the holds are submitted secretly. There are rolling holds, all kinds of holds now. And the net effect is that a few are able through secrecy to block the Senate from action without any public accountability, and they are able to do that because just behind that hold is the threat of a filibuster. And the leader knows he can't make any progress.

So I think that we need to adjust the rules, not to become the House, but to become a restored, effective Senate with the power to deliberate so we can do our jobs and do them better.

Senator UDALL. Thank you very much. You said we haven't talked enough about holds. I mean, one of the results of holds, and you know this, observing us currently, I believe it was the Washington Post reported that after the first year, the Obama administration had been in office for a year, they only had 55 percent——

Mr. MONDALE. Right.

Senator UDALL [continuing]. Of their appointees in place. So basically you have the hold process holding up the administration from getting its team in place. That wasn't what was ever envisioned, I think, by our Founders or by the Constitution. It has been completely abused.

What would you suggest in terms of if you were going to make a rule change about holds, specifically? Could you talk to us a little bit about that?

Mr. MONDALE. Yes. What I said in my testimony was that I think the Leader ought to be able to move to proceed, and it should be done with a majority vote, maybe with a certain time limit for the debate. But it shouldn't be, in effect, filibuster. And I am talking about how you get the measure up for consideration. I am not talking about how it is finally resolved. The regular rules would apply to that.

Senator UDALL. Yes.

Mr. MONDALE. Many times we have seen on these holds that they are held up, and then when it finally gets to a filibuster vote or a final vote on the nominee, they pass 98-to-two or something like that. So it was apparently a false issue.

Senator UDALL. Thank you very much, and thank you for allowing me to run a little bit over there——

Chairman SCHUMER. It was well worth it.

Senator UDALL [continuing]. Actually with his answer. Thank you, Mr. Chairman.

Chairman SCHUMER. Senator Alexander.

Senator ALEXANDER. Just to put all this in historical context, the Vice President's last example was exactly what happened to me in the spring of 1991 when Senator Metzenbaum held my nomination as Education Secretary up for three months and then finally I was confirmed at midnight by unanimous consent, you know, after I had waited around for about four months. I told the story at the earlier hearing, I went to see Warren Rudman and said, what do I do about this? He said, "Keep your mouth shut. You have no cards." And he told me the story of how Senator Durkin had held him up and he would withdraw his name and run against Durkin

and beat him in 1976. So there is not so much new about these holds.

Mr. Vice President, this has been very helpful to have you here. Senator Udall was talking about his impressions as a new Senator. Mine was shock at the filibustering of Judge Pryor, who had clerked for Judge Wisdom in New Orleans, for whom I had clerked, Judge Pickering, who had been a civil rights advocate in Mississippi when it was unpopular, Miguel Estrada, and Priscilla Owen. Do you think it was wrong for the Democratic minority to filibuster President Bush's judicial nominees when he was President?

Mr. MONDALE. What we are getting at here is whether we are all taking situational, tactical positions on the rules – that is using them when it serves our purposes and opposing it when it doesn't.

Senator ALEXANDER. Right.

Mr. MONDALE. My view is you have to live by these rules. They were bipartisan. We put them in place. I hope they can be bipartisan if there are any changes now. And I don't see anything in the rules that says that you can't filibuster a nominee as well as a regular measure.

Senator ALEXANDER. Thank you for that. There had been a precedent, of course, of not doing that. Justice Scalia—well, we won't go into all of that, but it was a big, big change. And when we Republicans, and I was one really on the other side of this issue with the Gang of 14 movement, when many Republicans tried to change the rules and assert the argument you are now making, the constitutional argument, Senator Reid said it would be the nuclear option. It would be the end of the Senate as we know it and it was going to be Armageddon.

Let me go back to my earlier point about the hold that Senator Metzenbaum put on me. You mentioned Senator Allen.

Mr. MONDALE. Yes.

Senator ALEXANDER. And you remember when you were first elected, Senator Williams from Delaware, who would sit on the front row and had this high voice. We have always had, at least in my experience here of watching the Senate and serving in it, individual Senators who have exercised these rules, and we have them today.

I mean, if you will remember in the 1980s, Senator Byrd and Senator Baker operated the Senate on the sort of handshake that Senator Nickles talked about. They had these, I guess you would call them broad agreements on every bill that came up, that we would bring up the X bill, the financial regulation bill, and we will have 35 amendments on it, or 36, 18 here and 18 here, and then we will vote, and that is how almost all business was done. Of course, it can't be done if one Senator objects, which may be the reason we don't have that kind of thing today.

So I am going to ask you a question and this will be my last one. It seems to me that changing the 60 would only make less likely bipartisanship, because when the Democrats have had 60 in the last year and a half, they paid no attention to the Republicans and they have just jammed their own legislation through, in my judgment. When they get fewer, they will have to pay attention to us, or we are in the majority and you have fewer, we will have to pay

attention to you, and that produces compromise and bipartisanship, I believe.

But maybe there is a different way to deal with the question of the individual Senator who puts on too many holds or holds up things for too long without changing the 60. I mean, is there a solution for a Senator who the rest of the Senators think is taking advantage of the rules and making it impossible for the Senate to operate under the kind of broad agreements that Senator Byrd and Senator Baker once used to manage the flow of the Senate?

Mr. MONDALE. I think one of the things that many Senators have tried to do is make these holds public so the holder must explain to his colleagues and to his constituents why he is doing it. As you know, there is a rule here now that if you put on a hold for longer than six days, the name will be disclosed, and so now there is a strategy for rolling the hold so that every fifth day, the name of the holder changes. So it has frustrated the disclosure. If there would be some way to guarantee public disclosure immediately, that might help.

But there is nothing in the rules about holds. There has never been a Senate decision. But it is now not a minor problem, it is a pervasive problem, and every leader, Republican leader and Democratic leader, has at one time in his career stood up and lamented what holds have done to his ability to conduct a sensible Senate. I think we need to deal with holds, because it is now a much bigger problem and it is a growing problem because it works, it is secret, it is effortless, and it is, I think, very destructive of the purposes of the Senate.

Chairman SCHUMER. Thank you, Mr. Vice President.

Senator ALEXANDER. Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Alexander.

Now, we had asked unanimous consent at the beginning of this hearing that when Senator Byrd arrived if he could make his opening statement. I don't believe he will ask questions. So with everyone's permission, he has been waiting for a couple of minutes, I would like to call on Senator Byrd to make his opening statement.

Senator Roberts will ask questions and you will be on your way, but it has been really helpful for you to be here today.

[Pause.]

Chairman SCHUMER. Thank you for being here, Senator Byrd. I think I join everyone here—Senators, Vice President Mondale, and the audience—in really thanking Senator Byrd for going out of his way to be here.

Senator, your name has come up on many, many occasions in this hearing and how you were so instrumental in what happened and in forging the compromise in 1975 and in many other ways. We are honored you are here. I know it will be a token, not just to the attendees here but to this committee and the whole Senate, of how important you think this subject is. So thank you, and the floor is yours.

OPENING STATEMENT OF THE HONORABLE ROBERT C. BYRD, A U.S. SENATOR FROM WEST VIRGINIA

Senator BYRD. Thank you. Mr. Chairman, in his 1789 journal, Senator William Maclay wrote, and I quote, "I gave my opinion in

plain language that the confidence of the people was departing from us owing to our unreasonable delays. The design of the Virginians and of the South Carolina gentlemen was to talk away the time, so that we could not get the bill passed."

Our Founding Fathers intended the Senate to be a continuing body that allows for open and unlimited debate and the protection of minority rights.

Senators have understood this since the Senate first convened. James Madison recorded that the ends to be served by the Senate were, "first, to protect the people against their rulers, secondly, to protect the people against the transient impressions into which they themselves might be led." A necessary fence against such danger would be the United States Senate.

The right to filibuster anchors this necessary fence. But it is not a right intended to be abused.

During this 111th Congress, in particular, the minority has threatened to filibuster almost every matter proposed for Senate consideration. I find this tactic contrary to every Senator's duty to act in good faith.

I share the profound frustration of my constituents and colleagues as we confront this situation. The challenges before our nation are too grave, too numerous, for the Senate to be rendered impotent to address them, and yet be derided for inaction by those causing the delays.

There are many suggestions as to what we should do. I know what we must not do.

We must never, ever, ever, ever tear down the only wall, the necessary fence, that this nation has against the excesses of the executive branch and the resultant haste and tyranny of the majority.

The path to solving our problem lies in thoroughly understanding the problem. Does the difficulty reside in the construction of our rules, or does it reside in the ease of circumventing them?

A true filibuster is a fight, not a threat, not a bluff. For most of the Senate's history, Senators motivated to extend debate had to hold the floor as long as they were physically able. The Senate was either persuaded by the strength of their arguments or unconvinced by either their commitment or their stamina. True filibusters were, therefore, less frequent, and more commonly discouraged, due to every Senator's understanding that such undertakings required grueling, grueling personal sacrifice, exhausting preparation, and a willingness to be criticized for disrupting the nation's business.

Now, unbelievably, just the whisper of opposition brings the "world's greatest deliberative body" to a grinding halt. Why is that? Because this once highly respected institution has become overwhelmingly consumed by a fixation with money and media.

Gone, gone are the days when Senators Richard Russell and Lyndon Johnson, and Speaker Sam Rayburn gathered routinely for working weekends and couldn't wait to get back to their chambers on Monday morning.

Now, every Senator spends hours every day throughout the year and every year raising funds for reelection and appearing before cameras and microphones. Now, the Senate works three-day weeks, with frequent and extended recess periods.

Forceful confrontation to a threat to filibuster is undoubtedly the antidote to the malady. Most recently, Senate Majority Leader Reid announced that the Senate would stay in session around the clock to bring financial reform legislation before the Senate. As preparations were made and the cots were rolled out, a deal was struck and the threat of filibuster was withdrawn.

I strongly commend the Majority Leader for this progress, and I strongly caution my colleagues, as some propose to alter the rules to severely limit the ability of a minority to conduct a filibuster. I know what it is to be Majority Leader and wake up on a Wednesday morning in November, and find yourself a minority leader.

[Laughter.]

Senator BYRD. I also know that current Senate rules provide the means to break a filibuster. I employed them myself in 1977 to end the post-cloture filibuster on natural gas deregulation legislation. This was the roughest filibuster I have experienced during my more than 50 years in the Senate.

In 1987, I successfully used Rules 7 and 8 to make a non-debatable motion to proceed during the morning hour. No leader has attempted this technique since, but this procedure could be and it should be used.

Over the years, I have proposed a variety of improvements to Senate rules to achieve a more sensible balance allowing the majority to function while still protecting minority rights. I have supported eliminating debate on the motion to proceed to a matter (except for changes to the Senate rules), or limiting debate to a reasonable time on such motions, with Senators retaining the right to unlimited debate on the matter once it was before the Senate. I have authored several other proposals in the past, and I look forward to our committee work ahead as we carefully examine other suggested changes. The committee must, however, jealously guard against efforts to change or reinterpret the Senate rules by a simple majority, by circumventing Rule 22, where a two-thirds majority is required.

As I said before, the Senate has been the last fortress of minority rights and freedom of speech in this republic for more than two centuries. I pray that Senators will pause and reflect long before ignoring that history and tradition.

Chairman SCHUMER. Well, thank you so much, Senator Byrd. First, I think for all of us, we are privileged to be here and hear your testimony. Anyone who is sitting here knows why Senator Byrd is revered in the Senate just by listening to him for the last 15 minutes, where in his own inimitable style, he made powerful, practical, and traditional arguments. I don't think need permission, and I am going to take the liberty of distributing your remarks to every member of the Senate.

Senator BYRD. Thank you, Mr. Chairman. Thank you very much.

Mr. MONDALE. Mr. Chairman.

Chairman SCHUMER. Vice President, please.

Mr. MONDALE. It was my privilege to serve with Senator Byrd when he was Minority and Majority Leader, to be Vice President presiding when we had some fairly rigorous tests of the rules——

Senator BYRD. You bet.

[Laughter.]

Mr. MONDALE [continuing]. And I came to deeply admire his understanding and his statesmanlike approach to these rules. Most of the rules that did reform the Senate, he himself wrote. They are the Byrd Rules, and it is an honor to hear from the Senator again today.

Chairman SCHUMER. Thank you, Mr. Vice President. It is really one of those moments in the Senate, I think, that many of us will just not forget.

Thank you, Senator Byrd. Thank you so much.

Senator BYRD. Thank you. Thank you, Mr. Chairman. I thank the committee, and I thank the Vice President.

Chairman SCHUMER. Thank you, Senator. That was great.

I just want to say, as Senator Byrd leaves, that we forget the traditions of the Senate in this rushed, sometimes partisan, angry world, and he brings us right back to it. This really was, in my opinion, and I think and hope I am not—I don't think I am overstating it, sort of a hallowed moment.

Senator Roberts, you may resume questioning of Vice President Mondale.

Senator ROBERTS. That is a pretty tough act to follow, to say the least. I recall when we first went to Great Britain on an interparliamentary exchange led by Ted Stevens, thinking that he could work things out better on the Appropriations Committee with Senator Byrd if we took him over to Great Britain, and I can't remember which Brit gave the opening speech, but it indicated that he wanted to welcome those of us from the colonies who obviously did not understand all of the intricacies of the mother country, but that we were certainly welcome. I leaned over to the British fellow to my left and said, he will regret those remarks for the rest of his life——

[Laughter.]

Senator ROBERTS [continuing] Because it was Senator Byrd who responded and then instructed all those present on the reign of virtually every King of England—and queen, and the politics behind it.

[Laughter.]

Senator ROBERTS. Two hours later, the guy sitting next to me said, "I say, is he going to continue through every one of them?"

[Laughter.]

Senator ROBERTS. And I said, yes, he is, and he did.

[Laughter.]

Senator ROBERTS. That was signature Bob Byrd, who also enthralled us during the entire trip with a lot of other stories.

Tom indicated that he was worried as a new Senator about coming to the graveyard of good ideas. Some feel—actually, I feel there is a growing number that might say that some of these ideas are bad ideas that deserve a decent burial. I think it is very important to pass legislation. I think that is probably why we are created, the House, the Senate. But it is just as important to prevent bad legislation from passing.

I kept telling Max Baucus and Chuck Grassley on the Finance Committee, Mr. Vice President, that we ought to have a flashing light, "Do no harm," every time we considered a myriad of amend-

ments that obviously not many people knew a lot about, with the exception of our Chairman.

At any rate, I stand in admiration of Senator Byrd and his fierce, fierce fight for the rights of the minority, and also in regards to the executive branch. I think the elephant in the room here as to why we have so many problems, or challenges, really, I don't want to call them problems, is that the executive branch obviously has a tremendous agenda. I don't know whether to compare it to the New Deal or the Great Society or whatever has been said by the knowing pundits that will testify here, but my goodness, I cannot think of any endeavor that affects any person's interest in the country that has not been touched by legislative efforts under the banner of change.

I think if you looked at the primaries, and we have the expert on primaries here to my right, who is a dear, dear friend, but I think that there has been an obvious reaction with regards to debt and spending and government takeovers and jobs and terrorist policy, et cetera, et cetera. And I say that because I think that that is the push, and Senator Byrd mentioned the executive that is coming down the pike and it is a lot like a fire hose. If it isn't legislative, it is done by Executive Order and you read about it on page 11 of some newspaper, if you read newspapers anymore, and it is a pretty shocking kind of thing to you. You say, oh, wait a minute. I would like to grab onto that and get it back to committee, but we don't go to committee anymore.

We bypass committees, and I think that is one of the things that Senator Nickles brought up and I am sure the Vice President agrees. You have got to go to committees, where the expertise is, and then hopefully avoid the appropriators trying to change it and then reach some accommodation and that is how it worked. But that is not how it is working now, because we are leapfrogging the committees on very, very important ideas that Tom has mentioned over there in his comments.

I want to talk about holds just a minute. I put holds on people. I don't like it at all. When I do so, I do it publicly. But I was stuck with a situation where there were many reports, and I believed that they had legs, where we were going to transfer those in Gitmo up to Fort Leavenworth where we had the Command and Staff School, and it is the intellectual center of the Army. That is where General Petraeus wrote the doctrine that is in evidence today with Afghanistan, hopefully that will be successful.

We have inside-out security, but we don't have outside-in, and I thought the suggestion was ludicrous. I tried with the White House, with the Department of Defense, with the National Security Council, with DOD, even the CIA, to figure out, is this really going to happen? Is there any possibility of this happening? And then finally I couldn't get any assurance, so I just put a—I said, I want assurance from the White House that this is not going to happen, and so I put a hold on the Secretary of the Army, who happened to be a very good friend of mine, a Republican Congressman replacing Pete Sessions, who was also a very good friend of mine.

At any rate, he called me and he said, "Why do you have a hold on me?" And I said, well, you are a great friend. I just thought I would pick you out and give you a little publicity. And he said,

"Well, what is the problem?" I said, I don't have any problem with you, John. It is just I am trying to get an answer from somebody to indicate to me where we are in regards to moving incarcerated terrorists to Leavenworth, Kansas.

Well, I finally got what I needed, and I can't talk about it because it was all confidential, and right now, that whole policy, I think, is sitting over there at the Justice Department somewhere being decided. But that was a case where I thought at least a hold was justified. I am not talking about holds that will last forever to hold up the progress of the Senate. That did hold up the situation with the Secretary of the Army. I know the head of DOD, Mr. Gates, who is from Kansas, certainly let me know how he felt about it.

I have always felt, I would tell the Chairman, that I didn't want any amendment that I would like to offer up to be debated on the floor of the Senate. I didn't even want it debated in the committee. I thought if I didn't have enough merit in the amendment to talk to somebody on the other side, regardless of who is in power on the committee, to put it in the Manager's Amendment or just agree by unanimous consent, that I probably didn't have too much business offering the amendment, and I certainly didn't want a vote on the Senate floor, where a vote could go the other way and then that puts it in cement and then you have lost the issue. I know there are those Senators who would rather have the debate and lose than they would make any progress with the amendment. So that is just my school of thought.

I think we do reach agreements, as Senator Nickles has indicated, when the rubber meets the road. We did during impeachment. We all met in the Old Senate Chamber and individuals came together and we worked a way out of a very difficult situation.

I don't know when we are going to meet like that again to reach some kind of accommodation with what we have facing us, which I say is a very ambitious agenda in a Senate and a country that is very Balkanized in regards to the response to all of that. I suspect it will come finally during the time of entitlement reform, which we must tackle, and our economic situation, and I think we are just going to have to sit down and say, all right, we have to do this regardless of the press, as the Senator has indicated, or elections or anything else. We will have no alternative. And I hope that would be rather a gloomy prospect if that is the only thing that can really bring us together. But I would hope that we could do what Senator Nickles has pointed out and also what the Vice President has pointed out.

I am way over time, Mr. Chairman. Thank you.

Chairman SCHUMER. Thank you. It is always a pleasure to listen to Senator Roberts. He didn't talk about each King of England, but he had a lot of wisdom in what he had to say.

[Laughter.]

Chairman SCHUMER. Vice President, thank you so much.

Mr. MONDALE. Thank you.

Chairman SCHUMER. As Tom Udall went out, his hat was off to you and how you have really helped us in this debate.

Mr. MONDALE. Thank you.

Chairman SCHUMER. So your generous donation, in a sense, of your time, but more importantly of your thinking, is going to help us, and certainly I will be continuing to consult you as we move forward here.

Mr. MONDALE. Thank you very much.

Chairman SCHUMER. Thank you, Mr. Vice President. Thank you.

Let us call our next panel, and I appreciate their understanding. I am going to give brief introductions because we are running a little late. We have a great panel here and let me just quickly do the introductions of our two witnesses.

Steven Smith is a Professor of Social Sciences at Washington University and Director of the Weidenbaum Center on the Economy, Government, and Public Policy there. He is the author of several books on the U.S. Congress, including "Politics or Principle?", which is about the filibuster. He is a former fellow of the Brookings Institute.

Norm Ornstein is a name well known to every one of us here. He is a resident scholar of the American Enterprise Institute. He also serves as Co-Director of the Election Reform Project and is the author of many books about Congress, including "The Broken Branch." He writes a weekly column for Roll Call, is an election analyst for CBS News, and is counselor to the Continuity of Government Commission.

Gentlemen, each of your statements will be read into the record, and if you could keep your testimony to the allotted time, which I am sure you will, that would be great.

Professor Smith.

STATEMENT OF STEVEN S. SMITH, DIRECTOR, THE WEIDENBAUM CENTER ON THE ECONOMY, GOVERNMENT, AND PUBLIC POLICY, KATE M. GREGG PROFESSOR OF SOCIAL SCIENCES, AND PROFESSOR OF POLITICAL SCIENCE, WASHINGTON UNIVERSITY, ST. LOUIS, MISSOURI

Mr. SMITH. Thank you, Mr. Chairman and Senator Bennett. This is a very important set of hearings. The Senate is, I think, at an important juncture in its history and the upshot of my testimony is that we actually have reached a point in the Senate that is qualitatively different than the Senate has been in at any time in its past and it is time to consider some changes, both in the rules and in how the parties and Senators behave.

My general argument is that one of the important roles of the Senate is to serve as a policy incubator, that is, for Senators to use their time and creativity to define and address the important problems of the country. But the Senate in the last ten years and especially in the last five years or so has reached a point where the Senate's most valuable resources, the time and creativity of its members, is undercut by how the Senate has come to operate.

As we have seen throughout the hearing and as the two of you know perfectly well, the more vigorous exploitation of minority rights and the majority response has had a very pervasive effect, and I think a negative effect, on how the Senate is operated. Here is what I see.

In recent Congresses with both Democratic and Republican minorities, very few major measures have been untouched by efforts

to delay or prevent action. I have some tables at the end of my testimony that you can take a look at. The minority has engaged in more silence in response to majority requests for clearance of bills for consideration. There have been more frequent objections to majority party unanimous consent requests to structure debate and amendments. There are more holds extended to more minor measures and nominations, something for an outsider very difficult to count, but plainly true. There are more delays of Senators, and sometimes, I think, deliberately minority party Senators to get to the floor to offer amendments. And even an increase in the number of minority party unanimous consent requests to try to restructure floor debate as they see fit.

Now, the minority's moves have motivated majority party leaders to leave nothing to chance. In kind of a tit for tat fashion, in kind of a parliamentary arms race fashion, over the years, the majority, indeed, has responded, just as we heard this morning from a variety of Senators on the Republican side. Beyond having a quick trigger on filing for cloture, Majority Leaders and bill managers of both parties have more frequently filled the amendment tree, more frequently used their own amendments to prevent other amendments from becoming the pending business, a tactic which became an especially sensitive matter just yesterday when the minority took advantage of the fact that a pending amendment prevents another amendment from being considered except by unanimous consent.

This has led to tightened unanimous consent agreements, including the use of 60-vote requirements for amendments, which is a relatively new development. And beyond the obvious things on the floor, it has moved Majority Leaders to take a closer look at nonconference mechanisms to avoid debatable conference motions. And on some sensitive matters, especially on appropriations bills, Majority Leaders have avoided floor action altogether by facilitating the creation of omnibus bills in conference to limit the number of shots at the bills once they get to the floor.

Now, this is not the kind of Senate that I heard anyone here wanting in the future. This is a question of the power of the Senate. What kind of a Senate is it that fails, because of the desire to avoid floor delay and obstruction, what kind of a Senate is it that fails to even consider appropriations bills that are the foundation of the power of the purse of the Congress in dealing with the executive branch?

Now, of course, the minority has not remained idle. The minority's countermeasures include more objections to unanimous consent requests, frequently more resolutely opposing cloture on bills. There have been any number of instances in which a Senator in the minority has said, because I can't get my amendment up, I am going to vote against cloture. So in this context, procedural prerogatives intended to protect an open, deliberative, flexible process has, in fact, generated in practice a complicated process that is often rigid and procedure-bound.

Now, the best metaphor for this, I think, is actually a medical one. It is really a syndrome, kind of an obstruct and restrict syndrome, one in which well-justified procedural moves on each side accumulate and harm the institution.

Each party now begins with the working hypothesis that the other side will fully exploit its procedural options, and so it must fully deploy its without any evidence from the other side that it is using its procedural options to harm its interests. Now, this can hardly be argued to be the kind of Senate in which every Senator gets an opportunity to fully explore new policy ideas. It is, in fact, a Senate that over the last decade or so has managed to radically reduce the incentives for individual Senators to take the time and to apply the creativity to address the nation's problems.

My second major point is that this is a role that the Senate should focus on. We are a country with immense problems. Senators of both sides have argued for years that many of these problems have gone unaddressed. Part of it is in our larger system of government, the checks and balances, divided party control of the House and the Senate and the Presidency and so on, but a large part of it rests right here in the Senate.

The constitutional features of the Senate that encourage this, of course, were the longer terms, the overlapping terms, the continuity of the Senate. All of this gave the Senate a special place for the application of creativity in addressing new ideas, building a national constituency for new ideas, and so on. Much of that has now been undercut by the system we have.

I favor a system where we reach a new balance. It is unfortunate, but we can't reverse history. We can't really expect the parties to unilaterally disarm. I think it is up to the Senate to figure out a few new ways to limit debate and at the same time protect minority rights that are currently being threatened by this awful obstruct and restrict syndrome.

[The prepared statement of Mr. Smith submitted for the record]

Mr. SMITH. Thank you, Professor Smith.

Mr. Ornstein.

STATEMENT OF NORMAN J. ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, WASHINGTON, DC

Mr. ORNSTEIN. Thanks, Mr. Chairman. It is a particular pleasure to testify in front of you and in front of this committee, which is filled with people who really do care about the Senate and its role in the American democratic process. I am particularly grateful that it does not require a motion to proceed for me to move on to my testimony or we might be here all week.

Let me start by saying that I am really not among those who want to end Rule 22. I don't want the Senate to become like the House. I actually think that the Senate has become more like the House, in part because so many House members, especially the Class of 1994 and classes that have followed, have gravitated over here and have brought some of the norms of a harshly partisan, deeply divided, and perhaps ultra-efficient House into the Senate DNA a little bit more than they should have.

As I listened to the testimony and as I watched the testimony from the last hearing—by the way, I want to commend the committee, more than any other, the ability for somebody to be able to go to your website and watch what you do and see, by the way,

how carefully it is done is just a Godsend for those of us who follow Congress.

But I have had some sympathy with both sides in this. We do have a chicken and egg problem, as Steve has said. This is a problem for the majority and the minority in a lot of ways, and it is a problem of the culture. And it is, as Senator Byrd so eloquently said, in some respects a problem of the larger political culture, the outside moving and infecting the inside, and some of that outside culture is particularly obnoxious at this particular point. But we can't change the culture entirely inside the Senate and we need to also focus to some degree on the rules. And hopefully, we can find ways to change the norms and the rules together.

I am not going to spend a lot of time because of the substance of this hearing on specific recommendations, although I am very happy, and both of us, along with other scholars who follow this process closely, have lots of ideas about specific things to do. But I want to mention——

Chairman SCHUMER. I would just ask, either of our witnesses here, if they would like to offer suggestion. But, we are not up to specific suggestions yet.

Mr. ORNSTEIN. Yes.

Chairman SCHUMER. But if you would, it would be really helpful to us if you want to submit in writing some specific suggestions and we would add them to the record. Then we might have you back again to ask questions about your suggestions, if that would be okay.

Mr. ORNSTEIN. I think both of us would be delighted to do so——

Chairman SCHUMER. Thank you.

Mr. ORNSTEIN [continuing]. And, of course, to work with the committee in any way that we can to help to move this process forward.

I want to talk about a couple of elements that I think are a focal point of this hearing which really are what all this has done to the fabric of governance in America.

I had great sympathy for Senator Alexander when he was held—his nomination for Secretary of Education was held by Senator Metzenbaum. Steve Smith turned to me at that particular moment and said, well, we have 100 Metzenbaums now. And one of the problems is that nominations that are held for three months, or in many cases six months, nine months, a year, or more, many leaving nominees to twist in the wind, have an enormous human cost for those individuals. I have sympathy for Senator Roberts, having a really serious concern and wanting to get the attention of the executive branch and held up Congressman McHugh, which was painful to Congressman McHugh.

But Congressman McHugh was already here in Washington, had a job, had a house. Imagine people who make a commitment to public service and are living outside the city, as most of them do, thankfully, and we leave them twisting in the wind. I think individual Senators often do not recognize the human cost to people. They can't move their families. They can't time school years. We are losing a lot of good people, and at the same time, we are finding agencies, critical agencies, that are left headless or without the

main people who are designed to run things, career civil servants waiting for direction and can't get them.

I can tell you from what I have heard from local officials out in the country that one of the main problems we had in getting the stimulus package actually out there to have a more immediate and vibrant effect on the economy was that you had to expedite action through waivers of things like Environmental Impact Statements, or to move things more quickly than the normal process, and they couldn't do it because the officials were not in place.

At the same time, one of the great difficulties that we have is it is wonderful to have a tradition of unlimited debate and unlimited amendments. We are not in the 19th century. There is a huge agenda. Whether you like some elements of that agenda or not, the regular business of having authorizations done for programs and agencies, of having appropriations, is a necessary component for good governance. Whether you are a big government liberal or a small government conservative, the government that we have to protect the integrity of the country, to protect our citizens, ought to be run effectively and well.

We have gone for years in many cases without programs being authorized, and that hurts the implementation of those programs. Talk to any civil servant or government official trying to administer a program when you don't know what your appropriation is going to be, or you have to operate for months on a continuing resolution and then all of a sudden get a flood of money coming in. It is no way to run a government. Now, that is not entirely attributable to the way that the Senate is operating, but in fact, we have been forced because of the way the system has become clogged to move away from the regular order in too many ways.

The human cost is there for judges, as well. I must say, Senator Bennett, you are absolutely right that we did not have a tradition of filibustering nominees, although we did have filibusters before, including Justice Fortas. But not to get into that argument, what did change long before we had a discussion of filibusters of judicial nominees was an increasing practice of holding up nominations to try and keep slots open from one administration to the next, and that was a dramatic change from what we had had before.

And we have large numbers of judicial nominees, Elena Kagan among them, who sat for long periods of time when there were no objections to their individual qualifications—this was true for both parties—many of whom ultimately withdrew. Just as for executive branch officials, if you are in a law firm or in a university and you are waiting to take a leave or trying to leave your firm, you are left in limbo. It is no way to run things.

Frankly, I can make a better case for filibustering lifetime appointments than I can for filibustering temporary appointments for any period of time, but in either case, we are not considering the human cost.

There are ways to deal with these things, and the hold itself and the way it has exploded as a tactic for holding up hundreds and hundreds, not individual nominees, many of whom—most of whom now are not held up because of their qualifications or concerns but as hostages, and some for the purpose of killing them, can be changed. The notion of filibusters on motions to proceed moves

away from any argument about trying to cut off debate because, in fact, that is an attempt itself to cut off debate. And if we took Senator Schumer's chart and parsed it out, you would find an increasing number of the cloture motions are on motions to proceed.

And finally, let me say, if we talk about the numbers, one very simple change to consider, remember in 1975 we went from two-thirds of the Senate—or, excuse me, from two-thirds of the Senate present and voting to three-fifths of the Senate—would be to simply move to three-fifths of the Senate present and voting. One of the real problems you have got now is if somebody is sick, as we saw with Senator Byrd, one individual can create an enormous roadblock if you have a rigid number. So there is a way to preserve the number 60 but to create a little bit more flexibility. And then there are other ways to make sure that we can expedite action while preserving the right of a minority and the right of other members to offer amendments and have debate.

[The prepared statement of Mr. Ornstein submitted for the record]

Chairman SCHUMER. Thank you, Mr. Ornstein. I thank both our witnesses for excellent testimony.

We are running much later than we thought, but I do have one question. I have a whole lot of questions. I am going to submit some in writing.

The debate that some of us have been focusing on is—is it the Constitution that trumps the rule in Rule 22? But Senator Nickles had something interesting to say, and Senator Bennett and I were chatting here. It really is a 'chicken and egg', I think, as I think it was you, Professor Smith, said. We say, the majority Democrats at this moment say, you are filibustering to delay. The minority Republicans say, we are filibustering because you won't let us offer amendments.

And, it was always sort of in my mind a tradeoff, having moved from the House to the Senate, that I thought, 'well, that is the tradeoff.' The majority sets the agenda and the minority gets to offer amendments, not just to that agenda but other things. It seemed to me sort of a balanced system. In a sense, when I moved from the House to the Senate, I said it is harder in the Senate because you have to vote on all kinds of things, and you don't have the Rules Committee when you are in the majority. I have served minority House, majority House, minority Senate, majority Senate. Only one is really bad.

[Laughter.]

Chairman SCHUMER. So there was that sort of balance, and it is sort of taken out of the way. Now, I could argue with Senator Bennett that holds on nominees are not intended to prevent debate and amendment but just intended to be dilatory. Motions to proceed are somewhat different.

But my question, and I will only ask one here, although I am interested in your views, and I will ask you in writing, on the Constitution versus Rule 22, is this. Do you think there is some hope? Senator Nickles said, don't change the rules. Try to come to some bipartisan agreement, you know, agreement between the caucuses, I think he called it.

Do you think that is possible in this day and age, where the majority would say to the minority, we are going to ensure your right to offer several amendments, or a bunch of amendments, not to be dilatory, not to take over. It would be unfair, it seems to me, for the minority to spend more time on their amendments that are not relevant to the bill than the majority spends on the bill itself. That would take away the power to set the agenda. But we will guarantee you your right to offer some non-germane amendments, but in return, you don't slow things down unnecessarily.

I don't know, maybe that tradeoff could work, especially given the fact that each of us realizes we may be on the other side, majority-minority, several times in our career, as has happened to me. So that is my only question. I would ask each witness to give an answer, and then we will call on Senator Bennett and let people go.

Mr. SMITH. Senator Schumer, I certainly favor some kind of a mixed package that, on the one hand, limits debate at least on some motions, the motion to proceed. I would like to see some limits on motions to go to conference. I would even like to see limits on debate on amendments, which would have the effect of guaranteeing the minority a vote on an amendment that is taken up on the floor. And in exchange for that, some real guarantees for the minority to offer amendments and to debate those amendments and the bill.

Now, whether that is a tradeoff that would be acceptable to the minority, I am actually very dubious about that. If some kind of a tradeoff like that is not possible, then we do fall back on the question of how the majority can change the rules without making the case that the Constitution allows it to do so by a simple majority.

Mr. ORNSTEIN. I would love to see this handled informally. I have sympathy for the minority. I must say, though, one problem that I have seen and I mention in my testimony, we have had a number of bills that ended up passing unanimously or near unanimously that had to go through filibusters on the motions to proceed and on the bills themselves and took days and days. I mention a nomination for a court of appeals where this poor woman was held twisting in the wind for months and months and then ultimately got through on a near-unanimous vote.

The only reason for doing that—this is not about the concerns about having an opportunity to debate. This is to stretch out an agenda. And so you have got to come to an agreement, and whether that agreement can be reached, I don't know.

More generally, I just believe that people who make the sacrifice for public service deserve at some point a vote, and in almost every instance, it ought to be an up or down vote. And so I don't think you can achieve that without some change in the rules that takes nominations to a different level, and it seems to me that there may be some opportunity there for a bipartisan agreement. You are going to have to do some mix of informal negotiations between leaders and among members, and I hope some bipartisan consensus on a modest package of rules changes, but I don't see any other way out.

Chairman SCHUMER. Obviously, if we had bipartisan consensus, we wouldn't have to debate whether we need 67, 60, or a majority.

Mr. ORNSTEIN. Yes.

Chairman SCHUMER. Senator Bennett.

Senator BENNETT. Thank you, Mr. Chairman, and thanks to both of you for your patience today and your thoughtful consideration.

Mr. Ornstein, I would make just one comment about the objection to the motion to proceed. I will not speak for Senator McConnell, but I have been at the leadership tables where the decisions are made as to whether or not we will object to a motion to proceed, and in every instance, there is a significant negotiation that takes place where this becomes ultimately his ultimate weapon in his conversations with Senator Reid. It is not entered into lightly. Okay, Senator Reid, we will give you the motion to proceed if we can have your word that the following things will happen. And again, I am not privy to any of the conversations, only as they get reported in the leadership table, and I am going to be very careful not to violate any confidentiality that comes out of that.

It is my guess, I will put it that way, that there are circumstances where Senator Reid would like to accommodate Senator McConnell but feels he cannot because of the reaction he would get within his conference. And it is my guess that there are times when Senator McConnell would like to be more accommodating to Senator Reid but cannot because to do so would arise the ire of the Republican Conference.

I remember Senator Dole saying to me, "I am supposed to be the leader around here," and this was when we were in the minority, and, he said, "I have got 42 independent contractors I have to deal with," every one of which has the right to object to a unanimous consent agreement and without giving any hint of circumstances or context. I have seen Senator McConnell be frustrated in a very legitimate kind of action that he would like to proceed with, frustrated by a single Senator who refused to give a unanimous consent agreement. And I have seen Senator Reid in the same circumstance, where a single Senator on his side has caused Senator Reid to, perhaps injudiciously, but I will protect him, make some less than flattering comments about a member of his own conference, as we then end up in the situation where we do.

The only other comment I would make, I think the—and I do lay this at Tom Daschle's door because he is the first one I saw who used it—the inability to appoint conferees by unanimous consent was always done. The leader picked the name. The unanimous consent agreement was made. The conferees were appointed. And Senator Daschle was the first one that I saw who said, no, we will not allow you to appoint conferees. We will allow you to pass the bill. Indeed, we will vote for it so we get credit with our constituents as being in favor of it. But we will not allow the bill to ever survive because we won't allow you to appoint conferees. And that gives the minority power to dictate the results of the conference.

And one of the things that has disturbed me, Mr. Chairman, as much as all of the filibusters and the holds, is that we are not having conferences anymore.

Chairman SCHUMER. That is true. That is true.

Senator BENNETT. When I first came here, it was, okay, we are going to write this bill in conference. We understand we have got to work with the House. We have got to work this out. We will

write the bill in conference, and it goes through. Okay, take that amendment in order to get to conference. And increasingly, we are not having any conference.

So I say somewhat facetiously, the Senate is superbly structured to deal with the problems of the 19th century and we need to, whether it is done with precedent or whether it is done with rules changes or whether it is done with greater comity within the various conferences, we do have a problem.

That being said, I reserve the right to object to anything you want to do——

[Laughter.]

Senator BENNETT [continuing] With respect to changing the rules. Thank you.

Chairman SCHUMER. And on that happy note——

[Laughter.]

Chairman SCHUMER [continuing]. This was a great hearing. My only wish is that every one of our colleagues could have witnessed it, and maybe they will look at parts of it. It really has helped shed light on the big problems we all agree we face, even if we can't yet agree on solutions.

I thank the witnesses here——

Mr. ORNSTEIN. Thank you very much, Mr. Chairman.

Chairman SCHUMER [continuing] And the earlier witnesses. I thank my fine colleague, Senator Bennett.

The hearing is adjourned.

[Whereupon, at 12:33 p.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

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Bennett Opening Statement
Senate Rules Committee
Examining the Filibuster: The Filibuster Today and its Consequences
May 19, 2010

Mr. Chair, thank you for holding this hearing and for the opportunity to offer a few introductory remarks.

Though the majority has chosen to focus on what it believes to be the abuse of the filibuster by the minority, these hearings have also revealed how the majority leadership is abusing the rules to limit debate and amendment. At our first hearing we saw how the leadership is "filling the tree" to prevent the consideration of amendments. At our request the Congressional Research Service produced a report that shows our current Majority Leader used this tactic at a rate more than double that of his predecessor and almost five times as often as the last 5 Majority Leaders combined.

Since that first hearing, we have continued to study these abuses of Senate Rules by the majority; the use of Senate Rule 14 to bypass regular order and avoid committee consideration; and the decreasing time between the introduction of a matter and the filing of a cloture petition. Each report reveals a trend towards greater manipulation of Senate Rules by the Majority to restrict the voice and influence of the Minority and the citizens we represent. For example, during the 109th Congress, Rule 14 was used a total of 11 times. In the 110th Congress, that number grew to 30. CRS also reveals that since January 2007 the Majority has filed cloture on the first day a measure, matter or motion was raised at an alarming rate. This clearly indicates cloture is being filed prematurely, before a filibuster has even commenced. Yet some would still claim that cloture filings, by the majority, somehow prove abuse of the filibuster by the minority.

Interestingly, these abuses by the Majority go largely unnoticed (or ignored) by the media and pundits; many of whom have rediscovered their skepticism of the filibuster's utility now that the Republicans are using it to make their voice heard. I look forward to this hearing and the opportunity it affords this Committee to provide a more complete picture of obstructionism in the Senate.

I ask that the three CRS reports I have cited in my remarks be made part of the record.

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Senate Rules Committee
Hearing on "Examining the Filibuster: The Filibuster Today and Its Consequences"
Opening statement of Senator Tom Udall

Mr. Chairman,

Thank you for holding this hearing.

Today's hearing is not about examining the current use of the filibuster, but the abuse of it. We would not need to examine the filibuster if it were used sparingly and judiciously. Unfortunately, both parties in recent years have shown their willingness to use it as a tool of obstruction, rather than a means to extend debate.

One of the main reasons I ran for the Senate is because I saw the world's greatest deliberative body turning into a graveyard of good ideas. After over a year of observing this body in action, or in many cases in lack of action, it's clear that we're in danger of becoming just that.

Last month, this committee held its first hearing on the filibuster – it focused on the evolution of the filibuster throughout the history of the Senate. At that hearing, several of my senior colleagues on the other side of the aisle spoke about the need to preserve the filibuster in its current form. They argued that it is embedded in the Senate's tradition of unlimited debate … that any attempt to reform it is simply a short-sighted power grab by a frustrated majority.

But I believe my colleagues are missing the point. I have been speaking for months about reforming the Senate Rules – not just the filibuster – to make this a better institution. I am not approaching this effort with disrespect for the body's traditions. I hope that by reforming our rules we can restore some of the collegiality and bipartisanship that our founders intended for the Senate.

And let me make clear … I don't necessarily think that the current three-fifths requirement to achieve cloture is wrong. What is wrong is that only three current members of the Senate, Senators Byrd, Inouye, and Leahy, have had the opportunity to vote on Rule XXII – which was last changed in 1975. What is truly wrong with our rules is that they have become entrenched against change – something our founders never intended.

I am very happy to see former Vice President Mondale here today, as he was one of the leaders of the filibuster reform effort in 1975. He believes, as I do, that each Senate has the constitutional right to change its rules by a majority vote. He states very clearly in his testimony that the actions of the Senate in 1975 did not "seek to bind the members of future congresses … Even if we wanted to, we could not under the U.S. Constitution bind a future congress or waive the right of a future majority."

The Senate of 1975 thought that the filibuster was being abused. But more recent Senates have demonstrated a whole new level of obstruction … with senators from both sides of the aisle increasingly using it as a weapon of partisan warfare.

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It is time to reform our rules. As I've said many times, I will hold this view whether I am a member of the majority or minority. There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedures should not be one of them. We can, and should, ensure that minority rights are protected and that the Senate remains a uniquely deliberative body. But we must also ensure that it is a functional body, regardless of which party is in the majority.

Next January, I will follow in the tradition of Vice President Mondale, and my successor, Clinton Anderson, and offer a motion to adopt our rules by a simple majority. We don't have to make drastic changes nor do I think many senators want to. But we can modify the filibuster rule and other rules in a way that still respects minority rights but prevents our current state of minority obstruction.

Thank you again, Mr. Chairman.

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WEDNESDAY, MAY 19, 2010
SENATE RULES COMMITTEE

TESTIMONY OF WALTER F. MONDALE

Mr. Chairman, Members of the Committee:

I am very grateful to the Committee for conducting these hearings on the need to reform the rules to protect debate and deliberation—so central to the unique role of the U.S. Senate—while removing flaws in the procedures that, experience has proven, fuel obstruction and paralysis.

Perhaps I was asked to testify because of my involvement in the bipartisan and, because of that, successful battle to reform Rule XXII at the opening of the 94th Congress in 1975. That ended with the Senate reducing the number of votes required for cloture from a maximum of 67 to 60. At about the same time, the rule was also amended to set a time certain following the adoption of cloture for the vote on the underlying legislation. These measures, we had hoped, would assure debate and deliberation but avoid paralysis.

My cosponsor, Jim Pearson from Kansas, a Republican, and I called up our proposal at the very opening of the Congress. Our strategy was based on the constitutional right of the Senate to propound its own rules by a majority vote. Vice President Rockefeller's rulings from the chair supported our position. The majority leader, Mike Mansfield, appealed the chair's initial ruling, which we then successfully moved to table. In that long and sometimes bitter fight, lasting several weeks, the Senate on three separate occasions voted to sustain the constitutional option—the principle of majority vote. After the sense of the Senate became clear, Senator Mansfield and Bob Byrd, and the Republican's leadership, with Russell Long's help, reached the negotiated compromise that I just outlined. These rules are basically the rules that govern the Senate now, 35 years later.

Constitutional Foundations

That constitutional precedent remains today as well—a majority of the Senate can shape its rules at least at the commencement of each new Congress. Some argue that the rules themselves require a two-thirds vote for any amendment or that the precedents we established during the reform debate of 1975 were somehow erased by later votes declaring fealty to Rule XXII as then written. But as Alan Cranston of California said:

> Upholding the Mansfield point of order only adds one tree to the jungle of precedents we reside in. But above and beyond that jungle stands the Constitution. And no precedent can reverse the fact that the Constitution supersedes the rules of the Senate—that the constitutional right to make its rules cannot be challenged.

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At the time, I pointed out that those of us who asserted the Senate's constitutional right to change its rules by majority vote, but who later supported the 60-vote compromise, did not, by the adoption of that compromise, "seek to bind the members of future congresses.... Even if we wanted to, we could not under the U.S. Constitution, bind a future congress or waive the right of a future majority." The Senate and its rules are continuous, but the Senate itself under the Constitution decides those rules.

The foundation for this discussion, and the proposals I suggest today, is the Constitution itself. The framers, of course, were wary of the requirement for a super-majority on any issue. The Constitution itself rarely provides for it—ratifying treaties and constitutional amendments, veto overrides, impeachment, the expulsion of its own members. Indeed, the Great Compromise that led to the composition of the Senate, each state regardless of size having the same voice, itself suggests that the Senate should decide the issues of the day, at least eventually, by a simple majority.

Moreover, Article I, section five, requires only a majority to establish a quorum. That same provision permits the Congress to decide for itself its own rules. The provision may state the obvious, but it is beyond dispute: "Each House may determine the Rules of its Proceedings." Senator Byrd, in 1975, noted the unmistakable effect of this Constitutional provision: "at any time that 51 senators are determined to change the rule and ... have a friendly presiding officer, and if the leadership of the Senate joins them ... that rule can be changed and senators can be faced with majority cloture."

The Senate took that bold step to reduce the cloture requirement because it was becoming paralyzed by what many of us saw as an abuse of the rules. Jim Allen, of Alabama, was a rules wizard. He had a coterie of allies who began the march toward what we see today: the use of cloture to paralyze the Senate, preventing it from acting on any issue that a motivated minority might seek to block.

The constitutional remedy was invoked by majority rule, and the compromise was adopted by a large bipartisan vote. We believed we had to change to remain a functioning Senate. I think it was a monumental change. If there is any doubt about that, one need only ask this question: How would the Senate function at all today if the rules still required a two-thirds vote to invoke cloture?

While the circumstances then differ in detail from what you confront today, fundamentally what we see now is a logical extension of the paralysis we faced in 1975. The Senate has evolved into a super-majority legislative body. The ever present threat of filibuster has greatly enhanced the ability of a single Senator, simply through a "hold" on a nominee or a measure, to prevent any consideration and to do so secretly. Many members of the Senate have said that this body is in crisis. It sure looks that way to me. More importantly, it looks that way to much of the American public.

In one profound sense, the crisis is much more threatening than the one we faced. Because we enjoyed broad bipartisan support for reform, Jim Pearson and I as the principal authors benefited from a growing consensus that the Senate was dysfunctional and increasingly unable to serve the nation. The right to have extended debate had become paralysis. A remedy

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that had been used principally to resist civil rights reforms had metastasized, once those reforms had been adopted, to cover any and all issues and, later, any and all nominations.

I am heartened that, particularly among newer members of the Senate and, I hope, in the Senate at large, there is a growing demand for rules reform. I hope reforms will be ready for adoption at the outset of the new Congress, next January.

Permit me to briefly outline a few suggestions:

- Weaken the power of "holds" by making a motion to proceed either non-debatable or debatable for a limited amount of time, such as two hours. This change has been suggested many times over the years, but today's Senate demonstrates how badly it is needed. The rules should provide that the consideration of any nominee or debate on any measure can begin by a traditional motion to proceed requiring only a majority vote.

  Critics argue that this change is contrary to the Senate's tradition of unlimited debate. However, this suggestion focuses on the start of debate, not on the end of it: a simple majority should be sufficient to begin debate in the Senate. No Senator, in other words, not even a significant minority, should be able to block a proposal or a nominee from coming to the floor on a motion to proceed.

- I would hope that the joint leadership could shape a reformed Rule XXII, as our leadership did in 1975, that would reduce the number of Senators required for cloture from the present 60 to perhaps between 58 and 55 members. There is no magic number. We tried to find a line between deliberation and debilitation. The number 60 worked for us then. In the harshly partisan Senate of today, it is a hill too high.

  I know that Senator Harkin and many others would like a rule that would, perhaps by steps, eventually allow for majority cloture on all measures and nominees. I like part of his proposal, an incremental reduction in the cloture requirement on successive votes, but it would worry me to reduce the cloture requirement all the way down to a simple majority to end debate. It would be more efficient, but the Senate has a much higher calling. It must protect liberty, ventilate tough issues, and call its own government and powerful interests to account. You must protect the integrity of our courts. You must shape fundamental compromises reflecting our federal system. At times of great passion, you must help us find our way, lead us forward and hold us together. It takes time.

I served in the Senate during most perilous times when war began or escalated, when funds were spent or withheld, when civil liberties and civil rights were under assault—all with little public awareness initially until a few Senators began, publicly on the floor of the Senate, to express doubt and raise questions. That right should be sustained.

Ironically, however, the use of that right as now practiced threatens the credibility of the Senate and its procedures and adds—not causes, but adds—to the incivility that undermines public confidence in government today. The filibuster should not be used to frustrate the very

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purpose of the Senate's procedures: to foster discussion, even extended discussion, to enhance public understanding of the issues that face the country.

The House, with its greater numbers, has rules that necessarily promote efficiency; the 100-member Senate—with its smaller numbers and longer terms, with its expanded authority over treaties and confirmation, with its special responsibilities in the federal system—has provided itself time to do its job as its member think it should be done. If we became a majority rule Senate, for every procedural and substantive vote, I fear that efficiency, and the emphasis on delivery not deliberation, could have disastrous consequences. The Constitution permits the Senate itself to strike the proper balance.

The Confirmation Process

The Senate's Constitutional authority to advise and consent to presidential nominations is one of its most important responsibilities. Yet there can be no consent without debate and there can be no debate if a minority of Senators—indeed, even a single Senator—can bar the Senate from giving its consent. Under the same Constitutional provisions that give the Senate the power to change Rule XXII by majority vote, it can change its procedures for bringing nominations to the floor.

The Senate's leadership should have the authority, sustained by a majority and a ruling of the presiding officer if necessary, to bring nominations to the Senate. In addition, the Senate's leadership has the ability to suspend, until a particular nomination has been resolved, the two-track system that has permitted filibusters—in name, but not in fact. The two-track system, established more than 35 years ago, permits the Senate to entertain an issue subjected to filibuster and, simultaneously, issues that are brought to the floor, by unanimous consent, and debated and adopted or defeated. That system has ended the around-the-clock sessions that once characterized debates on civil rights, but that "reform" has come at a price. Using the two-track system promotes efficiency because it allows a silent filibuster to continue without using valuable floor time. However, it also allows a small minority of Senators to block legislation and nominees without ever having to actually filibuster. If the Majority Leader, from time to time, suspended the two-track system and forced members opposing a measure to hold the floor, I suspect that you might see far less obstruction in the Senate.

There was a time that any one Senator, without fear of disclosure, could place a hold on a nomination. The Senate amended that practice by requiring that the name of the Senator ordering the hold be made public after six session days. Yet that welcome change, too, has seen its effectiveness eroded by serial and still secret holds exacting a cost in public confidence and in the Senate's effectiveness. This is not a minor problem. Filibusters are now undertaken not as a last resort but as a first resort. Because of that, a "hold" not only serves notice that a unanimous consent agreement cannot be reached but suggests a serious threat of a filibuster itself.

This practice frustrates the very workings of government and prevents public accountability. It relieves those interrupting the Senate's business of the responsibility for blocking Senate consideration of a measure or a nominee, and I believe the rapid increase in the number of filibuster and "holds" since then is attributable in part to this change. I know that

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there are times when the leadership feels it must proceed on a two-track system. But I think it would be helpful if the leader would force more filibusterers to fully disclose their opposition.

We can be confident that the President's nomination to the Supreme Court to replace Justice Stevens will be the subject of extended and perhaps emotional debate. No one will attempt to place that nomination on hold. Yet I will not be the first to note the irony in the fact that Solicitor General Kagan, though nominated to the U.S. Court of Appeals for the District of Columbia Circuit by President Clinton, never had a hearing let alone a vote on her nomination because of a hold.

There are today dozens of vacancies in the executive branch and in the federal judiciary that remain unfilled because the Senate has not taken up the nominations. The background checks have been completed. Most of them probably will be confirmed. But they cannot even be addressed because a single Senator has decided, for reasons related or unrelated to the nominee, that the nomination will not be placed before the Senate for discussion, let alone for a vote.

To use an indelicate phrase, the leverage that this institution has does not come from refusing to permit debate. It comes, to the contrary, from a free and open—indeed, extended—discussion of public issues and the public personalities that a president has chosen to serve in government.

This country faces challenges that are severe, broad and deep, not the least of which is the budget deficit that will weigh so heavily on our grandchildren and their children. Deliberation and debate are essential—the Senate has proven their value time and again—but, ultimately, the country through its elected representatives needs to address those challenges with sound public policy and laws enacted to protect our prosperity and our security.

When I served in this institution, my party had significant majorities in the Congress. Whatever may come with age and experience, however, it is the certainty that partisan political success comes and goes. It cannot be the basis for any change that involves Constitutional principles. Unlike partisan success, those principles endure. We did not propose reform in 1975 for partisan gain, nor should we today, but both reform and the bipartisanship necessary to achieve it are even more important today than they were then.

Speaking at ceremonies dedicating the restored original Senate chambers, Senator Tom Eagleton centered his remarks on the Senate's remarkable history, except for the civil war, of managing the powerful forces of change and differences that have challenged our nation. In his words:

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> Here in this room has been sheltered the structural side of our democratic government for decades. That government's life force—what makes it work and endure—is our capacity to accommodate differences and to find a way beyond parochial, partisan, and ideological concerns to live together as a free nation.

As you know, Americans are increasingly anxious about our ability to find our way, despite our differences, to heal and unite. That's why the work of this Committee and the decisions of the Senate on how it will conduct itself are so crucial to our future.

Thank you.

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STATEMENT OF U.S. SENATOR DON NICKLES
Prepared for
The U.S. Senate Committee on Rules & Administration
May 19, 2010

I welcome this opportunity to offer some observations about the Senate rules, the goals they were intended to service, and the peril of modifying them in the ways being discussed.

I had the honor of serving four terms – nearly a quarter of a century – as a member of the United States Senate. During that time span I served in the minority and the majority and leadership in the Senate changed five times. It changed again in 2007 and will change again. I began, as we all did, as a junior member, learning the rules and learning how the institution functions, and had the privilege of serving as a committee chairman and in multiple leadership capacities.

Newly elected Senators come from all backgrounds – former governors, former House members, or, in my case, a former state legislator. We all come with ideas and goals and an appetite for change.

Then you get here and you realize, there are 99 other people who also have some ideas. You also realize what fundamentally makes the Senate a unique and important body, is that the rules try to ensure all those ideas are heard. Further, and importantly, the rules of the Senate try to ensure bills can only be passed through collaboration, not confrontation.

For that reason, I firmly believe efforts to modify rules governing the Senate filibuster would not be in the best interest of the Senate as an institution or in the best interest of the American people, in whose interest we are privileged to serve.

During my tenure, neither party held a filibuster-proof majority. But that did not prevent us from passing significant legislation. We rewrote the tax code, reformed welfare, balanced the federal budget, and dealt with complex defense and foreign policy challenges. I didn't agree with everything we did. My colleagues on the other side of the aisle didn't agree with everything either. But we worked together across the aisle to forge agreement, as the Senate rules require.

That is where the impact of the filibuster is revealed. While your perspective of it may change depending on which side you sit – majority or minority - it ultimately forces both sides to come together and hash out solutions.

I have been on the outside of this body now for five years, but am still a close observer and friend of the Senate. I am concerned about the increasing use of

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tactics that serve to blunt debate, circumvent a healthy exchange of ideas, diminish the role of Senate committees and cut off debate using cloture before debate has even occurred or amendments offered. Indeed, the filibuster is the last measure available to push back against these tactics, which unfortunately have become a practice all too common by both sides.

For example, cloture traditionally is filed to bring debate to an end and to block further amendments but it has increasingly been used to prevent debate from beginning without any amendments even being considered.

The Congressional Research Service found that between January 2007 and April 15, 2010, cloture was filed 141 times on the very same day a matter, measure or motion was brought to the Senate floor. Reducing the number of votes needed to invoke cloture will only increase the use of such tactics.

All Senators should have the opportunity to debate and offer amendments before there is an effort to halt debate and limit amendments. This is what separates the Senate from the House and makes the Senate the greatest deliberative body in the world.

The committee process, which enables members to be focused and develop an expertise on particular issues that fall within their committee's jurisdiction is another valuable tradition. Committee hearings and mark-ups provide a fuller airing of views, and afford members who have an established interest and expertise in particular areas to shape legislation before it reaches the floor.

The increasing use of Rule 14, which enables the Senate Leader to put bills on the Senate calendar without the benefit of committee consideration undermines Senate process. It makes legislation more partisan and doesn't allow the vetting process, which is important in crafting legislation, and increases partisan divides, which is not constructive for the Senate.

According to CRS, in this and the preceding Congress, 36 measures have come before the Senate without committee approval. This represents a 20 percent increase over the total number of times this procedure was used in the preceding two Congresses...and we're still months away from adjournment.

Finally, there is the practice of filling the amendment tree, a tactic that limits the rights of the minority to offer amendments. This practice has increased significantly in recent years.

Between 1985 and 2002, five majority leaders used the tactic a total of 24 times. From 2003 through 2010, it has been used 37 times.

In contrast, the current floor debate on the financial services bill is a model of how the process should work. The Senate is now in its third week of debate, and

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cloture was filed only after proposals by members of both parties to change the bill had been considered, debated and voted on. Some were adopted and some were rejected, but many were proposed and aired. Such an open process, though slow and cumbersome to some, represents the Senate at its best and I compliment Chairman Dodd for his approach.

And I would commend you, Mr. Chairman, and the members of this committee for undertaking this important discussion because it goes to the very heart of the Senate's role in our Republic. The Senate is a unique legislative body. It differs from the parliamentary bodies of other countries and from our own House of Representatives, where the majority party can legislate unhampered by the objections of its opponents. These differences can frustrate those seeking change. It frustrated me at times. But the genius of the Senate's cloture rule is that it forces members to slow down when they seek to act in haste, to compromise when they want to run over their opposition.

Sixty is the Senate's magic number. It forces compromise and collaboration. It allows for discussion and debate. I believe that it ultimately makes for better legislation.

Eliminating the super majority – changing it even to 55 - will feed partisan politics and hamper the collegial spirit intrinsic to the Senate. Those in the majority will have less incentive to work with the minority. This change would fundamentally alter the institution of the Senate not for better, but for worse, to the detriment of the American people.

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Testimony of

Steven S. Smith

Director, the Murrary 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

May 19, 2010

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

Today's Senate has reached a point in its procedural history that is qualitatively different than anything it has experienced before. This has material consequences for the role of the Senate in our political system as an incubator of policy ideas. Let me make three observations and leave the longer story for the report I submitted.

First, in the last two decades, the more vigorous exploitation of minority rights and the majority response have had a pervasive and negative effect on the Senate.

Here is what I see: In recent Congresses, with both Democratic and Republican minorities, very few major measures are untouched by minority efforts to delay or prevent action (see Figures 1 and 2 at the end of my oral testimony). More silence in response to requests for clearance, more frequent objections to majority party unanimous consent requests to structure debate and amendments (Figure 3), more holds extended to more minor measures and nominations, more delays in getting to the floor to offer amendments, and even an increase in the number of minority party UC requests to alter the agenda.

The minority's moves have motivated majority party leaders to leave nothing to chance. Beyond having a quick trigger in filing for cloture, majority leaders and bill managers of both parties have

- more frequently filled the amendment tree,
- more frequently used their own amendments to prevent other amendments from becoming the pending business (a tactic sometimes used in combination with cloture, after which the two-amendment limit applies),

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- tightened unanimous consent agreements, including the use of 60-vote requirements for amendments;
- moved to non-conference mechanisms to avoid the debatable conference motions; and
- on some sensitive matters, such as appropriations bills, avoided floor action altogether by facilitating the creation of omnibus bills in conference.

The minority party has not remained idle. Minority counter-measures include more objections to UC requests and more resolutely resisting cloture on bills, if for no other reason that to object to majority manipulation of the amending process.

In this context, the procedural prerogatives intended to protect an open, deliberative process have generated, in practice, a complicated process that is often rigid and procedure-bound.

The best metaphor for this is a medical one. This is a syndrome--an obstruct-and-restrict syndrome--one in which well-justified procedural moves by the two parties accumulate and harm the institution.

Each party now begins with the working hypothesis that the other side will fully exploit its procedural options. Each side acts peremptorily to protect its interests. Bill after bill, the Senate works itself into the manipulation of the amendment process, rigid UCs, and, wherever possible, the use of debate-limited procedures. Many of the most important policy decisions are taken out of formal venues of committees, conferences, the floor and moved into party offices.

It can hardly be argued that the quality of deliberation has been improved by the full exploitation of procedural rights by the minority and majority.

Second, and regrettably, a special role of the Senate in our political system as an incubator of new policy ideas has been undermined.

While the Constitution and the framers did not anticipate that the filibuster would become a tool of the Senate minority, they did anticipate that the Senate would have a special place in the American political system. The greater experience, method of selection, longer and staggered terms, and large constituencies encourage a broader perspective with a longer time horizon than in the House.

The constitutional features of the Senate were enhanced by the flexible, informal, and permeable decision-making process of the smaller upper house, which historically facilitated the exchange of ideas, encouraged the trial and error process of defining policy problems and solutions, and generated opportunities for participation that bring job satisfaction and incentives for interaction across party lines.

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The obstruct-and-restrict syndrome undermines the Senate policy incubator. Full deployment of procedural weapons protects minority rights and promotes majority interests but harms the Senate. It breeds rigidity, reduces opportunities to explore and advocate new ideas, shrinks time horizons, and swallows up the most valuable resources of the institution: the time and creativity of senators.

Third, it is hard to reverse history. We can hope that partisan polarization and procedural warfare subside, but, once invented and exploited, procedural weapons continue to be used. Wise leaders must anticipate and defend against the possible moves of the other party. So the syndrome does not cure itself; you must address it.

I would like to see several steps taken:

1. Generous debate limits should be established for the motion to proceed, for amendments, and for the motions required to go to conference.
2. Limiting debate on appropriations measures, perhaps under the Budget Act.
3. Limiting debate on matters considered under the Senate's "advice and consent" power—nominations and treaties—found on the executive calendar.
4. To protect the right to debate under these limits, you might establish a high threshold, a three-fifths majority, to further reduce time for debate.

These are not easy steps to take. I believe they will strengthen the Senate.

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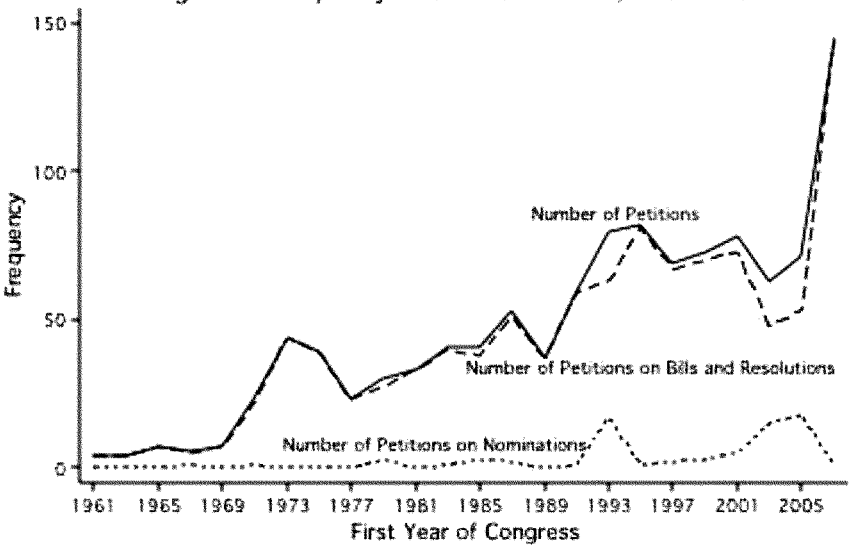
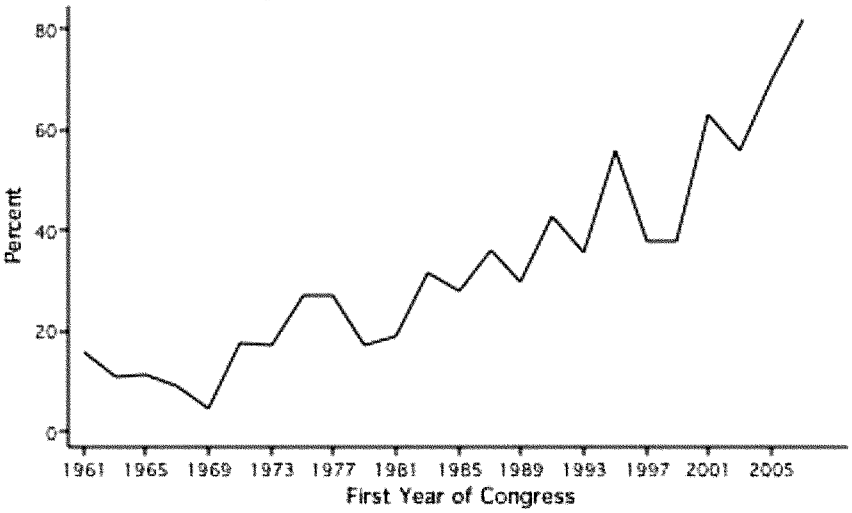
Figure 1. Frequency of Cloture Petitions, 1961-2008.



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.

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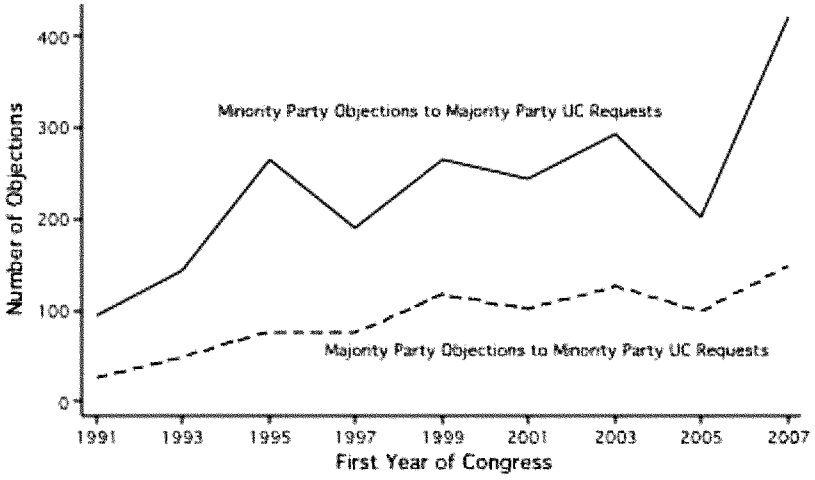
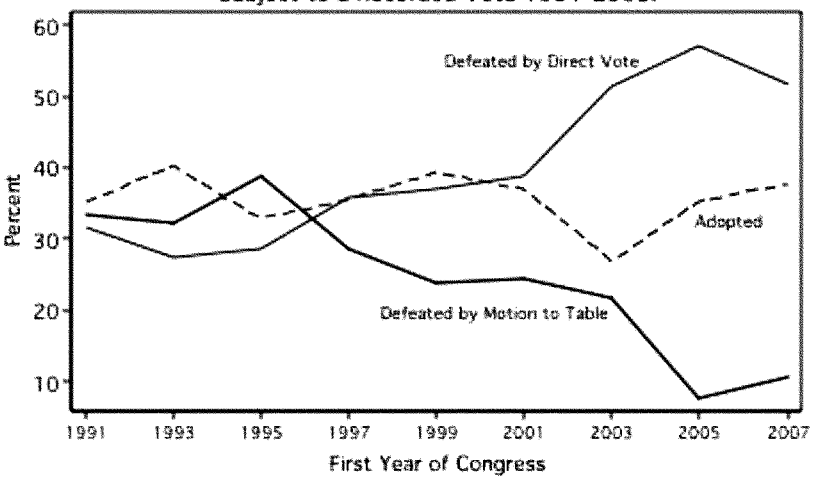
Figure 3. Objections to Unanimous Consent (UC) Requests by Party of Author and Objector, 1991-2008.



Source: Congressional Record.

Figure 4. Disposition of Senate Floor Amendments Subject to a Recorded Vote 1991-2008.



Source: Senate vote record.

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Testimony of Norman J. Ornstein
Resident Scholar, American Enterprise Institute

Before the
Committee on Rules
U.S. Senate
May 19, 2010

Chairman Schumer, Ranking Member Bennett, members of the committee. I am pleased and honored to be invited to testify today on the filibuster today and its broader consequences for the Senate, other institutions, and the fabric of governance in America.

Let me note first that I am not among those who want to abolish Rule XXII or believe that procedures that protect minority viewpoints in the Senate are per se wrongheaded. I certainly join with scholars who have shown that unlimited debate in the Senate was in many ways a historical accident, not an objective of the Framers. The rules that followed the removal of the previous question motion, including those in place today, were neither preordained by the Framers of our Constitution, nor are they written in stone.

But I do believe that the Framers wanted the Senate to be a body quite distinct from the House of Representatives, and were deeply concerned about the potential tyranny of a majority. So a body built on a greater role for individuals, relying significantly on unanimous consent, and with the capacity for a minority of representatives with intense views about an issue of great national concern to retard action and force greater deliberation in the face of majority sentiment, fits that vision.

However, in too many ways, that vision of the Framers is being distorted today, at a substantial cost to the fabric of comity, the process of deliberative democracy and the vital business of governance in the country. This is true of the use of the filibuster as a pure tactic of delay and obstruction and not as a way for a minority to express its intense feelings about an important issue, and of the use of the filibuster's first cousin, the hold.

On the changing use of the filibuster, I have appended to my testimony an article I wrote in 2008 for the magazine The American, with a chart showing the changes in cloture motions over the past three decades, including the dramatic spike in the 110th Congress. We are on course to break that record in the 111th. As I wrote then, "In the 1970s, the average number of cloture motions filed in a given month was less than two; it moved to around three a month in the 1990s." In the 110th and 111th—where there have been 92 cloture motions through the end of April—the average is more like two a *week*.

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The sharp increase in cloture motions reflects the routinization of the filibuster, its use not as a tool of last resort for a minority that feels intensely about a major issue but as a weapon to delay and obstruct on nearly all matters, including routine and widely supported ones. It is fair to say that this has never happened before in the history of the Senate. No doubt, the increase in cloture motions reflects changes on the part of both parties, as the minority has moved to erect a filibuster bar for nearly everything and the majority has moved preemptively to invoke cloture at the start of the process.

But the fact is that the major change is minority strategy. Consider three examples from the 111th Congress. The first is H.R. 3548, the Worker, Home Ownership and Business Assistance Act of 2009 that moved to extend unemployment benefits in the face of the deep recession. There was no opposition in the Senate to this bill; it ultimately passed 98-0 in November 2009. But before that point it was subjected to filibusters both on the motion to proceed and on final passage. The first cloture motion was adopted 87-13; the second, 97-1. A bill that should have zipped through in a day or two at most took four weeks, including seven days of floor time, to make it through.

The second example is H.R. 627, the Credit Cardholders' Bill of Rights Act. This one ended up with only one cloture vote, after the filibuster on the motion to proceed was withdrawn. The cloture motion on passage sailed through 92-2, and the bill passed by a 90-5 vote. But again, the clog in the process caused by filibuster threats and the delays allowed by Rule XXII meant weeks of delay and seven days of floor time.

Third is the Fraud Enforcement Recovery Act; again cloture on the motion to proceed was withdrawn, but cloture had to be invoked on final passage. The cloture motion was 84-4, and final passage was 92-4. This time, six days of floor time.

The three bills above demonstrate vividly the new tactical approach to the filibuster. Twenty days of precious and limited floor time take up by non-controversial bills, with the lions' share of that time spent not debating the merits of the bills or working intensively to improve them via substantive amendments, but just trying to use up more floor time to make action or progress on other bills more cumbersome and difficult. Is this deliberate obstructionism? I will leave that interpretation to the words of former Republican Leader Trent Lott, who observed in the 110th Congress, "The strategy of being obstructionist can work or fail. For [former Senate Minority Leader] Tom Daschle, it failed. For Reid it succeeded, and so far it's working for us."

I accept Senator Lott's characterization that the tactic of obstructionism is not owned by either party; it has been employed by both parties when it suited their purpose. But the use of the tactic has expanded sharply and shows no signs of abating.

Unfortunately, it has also been employed increasingly as a tool against nominations, both to courts and executive branch positions. The most pointed example here is the nomination of Judge Barbara Milano Keenan to the U.S. Court of Appeals for the Fourth Circuit. There were no issues about Judge Keenan's qualifications or

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nomination. But her confirmation in March of this year was subject to a filibuster—and a cloture motion that passed 99-0, followed by a similar 99-0 confirmation vote. In the case of Judge Keenan, her confirmation occurred a full 169 days after her nomination, and 124 days after the Judiciary Committee unanimously reported her nomination to the floor.

Judge Keenan's nomination took much longer on the floor than it should have. But here, as in hundreds of other nominations, the real villain has been the use and misuse of the hold. The hold, as you know, is simply a notice by a senator that he or she will deny unanimous consent if a bill or nomination is brought forward. Holds are nothing new, but the way in which they are employed has changed even more dramatically than cloture motions and filibusters per se.

Where holds used to be employed sparingly, and served mainly to delay for a short time, days or weeks, a vote on a bill or nomination to enable a senator to be present for the debate, or to muster the best arguments to use on the floor, holds now are frequently the equivalent of death sentences or long periods of torture for nominees. Where holds on nominations once reflected concerns of senators about the nominees, now they more frequently are hostage-taking devices.

One problem, as you know well, is that many holds are anonymous, leaving both the nominee twisting in the wind and the public unaware of who or why the delay is occurring. This practice was theoretically changed three years ago, but the pledge to end anonymous holds has never come close to being implemented. It is both wrong and cowardly for senators to cling to anonymity. But it is also wrong and shameful to manipulate the lives of those who are willing to make the sacrifices to come into public service, and to sacrifice quality governance for narrow and self-serving ends.

It is difficult to quantify exactly how many holds on executive and judicial nominees are actually in place at any one time. But there are at present around a hundred nominations for executive and judicial positions on hold while awaiting confirmation votes, many of them having been waiting for many months.

Imagine you live in California and are offered, and accept, an attractive position in the private sector on the East Coast. You can plan your career and family change, and probably time your move to coincide with the end of the school year, selling your house and finding a new one in time for your family to get acclimated to the new schools. If you as an individual decide to accept the call for public service, to a position requiring Senate confirmation, you have no such luck. You can inform your employer that you are leaving—but not know for months or maybe a year or more when you will be going, leaving everyone in limbo. You cannot tell when you can or should move to Washington. You may be able to stay in your job in the interim, but end up having to recuse yourself from some decisions, and have your employer and colleagues look at you in a different way since you will probably be leaving them sometime in the foreseeable future. The uncertainty is excruciating for nominees and their families, a human cost that is often just ignored by senators who put holds on nominees they don't know, may not even oppose and are exploiting for other political purposes.

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To be sure, leaders can transcend the holds by bringing up the nominations and overcoming the lack of unanimous consent. But that moves the nominations back into the time-consuming process of Rule XXII and other Senate procedures that mean days and weeks of precious floor time that simply can't be spared.

The upshot has been that many key posts in government, like the chief operating officer of the executive branch (the head of the General Services Administration,) individuals on the front lines of protecting our homeland security like the head of the Transportation Safety Administration, members of the National Transportation Safety Board, key officials whose jobs deal with issues like the oil spill and the international financial architecture, have seen their posts go unfilled for months, leaving headless key agencies and offices that need leadership. Whether you are a small-government conservative or a big-government liberal, enforcing the laws, running the agencies, protecting Americans against terrorist threats and natural disasters, are all necessary—and the current misuse of holds damages the country's ability to do all those things and more.

There is no panacea here. The problem is less the rules themselves and more the current culture. But the rules do play a part, and there are modest but important changes that deserve broad bipartisan support from those who want to see an appropriate balance in the Senate between minority concerns and majority governance, and want to see the Senate, and the broader government, functioning in the best interest of the country. I would be pleased to discuss some ideas for change if and as the committee desires.

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Congressional Research Service

MEMORANDUM May 17, 2010

To: Senate Committee on Rules and Administration
Attention: [redacted]

From: Richard S. Beth, Specialist on Congress and the Legislative Process, 7-8667
Christopher M. Davis, Analyst on Congress and the Legislative Process, 7-0656

Subject: **Days of Senate Consideration of Various Questions Before the Filing of Cloture**

This memorandum responds to your request for statistics on the average number of calendar days of Senate consideration of various questions before the first cloture motion was filed on them.[1] The data contained in this memorandum may be used to respond to other Congressional clients seeking identical information.

The Cloture Process

Short of unanimous consent, the cloture process authorized by Senate Rule XXII is the only procedure by which the Senate can vote to set an end to a debate without also rejecting the bill, amendment, conference report, motion, or other matter it has beeu debating.[2] There are several stages to invoking cloture.

- First, at least 16 Senators sign a cloture motion moving that debate be brought to a close on some pending question. When the motion is presented, the clerk reads it.
- The Senate votes on the cloture motion one hour after it convenes on the second calendar day after the cloture motion was filed, and after a quorum call has established the presence of a quorum. The time for the cloture vote may be changed by unanimous consent, and this required quorum call is routinely waived.
- The presiding officer presents the cloture motion to the Senate for a roll call vote at the time required by Rule XXII, even if the Senate is considering other business.
- The majority required to invoke cloture is three-fifths of the Senators duly chosen and sworn, or 60 votes if there are no vacancies in the Senate's membership. Invoking cloture on a measure or motion to amend the Senate's rules requires the votes of two-thirds of the Senators present and voting, or 67 votes if all 100 Senators vote.

[1] The authors wish to express appreciation to CRS Analysts Bill Heniff Jr. and Elizabeth Rybicki who participated in the gathering of the data on which this memorandum is largely based.

[2] *Senate Manual*, 110th Cong., 2nd sess., S.Doc. 110-1 (Washington: GPO, 2008), pp. 20-22.

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Senators who wish to offer amendments to legislation on which cloture has been invoked must submit their amendments in writing before the cloture vote takes place. First-degree amendments must be submitted no later than 1:00 p.m. on the day after the cloture motion is filed. Second-degree amendments must be submitted at least an hour before the Senate votes on cloture.

If cloture is invoked on a question, its consideration is "locked in" and there are a maximum of 30 additional hours of consideration before a vote is taken on the pending question. All amendments considered post-cloture must be germane.

While Rule XXII authorizes the cloture process, it does not compel a Senator to file cloture at a given time or at all when considering a measure or matter. As such, on a given piece of legislation various political, procedural, and policy considerations may influence whether cloture is filed, and if so, when and on what question. While any Senator may file a cloture motion, in most cases, it is the Senate Majority Leader or his designee who decides when and if to file cloture in keeping with his role as the individual responsible for setting the Senate's floor schedule.

Research Method

This memorandum includes seven tables. **Table 1** reflects the number of cloture petitions, sorted by question and by Congress, which were examined in this memorandum.

Table 2 reflects the average number of calendar days which elapsed on various questions before the filing of cloture. These questions are:

- All legislative questions on which cloture was filed;
- Motions to proceed to consider;
- Measures and amendments in the nature of a substitute; this category includes all amendments in the nature of a substitute whether they were reported by a committee or not;
- All other amendments; this category includes motions to commit and recommit with amendatory instructions; and,
- Questions related to resolving legislative differences; this category includes conference reports, and motions related to amendment exchanges between the Senate and House, such as motions to concur and to disagree.

Tables 1 and 2 both include cloture motions filed from the 107th Congress (2001-2002) through the first session of the 111th Congress (2009-2010). **Tables 3 through 7** show, by Congress, cloture motions filed in each Congress over the same period and the number of calendar days each question was under Senate consideration before the first cloture motion to end debate was filed on it. The statistics in this memorandum include only legislative business; cloture motions filed on treaties and nominations are not included.

The data which compose these tables are from the Legislative Information System of the U.S. Congress (LIS) and the verbatim language of the legislative status steps in LIS is used. The tables and calculations of averages reflect only the first cloture petition filed on each question. If more than one cloture petition was filed on the same question over the course of its consideration, those subsequent cloture motions are

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not included. The table also does not include cases in which a cloture motion was voted on a second time though the use of a motion to reconsider.

When more than one motion was made to proceed to the consideration of a given measure, or the Senate took up a single measure on more than one occasion after laying it aside, the time between the raising of the question and the offering of a cloture motion is measured from the most recent previous occasion of raising the question. In cases where a cloture motion was filed by unanimous consent before the question on which cloture is moved became pending, the time between the raising of the question and the moving of cloture is given as a negative number.

Table 1. Number of Cloture Petitions Per Question Analyzed

107th – 111th Congresses (2001-2010)

Congress & Years	All Questions	Motion to Proceed to Consider	Measure or Substitute Amendment	All Other Amendments	Questions Relating to Resolving Legislative Differences
107th (2001-2002)	59	14	26	16	3
108th (2003-2004)	34	10	12	4	8
109th (2005-2006)	50	17	23	5	5
110th (2007-2008)	133	53	46	20	14
111th (2009-2010)	54	14	31	4	5

Source: Legislative Information System of the U.S. Congress

Notes: Reflects first cloture petition filed on a question. Data for the 111th Congress includes only the first session (2009).

Table 2. Average Calendar Days Elapsed Before Filing of First Cloture Motion

107th – 111th Congresses (2001-2010)

Congress & Years	All Questions	Motion to Proceed to Consider	Measure or Substitute Amendment	All Other Amendments	Questions Relating to Resolving Legislative Differences
107th (2001-2002)	5.42	0	9.92	3.87	0
108th (2003-2004)	3.35	0.30	9.25	0	0
109th (2005-2006)	2.40	0.58	4.73	0.20	0
110th (2007-2008)	2.15	0	5.91	0.70	0.07
111th (2009-2010)	1.79	0	2.96	1.25	0

Source: CRS Analysis of data from the Legislative Information System of the U.S. Congress (LIS).

Note: Data for the 111th Congress includes only the first session (2009). Days are calendar days.

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Table 3. Calendar Days Elapsed Before First Cloture Motion Filed on Legislation

107th Congress (2001-2002)

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
H.R. 10	0	11/27/2001	Motion to proceed to consideration of measure made.	11/27/2001	Cloture motion on the motion to proceed presented.
H.R. 10	0	11/29/2001	Measure laid before Senate by motion.	11/29/2001	Cloture motion on the bill presented.
H.R. 333	0	7/9/2001	Motion to proceed to consideration of measure made.	7/9/2001	Cloture motion on the motion to proceed to the consideration of the bill presented.
H.R. 2215	0	10/1/2002	Motion to proceed to consideration of the conference report agreed to by voice vote.	10/1/2002	Cloture motion on the conference report to accompany H.R. 2215 presented.
H.R. 2299	6	7/19/2001	Measure laid before Senate by unanimous consent.	7/25/2001	Cloture motion on the bill H.R. 2299 presented.
H.R. 2311	2	7/16/2001	Measure laid before Senate by unanimous consent.	7/18/2001	Cloture motion on the bill presented.
H.R. 2356	0	3/13/2002	Motion to proceed to consideration of measure made.	3/13/2002	Cloture motion on the motion to proceed to the measure presented.
H.R. 2356	0	3/18/2002	Measure laid before Senate by unanimous consent.	3/18/2002	Cloture motion on the measure presented.
H.R. 2506	0	10/12/2001	Motion to proceed to consideration of measure made.	10/12/2001	Cloture motion on the motion to proceed presented.
H.R. 3009	0	4/25/2002	Motion to proceed to consideration of measure made.	4/25/2002	Cloture motion on the motion to proceed presented.
H.R. 3009	20	5/1/2002	Measure laid before Senate by motion.	5/21/2002	Cloture motion on H.R. 3009 presented.
H.R. 3009	0	7/30/2002	Motion to proceed to consideration of the conference report agreed to.	7/30/2002	Cloture motion on the conference report to accompany H.R. 3009 presented.
H.R. 3210	0	11/19/2002	Conference report considered by unanimous consent.	11/19/2002	Cloture motion on the conference report to accompany H.R. 3210 presented.
H.R. 4775	1	6/3/2002	Measure laid before Senate by unanimous consent.	6/4/2002	Cloture motion on the bill presented.
H.R. 5005	0	7/31/2002	Motion to proceed to consideration of measure made.	7/31/2002	Cloture motion on the motion to proceed presented.
H.R. 5005	71	9/3/2002	Measure laid before Senate by motion.	11/13/2002	Cloture motion on the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S.Res. 304	0	10/11/2002	Motion to proceed to consideration of measure made by Unanimous Consent.	10/11/2002	Cloture motion on the motion to proceed to the measure presented.
S.J.Res. 45	0	10/1/2002	Motion to proceed to consideration of measure made.	10/1/2002	Cloture motion on the motion to proceed to the measure presented.
S.J.Res. 45	5	10/3/2002	Measure laid before Senate by motion.	10/8/2002	Cloture motion on the joint resolution presented.
S. 1	0	4/26/2001	Motion to proceed to consideration of measure made.	4/26/2001	Cloture motion on the motion to proceed presented.
S. 420	7	3/5/2001	Measure laid before Senate by unanimous consent.	3/12/2001	Cloture motion on the bill presented.
S. 565	14	2/13/2002	Measure laid before Senate.	2/27/2002	Cloture motion on the bill presented.
S. 625	0	6/7/2002	Measure laid before Senate by unanimous consent.	6/7/2002	Cloture motion on the bill presented.
S. 812	0	7/15/2002	Motion to proceed to consideration of measure made.	7/15/2002	Cloture motion on the motion to proceed to the measure presented.
S. 812	12	7/17/2002	Measure laid before Senate by motion.	7/29/2002	Cloture motion on the measure presented.
S. 1246	0	7/27/2001	Motion to proceed to consideration of measure made.	7/27/2001	Cloture motion on the motion to proceed presented.
S. 1246	2	7/30/2001	Measure laid before Senate by motion.	8/1/2001	Cloture motion on the bill presented.
S. 1438	5	9/21/2001	Measure laid before Senate.	9/26/2001	Cloture motion on the bill presented.
S. 1447	0	10/3/2001	Motion to proceed to consideration of measure made.	10/3/2001	Cloture motion on the motion to proceed presented.
S. 1731	0	11/30/2001	Motion to proceed to consideration of measure made.	11/30/2001	Cloture motion on the motion to proceed presented.
S. 2514	7	6/18/2002	Measure laid before Senate.	6/25/2002	Cloture motion on the bill presented.
S. 2578	0	6/10/2002	Motion to proceed to consideration of measure made.	6/10/2002	Cloture motion on the motion to proceed to the measure presented.
S. 2600	1	6/13/2002	Measure laid before Senate by unanimous consent.	6/14/2002	Cloture motion on the measure presented.
S. 2673	2	7/8/2002	Measure laid before Senate.	7/10/2002	Cloture motion on the bill presented.
S.Amdt. 974	0	7/12/2001	Amendment SA 974 proposed by Senator Leahy.	7/12/2001	Cloture motion on amendment SA 974 presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S.Amdt. 1025	6	7/19/2001	Amendment SA 1025 proposed by Senator Murray.	7/25/2001	Cloture motion on the substitute amendment SA 1025 presented.
S.Amdt. 1855	0	10/10/2001	Amendment SA 1855 proposed by Senator Daschle for Senator Carnahan.	10/10/2001	Cloture motion on the Daschle for Carnahan Amendment (SA1855) presented.
S.Amdt. 2044	2	10/31/2001	Amendment SA 2044 proposed by Senator Daschle.	11/2/2001	Cloture motion on Daschle Amendment No. 2044 presented.
S.Amdt. 2170	0	11/29/2001	Amendment SA 2170 proposed by Senator Daschle for Senator Hatch.	11/29/2001	Cloture motion on Amendment SA 2170 presented.
S.Amdt. 2171	0	11/29/2001	Amendment SA 2171 proposed by Senator Lott to Amendment SA 2170.	11/29/2001	Cloture motion on Amendment SA 2171 presented.
S.Amdt. 2471	1	12/11/2001	Amendment SA 2471 proposed by Senator Daschle for Senator Harkin.	12/12/2001	Cloture motion on Amendment SA 2471 presented.
S.Amdt. 2698	12	1/23/2002	Amendment SA 2698 proposed by Senator Daschle.	2/4/2002	Cloture motion on the amendment SA 2698 presented.
S.Amdt. 2773	0	2/4/2002	Amendment SA 2773 proposed by Senator Grassley to language proposed to be stricken by amendment no. 2698.	2/4/2002	Cloture motion on amendment SA 2773 presented.
S.Amdt. 2917	62	2/15/2002	Amendment SA 2917 proposed by Senator Daschle.	4/18/2002	Cloture motion on Amendment SA 2917 presented.
S.Amdt. 2989	32	3/7/2002	Amendment SA 2989 proposed by Senator Feinstein to Amendment SA 2917.	4/8/2002	Cloture motion on Amendment SA 2989 presented.
S.Amdt. 3132	0	4/16/2002	Amendment SA 3132 proposed by Senator Murkowski to Amendment SA 2917.	4/16/2002	Cloture motion on Amendment SA 3132 presented.
S.Amdt. 3133	0	4/16/2002	Amendment SA 3133 proposed by Senator Stevens to Amendment SA 3132.	4/16/2002	Cloture motion on Amendment SA 3133 presented.
S.Amdt. 3399	0	5/9/2002	Amendment SA 3399 proposed by Senator Lott to language proposed to be stricken by amendment no. SA 3386.	5/9/2002	Cloture motion on the Lott amendment SA3399 presented.
S.Amdt. 3401	10	5/10/2002	Amendment SA 3401 proposed by Senator Baucus.	5/20/2002	Cloture motion on the Baucus amendment SA3401 presented.
S.Amdt. 3433	1	5/16/2002	Amendment SA 3433 proposed by Senator Rockefeller to Amendment SA 3401.	5/17/2002	Cloture motion on the Rockefeller Amendment SA3433 presented.
S.Amdt. 3843	4	6/13/2002	Amendment SA 3843 proposed by Senator Brownback.	6/17/2002	Cloture motion on the amendment SA 3843 presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S.Amdt. 4299	12	7/17/2002	Amendment SA 4299 proposed by Senator Reid for Senator Dorgan.	7/29/2002	Cloture motion on Amendment SA 4299 presented.
S.Amdt. 4316	0	7/24/2002	Amendment SA 4316 proposed by Senator Rockefeller to Amendment SA 4299.	7/24/2002	Cloture motion on Amendment SA 4316 presented.
S.Amdt. 4471	13	9/4/2002	Amendment SA 4471 proposed by Senator Lieberman.	9/17/2002	Cloture motion on Amendment SA 4471 presented.
S.Amdt. 4480	9	9/4/2002	Amendment SA 4480 proposed by Senator Byrd to Amendment SA 4472.	9/13/2002	Clpture motion on Amendment SA 4480 presented.
S.Amdt. 4481	1	9/4/2002	Amendment SA 4481 proposed by Senator Daschle to Amendment SA 4480.	9/5/2002	Cloture motion on Amendment SA 4481 presented.
S.Amdt. 4738	0	9/25/2002	Amendment SA 4738 proposed by Senator Gramm to Amendment SA 4471.	9/25/2002	Cloture motion on Amendment SA 4738 presented.
S.Amdt. 4856	0	10/8/2002	Amendment SA 4856 proposed by Senator Lieberman.	10/8/2002	Cloture motion on the amendment SA 4856 presented.
S.Amdt. 4901	0	11/13/2002	Amendment SA 4901 proposed by Senator Thompson for Senator Gramm.	11/13/2002	Cloture motion on amendment SA 4901 presented.

Source: Legislative Information System of the U.S. Congress (LIS)

Table 4. Calendar Days Elapsed Before First Cloture Motion Filed on Legislation

108th Congress (2003-2004)

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
H.R. 1	0	11/22/2003	Conference report considered.	11/22/2003	Cloture motion on the conference report to accompany H.R. 1 presented.
H.R. 4	1	3/29/2004	Measure laid before Senate.	3/30/2004	Cloture motion on the committee substitute amendment presented.
H.R. 6	0	11/19/2003	Conference report considered by motion.	11/19/2003	Cloture motion on the conference report to accompany H.R. 6 presented.
H.R. 1047	0	11/17/2004	Motion to proceed to consideration of conference report agreed to by voice vote.	11/17/2004	Cloture motion on the conference report to accompany H. R. 1047 presented.
H.R. 2115	0	11/14/2003	Conference report considered.	11/14/2003	Cloture motion on the conference report to accompany H.R. 2115 presented.
H.R. 2673	0	12/9/2003	Conference report considered.	12/9/2003	Cloture motion on the conference report to accompany H.R. 2673 presented.
H.R. 4520	0	10/8/2004	Conference report considered.	10/8/2004	Cloture motion on the conference report to accompany H.R. 4520 presented.
H.R. 4567	0	10/9/2004	Motion to proceed to consideration of conference report agreed to by Unanimous Consent.	10/9/2004	Cloture motion on the conference report to accompany H.R. 4567 presented.
H.R. 4837	0	10/9/2004	Motion to proceed to consideration of conference report agreed to by Unanimous Consent.	10/9/2004	Cloture motion on the conference report to accompany H.R. 4837 presented.
S.Res. 18	0	1/14/2003	Measure laid before Senate by unanimous consent.	1/14/2003	Cloture motion on the resolution presented.
S.Res. 445	0	10/6/2004	Measure laid before Senate by unanimous consent.	10/6/2004	Cloture motion on the resolution presented.
S.J.Res. 1	0	4/20/2004	Motion to proceed to consideration of measure made.	4/20/2004	Cloture motion on the motion to proceed to the measure presented.
S.J.Res. 40	3	7/9/2004	Motion to proceed to consideration of measure made.	7/12/2004	Cloture motion on the motion to proceed to S.J.Res. 40 presented.
S. 11	0	7/7/2003	Motion to proceed to consideration of measure made.	7/7/2003	Cloture motion on the motion to proceed to the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S. 14	0	7/30/2003	Motion by Senator Frist to commit to Senate Committee on Energy and Natural Resources with instructions that the Committee report forthwith with amendment SA 1432.	7/30/2003	Cloture motion on the motion to commit S. 14 to the Committee on Energy and Natural Resources presented.
S. 150	0	4/22/2004	Motion to proceed to consideration of measure made.	4/22/2004	Cloture motion on the motion to proceed presented.
S. 1072	0	1/28/2004	Motion to proceed to consideration of measure made.	1/28/2004	Cloture motion on the motion to proceed presented.
S. 1072	7	2/3/2004	Measure laid before Senate by motion.	2/10/2004	Cloture motion presented.
S. 1637	0	3/22/2004	Motion by Senator Frist to recommit to Senate Committee on Finance with instructions that the Committee report forthwith with SA 2886 made.	3/22/2004	Cloture motion on the motion to recommit S. 1637 to the Committee on Finance presented.
S. 1637	65	3/3/2004	Measure laid before Senate.	5/7/2004	Cloture motion on the bill presented.
S. 1751	3	10/17/2003	Motion to proceed to measure considered.	10/20/2003	Cloture motion presented.
S. 1805	0	2/23/2004	Motion to proceed to consideration of measure made by Unanimous Consent.	2/23/2004	Cloture motion on the motion to proceed presented.
S. 2061	0	2/12/2004	Motion to proceed to consideration of measure made.	2/12/2004	Cloture motion on the motion to proceed to the measure presented.
S. 2062	0	5/21/2004	Motion to proceed to consideration of measure made.	5/21/2004	Cloture motion on the motion to proceed presented.
S. 2062	1	7/6/2004	Measure laid before Senate by unanimous consent.	7/7/2004	Cloture motion on the bill presented.
S. 2207	0	4/2/2004	Motion to proceed to consideration of measure made.	4/2/2004	Cloture motion on the motion to proceed presented.
S. 2290	0	4/20/2004	Motion to proceed to consideration of measure made.	4/20/2004	Cloture motion on the motion to proceed presented.
S. 2400	30	5/17/2004	Measure laid before Senate by unanimous consent.	6/16/2004	Cloture motion on the bill presented.
S. 2845	4	9/27/2004	Measure laid before Senate by unanimous consent.	10/1/2004	Cloture motion on the bill presented.
S.Amdt. 2285	0	2/10/2004	Amendment SA 2285 proposed by Senator Inhofe.	2/10/2004	Cloture motion on SA 2285 presented.
S.Amdt. 3048	0	4/27/2004	Amendment SA 3048 proposed by Senator McCain.	4/27/2004	Cloture motion on amendment SA 3048 presented.

Insert offset folio 72 here 62210.072

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S.Amdt. 3050	0	4/27/2004	Amendment SA 3050 proposed by Senator Daschle to language proposed to be stricken by amendment no. 3048.	4/27/2004	Cloture motion on amendment SA 3050 presented.
S.Amdt. 3051	0	4/27/2004	Amendment SA 3051 proposed by Senator Domenici to Amendment SA 3050.	4/27/2004	Cloture motion on amendment SA 3051 presented.
S.Amdt. 3981	0	10/6/2004	Amendment SA 3981 proposed by Senator McConnell.	10/6/2004	Cloture motion on Amendment SA 3981 presented.

Source: Legislative Information System of the U.S. Congress (LIS).

Insert offset folio 73 here 62210.073

Table 5. Calendar Days Elapsed Until First Cloture Motion Filed on Legislation

109th Congress (2005-2006)

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
H.R. 3	0	4/22/2005	Motion to proceed to consideration of measure made.	4/22/2005	Cloture motion on the motion to proceed to the measure presented.
H.R. 3	14	4/26/2005	Measure laid before Senate by motion.	5/10/2005	Cloture motion presented.
H.R. 6	7	6/14/2005	Measure laid before Senate by unanimous consent.	6/21/2005	Cloture motion on the bill presented.
H.R. 8	0	7/29/2005	Motion to proceed to consideration of measure made.	7/29/2005	Cloture motion on the motion to proceed presented.
H.R. 8	0	6/6/2006	Motion to proceed to consideration of measure made.	6/6/2006	Cloture motion on the motion to proceed presented.
H.R. 1268	4	4/11/2005	Measure laid before Senate by unanimous consent.	4/15/2005	Cloture motion on the bill presented.
H.R. 1815	0	12/19/2005	Motion to proceed to consider conference report adopted 95-0.	12/19/2005	Cloture motion on the conference report presented.
H.R. 2863	5	9/29/2005	Measure laid before Senate by unanimous consent.	10/4/2005	Cloture motion on the bill presented.
H.R. 2863	0	12/19/2005	Motion to proceed to consider conference report adopted 94-1.	12/19/2005	Cloture motion on the conference report presented.
H.R. 3010	4	10/21/2005	Measure laid before Senate by unanimous consent.	10/25/2005	Cloture motion on the bill presented.
H.R. 3199	0	12/14/2005	Conference report considered.	12/14/2005	Cloture motion on the conference report presented.
H.R. 4939	20	4/7/2006	Measure laid before Senate by motion.	4/27/2006	Cloture motion on the bill presented.
H.R. 4954	5	9/7/2006	Measure laid before Senate by unanimous consent.	9/12/2006	Cloture motion on the bill presented.
H.R. 5970	0	8/2/2006	Motion to proceed to consideration of measure made by Unanimous Consent.	8/2/2006	Cloture motion on the motion to proceed presented.
H.R. 6061	0	9/18/2006	Motion to proceed to consideration of measure made.	9/18/2006	Cloture motion on the motion to proceed presented.
H.R. 6061	4	9/21/2006	Measure laid before Senate by motion.	9/25/2006	Cloture motion on the bill presented.
H.R. 6111	0	12/8/2006	Motion to concur in the House amendment to the Senate amendment to the bill made.	12/8/2006	Cloture motion on the motion to concur in the House amendment to the Senate amendment to the bill H.R. 6111 presented.

Insert offset folio 74 here 62210.074

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S.J.Res. 1	10	5/26/2006	Motion to proceed to consideration of measure made.	6/5/2006	Cloture motion on the motion to proceed presented.
S. 22	0	5/5/2006	Motion to proceed to consideration of measure made.	5/5/2006	Cloture motion on the motion to proceed presented.
S. 23	0	5/5/2006	Motion to proceed to consideration of measure made.	5/5/2006	Cloture motion on the motion to proceed presented.
S. 147	0	7/29/2005	Motion to proceed to consideration of measure made.	7/29/2005	Cloture motion on the motion to proceed presented.
S. 147	0	6/6/2006	Motion to proceed to consideration of measure made.	6/6/2006	Cloture motion on the motion to proceed presented.
S. 256	4	2/28/2005	Measure laid before Senate by unanimous consent.	3/4/2005	Cloture motion on the bill presented.
S. 397	0	7/22/2005	Motion to proceed to consideration of measure made.	7/22/2005	Cloture motion on the motion to proceed to the measure presented.
S. 397	0	7/27/2005	Measure laid before Senate by motion.	7/27/2005	Cloture motion on the bill presented.
S. 403	0	9/27/2006	Motion to concur in House amendment with further amendment made.	9/27/2006	Cloture motion on the motion to concur in House amendment presented.
S. 852	0	2/6/2006	Motion to proceed to consideration of measure made.	2/6/2006	Cloture motion on the motion to proceed to the measure presented.
S. 852	5	2/8/2006	Measure laid before Senate by unanimous consent.	2/13/2006	Cloture motion on the measure presented.
S. 1042	2	7/20/2005	Measure laid before Senate by unanimous consent.	7/22/2005	Cloture motion on the bill presented.
S. 1955	0	5/5/2006	Motion to proceed to consideration of measure made.	5/5/2006	Cloture motion on the motion to proceed presented.
S. 1955	0	5/10/2006	Measure laid before Senate by motion.	5/10/2006	Cloture motion on the modified committee substitute presented.
S. 2271	0	2/14/2006	Motion to proceed to consideration of measure made.	2/14/2006	Cloture motion on the motion to proceed presented.
S. 2271	0	2/16/2006	Measure laid before Senate by motion.	2/16/2006	Cloture motion on the measure presented.
S. 2320	0	2/28/2006	Motion to proceed to consideration of measure made.	2/28/2006	Cloture motion on the motion to proceed presented.
S. 2320	1	3/2/2006	Measure laid before Senate by unanimous consent.	3/3/2006	Cloture motion on the bill presented.
S. 2349	2	3/6/2006	Measure laid before Senate by unanimous consent.	3/8/2006	Cloture motion on the bill presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture
S. 2454	0	3/16/2006	Motion to proceed to consideration of measure made.	3/16/2006	Cloture motion on the motion to proceed to the measure presented.
S. 2454	0	4/5/2006	Motion by Senator Frist to commit to Senate Committee on the Judiciary with instructions that the committee report back forthwith with amendment SA 3424.	4/5/2006	Cloture motion on the motion to commit the bill presented.
S. 2454	7	3/29/2006	Measure laid before Senate by unanimous consent.	4/5/2006	Cloture motion on the bill presented.
S. 2611	7	5/15/2006	Measure laid before Senate by unanimous consent.	5/22/2006	Cloture motion on the bill presented.
S. 2766	8	6/12/2006	Measure laid before Senate by unanimous consent.	6/20/2006	Cloture motion on the measure presented.
S. 3711	0	7/24/2006	Motion to proceed to consideration of measure made by Unanimous Consent.	7/24/2006	Cloture motion on the motion to proceed presented.
S. 3711	0	7/27/2006	Measure laid before Senate by motion.	7/27/2006	Cloture motion on the bill presented.
S.Amdt. 375	0	4/15/2005	Amendment SA 375 proposed by Senator Frist for Senator Craig.	4/15/2005	Cloture motion on amendment SA 375 presented.
S.Amdt. 387	1	4/13/2005	Amendment SA 387 proposed by Senator Mikulski.	4/14/2005	Cloture motion on SA 387 presented.
S.Amdt. 432	0	4/15/2005	Amendment SA 432 proposed by Senator Frist for Senator Chambliss.	4/15/2005	Cloture motion on amendment 5A 432 presented.
S.Amdt. 605	1	5/9/2005	Amendment SA 605 proposed by Senator Inhofe.	5/10/2005	Cloture motion on Amendment SA 605 presented.
S.Amdt. 2746	4	2/9/2006	Amendment SA 2746 proposed by Senator Frist for Senator Specter.	2/13/2006	Cloture motion on amendment 5A 2746 presented.
S.Amdt. 3192	5	3/30/2006	Amendment SA 3192 proposed by Senator Specter.	4/4/2006	Cloture motion on amendment SA 3192 presented.
S.Amdt. 5036	0	9/25/2006	Amendment SA 5036 proposed by Senator Frist.	9/25/2006	Cloture motion on SA 5036 presented.

Source: Legislative Information System of the U.S. Congress (LIS)

Insert offset folio 76 here 62210.076

Table 6. Calendar Days Elapsed Before First Cloture Motion Filed on Legislation

110th Congress (2007-2008)

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
H.J.Res. 20	0	2/8/2007	Measure laid before Senate by unanimous consent.	2/8/2007	Cloture motion on the bill presented in Senate.
H.R. 2	0	1/22/2007	Measure laid before Senate by unanimous consent.	1/22/2007	Cloture motion on the measure presented.
H.R. 6	0	6/6/2007	Motion to proceed to consideration of measure made.	6/6/2007	Cloture motion on the motion to proceed presented.
H.R. 6	7	6/12/2007	Measure laid before Senate by unanimous consent.	6/19/2007	Cloture motion on the bill presented.
H.R. 6	0	12/7/2007	Motion to agree to House amendments made.	12/7/2007	Cloture motion on the motion to agree to House amendments to Senate amendments presented.
H.R. 6	0	12/12/2007	Motion to agree to House amendment to the Senate amendment to the text of H.,R. 6, with an amendment, made.	12/12/2007	Pursuant to the order of December 11, 2007, cloture motion on the motion to agree to the House amendment to the Senate amendment to the text of H.R. 6, with an amendment (SA 3841) presented.
H.R. 800	0	6/19/2007	Motion to proceed to consideration of measure made.	6/19/2007	Cloture motion on the motion to proceed presented.
H.R. 976	0	7/26/2007	Motion to proceed to consideration of measure made.	7/26/2007	Cloture motion on the motion to proceed to the measure presented.
H.R. 976	1	7/31/2007	Measure laid before Senate by motion.	8/1/2007	Cloture motion on the bill presented.
H.R. 976	0	9/26/2007	Motion to concur in House amendments to Senate amendments to the bill made.	9/26/2007	Cloture motion on the motion to concur in House amendments to Senate amendments to the bill H.R. 976 presented.
H.R. 980	0	5/7/2008	Motion to proceed to consideration of measure made.	5/7/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 980	1	5/13/2008	Measure laid before Senate by motion.	5/14/2008	Cloture motion on the measure presented.
H.R. 1195	0	4/10/2008	Motion to proceed to consideration of measure made.	4/10/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 1195	1	4/15/2008	Measure laid before Senate by motion.	4/16/2008	Cloture motion on the bill presented.
H.R. 1495	0	5/3/2007	Motion to proceed to consideration of measure made.	5/3/2007	Cloture motion on the motion to proceed to the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
H.R. 1585	0	6/27/2007	Motion to proceed to consideration of measure made.	6/27/2007	Cloture motion on the motion to proceed presented.
H.R. 1585	9	9/17/2007	Measure laid before Senate by unanimous consent.	9/26/2007	Cloture motion on the bill presented.
H.R. 1591	0	3/26/2007	Measure laid before Senate by unanimous consent.	3/26/2007	Cloture motion on the measure presented.
H.R. 2082	0	2/11/2008	Conference report considered.	2/11/2008	Cloture motion on conference report to accompany H.R. 2082 presented.
H.R. 2095	0	9/27/2008	Motion to concur in House amendment to Senate amendment made.	9/27/2008	Cloture motion on the motion to concur in the House amendment to Senate amendment presented.
H.R. 2206	0	5/15/2007	Measure laid before Senate by unanimous consent.	5/15/2007	Cloture motion on the bill presented.
H.R. 2419	9	11/5/2007	Measure laid before Senate by unanimous consent.	11/14/2007	Cloture motion on the bill presented.
H.R. 2638	0	7/18/2007	Motion to proceed to consideration of measure made.	7/18/2007	Cloture motion on the motion to proceed to the bill presented.
H.R. 2638	0	9/26/2008	Motion to concur in House amendment to Senate amendment to the bill with an amendment made.	9/26/2008	Cloture motion on the motion to concur in the House amendment to the Senate amendment (considered filed on Sept. 25, 2008, pursuant to the order of Sept. 25, 2008) presented.
H.R. 2638	0	9/26/2008	Motion to concur in House amendment to Senate amendment to the bill with an amendment made.	9/26/2008	Cloture motion on the motion to concur in the House amendment to the Senate amendment (considered filed on Sept. 25, 2008, pursuant to the order of Sept. 25, 2008) presented.
H.R. 2764	0	12/18/2007	Motion to agree to House amendments to the Senate amendment made.	12/18/2007	Cloture motion on the motion to agree to House amendments presented.
H.R. 2831	0	4/21/2008	Motion to proceed to consideration of measure made.	4/21/2008	Cloture motion on the motion to proceed presented.
H.R. 2881	0	4/24/2008	Motion to proceed to consideration of measure made.	4/24/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 2881	2	4/29/2008	Measure laid before Senate by motion.	5/1/2008	Cloture motion on the measure presented.
H.R. 3221	0	2/14/2008	Motion to proceed to consideration of measure made.	2/14/2008	Cloture motion on the motion to proceed presented.
H.R. 3221	1	4/3/2008	Measure laid before Senate by motion.	4/4/2008	Cloture motion on the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
H.R. 3221	0	6/26/2008	Reid motion to concur in the amendments of the House, striking title VI through XI, to the Senate amendment presented.	6/26/2008	Cloture motion on Reid motion to concur in the amendments of the House, striking title VI through XI, to the Senate amendment presented.
H.R. 3221	0	7/8/2008	Reid motion to disagree to the amendments of the House adding a new title and inserting a new section to the amendment of the Senate to H.R. 3221 made.	7/8/2008	Cloture motion on the Reid motion to disagree presented.
H.R. 3221	0	7/23/2008	Motion to concur in the House amendment to the Senate amendment to the House amendments to the Senate amendment to the bill.	7/23/2008	Cloture motion on the motion to concur to the House amendment to the Senate amendment to the House amendments to the Senate amendment to the bill presented.
H.R. 3222	0	10/2/2007	Measure laid before Senate by unanimous consent.	10/2/2007	Cloture motion on the bill presented.
H.R. 3963	0	10/26/2007	Motion to proceed to consideration of measure made.	10/26/2007	Cloture motion on the measure presented.
H.R. 3963	0	11/1/2007	Measure laid before Senate by motion.	11/1/2007	Cloture motion on the bill presented.
H.R. 3996	0	12/4/2007	Motion to proceed to consideration of measure made.	12/4/2007	Cloture motion on the motion to proceed to the measure presented.
H.R. 4156	0	11/15/2007	Motion to proceed to consideration of measure made.	11/15/2007	Cloture motion on the motion to proceed presented.
H.R. 5140	0	1/31/2008	Motion to proceed to consideration of measure made.	1/31/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 6049	0	6/6/2008	Motion to proceed to consideration of measure made.	6/6/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 6304	0	6/23/2008	Motion to proceed to consideration of measure made.	6/23/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 6304	-12	7/8/2008	Measure laid before Senate by motion.	6/26/2008	Cloture motion on the measure presented.
H.R. 6331	0	6/26/2008	Motion to proceed to consideration of measure made.	6/26/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 6867	0	11/19/2008	Motion to proceed to consideration of measure made.	11/19/2008	Cloture motion on the motion to proceed to the measure presented.
H.R. 7005	0	12/10/2008	Motion to proceed to consideration of measure made.	12/10/2008	Cloture motion on the motion to proceed to the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S.Con.Res. 2	0	1/26/2007	Motion to proceed to consideration of measure made.	1/26/2007	Cloture motion on the motion to proceed presented.
S.J.Res. 9	0	3/12/2007	Motion to proceed to consideration of measure made.	3/12/2007	Cloture motion on the motion to proceed to the measure presented.
S.J.Res. 14	0	6/6/2007	Motion to proceed to consideration of measure made.	6/6/2007	Cloture motion on the motion to proceed presented.
S. 1	3	1/9/2007	Measure laid before Senate by unanimous consent.	1/12/2007	Cloture motion on the bill presented.
S. 1	0	7/31/2007	Motion to concur in House amendment made.	7/31/2007	Cloture motion on the motion to concur in House amendment presented.
S. 3	0	4/16/2007	Motion to proceed to consideration of measure made.	4/16/2007	Cloture motion on the motion to proceed presented.
S. 4	0	2/27/2007	Motion to proceed to consideration of measure made.	2/27/2007	Cloture motion on the motion to proceed to the measure presented.
S. 4	7	2/28/2007	Measure laid before Senate by motion.	3/7/2007	Cloture motion on the bill presented.
S. 184	0	2/17/2007	Motion to proceed to consideration of measure made.	2/17/2007	Cloture motion on the motion to proceed to the bill presented.
S. 214	0	3/12/2007	Motion to proceed to consideration of measure made.	3/12/2007	Cloture motion on the motion to proceed to the measure presented.
S. 294	2	10/24/2007	Measure laid before Senate by unanimous consent.	10/26/2007	Cloture motion on the bill presented.
S. 372	0	4/10/2007	Motion to proceed to consideration of measure made.	4/10/2007	Cloture motion on the motion to proceed to the bill presented.
S. 372	0	4/12/2007	Measure laid before Senate by motion.	4/12/2007	Cloture motion on the bill presented.
S. 378	0	4/16/2007	Motion to proceed to consideration of measure made.	4/16/2007	Cloture motion on the motion to proceed presented.
S. 378	0	4/18/2007	Measure laid before Senate by motion.	4/18/2007	Cloture motion on S.378 presented.
S. 470	0	2/1/2007	Motion to proceed to consideration of measure made.	2/1/2007	Cloture motion on the motion to proceed to the bill presented.
S. 574	0	2/15/2007	Motion to proceed to consideration of measure made.	2/15/2007	Cloture motion on the motion to proceed to the bill presented.
S. 1082	3	4/30/2007	Measure laid before Senate by unanimous consent.	5/3/2007	Cloture motion on the committee substitute amendment as modified presented.
S. 1082	3	4/30/2007	Measure laid before Senate by unanimous consent.	5/3/2007	Cloture motion on the measure presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S. 1200	23	1/22/2008	Measure laid before Senate by unanimous consent.	2/14/2008	Cloture motion on the measure presented.
S. 1257	0	9/12/2007	Motion to proceed to consideration of measure made.	9/12/2007	Cloture motion on the motion to proceed to the bill presented.
S. 1315	0	4/17/2008	Motion to proceed to consideration of measure made.	4/17/2008	Cloture motion on the motion to proceed presented.
S. 1348	0	5/14/2007	Motion to proceed to consideration of measure made.	5/14/2007	Cloture motion on the motion to proceed presented.
S. 1348	15	5/21/2007	Measure laid before Senate by motion.	6/5/2007	Cloture motion on the bill presented.
S. 1639	0	6/20/2007	Motion to proceed to consideration of measure made.	6/20/2007	Cloture motion on the motion to proceed presented.
S. 1639	0	6/26/2007	Measure laid before Senate by motion.	6/26/2007	Cloture motion on the bill presented.
S. 2035	0	7/28/2008	Motion to proceed to consideration of measure made.	7/28/2008	Cloture motion on the motion to proceed to the measure presented.
S. 2205	0	10/22/2007	Motion to proceed to consideration of measure made.	10/22/2007	Cloture motion on the motion to proceed to measure presented.
S. 2248	0	12/14/2007	Motion to proceed to consideration of measure made.	12/14/2007	Cloture motion on the motion to proceed to the measure presented.
S. 2248	53	12/17/2007	Measure laid before Senate by motion.	2/8/2008	Cloture motion on the bill presented.
S. 2284	0	5/2/2008	Motion to proceed to consideration of measure made.	5/2/2008	Cloture motion on the motion to proceed presented.
S. 2340	0	11/15/2007	Motion to proceed to consideration of measure made.	11/15/2007	Cloture motion on the motion to proceed presented.
S. 2633	0	2/25/2008	Motion to proceed to consideration of measure made.	2/25/2008	Cloture motion on the motion to proceed to the measure presented.
S. 2634	0	2/25/2008	Motion to proceed to consideration of measure made.	2/25/2008	Cloture motion on the motion to proceed to the measure presented.
S. 2663	0	2/29/2008	Motion to proceed to consideration of measure made.	2/29/2008	Cloture motion on the motion to proceed to the measure presented.
S. 2663	1	3/4/2008	Measure laid before Senate by motion.	3/5/2008	Cloture motion on the bill presented.
S. 2731	0	7/9/2008	Motion to proceed to consideration of measure made.	7/9/2008	Cloture motion on the motion to proceed presented.
S. 2739	0	4/4/2008	Motion to proceed to consideration of measure made.	4/4/2008	Cloture motion on the motion to proceed presented.

Insert offset folio 81 here 62210.081

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S. 3001	0	7/30/2008	Motion to proceed to consideration of measure made.	7/30/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3001	3	9/9/2008	Measure laid before Senate by motion.	9/12/2008	Cloture motion on the measure presented.
S. 3036	0	5/22/2008	Motion to proceed to consideration of measure made.	5/22/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3044	0	6/4/2008	Motion to proceed to consideration of measure made.	6/4/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3044	0	6/6/2008	Motion to proceed to consideration of measure made.	6/6/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3101	0	6/10/2008	Motion to proceed to consideration of measure made.	6/10/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3186	0	7/23/2008	Motion to proceed to consideration of measure made.	7/23/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3268	0	7/17/2008	Motion to proceed to consideration of measure made.	7/17/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3268	0	7/23/2008	Measure laid before Senate by motion.	7/23/2008	Cloture motion on the measure presented.
S. 3297	0	7/26/2008	Motion to proceed to consideration of measure made.	7/26/2008	Cloture motion on the motion to proceed to the measure presented.
S. 3335	0	7/28/2008	Motion to proceed to consideration of measure made.	7/28/2008	Cloture motion on the motion to proceed to the measure presented.
S.Amdt. 3	3	1/9/2007	Amendment SA 3 proposed by Senator Reid.	1/12/2007	Cloture motion on the amendment SA 3 presented.
S.Amdt. 4	3	1/9/2007	Amendment SA 4 proposed by Senator Reid to Amendment SA 3.	1/12/2007	Cloture motion on the amendment SA 4 presented.
S.Amdt. 100	4	1/22/2007	Amendment SA 100 proposed by Senator Reid for Senator Baucus.	1/26/2007	Cloture motion on amendment SA 100 presented.
S.Amdt. 101	0	1/22/2007	Amendment SA 101 proposed by Senator McConnell for Senator Gregg to Amendment SA 100.	1/22/2007	Cloture motion on Amendment SA 101 presented.
S.Amdt. 275	7	2/28/2007	Amendment SA 275 proposed by Senator Reid.	3/7/2007	Cloture motion on amendment SA 275 presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S.Amdt. 312	5	3/2/2007	Amendment SA 312 proposed by Senator McConnell for Senator Cornyn to Amendment SA 275.	3/7/2007	Cloture motion on amendment SA 312 as modified presented.
S.Amdt. 990	0	5/1/2007	Amendment SA 990 proposed by Senator Dorgan.	5/1/2007	Cloture motion on amendment SA 990 presented.
S.Amdt. 1097	0	5/14/2007	Amendment SA 1097 proposed by Senator Reid for Senator Levin to language proposed to be stricken by amendment no. 1065.	5/14/2007	Pursuant to the order of Monday, May 14, 2007, cloture motion on amendment SA 1097 presented.
S.Amdt. 1098	0	5/14/2007	Amendment SA 1098 proposed by Senator Reid for Senator Feingold to Amendment SA 1097.	5/14/2007	Pursuant to the order of Monday, May 14, 2007, cloture motion on amendment SA 1098 presented.
S.Amdt. 1123	0	5/15/2007	Amendment SA 1123 proposed by Senator Reid.	5/15/2007	Cloture motion on Amendment SA 1123 presented.
S.Amdt. 1134	0	5/15/2007	Amendment SA 1134 proposed by Senator Warner to language proposed to be stricken by amendment no. 1065.	5/15/2007	Cloture motion on amendment SA 1134 presented.
S.Amdt. 1135	0	5/15/2007	Amendment SA 1135 proposed by Senator McConnell for Senator Cochran to language proposed to be stricken by amendment no. 1065.	5/15/2007	Cloture motion on amendment SA 1135 presented.
S.Amdt. 1150	15	5/21/2007	Amendment SA 1150 proposed by Senator Reid for Senator Kennedy.	6/5/2007	Cloture motion on amendment SA 1150 presented.
S.Amdt. 1502	7	6/12/2007	Amendment SA 1502 proposed by Senator Reid.	6/19/2007	Cloture motion on amendment SA 1502 presented.
S.Amdt. 1704	0	6/19/2007	Amendment SA 1704 proposed by Senator Baucus to Amendment SA 1502.	6/19/2007	Cloture motion on amendment SA 1704 presented.
S.Amdt. 2011	69	7/9/2007	Amendment SA 2011 proposed by Senator Nelson NE for Senator Levin.	9/26/2007	Cloture motion on amendment SA 2011 presented.
S.Amdt. 2012	1	7/9/2007	Amendment SA 2012 proposed by Senator Webb to Amendment SA 2011.	7/10/2007	Cloture motion on amendment SA 2012 presented.
S.Amdt. 2022	0	9/17/2007	Amendment SA 2022 proposed by Senator Levin for Senator Specter to Amendment SA 2011.	9/17/2007	Cloture motion on amendment SA 2022 presented.
S.Amdt. 2087	5	7/11/2007	Amendment SA 2087 proposed by Senator Levin to Amendment SA 2011.	7/16/2007	Cloture motion on amendment SA 2087 presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S.Amdt. 2241	0	7/16/2007	Amendment SA 2241 proposed by Senator McConnell to language proposed to be stricken by amendment no. SA 2011.	7/16/2007	Cloture motion on amendment SA 2241 presented.
S.Amdt. 2530	1	7/31/2007	Amendment SA 2530 proposed by Senator Baucus.	8/1/2007	Cloture motion on amendment SA 2530 presented.
S.Amdt. 3035	0	9/25/2007	Amendment SA 3035 proposed by Senator Reid for Senator Kennedy to language proposed to be stricken by amendment no. 2064.	9/25/2007	Cloture motion on amendment SA 3035 presented.
S.Amdt. 3047	0	9/25/2007	Amendment SA 3047 proposed by Senator Casey for Senator Hatch to Amendment SA 2011.	9/25/2007	Cloture motion on amendment SA 3047 presented.
S.Amdt. 3452	0	10/24/2007	Amendment SA 3452 proposed by Senator Sununu.	10/24/2007	Cloture motion on amendment SA 3452 presented.
S.Amdt. 3500	9	11/5/2007	Amendment SA 3500 proposed by Senator Harkin.	11/14/2007	Cloture motion on amendment SA 3500 presented.
S.Amdt. 3899	23	1/22/2008	Amendment SA 3899 proposed by Senator Dorgan.	2/14/2008	Cloture motion on amendment SA 3899 presented.
S.Amdt. 3911	0	1/24/2008	Amendment SA 3911 proposed by Senator Rockefeller.	1/24/2008	Cloture motion on amendment SA 3911 presented.
S.Amdt. 3918	0	1/24/2008	Amendment SA 3918 proposed by Senator Reid to language proposed to be stricken by amendment no. 3911.	1/24/2008	Cloture motion on amendment SA 3918 presented.
S.Amdt. 3983	0	2/5/2008	Amendment SA 3983 proposed by Senator Reid.	2/5/2008	Cloture motion on amendment SA 3983 presented.
S.Amdt. 4146	0	4/16/2008	Amendment SA 4146 proposed by Senator Boxer.	4/16/2008	Cloture motion on Amendment SA 4146 presented.
S.Amdt. 4387	1	4/3/2008	Amendment SA 4387 proposed by Senator Dodd.	4/4/2008	Cloture motion on amendment SA4387 presented.
S.Amdt. 4627	1	4/30/2008	Amendment SA 4627 proposed by Senator Rockefeller.	5/1/2008	Cloture motion on amendment SA 4627 presented.
S.Amdt. 4720	0	5/7/2008	Amendment SA 4720 proposed by Senator McConnell to language proposed to be stricken by amendment no. SA 4707.	5/7/2008	Cloture motion on Amendment SA 4720 presented.
S.Amdt. 4751	0	5/13/2008	Amendment SA 4751 proposed by Senator Reid for Senator Gregg.	5/14/2008	Cloture motion on amendment SA 4751 presented.
S.Amdt. 4763	0	5/14/2008	Amendment SA 4763 proposed by Senator Graham to the text of the bill proposed to be stricken by Amdt. No. 4751.	5/14/2008	Cloture motion on amendment SA 4763 presented.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S.Amdt. 4803	0	5/20/2008	Amendment SA 4803 proposed by Senator Reid.	5/20/2008	Cloture motion on the Reid motion to concur in the House amendment No. 2 to the Senate amendment with an amendment (SA 4803) presented.
S.Amdt. 4825	0	6/4/2008	Amendment SA 4825 proposed by Senator Reid for Senator Boxer.	6/4/2008	Cloture motion on amendment SA 4825 presented.
S.Amdt. 4983	1	6/19/2008	Amendment SA 4983 proposed by Senator Reid for Senator Dodd to the motion to concur in the House amendment striking section 1 through title V and inserting certain language to the Senate amendment.	6/20/2008	Cloture motion on the Reid motion to concur in the amendment of the House, striking section 1 and all that follows through the end of Title V, and inserting certain language, to the amendment of the Senate, with amendment (SA 4983) presented.

Source: Legislative Information System of the U.S. Congress (LIS)

Table 7. Calendar Days Elapsed Until First Cloture Motion Filed on Legislation

111th Congress, First Session (2009)

Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
H.R. 146	0	3/12/09	Motion to proceed to consideration of measure made in Senate.	3/12/09	Cloture motion on the motion to proceed to the bill presented in Senate.
H.R. 627	0	5/6/09	Motion to proceed to consideration of measure made in Senate.	5/6/09	Cloture motion on the motion to proceed to the measure presented in Senate.
H.R. 627	2	5/11/09	Measure laid before Senate by unanimous consent.	5/13/09	Cloture motion on the bill presented in Senate.
H.R. 1105	2	3/2/09	Measure laid before Senate by unanimous consent.	3/4/09	Cloture motion on the bill presented in Senate.
H.R. 1256	0	5/21/09	Motion to proceed to consideration of measure made in Senate.	5/21/09	Cloture motion on the motion to proceed to the measure presented in Senate.
H.R. 1256	1	6/3/09	Measure laid before Senate by motion.	6/4/09	Cloture motion on the bill presented in Senate.
H.R. 1388	0	3/19/09	Motion to proceed to consideration of measure made in Senate.	3/19/09	Cloture motion on the motion to proceed to the measure presented in Senate.
H.R. 1388	1	3/24/09	Measure laid before Senate by motion.	3/25/09	Cloture motion on the bill presented in Senate.
H.R. 2346	0	5/19/09	Measure laid before Senate by unanimous consent.	5/19/09	Cloture motion on the bill presented in Senate.
H.R. 2346	0	6/17/09	Conference report considered in Senate.	6/17/09	Cloture motion on the Conference Report to accompany the bill presented in Senate.
H.R. 2647	0	10/20/09	Conference report considered in Senate.	10/20/09	Cloture motion on the conference report to accompany H.R. 2647 presented in Senate.
H.R. 2847	3	10/5/09	Measure laid before Senate by unanimous consent.	10/8/09	Cloture motion on the bill presented in Senate.
H.R. 2847	3	10/5/09	Committee reported substitute amendment proposed.	10/8/09	Cloture motion on the committee reported substitute amendment presented in Senate.
H.R. 2892	1	7/7/09	Measure laid before Senate by unanimous consent.	7/8/09	Cloture motion on the bill presented in Senate.
H.R. 2996	5	9/17/09	Measure laid before Senate by unanimous consent.	9/22/09	Cloture motion on the bill presented in Senate.
H.R. 2996	5	9/17/09	Committee reported substitute amendment proposed.	9/22/09	Cloture motion on the committee substitute amendment presented in Senate.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
H.R. 2997	1	7/30/09	Measure laid before Senate by unanimous consent.	7/31/09	Cloture motion on the bill presented in Senate.
H.R. 3183	1	7/27/09	Measure laid before Senate by unanimous consent.	7/28/09	Cloture motion on the bill presented in Senate.
H.R. 3183	0	10/8/09	Conference report considered in Senate by Unanimous Consent.	10/8/09	Cloture motion on the conference report to accompany H.R. 3183 presented in Senate.
H.R. 3288	5	9/10/09	Measure laid before Senate by unanimous consent.	9/15/09	Cloture motion on the bill presented in Senate.
H.R. 3288	5	9/10/09	Committee reported substitute amendment proposed.	9/15/09	Cloture motion on the committee reported substitute amendment presented in Senate.
H.R. 3288	0	12/10/09	Conference report considered in Senate by motion.	12/10/09	Cloture motion on the conference report to accompany H.R. 3288 presented in Senate.
H.R. 3326	6	9/24/09	Measure laid before Senate by unanimous consent.	9/30/09	Cloture motion on the bill presented in Senate.
H.R. 3326	6	9/24/09	Committee reported substitute amendment proposed.	9/30/09	Cloture motion on the committee reported substitute amendment presented in Senate.
H.R. 3326	0	12/16/09	Motion by Senator Reid to concur in House amendment to Senate amendment made in Senate.	12/16/09	Cloture motion on the motion to concur in House amendment to Senate amendment to H.R. 3326 presented in Senate.
H.R. 3548	0	10/21/09	Motion to proceed to consideration of measure made in Senate.	10/21/09	Cloture motion on the motion to proceed to the bill presented in Senate.
H.R. 3548	0	10/29/09	Measure laid before Senate by motion.	10/29/09	Cloture motion on the bill presented in Senate.
H.R. 3590	0	11/19/09	Motion to proceed to consideration of measure made in Senate.	11/19/09	Cloture motion on the motion to proceed to the bill presented in Senate.
H.R. 3590	5	12/8/09	Motion by Senator Crapo to commit to Senate Committee on Finance with instructions made in Senate.	12/13/09	Cloture motion on the Crapo motion to commit presented in Senate.
H.R. 3590	0	12/17/09	Motion to proceed to consideration of measure made in Senate.	12/17/09	Cloture motion on the motion to proceed to the bill presented in Senate.
S. 22	0	1/9/09	Motion to proceed to consideration of measure made in Senate.	1/9/09	Cloture motion on the motion to proceed to the measure presented in Senate.
S. 22	0	1/12/09	Measure laid before Senate by unanimous consent.	1/12/09	Cloture motion on the measure presented in Senate.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S. 146	0	5/21/09	Motion to proceed to consideration of measure made in Senate.	5/21/09	Cloture motion on the motion to proceed to the measure presented in Senate.
S. 160	0	2/13/09	Motion to proceed to consideration of measure made in Senate.	2/13/09	Cloture motion on the motion to proceed to the bill presented in Senate.
S. 160	1	2/24/09	Measure laid before Senate by motion.	2/25/09	Cloture motion on the measure presented in Senate.
S. 181	0	1/13/09	Motion to proceed to consideration of measure made in Senate.	1/13/09	Cloture motion on the motion to proceed to the measure presented in Senate.
S. 386	0	4/2/09	Motion to proceed to consideration of measure made in Senate.	4/2/09	Cloture motion on the motion to proceed to the measure presented in Senate.
S. 386	1	4/22/09	Committee reported substitute amendment proposed.	4/23/09	Cloture motion on the committee substitute amendment presented in Senate.
S. 1023	0	6/11//09	Motion to proceed to consideration of measure made in Senate.	6/11//09	Cloture motion on the motion to proceed to the measure presented in Senate.
S. 1023	0	6/19/09	Measure laid before Senate by unanimous consent.	6/19/09	Cloture motion on the bill presented in Senate.
S. 1390	9	7/13/09	Measure laid before Senate by unanimous consent.	7/22/09	Cloture motion on the bill presented in Senate.
S. 1776	0	10/15/09	Motion to proceed to consideration of measure made in Senate.	10/15/09	Cloture motion on the motion to proceed to the bill presented in Senate.
S.Amdt. 570	0	2/7/09	Amendment SA 570 proposed by Senator Reid for Senator Collins.	2/7/09	Cloture motion on amendment SA 570 presented in Senate.
S.Amdt. 687	1	3/24/09	Amendment SA 687 proposed by Senator Mikulski.	3/25/09	Cloture motion on amendment SA 687 presented in Senate.
S.Amdt. 1058	2	5/11/09	Amendment SA 1058 proposed by Senator Dodd.	5/13/09	Cloture motion on amendment SA 1058 presented in Senate.
S.Amdt. 1247	0	6/4/09	Amendment SA 1247 proposed by Senator Dodd.	6/4/09	Cloture motion on amendment SA 1247 presented in Senate.
S.Amdt. 1347	0	6/19/09	Amendment SA 1347 proposed by Senator Reid for Senator Dorgan.	6/19/09	Cloture motion on amendment SA 1347 presented in Senate.
S.Amdt. 1373	1	7/7/09	Amendment SA 1373 proposed by Senator Reid for Senator Byrd.	7/8/09	Cloture motion on Amendment SA 1373.
S.Amdt. 1511	0	7/15/09	Amendment SA 1511 proposed by Senator Reid for Senator Leahy.	7/15/09	Cloture motion on amendment SA 1511 presented in Senate.

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Measure number	Elapsed Days	Date Question Proposed	Question	Date Cloture Presented	Cloture Motion
S.Amdt. 1813	1	7/27/09	Amendment SA 1813 proposed by Senator Dorgan.	7/28/09	Cloture motion on Amendment SA 1813 presented in Senate.
S.Amdt. 1908	1	7/30/09	Amendment SA 1908 proposed by Senator Kohl.	7/31/09	Cloture motion on Amendment SA 1908 presented in Senate.
S.Amdt. 2712	0	10/29/09	Amendment SA 2712 proposed by Senator Reid for Senator Baucus.	10/29/09	Cloture motion on amendment SA 2712 presented in Senate.
S.Amdt. 2786	28	11/21/09	Amendment SA 2786 proposed by Senator Reid.	12/19/09	Cloture motion on amendment SA 2786 presented in Senate.
S.Amdt. 3276	0	12/19/09	Amendment SA 3276 proposed by Senator Reid to Amendment SA 2786.	12/19/09	Cloture motion on amendment SA 3276 presented in Senate.

Source: Legislative Information System of the U.S. Congress (LIS).

We trust this information meets your needs. If you have questions, require additional research, or if we can be of further assistance, please do not hesitate to contact Richard S. Beth (7-8667 or rbeth@crs.loc.gov) or Christopher M. Davis (7-0656 or cmdavis@crs.loc.gov).

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Congressional Research Service

Memorandum March 18, 2010

TO: [redacted]

FROM: Christopher M. Davis
Analyst on Congress and the Legislative Process
Government and Finance Division

SUBJECT: Measures on Which Opportunities for Floor Amendment Were Limited by the Senate Majority Leader or His Designee Filling or Partially Filling the Amendment Tree: 1985-2010

This memorandum responds to your request that the Congressional Research Service (CRS) identi fy instances when the Senate majority leader or his designee may have limited available amending opportunities by filling, or partially filling, the "amendment tree."

Background on The Amendment Trees

The amendment trees have developed over decades of practice in the Senate as a way of visualizing certain principles of precedence that govern the offering of, and voting on, amendments in that chamber. These principles of precedence are reflected in four charts published in *Riddick's Senate Procedure*, the official compilation of Senate precedents.[1] The four *Riddick* charts depict the maximum number and type of amendments that may be offered to a bill and simultaneously pending under various circumstances during its consideration. Which of the four charts will be applicable at a given point during consideration of a measure is dictated by the form of the first amendment that is offered — be it an amendment to insert, to strike, to strike and insert, or in the nature of a substitute.

While the four charts in *Senate Procedure* are the sole official guide to the precedents governing the Senate amendment process, the same principles of precedence are often depicted in four line diagrams whose component parts resemble the trunk of a tree (representing the legislative measure being considered) with limbs (representing the various possible amendments to the measure) growing out from the trunk. These diagrams are widely and colloquially referred to as "amendment trees."

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[1] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 1st sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 74-89.

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An amendment tree may be said to be "filled" when all of the possible amendments permitted by these principles of precedence have been offered and are pending. Depending on which tree is in use in a given floor situation, an amendment tree might be filled by as few as two amendments, or as many as 11. Even if a majority leader does not fill all of the available limbs of a tree, he may limit some amending opportunities by strategically occupying some of them.

When an amendment tree is filled, the amendment process is, in effect, frozen — no additional floor amendments may be offered to the measure until action is taken to dispose of one or more of the amendments that are already pending. Pending amendments might be disposed of by being voted upon, withdrawn by their sponsor, tabled, or because they fall after the Senate invokes cloture (discussed below). The Senate might also choose to lay aside a pending amendment or amendments so that a Senator may offer another amendment to the same or to a different portion of the measure, notwithstanding the number already pending. While this latter practice is routine, laying aside a pending amendment requires unanimous consent, and thus, may be blocked by a single Senator's objection.[2] In addition, should consent be granted to lay aside a full tree so that other amendments may be offered, the next amendment offered begins a different amendment tree that does not affect the "fullness" of the other tree. In this way, the Senate often "stacks" a series of amendments without the formality of requiring final action on each one before proceeding to consider the next.

A motion to commit or recommit a measure to committee may be offered even when an amendment tree on a bill is full. Such a motion may be offered with or without amendatory instructions. Those instructions, however, may also be amended in two degrees, a first degree amendment to the instructions and a second degree amendment to the amendment. Thus, it is also possible to "fill the tree" on such a motion, and a majority leader will often do so when trying to eliminate all opportunities for floor amendment.

Recognition and the Senate Majority Leader

Under paragraph 1(a) of Senate Rule XIX, the Presiding Officer "shall recognize the Senator who shall first address him." Under traditions and practices observed since at least the late 1930s, however, the majority leader and minority leader are given preferential recognition when they seek the floor simultaneously with other Senators.[3] As *Riddick's Senate Procedure* notes, "... in the event that several Senators seek recognition simultaneously, priority of recognition shall be accorded the Majority Leader and Minority Leader, the majority [bill] manager, and the minority manager, in that order."[4] This preference in recognition afforded the majority leader is also given to a Senator serving as the designee of the leader. This custom is relevant to the amendment tree because the order of recognition can affect opportunities in the amendment process.

In keeping with Rule XIX, Senators offer amendments to a pending bill in the order they seek and obtain recognition to do so. When a Senator is recognized and has offered an amendment, he or she has the right to withdraw or modify the amendment, but may not offer

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[2] Ibid., pp. 41-42.

[3] Ibid., pp. 1093-1094, 1098.

[4] Ibid., p. 1093.

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an amendment to his or her own amendment, until the Senate takes some action in relation to it.[5] After action has been taken on the amendment, its author loses the unilateral right to withdraw or modify it, but gains the right to offer an amendment to it. Accordingly, if a Senator offering an amendment can secure recognition a second time, he or she can secure some Senate action on his or her own amendment (such as obtaining the yeas and nays) and then offer an amendment to it, as long as the new amendment is in keeping with the principles of precedence described above.

The question of recognition, then — who is recognized, and in what order — can be an important influence on both the substance of legislation as well as progression of the amendment process on the Senate floor, including the potential filling of the amendment tree. It is precisely in the matter of securing recognition that the Senate majority leader has an advantage over other members of the chamber.

While any Senator (or group of Senators acting in concert) might potentially "fill the amendment tree," the custom of granting the leader preferential recognition means that a determined majority leader will always be recognized before other Senators, and, as a result, the majority leader alone is *guaranteed* the ability to fill up the amendment tree on a pending measure by being repeatedly recognized in turn to offer amendments until no further amendments are in order under the principles of precedence. The majority leader's preferential recognition also means that he can often prevent other Senators, or a group of Senators acting in concert, from filling up the tree with amendments.

Motivation for Filling the Amendment Tree

A Senate majority leader might pursue a strategy of "filling the amendment tree," for several reasons, including, but not limited to:

- obtaining advantage in the negotiation of a unanimous consent request for the further consideration of a measure;
- fending off non-germane (and perhaps politically controversial) amendments to a measure until cloture can be invoked;[6]
- attempting to expedite overall Senate consideration of legislation;
- obtaining the first recorded vote on a policy provision in the exact form desired; and,

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[5] "Action" includes ordering the yeas and nays on the amendment, adopting, rejecting, or tabling it, amending it, or entering into a unanimous consent request specific to that amendment. See *Senate Procedure*, p. 65

[6] Once the amendment tree has been filled, a Senator may file a cloture petition, either on a pending amendment or on the underlying measure. If cloture is invoked on the measure, it limits amendments that may be offered to those that are germane and also establishes a 30-hour time limit for further consideration of the bill. By keeping the amendment tree full until cloture is invoked, a majority leader may be able to prevent action on an already pending non-germane amendment, prevent all non-germane amendments from being offered, or even prevent amendments altogether.

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- instituting some measure of leadership control over the subject and/or sequence of floor amendments offered.

Research Method

The instances of "filling the amendment tree" identified in this memorandum are those in which the Senate majority leader or a designee used the right of preferential floor recognition to limit the amending opportunities available to all Senators by amending legislation in such a way that some or all of the amendments permitted under the circumstances by the Senate's principles of precedence were pending. The definition used in this memorandum does not include instances in which all possible amendments were offered and an amendment tree filled by Senators in the normal process of considering a measure. The table and attached graph are organized by *measures* on which trees were filled, not individual *instances* of tree filling. Thus, measures on which a tree was filled more than once by the majority leader are counted just once on the table and the accompanying graph. It should be noted that other observers may count differently or have somewhat different definitions of "filling the tree," for example, including only those instances in which every possible amendatory motion (including, for example, a motion to commit or recommit) have been offered to legislation as examples of the practice.

In answering this request, CRS examined data from the Legislative Information System of the U.S. Congress (LIS) relating to the amendments offered by the majority leader between the 99th Congress (1985-1986) and the present. CRS's examination of these LIS data attempted to identify patterns in the offering of amendments that might suggest that an amendment tree was being filled or partially filled in the manner described above. These patterns include: the offering of amendments to a measure in sequence by the majority leader or his designee, including second-degree amendments; amendments offered to a measure that made small, technical, changes in the bill (such as changes in its effective date) or sequential amendments which differed in only slight, technical respects from each other; and amendments coupled with the offering of a motion to commit or recommit and/or the immediate filing of a cloture petition.

CRS also searched for instances in which the majority leader or a designee objected to a unanimous consent request to set aside a pending amendment so that another amendment might be offered. Finally, CRS conducted electronic and manual searches of the *Congressional Record* as well as a *Lexis* database search of various media sources for instances in which Senators might have alluded to the amendment tree being filled. The daily, rather than the bound, edition of the *Record* is cited here because it is electronically searchable and also because it is available to congressional offices online.

It should be noted that while care was taken to search for instances in which a designee of the majority leader may have filled a tree, such a search requires an examination of exponentially more amendments, and, within the time available for this research, CRS cannot preclude the possibility that some instances in which designees acted were not identified.

I trust this information meets your needs. Please do not hesitate to contact me at 7-0656 or cmdavis@crs.loc.gov if I can be of further assistance.

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Table 1. Measures on Which Opportunities for Floor Amendment Were Limited by the Senate Majority Leader or His Designee Filling or Partially Filling the "Amendment Tree": 1985-2010[7]

Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
99th (1985-1986)	Robert J. Dole (R-KS)	S.Con.Res. 32, Concurrent Resolution on the Budget for FY 1986	Sen. Dole filled the "amendment in the nature of a substitute" tree with amendments SA37-39,SA41-42 and the tree on the motion to recommit with instructions with amendments SA43-44. *(Congressional Record,* daily edition, vol. 131, Apr. 30, 1985, p. S4986.)
		S. 1714, Agriculture, Food, Trade, and Conservation Act of 1985	Sen. Dole filled the tree on the motion to recommit with instructions with amendments SA939-940. Cloture was filed on the motion. (*Congressional Record,* vol. 131, Oct. 31, 1985, p. 30087.)
		H.J.Res. 668, Increasing the Statutory Limit on the Public Debt	Sen. Dole filled the tree on the motion to commit with instructions with amendments SA2231-2232. *(Congressional Record,* daily edition, vol. 132, Jul. 25, 1986, p. S9664.)
100th (1987-1988)	Robert C. Byrd (D-WV)	S. 1420, Omnibus Trade and Competitiveness Act of 1987	Sen. Byrd, working in concert with Sen. Howard M. Metzenbaum, filled the "strike and insert" tree with a series of amendments, SA435-439. *(Congressional Record,* vol. 133, Jul. 8, 1987, pp. 18871-18876.) Media reports indicate the goal was to obtain a straight vote on a compromise proposal requiring advance notice of certain plant closings. ("Senate Passes Measure on Plant-Closing Notice," *The Washington Post,* July 9, 1987, p. E1.)
		S. 2, Senatorial Election Campaign Act of 1987	Sen. Byrd, working in concert with Sen. David L. Boren, filled the "motion to recommit" tree with amendments, SA1403-1405. In debate, Sen. Byrd indicated his goal was to displace several non-germane amendments to S. 1 relating to funding for the Nicaraguan contras, thus returning the Senate to consideration of the subject of the underlying bill. (*Congressional Record,* vol. 134, Feb. 17, 1988, p. 1481.)

[7] As of March 18, 2010. Information from the Legislative Information System of the U.S. Congress (LIS) and cited issues of the *Congressional Record.*

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 2488, Parental and Medical Leave Act of 1988	Sen. Byrd filled the "motion to recommit" tree with amendments, SA3308-3310. In floor debate, Sen. Byrd indicated that he had done so in response to a continued inability to secure a time agreement on the offering of amendments, including a requirement for germaneness or relevancy. He characterized the motion and the amendments to it as an attempt to place S. 2488 back before the Senate in a form containing several specific policy provisions. *(Congressional Record,* vol. 134, Sep. 29, 1988, pp. 26523-26588.)
101st (1989-1990)	George J. Mitchell (D-ME)	None identified	None identified
102nd (1991-1992)	George J. Mitchell (D-ME)	S. Con. Res. 106, Concurrent resolution setting forth the congressional budget for FY 1993, 1994, 1995, 1996, & 1997	Sen. Mitchell filled the "insert" tree with two amendments, SA1778-1779 offered to a substitute amendment for S. Con. Res. 106, SA1777, which appears to have been treated as an original text for the purposes of amendment. Floor debate suggests a unanimous consent agreement was entered into laying out this approach with the goal of controlling and structuring the consideration of policy alternatives relating to entitlement reform. *(Congressional Record,* vol. 134, Apr. 10, 1992, pp. 9283-9284.)
103rd (1993-1994)	George J. Mitchell (D-ME)	H.R. 1335, Emergency Supplemental Appropriations for FY 1993	Sen. Robert C. Byrd, acting on behalf of the majority leader, filled the tree on the substitute to the measure, offering SA271-272. *(Congressional Record,* daily edition, vol. 139, Mar. 25, 1993, p. S3715.)
		S. 1491, FAA Authorization Act of 1994	On multiple occasions during consideration of this measure, Sen. Mitchell or his designee offered second-degree amendments, for example, SA1776, 1779, and 1781, to non-germane first-degree amendments dealing with the subject of President William J. Clinton and the Whitewater Development Corporation. On each occasion, this action filled the "insert" tree and prevented a straight vote on the first-degree amendment. *(Congressional Record,* daily edition, vol. 140, June 15, 1994, pp. S6890-6894.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
104th (1995-1996)	Robert Dole (R-KS)	S.J. Res. 21, Constitutional Amendment to Limit Congressional Terms	Acting as the designee of the majority leader, Sen. Fred Thompson offered a series of amendments, SA3692-3397, to the committee substitute for S.J.Res 21, filling the amendment tree. He then offered a motion to recommit the joint resolution and proceeded to offer amendments SA3698-3699 to the motion, filling the tree on the motion. In debate, Sen. Thompson indicated that he did so to prevent non-germane amendments from being offered to the measure and to ensure that Senate debate would focus on the subject of congressional term limits. (*Congressional Record*, daily edition, vol. 142, Apr. 19, 1996, pp. S3715-3717.)
		S. 1664, Immigration Control and Financial Responsibility Act of 1996	Acting as the designee of the majority leader, Sen. Alan K. Simpson offered a series of second-degree amendments to a number of "stacked" first degree amendments, filling the amendment tree on them. He also filled the recommit tree on the underlying bill, offering SA3725-3726. In debate, Sen. Simpson indicated that he did so to prevent the offering of non-germane second-degree amendments on subjects such as the minimum wage and Social Security. (*Congressional Record*, daily edition, vol. 142, Apr. 24, 1996, pp. S4012-4016.)
		H.R. 2937, White House Travel Office Reimbursement	Sen. Dole offered a series of amendments, SA3952-3956, first to the bill and then to a motion to refer the bill, filling the tree on both. Sen. Dole indicated that he took this action to prevent non-germane amendments to the measure. Sen. Dole filed for cloture on the measure and indicated his willingness to enter into negotiations on possibly permitting a non-germane amendment relating to the minimum wage to be offered. (*Congressional Record*, daily edition, vol. 142, May 3, 1996, pp. S4670-4672.)
		H.R. 1296, To provide for the administration of certain Presidio properties at minimal cost to the federal taxpayer	On Mar. 26, 1996, Sen. Dole filled the tree on the motion to commit the bill with SA3653-3654 and immediately filed cloture on the motion. Floor debate suggests that this action was taken in an attempt to block non-germane amendments to the measure on the subject of the minimum wage. (*Congressional Record*, daily edition, vol. 142, Mar. 26, 1996, pp. S2898-2899.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
105th (1997-1998)	Trent Lott (R-MS)	S. 25, Bipartisan Campaign Reform Act of 1997	Sen. Lott offered a series of amendments, SA1258-1265, to the bill and to a motion to recommit the bill, filling both the "strike and insert" tree and the recommit tree. In debate, Sen. Lott indicated he did so to bar all amendments to the measure except those negotiated between himself and supporters of S. 25. The agreement provided for a modified form of the bill and one Lott amendment to it containing provisions of the so-called "Paycheck Protection Act," *(Congressional Record*, daily edition, vol. 143, Sept. 29, 1997, pp. S10106-10114.)
		S. 1663, Paycheck Protection Act	On Feb. 24, 1998, Sen. Lott offered a series of amendments, SA1648-1650, along with a motion to commit, which he then filled with amendments SA1651-1653. The leader then filed cloture on the motion. *(Congressional Record*, daily edition, vol. 143, Feb. 24, 1997, pp. S939-940.)
106th (1999-2000)	Trent Lott (R-MS)	S. 280, Education Flexibility Partnership Act of 1999	Sen. James Jeffords, as the designee of Sen. Lott, filled the tree on the measure on Mar. 10, 1999 with SA66-68. *(Congressional Record*, daily edition, vol. 145, Mar. 10, 1999, p. S2489-2490.) Media reports claimed he did so to prevent certain minority party Senators, "from offering amendments reflecting their education goals including the hiring of 100,000 additional teachers." (Matthew Tully, "Both Sides Used Senate Rules Effectively to Tie Things Up," *CQ Daily Monitor*, Nov. 29, 1999.)
		S. 557, An original bill to provide guidance for the designation of emergencies as a part of the budget process	On Apr. 20, 1999, Sen. Lott filled the tree by offering two amendments on behalf of another Senator, SA254-255 and then immediately filing cloture. Floor debate suggests he did this to block the offering of amendments relating to a Social Security and Medicare "lockbox." *(Congressional Record*, daily edition, vol. 145, Apr. 20, 1999, p. S3896.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 544, Emergency Supplemental Appropriations Act for Fiscal Year 1999	On Mar. 19, 1999, Sen. Lott proposed a second-degree amendment, SA124, "prohibiting the use of funds for military operations in the Federal Republic of Yugoslavia (Serbia and Montenegro) unless Congress enacts specific authorization in law for the conduct of those operations." This amendment filled the insert tree and he then filed cloture on the amendment. In floor debate. Sen. Lott indicated he took this action to ensure that there would be a debate on the subject of Yugoslavia, but added that he wanted to continue to negotiate a time agreement for Senate consideration of the measure. *(Congressional Record*, daily edition, vol. 145, Mar. 19, 1999, pp. S2995-2996.)
		S. 96, The Y2K Act	Sen. Lott filled the tree on the measure, offering SA268-271. In debate, he indicated his willingness to have a pending amendment on the filled tree laid aside so that germane amendments could be offered. *(Congressional Record*, daily edition, vol. 145, Apr. 27, 1999, pp. S4232-4234.) A media account stated that Sen. Lott pursued this strategy in part to prevent minority party Senators from proposing non-germane amendments relating to gun control. (Matthew Tully, "Both Sides Used Senate Rules Effectively to Tie Things Up," *CQ Daily Monitor*, Nov. 29, 1999.)
		H.R. 1501, Juvenile Justice Reform Act of 1999	On July 26, 1999, Sen. Lott filled the tree on the measure, offering amendments SA1344-1348. In debate, Sen. Lott indicated he filled the tree with amendments consisting of the Senate version of the bill. *(Congressional Record*, daily edition, vol. 146, July 26, 1999, pp. S9209-9210.)
		H.R. 434, African Growth and Opportunity Act	Sen. Lott filled the tree on the measure on Oct. 27, 1999, offering SA2332-2335. In debate, he expressed regret at "having to" do so, and indicated he would agree to lay aside a pending amendment if a Senator wished to offer relevant amendments. *(Congressional Record*, daily edition, vol. 146, Oct. 27, 1999, pp. S13202-13203.) A media account stated that Sen. Lott pursued this strategy in part to prevent minority party Senators from offering non-germane amendments on the subjects of minimum wage and campaign finance reform. (Matthew Tully, "Both Sides Used Senate Rules Effectively to Tie Things Up," *CQ Daily Monitor*, Nov. 29, 1999.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		H.R. 4577, Labor-HHS-Education Appropriations	Sen. Lott filled the tree on the motion to commit the bill, offering amendments SA3598-3600. During debate, he indicated his desire to negotiate a time agreement for the consideration of amendments dealing with the ergonomic standard issued by the Occupational Safety and Health Administration (OSHA). The motion to commit was later withdrawn when such a time agreement was successfully negotiated. *(Congressional Record*, daily edition, vol. 146, June 22, 2000, pp. S5628-5629.)
		S. 2045, American Competitiveness in the Twenty-First Century Act	Sen. Lott filled the "strike and insert" tree twice on this bill as well as the tree on a motion to recommit the measure. In doing so, Sen. Lott called up an amendment filed by a minority party Senator, SA 4183. In debate, Sen. Lott indicated followed this course because of an inability to reach a time agreement governing the further consideration of the measure. *(Congressional Record*, daily edition, vol. 146, Sept. 15, 2000, pp. S9026-9029.)
107th (2001-2002)	Thomas A. Daschle (D-SD)	H.R. 5005, Homeland Security Act of 2002	Sen. Daschle filled the tree on the motion to commit with instructions by offering amendments SA4742-4743. In debate, he indicated he did so to "keep in place the current parliamentary circumstances" while Senators tried to negotiate a time agreement for the further consideration of amendments. *(Congressional Record*, daily edition, vol. 148, Sept. 25, 2002, pp. S9205.)
108th (2003-2004)	William H. Frist (R-TN)	S. 14, Energy Policy Act of 2003	On July 30, 2003, the majority leader offered a motion to commit the bill to the Energy and Natural Resources Committee with instructions. He filled the tree on the motion to commit with instructions with amendments SA1433-1434 and filed cloture on the motion. In debate, the Senator indicated he did so to try to bring the underlying bill to a final vote prior to the August recess period. *(Congressional Record*, daily edition, vol. 149, July 30, 2003, p. S10251.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 2062, Class Action Fairness Act	On July 7, the majority leader offered two amendments to the bill, SA3548-3549, filling the insert tree. He then offered a motion to commit the bill with instructions and filled the tree on the motion with amendments SA3550-3551. The majority leader filed cloture on the bill. Floor debate suggests that Sen. Frist pursued this course in response to an inability to secure a time agreement structuring the offering of amendments to the bill, including a relevancy requirement. *(Congressional Record*, daily edition, vol. 150, July 7, 2004, pp. S7698-7699.)
		S. 1637, Jumpstart our Business Strength Act	On Mar. 22, 2004, the majority leader offered a motion to commit the bill with instructions that the committee report back the measure with an amendment specified in the motion. Senators filed amendments SA2898-2899 to those instructions, filling the tree. After cloture on the motion subsequently failed, the majority leader offered another motion to commit, and offered amendments SA3011-3013 to it, filling the tree. Floor debate suggests these efforts were attempts to expedite consideration of the bill. *(Congressional Record*, daily edition, vol. 150, Mar. 22, 2004, pp. S2852-2853.)
109th (2005-2006)	William H. Frist (R-TN)	S. 397, Protection of Lawful Commerce in Arms Act	On July 27, 2005, the majority leader offered amendments to the bill SA1605-1606 filling the tree. Senators asked unanimous consent to set aside pending amendments to offer additional amendments. This request was objected to each time. Floor debate suggests that this action was undertaken pending the negotiation of a time agreement relating to the consideration of amendments, including a germaneness requirement. *(Congressional Record*, daily edition, vol. 151, July 27, 2005, p. 9087.)
		H.R. 4297, Tax Relief Extension Reconciliation	On Feb. 2, 2006, the majority leader offered amendments SA2707-2709, filling the tree on the bill. He then offered a motion to commit the bill with instructions, and proceeded to fill the tree on the motion with amendments SA2710-2711. In floor debate, Sen. Frist indicated he did this in order to structure floor consideration and potentially reach a timely final vote on the measure. *(Congressional Record*, daily edition, vol. 152, Feb. 2, 2006, pp. 472-473.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 2271, USA PATRIOT Act Amendments	On Feb. 16, 2006, the majority leader filled the insert tree on the measure with amendments SA2895-2896. The majority leader then filed a cloture petition on the bill and objected to unanimous consent requests to lay aside any of the pending amendments. In debate, one Senator charged that the leader undertook this action to block amendments to the bill. *(Congressional Record*, daily edition, vol. 152, Feb. 16, 2006, pp. 1379-1380.)
		S. 1955, Health Insurance Marketplace Modernization Act	On May 10, 2006, the majority leader filled the insert tree with amendments SA3886-3887. He then offered a motion to recommit the bill with instructions and offered amendments SA3888-3890 to fill the tree on the motion. In debate, Sen. Frist explained that he did this because there had, "been attempts or suggestions that we use this bill as a Christmas tree for all sorts of amendments ... amendments that don't relate to the underlying bill." *(Congressional Record*, daily edition, vol. 152, May 10, 2006, pp. S4285-4295.)
		S. 3711, Gulf of Mexico Energy Security Act of 2006	On Jul. 27, 2006, the majority leader filled the insert tree with amendments SA4713-4714. The majority leader then filed cloture on the bill. Remarks made in floor debate suggests he did so to exert some control over the subject of energy amendments offered to the bill. *(Congressional Record*, daily edition, vol. 152, Jul. 27, 2006, p. S8334.)
		S. 2454, Securing America's Borders Act	On Mar. 29, 2006, SA3192 was offered as a substitute to the measure. Senators then offered amendments to SA3192, filling the tree. Senators attempted to offer additional amendments by asking unanimous consent to set aside the pending amendments, but objection was heard in each instance. On Apr. 5, 2006 the majority leader moved to commit the bill to the Judiciary Committee with instructions that the committee report back forthwith with an amendment. He then offered amendments to the motion SA3424-3426 filling the tree. *(Congressional Record*, daily edition, vol. 152, Apr. 5, 2006, p. S2895-2896.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		H.R. 6061, Secure Fence Act of 2006	On Sep. 21, 2006, the majority leader filled the insert tree on the bill with amendments SA5031-5032. On Sep. 25, 2006, the majority leader withdrew his first degree amendment (rendering the second degree amendment moot), and then filled the tree again with amendments SA5036-5037. He then filed cloture on the first degree amendment and offered a motion to commit the bill with instructions, and filled the tree on that motion, offering amendments, SA5038-5040. Floor debate suggests this action was taken while the leaders attempted to negotiate an agreement for the consideration of amendments relating to terrorist detainees. *(Congressional Record*, daily edition, vol. 152, Sept. 21, 2006, pp. S10097-10098)
		S. 403, Child Interstate Abortion Notification Act	On Sep. 27, 2006, Sen. Bennett, acting on behalf of the majority leader, filled the tree on the House amendment to the measure with amendments SA5090-5091. He also filed for cloture on the House amendment. *(Congressional Record*, daily edition, vol. 152, Sept. 27, 2006, pp. S10616-10618.)
		H.R. 6111, Tax Relief and Health Care Act of 2006	On Dec. 8, 2006, Sen. Frist filled the tree on the motion to concur in the House amendment to the Senate amendment to the measure, with SA5236-5237. He also filed for cloture on the motion. *(Congressional Record*, daily edition, vol. 152, Dec. 8, 2006, pp. S11658-11659.)
110th (2007-2008)	Harry M. Reid (D-NV)	H.J.Res. 20, Revised Continuing Appropriations Resolution 2007	On Feb. 8, 2007, Sen. Reid filled the tree on the measure with SA237-241. Debate suggests the strategy was pursued in order to speed consideration of the measure. *(Congressional Record*, daily edition, vol. 153, Feb. 8, 2007, p. S1746.)
		H.R. 2206, U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007	On May 15, 2007, Sen. Reid filled the tree on the measure and the motion to commit, offering SA1123-1128. Floor debate indicates this was an action taken with the knowledge and cooperation of the minority leader, in an attempt to structure floor consideration and move the measure to conference in a timely way. *(Congressional Record*, daily edition, vol. 153, May 15, 2007, p. S6116-S6117.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 1348, Comprehensive Immigration Reform Act of 2007	On June 7, 2007, Sen. Reid used his right of first recognition to offer two amendments to the measure, SA1492-1493. While this action does not appear to have completely filled the amendment tree, remarks made by the Senator in debate ("What I am going to do is send a couple of amendments to the desk so there is some control over amendments that are offered") suggest it was done to limit or obtain a measure of control over the next amendment offered by filling some available limbs and refusing consent to lay aside amendments. *(Congressional Record*, daily edition, vol. 153, June 7, 2007, p. S7303-7304)
		S. 1639, A bill to provide comprehensive immigration reform, and for other purposes.	On June 26, 2007, Sen. Reid proposed SA1934, and filled the insert tree multiple times when the amendment was subsequently divided into several components, an action which some colloquially referred to as the "clay pigeon." It appears that a motion to commit was technically still available on this measure. *(Congressional Record*, daily edition, vol. 153, June 26, 2007, p. S8534.)
		S.1, Honest Leadership and Open Government Act of 2007	On July 31, 2007, Sen. Reid filled the tree on the motion to concur in the House amendment to the measure, offering amendments SA2589-2590. The leader then filed cloture on the motion. *(Congressional Record*, daily edition, vol. 153, July 31, 2007, pp. S10400-10401.)
		H.R. 1585, FY 2008 National Defense Authorization Act	On Sept. 25, 2007, Sen. Reid offered SA3038-3040 to the motion to commit the bill, filling the tree. *(Congressional Record*, daily edition, vol. 153, Sept. 25, 2007, p. S12024.)
		H.R. 976, Children's Health Insurance Program Reauthorization Act of 2007	On Sept. 26, 2007, Sen. Reid moved to concur in the House amendment to the Senate amendment to H.R. 976. He then filed cloture on the motion and filled that tree, offering SA3071-3072. *(Congressional Record*, daily edition, vol. 153, Sept. 26, 2007, pp. S12122-12123.)
		H.R. 2419 Farm, Nutrition, and Bioenergy Act of 2007	On Nov. 6, 2007, Sen. Reid filled the "strike and insert" tree as well as the tree on the motion to commit tree, offering SA3509-3514. In debate, the Senator indicated he would be willing to lay aside pending amendments in order for Senators to offer germane or relevant amendments. *(Congressional Record*, daily edition, vol. 153, Nov. 6, 2007, pp. S13946-13949.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		H.R. 6, Energy Independence and Security Act of 2007	On Dec. 12, 2007, Sen. Reid filled the tree on the motion to concur with two amendments, SA3841-3842 and immediately filed cloture on the motion. (*Congressional Record*, daily edition, vol. 153, Dec. 12, 2007, p. S15218.)
		H.R. 5140, Economic Stimulus Act of 2008	On Feb. 5, 2008, Sen. Reid filled the insert tree as well as on the tree on the motion to commit with amendments SA3983-3987. (*Congressional Record*, daily edition, vol. 154, Feb. 5, 2008, p. S656.)
		H.R. 2881, FAA Reauthorization Act of 2007	On May 1, 2008, Sen. Reid filled the tree on the measure with amendments SA4628-4631 and on the motion to commit with instructions with SA4636-4637. (*Congressional Record*, daily edition, vol. 154, May 1, 2008, p. S3581-3582.)
		H.R. 2642, Supplemental Appropriations Act, 2008	On May 20, 2008, Sen. Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to the bill with SA4803-4804. (*Congressional Record*, daily edition, vol. 154, May 20, 2008, p. S4475.)
		S.3036, Lieberman-Warner Climate Security Act of 2008	On June 4, 2008, Senator Reid filled the tree on the amendment in the nature of a substitute, as well as on the motion to commit with instructions, with amendments SA4826-4632. (*Congressional Record*, daily edition, vol. 154, June 4, 2008, pp. S5017-5019.)
		H.R. 3221, Foreclosure Prevention Act of 2008	On June 26, Sen. Reid made a motion to concur in a House amendment to the Senate amendment to H.R. 3221, and filled the tree with SA5067-5068. (*Congressional Record*, daily edition, vol. 154, Jun. 26, 2008, p. S6224.) On July 23, Sen. Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to the House amendment to the Senate amendment to H.R.3221 with SA5103-5104. (*Congressional Record*, daily edition, vol. 154, Jul. 23, 2008, p. S7131.)
		S. 3268, Stop Excessive Energy Speculation Act of 2008	Sen. Reid filled the insert tree with SA5098-5099, and the tree on the motion to recommit with instructions with SA5100-5102. (*Congressional Record*, daily edition, vol. 154, Jul. 23, 2008, pp. S7129-7130.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		S. 3001, National Defense Authorization Act for FY2009	Sen. Reid filled the insert tree with SA5290-5291, and the tree on the motion to recommit with instructions with SA5292-5294. (*Congressional Record*, daily edition, vol. 154, Sep. 9, 2008, pp. S8159-8160.)
		H.R.2638 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009	Sen. Reid filled the insert tree on the motion to concur in the House amendment to the Senate amendment to the bill with SA5660-5661. (*Congressional Record*, daily edition, vol. 154, Sep. 26, 2008, p. S9622.) Subsequently, Senator Sheldon Whitehouse, acting as the designee of the majority leader, filled the tree on the motion to concur in the House amendment to the Senate amendment to the bill with Reid amendments SA5670-5671. (*Congressional Record*, daily edition, vol. 154, Sep. 26, 2008, p. S9850.)
		H.R.2095 Railroad Safety Enhancement Act of 2008	Sen. Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to H.R. 2095 with SA5677-5678. (*Congressional Record*, daily edition, vol. 154, Sep. 27, 2008, p. S10019.)
111th (2009-2010)	Harry M. Reid (D-NV)	S. 22, Omnibus Public Land Management Act of 2009	Sen. Reid filled the insert tree with SA15-16 and the tree on the motion to commit with instructions with SA17-19. (*Congressional Record*, daily edition, vol. 155, Jan. 12, 2009, p. S299.)
		H.R. 2346, Supplemental Appropriations Act, 2009	Sen. Reid offered second-degree amendment SA1201 to first-degree amendment SA1167. This filled the insert tree until cloture was invoked and SA1167 fell, having been ruled non-germane. (*Congressional Record*, daily edition, vol. 155, May 20, 2009, p. S5691.)
		S. 1023, Travel Promotion Act of 2009	Sen. Reid filled the tree on the bill with SA1348-1350, and the tree on the motion to recommit with instructions with SA1351-1353. (*Congressional Record*, daily edition, vol. 155, June 19, 2009, p. S6840.)
		H.R. 3548, Worker, Homeownership, and Business Assistance Act of 2009	Sen. Reid filled the tree on the bill with SA2712-2716, and the tree on the motion to commit with instructions with SA2717-2719. (*Congressional Record*, daily edition, vol. 155, Oct. 29, 2009, p. S10910.)

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Congress & Years	Senate Majority Leader	Measure(s)	Notes & Citations
		H.R. 3326, Department of Defense Appropriations Act, 2010	Sen. Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to H.R. 3326 with SA3248 & SA3252, and on the motion to refer with SA3249-3251. (*Congressional Record*, daily edition, vol. 155, Dec. 16, 2009, pp. S13295-13296.)
		H.R. 3590, Patient Protection and Affordable Care Act	Sen. Reid filled the tree on the bill with SA3276-3279, and the tree on the motion to commit with instructions with SA3280-3282. (*Congressional Record*, daily edition, vol. 155, Dec. 19, 2009, pp. S13477-13478.)
		H.R. 2847, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010	Sen. Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to the bill with SA3310-3311, and the tree on the motion to refer with instructions with SA3312-3314. Subsequently, the Assistant Majority Leader made a motion to concur in the House amendments to the Senate amendment to the House amendment to the Senate amendment to the bill and filled the tree with SA3498-3499 and the tree on the motion to refer with SA3500-3502 (*Congressional Record*, daily edition, vol. 156, Feb. 11, 2010, pp. S559-560 and Mar. 11, 2010, pp. S1479-1480.)
		H.R. 1299, the U.S. Capitol Police Administrative Act	Senator Reid filled the tree on the motion to concur in the House amendment to the Senate amendment to the bill with SA3326-3327, and the tree on the motion to refer with instructions with SA3328-3329. (*Congressional Record*, daily edition, vol. 156, Feb. 23, 2010, pp. S725-726.)

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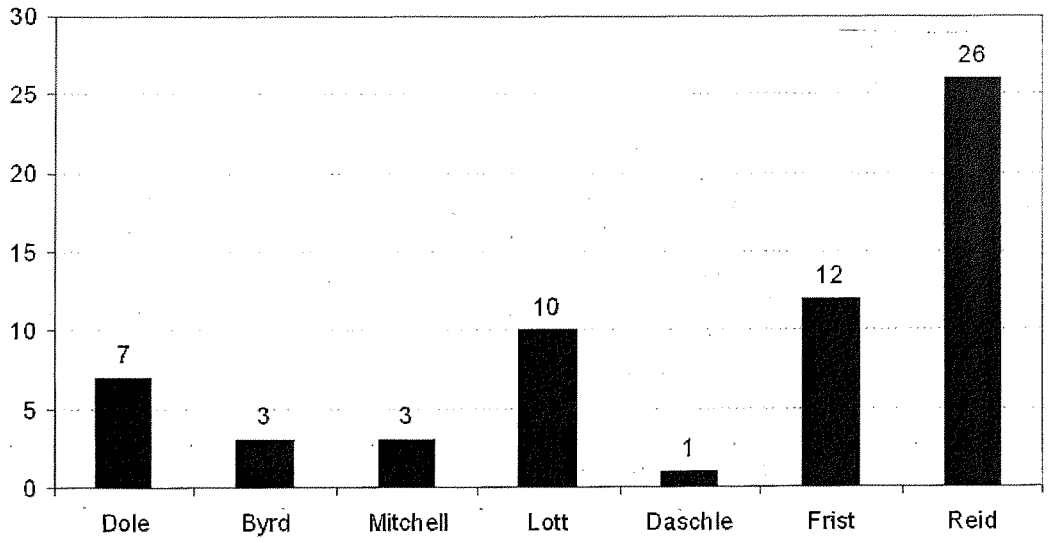
Figure 1. Measures on Which Opportunities for Floor Amendment Were Limited by the Senate Majority Leader or Designee Filling or Partially Filling the "Amendment Tree": By Majority Leader or Designee[8]



[8] Table reflects all Senate Majority Leaders and designees between Jan 1, 1985 and March 18, 2010. Information from the Legislative Information System of the U.S. Congress (LIS). Specific instances are detailed in the above table.

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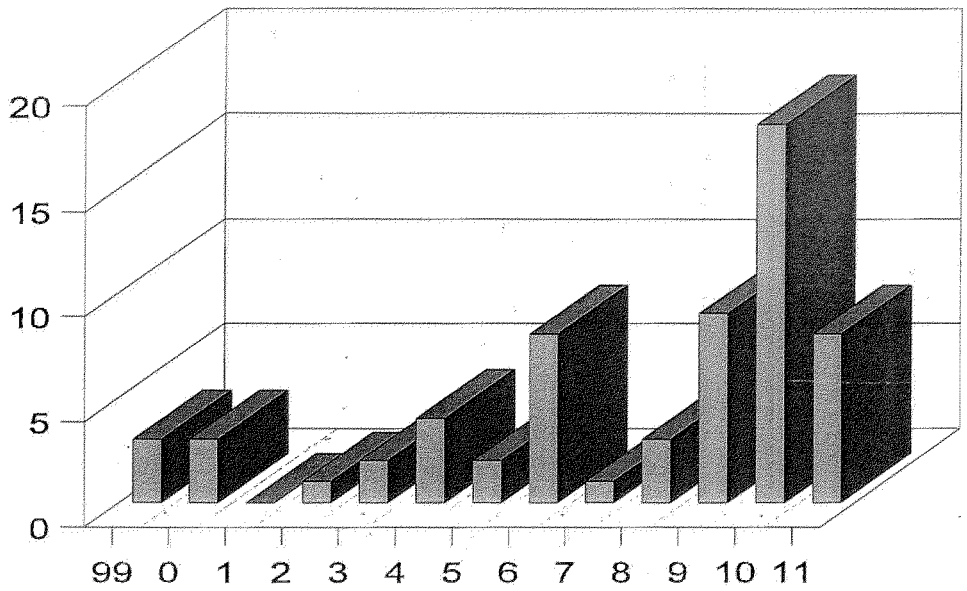
Figure 2. Measures on Which Opportunities for Floor Amendment Were Limited by the Senate Majority Leader or Designee Filling or Partially Filling the "Amendment Tree": 99-111th Congress[9]



[9] Between Jan 1, 1985 and March 18, 2010. Information from the Legislative Information System of the U.S. Congress (LIS). X (horizontal) axis represents the two-year Congress: "99" being the 99th Congress (1985-1986), "0" being the 100th Congress (1987-1988), "1" being the 101st Congress (1989-1990), etc. The Y (vertical) axis represents the number of measures on which amendment trees were filled by the leader or designee.

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Congressional Research Service

MEMORANDUM May 17, 2010

To: Senate Republican Policy Committee
Attention: [redacted]

From: Christopher M. Davis, Analyst on Congress and the Legislative Process, 7-0656

Subject: **Measures Placed on the Senate Calendar Via Rule XIV**

This memorandum responds to your request for statistics on measures placed directly on the Senate Calendar of Business under Rule XIV. The data contained in this memorandum may be used to respond to other congressional clients seeking identical information.

Measures Placed Directly on the Calendar

When a Senator introduces a bill or joint resolution (or the Senate receives a bill or joint resolution passed by the House of Representatives) that legislation is routinely referred by the presiding officer to Senate committee for consideration. In some cases, however, a Senator may choose to invoke procedures contained in Senate Rule XIV to prevent a measure's referral to committee, and instead place it directly on the chamber's Calendar of Business.[1]

Paragraphs 2 and 3 of Senate Rule XIV generally require a bill or joint resolution to be read aloud by title on two separate legislative days before being referred to committee and a third time before its final passage.[2] The rule, however, permits a measure to be referred without the two required readings if no Senator objects. In the vast majority of cases, that is what occurs: a Senator presents a measure at the desk for introduction (or the measure is received from the House), no Senator demands two required public readings, and the measure is immediately referred without comment or delay.[3]

Should a Senator publicly object to proceedings on an introduced or received measure, however, the bill or joint resolution is laid over until the following legislative day. If, on that subsequent day, an objection to further proceeding on the legislation is made, the measure is not referred but is placed directly on the

[1] For additional information on the Rule XIV mechanism, see: CRS Report RS22299, *Bypassing Senate Committees: Rule XIV and Unanimous Consent*, by Michael L. Koempel.

[2] *Senate Manual*, 110th Cong., 2nd sess., S.Doc. 110-1 (Washington: GPO, 2008), p. 11-12.

[3] For example, according to the Legislative Information System of the U.S. Congress (LIS), as of May 13, 3,375 bills and joint resolutions had been introduced in the Senate in the 111th Congress. 3,334 of these appear to have been automatically referred to Senate committee when introduced.

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Senate Calendar of Business. While the Rule XIV mechanism is available to any Senator, in practice, it is usually the Majority Leader or his designee who employs the rule in the scheduling of floor business.

There are many reasons why a Senator might employ the Rule XIV procedure. By placing legislation directly on the Senate Calendar, for example, it is immediately available for floor consideration either by unanimous consent or by the adoption of a motion to proceed to its consideration. In addition, certain steps in the legislative process which would otherwise occur, such as a committee markup, report, or discharge, do not occur. Other parliamentary requirements, such as a mandatory layover period for written committee reports and a prohibition on the consideration of committee amendments containing significant matter outside a panel's Rule XXV jurisdiction may also become moot. The Majority Leader or his designee sometimes places a measure on the Calendar so that they have a legislative "shell" which might be filled in later by amendment or used as a vehicle in the exchange of legislation with the House. In the course of Senate business, it is routine for measures received from the House of Representatives to be placed directly on the Calendar of Business if the Senate has already reported its own companion measure. On occasion, a minority party Senator may even place a measure on the Calendar under Rule XIV, and move to proceed to consider the legislation, forcing the Senate to record a vote on a specific policy alternative.

Table 1 shows bills and joint resolutions that CRS identified as being placed on the Senate Calendar under the Rule XIV mechanism just described and which subsequently received some form of Senate floor action. Measures placed on the Calendar by unanimous consent and those placed on the Calendar which received no floor action are not included. The attached table does not make a distinction as to which Senator placed the measure on the Calendar under Rule XIV, or which Senator, if any, moved to proceed to its consideration; the data includes measures placed on the calendar by any Senator which received subsequent action.

Table 1. Bills and Joint Resolutions Placed on the Senate Calendar of Business Under Rule XIV Which Subsequently Received Senate Floor Action

103rd Congress - Present

Congress & Years	Senate Measures	House Measures	Total Measures
103rd (1993-1994)	2	1	3
104th (1995-1996)	15	14	29
105th (1997-1998)	8	10	18
106th (1999-2000)	14	15	29
107th (2001-2002)	12	23	35
108th (2003-2004)	19	14	33
109th (2005-2006)	11	13	24
110th (2007-2008)	30	27	57
111th (2009-2010)	6	13	19

Source: Information from Legislative Information System of the U.S. Congress (LIS).

Notes: As of April 14, 2010. Measures were identified by searching LIS using the term "Read the second time. Placed on Senate Legislative Calendar under General Orders." LIS definition of floor action includes measures on which there was an attempt to proceed to its consideration (regardless of disposition), measures that were considered, and measures indefinitely postponed.

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I trust this information meets your needs. If you have questions, require additional research, or if I can be of further assistance, please do not hesitate to contact me at 7-0656 or cmdavis@crs.loc.gov.

Statement of Chairman Charles E. Schumer
Committee on Rules and Administration
Hearing on
Examining the Filibuster: The Filibuster Today and Its Consequences.
May 19, 2010

The Rules Committee shall come to order. Good Morning. I would like to thank my friend, Ranking Member Bennett, and my other colleagues present for participating in this hearing. I especially want to thank Senator Byrd for his continuing interest and participation in these hearings. His decades of leadership and his unsurpassed knowledge of Senate rules and procedures have benefitted us all, and we are very fortunate that he will be joining us later in the hearing. I ask consent that he be permitted to read his opening statement when he arrives.

We have here as one of our distinguished witnesses the former Senator from Oklahoma and Republican whip, Don Nickles, who served for 24 years in this body. Welcome, Senator Nickles, and thank you for taking time to share your thoughts with us.

There's no former living Senator who can give us more insight into the evolution of the filibuster and the cloture rule than our first witness, former Vice President and Senator Walter Mondale. He was the 42nd Vice President of the United States and served two terms in the U.S. Senate representing Minnesota.

In early 1975, Senator Mondale, together with Senator Byrd, successfully led the bipartisan debate which resulted in amending Senate Rule XXII, the cloture rule, to reduce the number of Senators needed to invoke cloture. The Senate first determined it could change its own rules by a simple majority – voting three times to set that precedent. Reaction to that precedent, which was later rescinded, resulted in a compromise. The Senate agreed to move from two-thirds of the Senators present and voting to the current 60 vote threshold for cloture that exists today.

In 1977 Mr. Mondale as Vice President, serving also as President of the Senate, and our then-Majority Leader Robert Byrd played a crucial role in shutting down the post-cloture filibuster of a natural gas deregulation bill. This action became the main catalyst for efforts in 1979 to limit post-cloture debate time.

There is a great deal of debate between those who believe that under the Constitution a majority of the Senate can change its rules, and those who disagree. Today we will see a glimpse of the Senate at a time when it did face and vote on that very issue.

This is the second in the series of hearings by this committee to examine the filibuster. The purpose is to listen and learn so that we can later consider whether the Senate should make any changes in its rules and procedures and if so, which ones. I have not settled on, nor ruled out any course of action, but as Chairman of the Rules Committee, I believe we need to fully and fairly assess where the Senate is today and whether we can make it better. One thing is certain,

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however – in recent years the escalating use of the filibuster has drastically changed the way the Senate works.

Our first hearing on April 22nd explored the history of the filibuster. We now focus on the filibuster today and its consequences – for the Senate; for all three branches of government; and ultimately, for the American people.

We learned in our first hearing that the use of the filibuster has reached unprecedented levels. This chart, prepared from facts supplied by the Congressional Research Service, shows that the use of cloture motions has escalated rapidly in recent Congresses. Cloture motion counts are useful because they represent a response to filibuster tactics – actual filibusters, threats or realistic expectations of them.

During the first period, from 1917 to 1971, there was an average of 1.1 cloture motions filed per year. The next period is from 1971 to 1993, when there was an average of 21 filibusters per year. In the period from 1993-2007, that number increased by almost a third – to an average of 37 cloture motions per year.

Then we come to the 110th and the beginning of the 111th congress. We are now averaging more than 70 cloture motions per year. That's an average of two per week when we're in sesion.

Before I call on the rest of my colleagues for their statements, I want to highlight a few statistics about where things stand today with our legislative, executive, and judicial branches and the filibuster.

LEGISLATIVE BRANCH

Not every bill that passes the House could or should pass the Senate. But as we know, Members of the House often complain that its bills stall out in the Senate, and the numbers indicate there's truth to that. According to statistics maintained by the Senate Library, there have been 400 bills passed by the House in this Congress that have not been considered by the Senate. Of those, 184 had passed by voice vote and another 149 passed with a majority of House Republicans voting yes on a roll call vote, indicating a high degree of bipartisan support.

EXECUTIVE BRANCH

The filibuster also is creating problems for the executive branch. For example, for fiscal year 2010, half of all non-defense spending – more than 290 billion dollars – was appropriated without legal authority because Congress hadn't reauthorized the programs.

Dozens of presidential appointments also are being delayed or blocked from floor consideration. Many of these were approved unanimously by both Democrats and Republicans in committee and are stuck on the executive calendar because of holds. That means executive agencies don't have the leadership and expertise to do their jobs well.

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Key national priorities are also being undermined. Even nominees to important national security positions are unreasonably delayed by holds and filibuster threats in this Congress. This is dangerous at a time when we need a federal government using all its resources to fight terrorism and protect our country.

JUDICIAL BRANCH

Today 102 federal judgeships are vacant, a problem which has consequences for Americans from all walks of life.

President Obama has submitted nominations to fill 41 of those. More than half, 24, have been reported out of the Judiciary Committee, yet languish on the calendar. Of those, 20 were approved by the Judiciary Committee with bipartisan, often unanimous, support. What's holding them up? Too often, it's simply the threat of a filibuster by one or a few Senators.

It's true that the Senate increasingly scrutinizes judicial nominations. I myself opposed some of President Bush's nominations to the bench. However, at this point in George W. Bush's presidency, the Democratic-minority Senate had confirmed 52 Federal circuit and district court judges. But as of today, the Republican-minority Senate has approved only 20 of President Obama's, even when candidates had strong bipartisan committee support. Without enough judges to staff the federal judicial branch, businesses and individuals alike may feel pushed to give up or settle rather than wait for years for their day in court.

These are but a few examples of the consequences of the filibuster.

I hope that today's hearing helps to inform Members of this Committee, the Senate, and the public at large about the use of the filibuster today and how it affects our government and our nation. I look forward to listening to our witnesses, and now I'll turn to Ranking Member Bennett for his opening statement.

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Testimony of
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW[1]

Submitted to the
U.S. SENATE COMMITTEE ON RULES & ADMINISTRATION

For the hearing entitled
THE FILIBUSTER TODAY AND ITS CONSEQUENCES

May 19, 2010

Mr. Chairman and members of the subcommittee:

During last month's hearing examining the filibuster, you recognized that the filibuster is an "almost-daily fact of life in the Senate, influencing how we handle virtually everything debated on the Senate floor."[2] For the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary to conduct regular Senate business.

Even more alarming, the frequency of filibusters continues to rise. Throughout the 1990s, there were, on average, about 29 filibusters per congressional session.[3] This number is ever increasing: there were 32 filibusters in the 107th Congress, 27 in the 108th, and 36 in the 109th. In the 110th Congress, there were approximately 52 filibusters – a 44 percent spike from the prior session. The current Senate hit its "golden" 50th filibuster in mid-April of this year.[4] Many fear that the Senate is perilously close to total breakdown.[5]

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[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. This testimony was primarily authored by Mimi Marziani, counsel and Katz Fellow at the Brennan Center. Diana Lee, a researcher at the Center and special assistant to the Center's executive director, provided invaluable research and writing assistance. Today's testimony supplements our April 22, 2010 submission, available at http://rules.senate.gov/public/?a=Files.Serve&File_id=a36a886b-dcaa-4290-a8c8-cb737fb16938.
[2] Examining the History of the Senate Filibuster: 1789-2008, Hearing before the Senate Comm. on Rules & Administration 1 (April 22, 2010) (statement of Senator Charles Schumer, Chairman).
[3] All filibuster statistics are taken from BARBARA SINCLAIR, *The New World of U.S. Senators*, *in* CONGRESS RECONSIDERED 7 (9th ed. 2009).
[4] Dana Milbank, *No Celebration of the 50th Filibuster*, WASH. POST, Apr. 13, 2010.
[5] *See* SINCLAIR, *supra* n. 3, at 20; THOMAS MANN & NORMAN ORNSTEIN, THE BROKEN BRANCH 212-216 (2006); Paul Krugman, *A Dangerous Dysfunction*, N.Y. TIMES, Dec. 21, 2009, at A31.

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The modern filibuster – constant and unprincipled – has grave effects upon our democracy. As explained in greater detail below, as it currently operates, the filibuster devalues the Senate as an institution, disrupts Congress' proper operation, and threatens to derail governmental checks and balances. "The Filibuster Today and Its Consequences" is thus not a partisan issue, but one that should concern all who cherish our American system of government.

The Modern Filibuster Devalues the Senate

The Framers intended the Senate to be a deliberative institution, different from the House of Representatives in both function and character.[6] With a smaller assembly of older members with longer, staggered terms of service, the Senate was intended to balance the "tendency to err from fickleness and passion" expected from the House.[7] Proponents of the filibuster paint it too as a feature of the Senate's original design, one that facilitates deliberation and compromise by extending the period for debate. A right to unlimited debate was not, however, envisioned by the Framers.[8] Moreover, and perhaps more to the point of today's hearing, the modern filibuster seldom fosters deliberation and compromise.

In the contemporary Senate, the filibuster is relentlessly wielded as a tool of obstruction, driven by partisan or strategic motives.[9] Last fall, for instance, a filibuster blocked a bill to extend unemployment benefits for weeks, even after the House approved the measure with substantial bipartisan support. The hold-up had little to do with the merits of the benefits – senators were apparently squabbling about unrelated issues.[10] Incredibly, when the bill finally reached the Senate floor, it passed unanimously.[11] Similarly, in February of this year, Senator Richard Shelby announced that he would place a blanket hold on every pending executive nomination (70 in total), thereby holding the Senate ransom to obtain earmarked

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[6] In the Federalist Papers, James Madison writes that the more stringent qualifications of a senator "is explained by the nature of the senatorial trust; which, require[es] greater extent of information and stability of character." THE FEDERALIST NO. 62, at 342 (Barnes & Noble Ed., 2006).
[7] G. J. GRAHM & S. G. GRAHM, FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT 116 (1984).
[8] Josh Chafetz & Michael Gerhardt, *Debate: Is the Filibuster Constitutional?*, 158 UNIV. PENN. L. REV. PENNUMBRA 245, 250-51 (2010) (Chafetz Opening Stmt.); *see also* SARAH BINDER & STEVEN SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 30-33 (1997) (describing early development of rules in House and Senate).
[9] *See* BINDER & SMITH, *supra* n. 8, at 90-92; Gerard Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 1, 25 (forthcoming 2011), *available at* http://ssrn.com/abstract=1564747; GREGORY WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 13 (2006).
[10] *See* Jessica Brady & Emily Pierce, *GOP Run Over in Game of Chicken*, ROLL CALL, Nov. 5, 2009, http://www.rollcall.com/issues/55_53/news/40279-1.html ("[A] 29-day impasse [] finally broke this week when Reid filed motions to end the Republicans' attempted filibuster and dared them to vote against the politically popular measure. No Republicans opposed. . . ."); Mike Lillis, *Expansion of Unemployment Insurance Stalled by ACORN, Immigration Amendments*, WASH. INDEPENDENT, Oct. 20, 2009, http://washingtonindependent.com/64513/expanded-unemployment-benefits-stalled-by-gop-acorn-immigration-amendments ("The stalling of legislation to expand unemployment insurance has little to do with the benefit itself.").
[11] U.S. Senate, Roll Call Votes 111th Congress on Passage of the Bill (H.R. 3548 as Amended), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00334 (last visited May 14, 2010).

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funding for his home state of Alabama.[12] The Senator made no pretences that his holds were based on objections to any nominee; instead, he was seeking a strategic bargaining position.[13] Indeed, a review of voting records shows that some senators simply refuse to agree to end debate and allow a vote as a matter of course.[14] Presumably, they believe there is political advantage in continuously seeking to block all legislative progress.

Not only does the modern filibuster fail to advance substantive deliberation, it often *discourages* public debate. Today's "stealth" filibuster does not require debate from, or even the presence of, the filibustering senator.[15] Instead, the mere threat of a filibuster prevents votes from reaching the floor.[16] If debate occurs at all, it is blocked from public view; deals are struck in backrooms behind closed doors, with no official record of the proceedings. As one legal academic bluntly put it, "[t]his cannot be called a procedure that enhances the quality of deliberation or protects the free speech of individual senators."[17]

Often, to overcome paralysis, the majority must appease individual Senators whose votes are needed to reach a supermajority. This provides substantial leverage to these pivotal few and concessions are regularly made that do not promote the collective good. For instance, before agreeing to supply the 60th vote for the recent health care reform bill, one senator notoriously negotiated special federal funding for the cost of Medicare expansion in his home state. As this example and others show,[18] a legislative process held hostage by the filibuster repeatedly yields incoherent and compromised results.

Finally, the modern filibuster has spurred an obsession with procedure that threatens to take precedence over substantive lawmaking. For example, as witnessed in the recent health care reform debate, legislators increasingly force bills through alternative procedural routes – like reconciliation – in order to beat the filibuster.[19] Senators also frequently employ a procedural tactic called "filling the amendment tree." Because Senate rules restrict the number of amendments pending at any given time, the majority leader can shut out all other,

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[12] Holds placed for no reason other than to obstruct are, for all practical purposes, indistinguishable from a threat to filibuster. *See* Chafetz & Gerhardt, *supra* n. 8, at 260-61 (Chafetz Closing Stmt.).
[13] According to Senator Shelby, he staged the delays due to "unaddressed national security concerns." Scott Wilson & Shailagh Murray, *Sen. Richard Shelby of Alabama Holding Up Obama Nominees for Home-state Pork,* WASH. POST, Feb. 6, 2010.
[14] Senator Jim DeMint, for instance, has voted against 92% of the cloture motions filed in this congressional session; Senator Jim Bunning has voted against 91%. Filibusted, The Whole List, http://filibusted.us/senators (last visited May 14, 2010). Expressing this mindset, one top senator recently declared that "[t]here will be no cooperation [with the majority party] for the rest of the year." Editorial, *After Health Reform, Is Anyone Willing to Compromise?*, WASH. POST, Mar. 24, 2010.
[15] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 200-09 (1997) (describing creation of modern "stealth" filibuster).
[16] *See* WAWRO & SCHICKLER, *supra* n. 9, at 259-260; Fisk & Chemerinsky, *supra* n. 15, at 203; Magliocca, *supra* n. 9, at 24.
[17] *See* Magliocca, *supra* n. 9, at 24.
[18] Another example: in March 2009, Senator Robert Menendez placed a hold on two crucial environmental nominees to gain leverage on an unrelated issue concerning Cuba. Juliet Eilperin, *Nominations on Hold For 2 Top Science Posts,* WASH. POST, Mar. 3, 2009.
[19] Thomas Mann, Norman Ornstein & Raffaela Wakeman, *Reconciling With the Past*, N.Y.TIMES, Mar. 7, 2010, at WK12; *see also* BINDER & SMITH, *supra* n. 8, 192-194.

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potentially germane, amendments by offering one amendment after another, *i.e.*, occupying all available branches of the tree.[20] In these ways and others, time that should be spent on policy deliberation is wasted on an endless game of procedural chess, in which success is measured not by the passing of effective legislation, but by the advancement of individual or party goals.

Relentless obstruction devalues the Senate, leaving it far from the distinguished institution envisioned by our Framers. Even worse, however, is that the Senate's dysfunction is uncontainable; it taints Congress as a whole.

The Modern Filibuster Disrupts Congress

Under Article I, section VII of the Constitution, a bill must pass the Senate and the House before it may be enacted into law.[21] As legal scholars have forcefully argued, the term "passed" embodies a principle of majoritarianism that binds both chambers of Congress.[22] The Senate's current operation, requiring a *de facto* supermajority vote for ordinary legislative action, thus offends constitutional intent.[23] Moreover, the gridlock caused by this supermajoritarian requirement alters the balance of power between the Senate and the House, disrupting the Constitution's bicameral design.

When a minority of the Senate uses the filibuster to block that chamber's proceedings, it sabotages the overall legislative process. In this way, and as the Senate currently operates, 41 senators enjoy a disproportionately large, negative power over the lawmaking process.

> A minority veto of this sort enables a polarized, unified minority party determined to oppose the main thrust of the majority's agenda to bring government to a halt. The minority cannot itself govern, of course. But

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[20] *See* Examining the History of the Senate Filibuster: 1789-2008, Hearing before the Senate Comm. on Rules & Administration 3 (April 22, 2010) (statement of Senator Pat Roberts); CONG. RESEARCH SERVICE, SENATE AMENDMENT PROCESS: GENERAL CONDITIONS AND PRINCIPLES (2001).

[21] CONST. art I, § 7. As the Supreme Court has explained, "[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings." INS v. Chadha, 462 U.S. 917, 951 (1982).

[22] *See* Chafetz & Gerhardt, *supra* n. 8, at 249 (Chafetz Opening Stmt.) (citing Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996)).

[23] There is substantial evidence that the Framers intended the Senate to operate under majority voting rules. The Constitution specifically requires a supermajority vote in seven extraordinary situations, implying that a majority vote would be used for all other legislative action. The Constitution also specifies that a simple majority "shall constitute a Quorum to do Business." And, Article I, Section 3, Clause 4 provides further support. That clause, which states that the Vice President "shall have no Vote, unless [the Senate] be equally divided," necessarily assumes majority voting. Finally, the Federalist Papers expressly argue against supermajority requirements. *See* Fisk & Chemerinsky, *supra* n. 15, at 239-241; BINDER & SMITH, *supra* n. 8, at 30-33; *see also* THE FEDERALIST NO. 22, at 119-121 & NO. 75, at 415-417 (Alexander Hamilton) (Barnes & Noble ed., 2006); THE FEDERALIST NO. 58, at 326-237 (James Madison) (Barnes & Noble ed., 2006).

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> neither can the majority in the presence of this kind of veto and polarized parties.[24]

Unsurprisingly, whereas bills used to be blocked by both chambers in roughly equal number, today most legislation dies in the Senate.[25] This continuous threat of death by filibuster provides the Senate with a substantial bargaining advantage vis-à-vis the House, particularly during conference negotiations.[26]

In addition, there is little doubt that the modern filibuster in fact prevents both chambers from fulfilling Congress' Article I duties. The self-perpetuating pattern of an increasing number of filibusters and growing workload makes it virtually impossible for the Senate to accomplish all of its duties;[27] as a result, key legislative items are blocked from the Senate floor because there is not enough time to go around. Appropriations bills are a prime example. By Constitutional design, these bills originate in the House before moving to the Senate for amendment.[28] Although, year after year, the House submits such measures to the Senate in a timely fashion, Congress consistently fails to enact appropriations bills by deadline.[29] The consequence is substantial – agencies are left adrift and ineffectual, wondering if they will ever receive sufficient funding for their work.

The filibuster's impact thus reaches far beyond the walls of the Senate. Congressional dysfunction, in turn, has even graver implications for our democracy writ large.

The Modern Filibuster Threatens to Derail our System of Government

Our Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity"[30] – a system integral to the proper functioning of our government. "The existence of checks and balances between rivalrous branches, each with an incentive to

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[24] Richard Pildes, *Ungovernable America?: The Causes and Consequences of Polarized Democracy* (presented at Thomas M. Jorde lecture, April 14, 2010), *available at* http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__news/documents/documents/ecm_pro_065536.pdf. The power of this minority veto is acutely felt by members of the House. Wisconsin Congressman David Obey, announcing his retirement after over 40 years of public service, lamented: "The wear and tear is beginning to take its toll. . . . There has to be more to life than explaining the ridiculous, accountability-destroying rules of the Senate to confused, angry, and frustrated constituents." Statement by Congressman David R. Obey (May 5, 2010), http://www.obey.house.gov/index.php?option=com_content&task=view&id=924.

[25] SINCLAIR, *supra* n. 3, at 18.

[26] *See* Josh Schatz, *House Stymied by Senate Rules*, CONG. Q., April 19, 2010, at 960; *see also* BRUCE OPPENHEIMER, *The Process Hurdles: Energy Legislation from the OPEC Embargo to 2008*, *in* CONGRESS RECONSIDERED 300-03 (9th ed. 2009) (describing House caving to Senate due to filibuster threat).

[27] *See* BINDER & SMITH, *supra* n. 8, at Table 1-3.

[28] CONG. RESEARCH SERVICE, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS (2008).

[29] THOMAS MANN & NORMAN ORNSTEIN, *Is Congress Still the Broken Branch?*, *in* CONGRESS RECONSIDERED Table 3-3 (9th ed. 2009).

[30] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

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monitor and prevent the other's misbehavior," ensures intragovernmental accountability.[31] This structure "allows government officials not just to report each other's bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers."[32] Our country's Framers recognized this arrangement as a necessary supplement to the electoral accountability provided by democratic elections.[33] The modern filibuster, however, threatens to derail this careful balance.

To start, the modern filibuster impacts the relationship between the legislative and executive branches in a number of ways. First, Congressional stalemate is likely to push the President to seek policy change through administrative action.[34] The result is a troubling expansion of executive power that is likely to remain unchecked. Indeed, as then-Professor Elena Kagan has chronicled, this is precisely what happened during Bill Clinton's presidency.[35] President Clinton responded to legislative inaction by issuing numerous directives to administrative agencies – ultimately, with little resistance from the deeply-divided Congress.

> [President Clinton's] political calculus depended on a judgment, confirmed in practice, that Congress would fail to override presidential directives. . . . [I]n general, a Republican Congress proved feckless in rebuffing Clinton's novel use of directive authority – just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process.[36]

Second, the modern filibuster may prevent Congress from properly monitoring the executive branch for another reason. When a substantially large, cohesive group of senators – such as all members of the minority party – removes itself from the legislative process by continuously opposing initiatives and never affirmatively lawmaking, the majority party is left with full oversight responsibilities.[37] When that same majority party controls the Senate and the Presidency, as is currently the case, Congress is unlikely to aggressively monitor executive actions. Now, the minority party has only a singular, blunt tool – the filibuster – that incentivizes obstruction, not action. Democracy would be better served if the minority were instead empowered by more tailored methods to monitor executive power.[38]

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[31] Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. R. 2311, 2343 (2006) (citing Thomas Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 718 (1993) and W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 16 (1965)).

[32] *Id.* at 2344.

[33] THE FEDERALIST NO. 51, at 288 (James Madison) (Barnes & Noble ed., 2006) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

[34] *See* Levinson & Pildes, *supra* n. 31, at 2362.

[35] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311-15 (2001).

[36] *Id.* at 2313-2314.

[37] Pildes, *supra* n. 24, at 42.

[38] As Professor Pildes has argued,

> [I]f we want to empower congressional checks on executive power that are more likely to be effective during unified government, we can consider measures that

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Third, when relentless minority obstruction prevents the President from fulfilling his responsibilities under the Appointments Clause, the filibuster impinges upon the President's constitutional duty to "take Care that the Laws be faitbfully executed."[39] Anticipating that "the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body,"[40] the Framers placed primary responsibility to make appointments with the President. Accordingly, the President "shall nominate" and "shall appoint" high-ranking executive officers, while the Senate provides "Advice and Consent."[41] Although requiring the Senate's approval provides an essential check on Presidential power, a *minority* of senators has no constitutional right to endlessly delay or actually veto the President's picks. In fact, during the Constitutional Convention, James Madison adamantly rejected any arrangement that could permit a nationally popular minority to control federal appointments.[42]

Moreover, there is evidence that the modern filibuster is actually preventing the President from executing his duties. On March 27th of this year, after waiting an average of 214 days per nomination, President Obama resorted to temporary recess appointment of 15 individuals nominated to serve in key administrative agencies.[43] He explained,

> Most of the men and women whose appointments I am announcing today were approved by Senate committees months ago, yet still await a vote of the Senate. At a time of economic emergency, two top appointees to the

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> would give the minority party, which has the appropriate incentives, greater tools to oversee the executive branch. Some other democracies do so. As I and others have described, we might consider giving the minority control of a certain oversight committee, such as an auditing committee; enabling the minority to call hearings under certain circumstances; or otherwise increasing the opposition party's ability to get information from the executive branch. These measures are not minority-veto rights, but ways of enabling more effective oversight.

Id.

[39] CONST. art II, § 3; *see also* CONST. art II, § 2. As federal judges are nominated for life, judicial nominations raise different constitutional considerations. The instant discussion deals with non-judicial nominations only.

[40] Edmond v. United States, 520 U.S. 651, 659 (1997). Indeed, Alexander Hamilton was adamant that the President was better positioned than Congress to make federal appointments.

> [I]n every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight.

THE FEDERALIST NO. 76, at 419 (Alexander Hamilton) (Barnes & Noble ed., 2006).

[41] CONST. art II, § 2.

[42] Adam White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 116-17, 123-24 (2005).

[43] Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (March 27, 2010), http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.

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> Department of Treasury have been held up for nearly six months. I simply cannot allow partisan politics to stand in the way of the basic functioning of government.

Indeed, as of May 18th, there were 133 non-judicial, civilian nominations pending before the Senate.[44]

Finally, the modern filibuster also impedes Congress' ability to check the Courts' power of judicial review. As envisioned by the Constitution, Congress can respond to judicial decisions in a variety of ways – by fixing unconstitutional provisions of otherwise valid statutory schemes, by holding evidentiary hearings to create a factual record in support of legislation, by clarifying improperly vague laws, and so on. A Congress paralyzed by the filibuster, however, has little ability to counteract or refine judicial decisionmaking.

There is thus no question that the modern filibuster disrupts the balance of powers between the legislative, executive and judicial branches. Upsetting our Constitution's structural safeguards leaves our democracy in a vulnerable state. Especially now, during this era of war, economic crises, and social unrest, we cannot afford to allow the Senate's procedural dysfunctions to derail our entire system of government.

****

And so, once again, we encourage you to continue this searching assessment of the functioning of the Senate. As this Committee works to remedy the current state of affairs, we urge you to consider the ways in which Senate dysfunction harms our democracy and to focus on solutions that advance democratic values.

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[44] U.S. Senate, Nominations in Committee (Civilian), http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm (last visited May 15, 2010).

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Center for American Progress Action Fund

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The Honorable Charles E. Schumer
Chairman of the Senate Rules Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer,

Please accept the attached report, "From Deliberation to Dysfunction: It Is Time for Procedural Reform in the U.S. Senate," as a submission for the official record of the hearing "Examining the Filibuster: The Filibuster Today and Its Consequences" on May 19, 2010.

Sincerely,

Scott Lilly, Senior Fellow
Center for American Progress Action Fund
slilly@americanprogress.org

Progress Through Action

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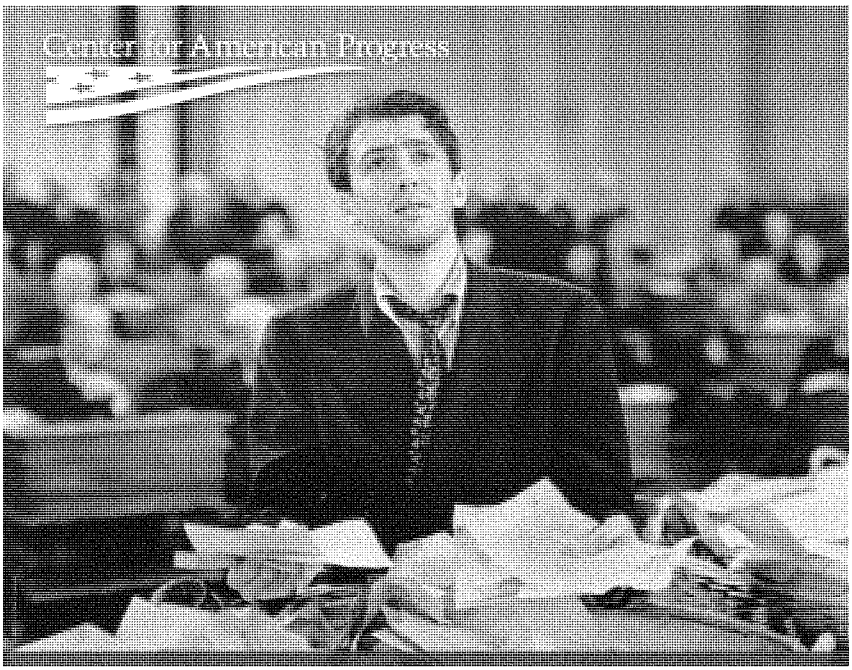

From Deliberation to Dysfunction

It Is Time for Procedural Reform in the U.S. Senate

Scott Lilly March 2010

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Center for American Progress

From Deliberation to Dysfunction

It Is Time for Procedural Reform in the U.S. Senate

Scott Lilly March 2010

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Introduction and summary

The U.S. Senate has a proud tradition of ensuring that important decisions are carefully weighed before they become law. This has served the nation well at times. But under current practices the latitude granted to individual senators to obstruct does not always contribute to more measured consideration of national policy. In recent years, the Senate has been less and less able to follow the regular order in the consideration of pending legislation, the confirmation of senior executive branch officials, and other work.

Increasingly, the Senate has been forced to rely on legislative shortcuts that severely undermine the philosophy of full and careful consideration of all matters before the body. Even so, the chamber fails to complete much of the work for which it is responsible and falls so far behind schedule in completing the work it does do as to seriously undermine the capacity of the entire federal government to respond in an effective and efficient way to the problems facing our country.

The root cause of these problems is the institution's inability to adopt rules that balance the responsibilities of Congress against the rights of individual senators. Rules that allow the Senate to limit debate and maintain a functional schedule have not been strengthened in more than four decades, but during that period the workload has increased significantly, and the willingness of senators to use all of the powers offered by the rules to obstruct legislative progress has increased exponentially.

While many Americans continue to think of the filibuster as it was portrayed in the 1939 film, "Mr. Smith Goes to Washington," it has evolved into a very different practice over the course of the past 71 years. It has been decades since a senator actually took to the floor and attempted to block legislation through extended speechmaking. Now a senator merely needs to serve notice that he or she will not concur in a procedural motion by the leadership that the prospects for making progress on the legislation proposed for consideration are so diminished that it is often pulled from the legislative schedule. This practice applies to not only new laws altering national policy in some significant way, but also to the annual spending bills that keep the government operating and even the appointment judges, senior, and even not-so-senior executive branch officials and military officers.

While it is unlikely the Senate will abandon the filibuster, it is clear that the rules governing the use of the filibuster must change if the body is to be prevented from becoming a

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more serious impediment to competent governance. The chaotic, hit-or-miss process in which rather mundane matters are debated at great length while more important issues are slipped past the full Senate without significant debate or opportunity for amendment turns the concept of deliberation on its head.

The long delay in adopting spending measures diminishes the capacity of program managers in executive branch agencies to effectively manage public funds. And the hundreds of unfilled administrative positions across the executive branch created by Senate inaction on executive branch nominees further reduce the prospects that taxpayer dollars will be spent in a thoughtful and effective manner.

At a minimum, the Senate needs to adopt modest procedural changes to its rules curbing some of the filibuster's worst abuses and making the Senate not only more responsible in performing its work but at the same time more deliberative.

Origins of the filibuster

The word filibuster is taken from Spanish and translates roughly to the English word "pirate," as in stealing the legislative process. The framers of the Constitution did not envisage that individual senators would hold this powerful tool. The original Senate Rules provided for the termination of debate at any time by majority vote. A motion to ask for a vote on the business pending before the Senate, or in legislative-speak to move "the previous question," was allowed until the rules were rewritten in the 9th Congress in 1806, but even then, prolonged debate for the purpose of obstruction was not practiced until 1841 as comity deteriorated in the decades leading up to the Civil War.

In the two decades preceding the Civil War, the filibuster became strongly established in Senate tradition. During that period, there was no legislative recourse to a decision by a small number of senators to kill legislation—even if they were the only ones in the entire country who opposed it. As a result, Congress ceased to be a forum for resolving the major issues of the day unless senators themselves recognized the need to limit their power to obstruct.

From the decade following the Civil War until the U.S. entry into World War I, there were repeated attempts to change Senate rules and allow limitations on debate—all of which failed. But when antiwar isolationists used the filibuster to block the arming of U.S. merchant ships against German submarines in 1917, President Woodrow Wilson recognized the opportunity to force change. Calling a special session of Congress to complete the work that filibusters had blocked in the previous Congress, Wilson demanded reform:

> *"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."*

Days later, the Senate adopted Rule XXII, which allowed limits to be placed on debate if two-thirds of the senators present and voting concurred. Then (as is the case today) the rule still provided several days of debate and parliamentary maneuvering before the matter being subjected to filibuster could be resolved. In essence, the Senate moved somewhat in the direction advocated by President Wilson, but established a threshold for terminating debate that made reform more apparent than real.

Following the Watergate scandal a second wave of reform swept the Senate in 1975. Included in the changes adopted by the post-Watergate Senate was the requirement that committee meetings be open to the press and public and that the two-thirds requirement for ending a filibuster be lowered to three-fifths, or 60 percent of the membership.

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The disappearance of authorizing legislation

The federal government is run through a two-track process. In one, Congress enacts legislation "authorizing" the parameters of a particular program, for instance the National Park Service, while in a separate process it decides annually the amount of money that will be spent on the programs that are authorized. Over the course of the past several decades, the authorizing process—in which many of the most contentious issues affecting programs should be resolved—has been in decline.

The Congressional Budget Office reports that in the current fiscal year, FY 2010, about half of the money provided for the nondefense activities of the government ($290 billion out of $584 billion) had to be appropriated without legal authority. That is because a total of 250 laws authorizing various pieces of the federal bureaucracy had expired, and Congress had failed to take the necessary steps through the authorizing process to enact replacement legislation.

There are a variety of reasons why these "authorizations" were not renewed, but chief among them is that the chairmen of the committees of jurisdiction in the Senate cannot get the legislation scheduled for consideration by the full Senate. The reason? The legislative calendar is so consumed by extended debate and deliberation—often on minor issues—there is no time left for most major authorizations to come to the Senate floor.

This problem then cascades into the appropriations process as the Senate leaders must decide whether to fund programs for which there is no legal authority or terminate important government services and activities. Appropriation bills must then address programmatic problems that should have been dealt with by the committees with authorizing jurisdiction.

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The appropriations logjam

Despite numerous efforts over the years to ensure that Congress pass all of the 12 annual appropriation measures before the beginning of a new fiscal year, Congress has not enacted all appropriation bills on time in 15 years. Frequently, federal agencies do not know how much they have to spend in a given fiscal year until nearly half of that year has expired. In most instances this is problem is tied to the Senate schedule.

During the past year, the House of Representatives passed 4 of the 12 bills in June and the remainder in July. The Senate passed three in July, one in August, two in September, one in October, and two in November. The remaining three bills, including the largest domestic spending bill, never went to the Senate floor at all. Those three bills nonetheless conferenced went to conference with the House of Representatives as if they had been considered by the Senate when in fact they had only been considered in a committee comprising only 30 of the Senate's 100 members.

That may sound like a terrible abuse of process and a lousy work record, but in fact it is better than normal. In only two of the last 10 years has the Senate considered all of the appropriation bills that were sent to the president for signature. Since FY 2001, the Senate has conferenced 51 annual appropriation measures as though they had been considered by the Senate and brought back conference reports for nothing more than an up-or-down vote on every one of them. The average number of bills failing to get full Senate consideration has been five per year over the course of the past decade.

By the same token, Congress did not enact the last of the appropriation bills for FY 2010 until December 19, 80 days or nearly a quarter of the way into the new fiscal year. But that was better than normal by the standard of the past decade. The FY 2003 bills did not become law until late February. In FY 2004 it was late January, in FY 2006 it was the end of December, and in FY 2007 was mid-February (See table 1).

TABLE 1

Failing on the job

Record on the passage of appropriations bills without full consideration on the floor of the Senate, 2001-10

Fiscal year	Appropriation bills not considered
2001	5
2002	0
2003	10
2004	1
2005	7
2006	0
2007	9
2008	5
2009	11
2010	3
Total	**51**
Average 2001–2010	**5.1**

Source: Thomas, "Status of Appropriation Legislation, Fiscal Years 2001 -2010," Congressional Research Service, available at http://thomas.loc.gov/home/approp/app10.html.

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The hollowing out of government leadership

Another major responsibility of the Senate is to confirm or reject presidential appointments to key positions within the federal government. One practice that has evolved with the Senate's handling of this responsibility is a special form of the filibuster known as a 'hold" on appointments.

During an earlier period, holds were used to simply give an individual senator an opportunity to have a week or two to examine an appointee before a decision was made on confirming or rejecting an appointment. The hold means that the senator who has placed it is signaling that he will object to a unanimous consent request allowing for consideration of the appointment. That means that a cloture motion will be required to proceed to consider the confirmation. Since that will take the better part of a week—and the Senate must under current law confirm hundreds of executive and judicial branch positions—it is practical to bring up only those nominations that can get unanimous consent.

Over the years, senators have realized that presidents not only need these nominations to proceed but are willing to pay a price in certain instances to get them. A White House desperate to put their team in place may be willing to make valuable concessions to a senator willing to release a hold—but you can't be a player if you don't have a hold to begin with. Increasingly, holds are attached to nominees for reasons having nothing to do with the nominee or his or her ability to serve.

Evidence of how much this practice has grown surfaced recently when it was revealed that Sen. Richard Shelby (R-AL) placed a hold on every single one of the 80 administration appointees who had been cleared for approval by Senate committees. Sen. Shelby explained that he thought the Obama administration had a bias against his home state in awarding grants and contracts. In particular, he was concerned that the U.S. Air Force might decide that the bid by European Aeronautic Defense and Space Corporation to build a new generation of tanker aircraft was not the best value to U.S. taxpayers. EADS had indicated that although the components of the plane would be largely produced in Europe they would be shipped to the United States and assembled in Shelby's home state of Alabama. The senator felt holding up all nominees would place maximum pressure on the administration to ignore other contract bids.

After a barrage of negative press reports, Sen. Shelby released the hold on most of the appointees but continued until recently to block confirmation of nominees to manage the

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Department of Defense's acquisition and technology operations and Air Force installations and logistics (both of whom had now been awaiting confirmation for nearly seven months). Sen. Shelby also continued to block the confirmation of the administration's nominee to be undersecretary of the Air Force.

As of March 1, there were 228 presidential nominees pending confirmation before the U.S. Senate. There are six who were nominated more than 10 months ago. A total of 34 nominees have been on hold more than six months, and 34 more have been on hold between four and six months. Among the positions left vacant during that period are the head of the office of legal counsel at the Department of Justice, the undersecretary of treasury for international affairs, and the undersecretary of commerce for international trade.

What's more, many nominees who eventually were confirmed were prevented from joining the Obama administration for most if not all of its first year in office. One emblematic case in point: The administration sent the Senate a nominee to run the Office of Resources and Technology at the Department of Health and Human Services on June 1 of last year. She was confirmed more than eight months later on a voice vote, but only after the president's budget for the department had been submitted for the coming fiscal year, which ends in September 2011.

Or consider the undersecretary for science and technology at the Department of Homeland Security. She also was approved on a voice vote, but only six months after her nomination had been submitted to the Senate while a critical office in planning our defenses against possible terrorist attacks remained vacant.

Having run on a platform of reforming government contracting and procurement policies, a top priority for the Obama White House was filling the top position at the General Services Administration. In the end, their nominee got all of the 96 votes cast on her approval, but it was nearly 10 months after her name had been sent to the Senate for confirmation.

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Systemic government failure

Unfortunately the failure of the Senate to pass new authorizations, send spending measures to the White House in a timely manner, or confirm nominees for key positions in the executive and judicial branches of government are not simply measures of how well the Senate is performing in a given year. They have immense implications that extend far beyond the Senate chamber.

The failure to pass new authorizations means that most of the resources available to the Senate to oversee the functioning of the federal government are disengaged. Executive branch managers are not challenged on program performance. Standing authorities for program management are left in place for years after they should have expired and new authorities that are needed are not granted. Further, failure to resolve issues through the work of the 18 Senate committees that are charged with reviewing, repealing, or updating authorizations means that contentious issues that should be resolved through that process are dumped onto annual appropriation bills, making expeditious consideration of those bills more difficult.

The failure to adopt spending legislation in a timely manner has a more profound and immediate impact on government programs and how efficiently tax dollars are spent. Each agency has finite resources to manage the workload it is assigned under federal law. If project managers, contract officers, or grant administrators get their budget at the beginning of a fiscal year in October, they have a full 12 months to publish solicitations for grant and contract proposals, appoint reviewers to select proposals that give the taxpayer the greatest value, draft contracts that protect the government's interests in the timely and effective performance of work, and consummate those contracts.

If appropriation measures are not agreed to until February, however, then funds may not be allocated to agencies until March. That means there simply isn't enough time to make the process work, and there is certainly not enough time to make it work well. As a result, the delay in adopting annual appropriation measures that has become a routine consequence of the Senate's methods of making decisions is a prescription for waste, fraud, and abuse. Contracting procedures are necessarily short circuited. Noncompetitive contracting becomes routine and the reviews to determine best value become pro-forma.

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The consequences of leaving key executive branch positions unfilled for extended periods is more obvious, but the costs in terms of quality government are underestimated.

Government programs must be funded without formal standing legal authority because there is no time on the Senate schedule to bring such authorizations to the Senate floor. Funding for much of the government is not agreed to until months after the fiscal year has already started, leaving program managers and contract officers with only six or eight months to do a full year's work. A major portion of the agencies and programs across the government are left leaderless not simply for months, but in some instances for years because the Senate finds it impossible under its rules of procedure to move forward with nominations.

An additional price paid by taxpayers for the manner in which nominations are now managed is the increasing unwillingness of qualified people to place their lives on hold for the extended periods of time that is frequently required for Senate confirmation. By shrinking the pool of qualified people willing to become candidates for managing government programs the Senate is without question increasing the cost of those programs and lowering the quality of services provided.

More aggressive use of obstruction

Filibusters used to be viewed as an option to slow consideration on measures of great import on which there were deep philosophical divisions. Remarkable restraint was exercised in the use of this powerful and undemocratic tool during most of the 20th century. During the 44 years between 1917 and 1970, motions to limit debate were filed on 56 occasions or little more on average than about once a year.

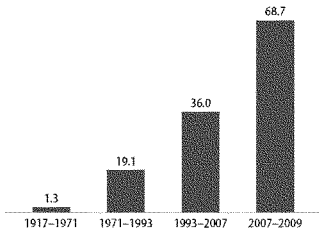
Significant change in the use of the filibuster began to occur beginning in the 1970s. During the 22 years between 1971 and 1993, 420 cloture motions were filed, or an average of nearly 20 filibusters per year. The pace picked up again in 1993. Between 1993 and 2006, there were 504 cloture motions or 36 per year.

But since the 2006 elections the use of the filibuster has again doubled. To borrow a term from "Star Wars," filibustering has gone from overdrive to "hyperspace." Filibusters are now commonly used to block not only legislation the minority opposes, but to block legislation the minority does not necessarily have strong feelings on but will use to place a stick in the spokes of the legislative wheel anytime an opportunity presents itself.

During the two sessions of the 110th Congress, 139 cloture motions were required. And in the first session of the current Congress, 67 such

FIGURE 1
Flooding the zone

Average cloture motions to end filibusters per year in the Senate, 1917–2009



Source: U.S. Senate, Senate Action on Cloture Motions, available at http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm.

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motions were required. This represents an average of about 69 filibusters per year over the past three years. Since the cloture rule was created almost 93 years ago, more than two-thirds of the motions for cloture have occurred in the last two decades, and more than a quarter of those have occurred in just the last three years (see figure 1).

Further, the number of cloture motions is only a partial picture of the total range of obstruction taking place in the modern U.S. Senate. Cloture is filed against only those threatened filibusters that the Senate leadership has the floor time and possible votes to overcome. Much legislation and many presidential appointments are killed before they can be reported by committee either because 60 votes cannot be obtained or the cost in time to the Senate schedule is too great to warrant the effort required to defeat a threatened filibuster.

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Factors behind the out-of-control filibuster practice

What has changed? What fostered a culture of broad restraint in the use of obstructionism for more than four decades but seems to have steadily dissipated in the subsequent 30 years and has now disappeared altogether? One explanation has less to do with the Senate as an institution than the change that has taken place in our national political culture over that period. As politics has become more confrontational and less gentile in the country, it has gradually been reflected in the types of people elected to the Senate and their approach to the legislative process.

Beyond that, however, are other factors. Some observers believe the Senate has gradually become an institution that is more focused on protecting the prerogatives of its individual members than in protecting the integrity of the institution to act as a rational and functioning legislative body. The capacity of a single senator to unilaterally block the confirmation proceedings of senior administration appointees or to stall the consideration of essential legislation may weaken both the Senate and the nation, but it ensures that any administration or any Senate leader who ignores the demands of any senator regardless of seniority, party, or standing among his or her colleagues places a great deal at risk.

The current staff director of the Senate Finance Committee, Bill Dauster, said it well in a 1996 article in *Roll Call*: "These powers to debate and amend make every single United States Senator a force to be reckoned with." The absence of hierarchy and discipline within the body may create a dysfunctional institution, but it insures a certain minimal power threshold for all of its members.

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Modest changes to make the Senate a more responsible institution

This is a sensitive subject. It is unlikely the Senate will adopt reforms that go as far as many feel appropriate. Whether the Senate should be able to resolve major transformative issues such as the current proposals for changing the nation's health care system by a majority vote is fair question for debate and there are good arguments on both sides.

But that is a different question from the procedural issues raised in this paper. Approving administration nominees in a timely manner or passing the annual appropriation bills before the beginning of a new fiscal year is not about deliberation—it is about whether the country wishes to grant individual senators so much power that the institution can devolve into the kind of anarchy, chaos, and gridlock we are now witnessing.

A huge amount of Senate floor time has been consumed each year in the consideration of the annual appropriation bills. Last summer after two days of seemingly endless debate on the Energy and Water Appropriation bill a cloture motion was filed by Senate Majority Leader Harry Reid (D-NV). The following day, Sen. Byron Dorgan (D-ND), the chairman of the Appropriation Subcommittee that had produced the bill, explained:

> *"The cloture motion was filed last evening, and I understand why ... We bring an appropriations bill to the floor that has very widespread support and then it largely comes to a standstill. It would not make much sense for us to be here in this position all week."*

When the opposition to the bill realized debate would be shut off, they allowed it to come to passage and moved their effort to clog the legislative calendar to other targets, allowing the bill in question to be acted on. The opposition then moved their efforts to a different target, allowing the appropriation measure to pass the Senate and go on to conference with the House on an 85-9 roll call vote.

There was a far less satisfactory outcome, however, for a majority of the 12 annual appropriation measures. Eight had to be delayed for consideration until September, when there was little prospect that they could be enacted before the beginning of the new fiscal year. Of those eight, three were not even brought before the Senate until the fiscal year they were intended to fund had already begun, and three others including the largest domestic bill never came before the Senate at all. Those three bills were wrapped into a must–pass, year-end legislative measure that was not subject to amendment.

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The full Senate's failure to consider a significant portion of the annual appropriation bills is not simply a monumental failure of process. It also ironically defeats the very objective that the filibuster was intended to protect: the right of individual senators to fully debate and if necessary amend the decisions delegated to Congress under the Constitution. When the extended consideration of appropriation bills consumes so much floor time that authorization bills can never get to the floor, it means that authorizing committees are blocked from real participation in the legislative process and that the appropriation process is the only real means of affecting government policy.

But when legislation produced by the Appropriations Committee goes directly to conference with the House without debate in the full Senate, it means that only the 30 members of that committee have a real say in the only part of the legislative process that is left. More than two-thirds of the body is excluded from the exercise of the most fundamental power of the legislative branch.

In 1974, the Senate agreed to an important exception to the rule of unlimited debate. The Congressional Budget Act provided that if a budget resolution passed by both houses of Congress directed Congress to enact legislation altering the size of the budget deficit (or surplus), then that legislation would be considered in the Senate with only limited opportunity for amendment and with no more than 20 hours of debate.

It is time for the Senate to adopt a second exception to ensure the deliberate and timely consideration of all appropriation measures. All debate on each measure could be limited to no more than 16 hours—except that each senator who chose to offer an amendment could do so even if the 16-hour time limit had been exceeded. Debate on a single amendment could be limited to one hour.

If this kind of reform were enacted, then most senators would have more say in appropriation matters than they do presently. The Senate would be able to pass funding bills and get their bills to conference committee with the House in time to send final legislation to the president before the beginning of the fiscal year. And a more orderly and structured approach to appropriations would free the Senate to spend more time on other important legislation.

The logjam created by extended debate on appropriation bills in the Senate often makes it nearly impossible for chairmen of authorizing committees to get important legislation on the Senate calendar. Authorizing legislation dealing with philosophical issues that have proven historically to be more difficult to resolve would still be subject to current rules of debate, but authorizing committees would have greater opportunity to take their legislation to the Senate floor by virtue of the restraints placed on the consideration of appropriation bills. More frequent authorizations would in turn help reduce the number of contentious issues in appropriation measures.

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Similar steps need to be taken with respect to the confirmation process. There is no question that Congress needs to hold the executive branch more accountable, but this is not the way to do it. No senator should be allowed to hold up the confirmation of a nominee for more than a matter of weeks. Committees should be discharged of further consideration of a nominee after a period of two months unless the committee formally votes for further delay based on the fact that it has received insufficient information to reach a conclusion. After 30 days, consideration of confirmation should be in order without unanimous consent, and debate on the confirmation should be limited to a reasonable period—for example, four hours.

Many will see even these modest proposals as an infringement on the great traditions of a great deliberative body. But all institutions change over time. Some change in gradual and incremental ways to deal with the changes in the world around them. Others postpone change until the problems they face become grave and the remedies extreme. The Senate seems to be in the later category, but unlike many institutions it places more than itself at risk.

Most rank-and-file senators will not willingly give up the extraordinary powers that the current system grants them. And their leaders would probably cease to be leaders if they demanded such reforms. Change will probably only come when the public is made more aware of the costs of the current system and demands specific change.

About the author

Scott Lilly is a Senior Fellow at American Progress who writes and researches in a wide range of areas including governance, federal budgeting, national security, and the economy. He joined the Center in March 2004 after 31 years of service with the U.S. Congress. He served as clerk and staff director of the House Appropriations Committee, minority staff director of that committee, executive director of the House Democratic Study Group, executive director of the Joint Economic Committee, and chief of staff in the Office of Congressman David Obey (D-WI).

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The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is "of the people, by the people, and for the people."

Center for American Progress

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CENTER FOR AMERICAN PROGRESS ACTION FUND

DELIBERATION, OBSTRUCTION OR DYSFUNCTION?

MODERATOR:
JAMES THURBER,
DISTINGUISHED PROFESSOR AND DIRECTOR,
CENTER FOR CONGRESSIONAL AND PRESIDENTIAL STUDIES,
AMERICAN UNIVERSITY

SPEAKER:
SEN. TOM UDALL (D-NM)

PANELISTS:
SCOTT LILLY,
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ROBIN CLEVELAND,
PRINCIPAL,
OLIVET CONSULTING, LLC

FRIDAY, MARCH 12, 2010
9:30 A.M.
WASHINGTON, D.C.

Transcript by
Federal News Service
Washington, D.C.

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JIM THURBER: Good morning, everyone. I'm Jim Thurber. I'm the director of the Center for Congressional and Presidential Studies at American University. This is a joint forum with the Center for American Progress.

And I want to say at the very beginning before we get into the program all of us are saddened by Sen. Reid's wife's accident, injury of their daughter. His wife is in serious condition. If you didn't know, they were rear ended yesterday at 1:00 by a tractor trailer on Interstate 95. They're both in the hospital right now and a moment of silence I think would be good to send good thoughts to the Reid family.

It's my pleasure to yet again work with Scott Lilly and the Center for American Progress. This is the 30th anniversary of our center. It happens to be the 30th anniversary of C-SPAN. And we've had over 200 forums in 30 years and C-SPAN has covered many of them. But they usually cover, Scott, the ones that we do together. And we've had five of them on issues related to the presidency but also issues that are of importance to Congress and that's what we're doing today.

We're going to have, as you know, a forum on the filibuster. But to put the filibuster in context, it is a problem, people think. I think it's a problem and there are efforts by Senator Udall who'll be introduced later, and others to change the rule, Rule XXII on the cloture vote.

But let's put it in the context of the perception of the American people of the institution of Congress and many other problems that are facing the institution. This is one problem, in my opinion, facing the institution. But we also have holds that clog the legislative work, delays in confirming executive branch officials. We really have a lack of true deliberation and debate often in the Senate.

There's a breakdown of the budget process frequently. It's not passed on time or it's changed every year. There's an excessive use of earmarks. There's a debate as to whether they're excessive or not but I think the American people think it's excessive and riders added not only to appropriation bills but also tax bills and sometimes they become a crutch to act on significant policy issues that cannot be acted by the authorizers.

There's withholding sometimes of appropriations to fully fund authorization bills. There's a tendency towards government by continuing resolution. There's the nonuse, or abuse, of the conference committee, I think really met recently, very often, and there's a lack of comity and civility that the American people are concerned about, a lack of true bipartisanship.

Now that's controversial because some people think that we don't need bipartisanship. Some of this comes from the polarization of Congress where there are fewer and fewer moderates. Back in the 1970s, a third of the Senate were considered moderates – if you look at ideological sports scores as we do in political science. Now it's down to about 5 to 8 percent

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moderates in the Senate and in the House of Representatives and then there's criticism of the institution for ineffective or no oversight of the executive branch.

It is within these trends that we look at the filibuster. And these trends have led, in my opinion, to a serious decline of public confidence in the institution, trust in Congress generally, and government generally and it's increased skepticism, cynicism, and discouraged public participation and trust in the institution of Congress.

The forum today is primarily on the filibuster but it's within that context that we look at the filibuster. In conclusion in the introduction remarks, I'm reminded that change comes from elections. Change comes from freshmen frequently.

Change in this particular case on the filibuster is coming from the class of 2006, 2008 and indeed now in the leadership race in the Senate. The leaders are becoming focused on this issue and the leader of this change on the filibuster is Senator Tom Udall, Democrat from New Mexico. And I'd like to have my colleague Scott Lilly, here from the Center for American Progress, introduce the senator at this point.

SCOTT LILLY: It's always great to work with Jim and American University. They're great partners in these kinds of events and I hope you find it as useful to listen to as we've found it useful to prepare for.

If you go back to 1954, it was halfway through the Eisenhower – first term of the Eisenhower administration and there were 19 new Democrats who were elected to the House of Representatives. And when they got there they found out that all the things they'd campaigned on, all of the ideas that they had presented to their constituents about how the country needed to change and adapt were things that they really could do almost nothing about.

The institution – there'd been an election and the institution had come from Democratic chairman – or from Republican chairman to Democratic chairman, but the Democratic chairmen were in many cases even more conservative than the Republicans.

They were old line Southerners who'd been in the Congress for decades and decades. They were extremely conservative on social grounds, certainly on civil rights, on economic issues, and these freshmen found that it was next to impossible to get anything done.

One of the 19 new Democrats was a young congressman from Arizona named Stewart Udall and Stewart Udall began meeting with a couple of other disgruntled younger members, Lee Metcalf of Montana, who'd come two years earlier, and Frank Thompson, who was elected later in 1955, and they typically met in Eugene McCarthy's office over in tbe Cannon building and plotted how they were going to change the system.

That little band grew into what became known as the Democratic Study Group. And before Stewart Udall left the House of Representatives to become secretary of interior in 1961, they'd already pulled off their first coup. They had increased the size of the House Rules

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Committee, which allowed Speaker Rayburn to gain control of that committee and block Judge Smith of Virginia who was the chairman from controlling the floor agenda.

That in turn made it possible for the Kennedy administration to get the New Frontier agenda to the House floor. So they already had that one victory before Stewart Udall left the House. But he was succeeded by his brother Mo who immediately became a major figure in the reform movement.

In 1969, he led the effort of the reforms to replace Speaker McCormack, who at that time was 78 years old and by most accounts was not really functioning very effectively as speaker. Mo was crushed in that effort, which shows that reform's not easy because he said when he left the caucus, his famous words comparing a caucus with a cactus. He said, you know, with a cactus, the pricks are on the outside.

But at any rate, six years later, the reformers did win. In 1974, after the Watergate landslide, they changed the House rules. They turned the institution upside down. They made committee chairmen subject to votes before the caucus. They removed three sitting committee chairmen and the House of Representatives was never the same again.

It took 20 years from when Stewart Udall started meeting in Eugene McCarthy's office. But they finally did it and they permanently changed it. I say that in part to say that even the biggest and most powerful of institutions with the most intimidating people running them can be changed if people are smart and stick to it. And I also point that out to say that our speaker has the genes that it takes to do that. So we're very pleased to have him.

He has spent his life in public service. He was a federal prosecutor for a number of years. He was elected as attorney general of the state of New Mexico and served two terms before he came to the House where he was a member for 10 years and very much beloved in the House.

There was great displeasure at the fact that he decided to run for the other body. But I think everybody is glad now that he's done that because he is someone who can be part of an institution, be loyal to the institution, and still recognize the imperfections and the need for change. Tom, thank you for coming.

SEN. TOM UDALL (D-NM): Boy, that's an impressive opening statement and an impressive introduction and I thank you all for being here. My brothers – I have five brothers and sisters and when you talk about genes, Scott, I think they would – they always say in the family that none of them are in elected office. None of the five brothers and sisters are interested at all in running for office. They think I got the defective gene. That's what they say.

But anyway, thank you and it's going to be great to be on this wonderful panel. Let me also echo what you said. We're a very small Senate family and our thoughts and prayers really go out today to Senator Reid and his family and I hope I'll be able to give him some encouraging words in person in the next couple of days.

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Jim, I couldn't agree with you more in terms of kind of setting the stage on the filibuster. In my 11 years here in the Congress and now the first year in the Senate, the way I see the institution is it's an institution in much need of reform, whether it's the committee structure. It used to be you specialized on a committee. Now we're on so many committees we can't specialize. The appropriations part is – Labor-HHS, the biggest bill, hardly ever gets to the floor anymore and I know Scott's going to talk about that.

We have authorizing responsibilities where 250 programs or agencies don't come to the floor for their regular authorization. Somebody told me the other day the Department of Justice has a mandatory requirement in the law that it be authorized every year. That doesn't happen and then the thing that I think undermines and corrupts and is the most corrosive influence is the fundraising.

So I think we'll have an opportunity to talk about all of that as we move on here onto the panel but I'm going to focus now on Senate rules reform and specifically talk about the filibuster.

Scott talked about my dad. After my election in 2008, my father gave me some good advice. He suggested that I reread the autobiography of Clinton Anderson, the man who held the same Senate seat I now hold. Anderson addressed many issues during his time in the Senate. But the one that stood out to me was his dedication to making the Senate a functional legislative body. It's a dedication we share.

One of the main reasons I ran for the Senate is because I saw the world's greatest deliberative body turning into a graveyard of good ideas. After a year of observing this body in action, or in many cases in lack of action, it's clear that we're in danger of becoming just that.

In Anderson's day, the toxic partisanship we face today had not yet poisoned the system. But the manipulative use of the filibuster had already taken hold. It was used to block some of the most important legislation of that time, including civil rights bills that now rank among the Senate's greatest accomplishments.

Anderson heard the same thing from Senate leadership that we hear today. He was told the changing the rules would never happen because of the two-thirds requirement to limit debate. In other words, any attempt to change Rule XXII, the filibuster rule, would get filibustered. But Anderson didn't agree. He knew the Constitution, not the Senate rules, gave each house the authority to adopt its rules by a majority vote.

Anderson's constitutional option was soundly based in constitutional interpretation and common law. Article 1, Section 5 of the Constitution clearly states, "Each house may determine the rules of its proceedings." Each house may determine the rules of its proceedings. The Constitution also explicitly requires a supermajority vote in seven instances, for things like overriding a presidential veto or ratifying a treaty or amending the Constitution.

It clearly spells out when a supermajority vote is required and in stating that each house may determine its rules, a supermajority vote requirement is noticeably absent. There is also a

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longstanding common law principle upheld in the Supreme Court that one legislature cannot bind its successors. Liberals and conservatives alike have cited this principle to argue the Senate can change its rules by a majority vote.

Professor Steven Calabresi, a cofounder of the Federalist Society, stated in congressional testimony that "to the extent that the Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rules change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature," end quote.

Armed with the Constitution and common law on his side, Senator Anderson went to the floor in January 1953 and moved that the Senate immediately consider the adoption of its rules. His motion was tabled but he introduced it again at the beginning of the 85th Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice President Nixon, who was presiding over the Senate. Nixon understood the inquiry to address to basic question, do the rules of the Senate continue from one Congress to another.

Noting that there had never been a direct ruling on this question from the chair, Nixon stated, and I quote, "While the rules of the Senate have 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 a previous Congress," end quote.

Nixon went on to say that any provision to deny that right was unconstitutional and I would also note on this point, three vice presidents, Democrats and Republicans, sitting in the chair president as Nixon did, have all come to the same conclusion and to the same result. But despite Nixon's opinion, Anderson's motion was tabled.

In 1959, Anderson again introduced the constitutional option, this time with the bipartisan support of some 30 other senators. Then Majority Leader Johnson wasn't happy with Johnson's proposal – wasn't happy with Anderson's proposal. He saw it as gaining momentum and realized a majority of senators might join the cause.

To prevent Anderson's motion from receiving a vote, Johnson came forward with his own compromise. He proposed changing Rule XXII to reduce the required vote for cloture to two-thirds of the senators present and voting. Johnson's compromise passed but attempts to change the filibuster rule continued for more than a decade.

Rule XXII was last changed in 1975 when Senators Walter Mondale and James Pearson used the constitutional option to change the cloture requirement for most issues, except rule changes, to three-fifths of those senators chosen and sworn.

Only three of my colleagues, Senator Byrd, Inouye, and Leahy, were in the Senate then and have ever had the opportunity to vote on Rule XXII. Ninety-seven of us have never voted on the rule that prevents today's Senate from passing critical legislation.

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All of this brings us to today. Over the past couple of years, the impact of the filibuster has become even more pronounced. Senators from both sides of the aisle have increasingly used it as a weapon of partisan warfare. You only have to look at the lengthy and winding path of healthcare reform to understand that something is seriously broken in the system. And just recently, we saw another example when a single senator used the Senate rules to play politics and ultimately prolong passage of an unemployment bill that otherwise had wide bipartisan support.

These examples underscore for me, for dozens of my colleagues, and for the American people, the time has come to address rules reform again. I intend to lead that effort. At the beginning of the 112th Congress by constitutional authority and because one legislature cannot bind its successors, the next Senate will not be bound by Rule XXII. It can end the debate on a rules change by a simple majority and proceed to a vote on its rules.

Next January, I will follow in the tradition of Clinton Anderson and offer a motion to adopt our rules. Now, we don't have to make drastic changes nor do I think a majority of senators want to. But we can modify the filibuster rule in a way that still respects minority rights but prevents our current state of minority obstruction.

We should also look at reforming other provisions that are being abused or misused, provisions like the use of anonymous holds to block legislation and nominations. I'm often asked how much support there is for my proposal. As you know, many senators have expressed a desire to reform or end the filibuster.

Sens. Harkin and Bennett of Colorado have both introduced resolutions to change the cloture requirement. All of the proposals under discussion have merit. But the reality is none stand a chance of passage without the constitutional option as the foundation for reform. Each time the cloture requirement has been changed since its enactment in 1917, it was the constitutional option that provided the impetus for the Senate to act.

But let me make clear, my proposal is not the nuclear option, despite the assertion by some. The nuclear option was a threat by Republicans in 2005 to declare the filibuster rule unconstitutional in the middle of a Congress. To me, that's like a baseball team that's losing in the fifth inning trying to make the opposition's home runs stop counting.

I understand that through the 111th Congress we're bound by the current rules, the ones we acquiesced to in 2009. We can't change course midstream and simply declare a rule unconstitutional because we don't like the way it's being used. The right way to make the changes for the Senate is to exercise its responsibility and examine the rules at the beginning of a new Congress. That's what the Constitution provides and that's what members of past Senates have called for. The nuclear option is just a continued manipulation of the rules. It's not a real solution.

And finally, I hear the question of what happens if your party is in the minority. Won't you want the filibuster the way it is? Well, first of all, history tells us that shift is inevitable. But I think the real question to ask is this. Shouldn't the minority's primary concern be the well-

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being of our country, not the power of its party and what will happen to this country if we fail to pass critical legislation?

I have every intention of making a motion for the Senate to adopt its rules next January regardless of the majority party. As senator, I want to have the chance to legislate, whether I'm in the majority or the minority, and to advance the best ideas developed by great minds throughout our country.

Our current state of paralysis prevents that and it's unacceptable. The constitutional option will help ensure that the Senate does not become a graveyard of good ideas. I'm very pleased to be here and as I understand the schedule, Jim, we're going to take a few questions and then move into the panel. So I'm happy to do –

MR. THURBER: We have about 20 minutes for Q&A at this point.

SEN. UDALL: Yeah, I wanted to try to keep my remarks brief and then try to do some Q&A and then we'll move into the panel and all of us will have a crack at this too. So, Jim why don't you –

MR. THURBER: I should say when you raise your hand, introduce yourself and we'll bring a mike to you and we'll go that way. I'll be Oprah.

MS. : Christine will take the mike.

MR. THURBER: Okay, all right, I didn't know what –

SEN. UDALL: In your dreams you'll be Oprah.

Q: Hi, I'm David Ducraken (ph).

SEN. UDALL: How are you?

Q: Hi. I am puzzled the by assertion that we have to wait for the Senate rules changed. There have been no Senate rules adopted. They can be set at any time and I'm puzzled by the assertion that this will be like changing the rules in the middle of a baseball game. This is not a game. This is governing the country and it is ungovernable at present.

It's more like saying these rules that say the other side gets two home runs for every one they hit are bad rules and they should not be acquiesced to. The country can't afford more of this game playing. So what I want to know is can't the Senate change its rules right now?

SEN. UDALL: Well, I gave you a little bit of the basis of why I come to the conclusion that I have that changing in midstream is not a good idea and the reason is, those three vice presidents looked at exactly the issue that you're talking about. They looked at the issue because it was brought to them at the beginning of a Congress and it was brought to them at some points

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later and they knew that there was going to be the critical thing – can you in the middle just throw out the rules and put in new rules and here's what they concluded.

Their analysis is they looked and they looked at the constitutional provision. They said at the beginning of a Congress by a majority vote that you can do that after you move past the beginning, basically what you have done is acquiesce in the adoption of the rules from the previous Congress and so the crazy thing is – I mean, in some of these debates, this may be interesting to you, they extended the first day of the Senate, in this case, sometimes to six weeks while they debated the issue that I'm talking about in order to try to come to a conclusion.

But still the same construct and legal analysis is there, that on the first day, on the first day you can take up this issue and it may be extended as I've said, the first legislative day, and that is the appropriate time to do it. It doesn't mean – now, and I couldn't agree more with your frustration about the current system.

I mean, you don't think I'm frustrated? I came here to legislate. I was elected in 2008. I can't believe that the energy that went into that 2008 election, electing a president that for the first time got this huge majority, more than 25 or 30 years in the country and what we stood about, stood for was change. He wanted to change our healthcare system. He wanted to tackle these economic issues.

You know what the issues are out there and here we have a situation where a rule is being abused and misused and we have basically with the rules we have given the minority the power over the will of the majority and so I read this book before I was elected, this Anderson autobiography, and I thought, well, I should offer it in 2009 and as I came in, we preside.

The newer senators preside over the Senate and I kept asking the parliamentarians, how's this work with the adoption of the rules? Well, I was two days later than the opening day and they said, oh, the rules are the standing rules of the Senate. They go from one Senate to the next. I didn't take that as an answer. I researched it and the deeper and deeper that I got, I realized and came back to the conclusion that the three vice presidents have come to. The time to do it is at the beginning of a Congress.

There are many things we can do now to try to break this logjam and I think one of them happened yesterday or the day before when harry Reid basically sent a warning out the Mitch McConnell supporting the constitutional option and supporting changing the rules at the beginning of the next Congress.

To me, he was saying to Mitch and the opposition party, if you continue this, you may find yourself in a very different situation when we get at the beginning of the next Congress and so I hope that with all of the things that are going on, that we will see some lessening of this opposition and this obstructionism that has really become a part of the system.

One more thing, if we had a chart here – I was going to bring charts today and my staff said, oh don't bring a bunch of charts. But imagine a chart of filibusters that have been utilized, motions for cloture filed. If you go back to the beginning of the filibuster, close to a hundred

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years ago, you would see on this chart very, very small numbers and then you would see at the 111th Congress, the 110th Congress, the last Congress, you would see it come up to 112 clotures filed.

So that 112 is more than all of the filibusters in the 1950s and 1960s and we are on a path in the 111th Congress to break the record for the 110th of 112 and it's probably going to happen. So this is a trend that we've got to deal with and the way to deal with it is the constitutional option. Yes sir, all the way back there.

Q: Bill Klein, I'm a retired Army physician. I'm a great believer in our government of buy in on your side for the people. So my question is where does the electorate fit into this issue? I have a feeling there's a lot of anger but also an awful lot of ignorance. It's an extremely complex issue but where can you get going if you don't have the support of the electorate behind you?

SEN. UDALL: Well, the interesting thing, the other day and I at first thought what the premise of your question is the public doesn't know much about this. This public has focused on this and there's an energy behind this that is pretty amazing. Why do I say that?

In a recent New York Times poll, a majority of the public wanted to do away with the filibuster. That identifies the frustration that the gentleman that spoke earlier talked about, the frustration that I have of saying how can you allow the minority to prevent the majority from doing the will of the American people.

So that's where we are with that. I am trying to do everything I can to engage the American people. We're on Facebook. Normally on Facebook you have fans of people. We'll I'm trying – I've set up a Facebook site called "Fixing Senate Rules" and you can sign up as a fan. We're trying to use every bit of media savvy we know to get the word out there.

But I can tell you what I hear over and over again when I go home, and this subject comes up, is people say why don't you make them stand up and filibuster these unpopular – these popular things and show how unpopular they are and the answer is that's very tough. But we should be doing more of that.

One of the reforms I'm looking at – I haven't signed on to any particular filibuster reform. I'm trying to lead the entire effort at rules reform with the constitutional option, utilizing the constitutional option, noting the history, every time there was a change in the rules it came about by the constitutional option being the catalyst for that and I think people are engaged.

One other thing on reform. One of the things we might look at in filibuster reform is what I would call use it or lose it. If you view the Senate today during a filibuster, many of you would look at that screen on C-SPAN2 and what you will see is quorum call and nothing's going on and so you flip on to something else.

Well, what's happening during that filibuster period is time is being utilized. The filibuster's going on but nobody is on the floor and that's the case for a significant amount of

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time. What my use it or lose it proposal would do would basically say if you're not utilizing that time, then for every minute you don't use, a minute gets yielded back and we're working on something like that.

But we're working on – the important this is working on something, protect the minority rights, don't make the Senate exactly like the House, but make it work so that when you have a majority that you can get things done and I think that's what the American people want and that's the frustration we feel out there. Yeah, please, go ahead right here. She's bringing you the microphone. There you go.

Q: Hi, my name is Maggie Reinstein (ph). And my question is if you have to wait until January, don't you need to make it concrete for the rest of the electorate? Don't you have to – even though it is tough, don't you have to let some of these filibusters, let these senators go. Don't you need to show that to the American people?

My second question is that I had had a discussion with Norm Ornstein a couple of months ago and he seemed to still feel that the Senate rule, the two-thirds to change the Senate rules, was still the top priority. How do you answer his arguments?

SEN. UDALL: Give me the second one again or hold on, let me just deal with your first issue there which is basically we're coming back again, aren't we, to what I was talking about. How do you make them stand up on what is a popular issue and show the obstruction, show the face of obstruction, rather than having a quorum call be the face of obstruction, which then people don't understand.

We're going to do more of that. I think the poster child of doing more of that was the senator from Kentucky standing up on unemployment and one senator – it shows you the way the Senate rules are structured – one senator is able to stop the entire show. But he paid a price for that. We had a number of senators come down to the floor and talk about what was happening with unemployment, what was happening with the Highway Trust Fund and the fact that we had to stop projects and people were being laid off in these tough economic times.

It took us several days but he ended up folding. He ended up folding and the result was, I think, that the aggressiveness that we showed on that front meant that they were going to have to think very hard, are we going to do that again, and so by being aggressive like that, I think we can make a difference and try to change it a little bit.

Let me just jet a second into the more arcane part of the way this rule is structured to show you how difficult it is today to actually require them to get up and vote and to get up and talk about a particular issue that we're considering a vote on.

The first step that is required is to get a quorum before you can force that. Well, a quorum is 51 senators and they don't need to get the quorum. We need to get the quorum. The majority needs to get the quorum. So you have 51 senators – we have 59 Democrats now – that have to be on the floor or near to the floor to establish a quorum call to force that debate.

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So they can strategically, the opposition, in this case the Republicans – it can always be reversed – but the opposition designates four senators who will take a four hour block of time and come down and speak.

Well guess what, when they get up and speak about whatever the issue is – let's pick unemployment like the senator from Kentucky did and so they're talking about, well, this unemployment, we don't like the way this bill's structured. Well, as soon as they notice that 51 senators are no longer on the floor, they can note the absence of a quorum.

The Senate goes into a quorum call, which is what you see on the screen, and then the clerk has to call the names of all the senators to determine when 51 are there. The 51 come back onto the floor and then when a quorum is established you then go back into the debating session. But you only have one senator at a time have to stand up while 51 of us have to be there to meet the quorum call.

So under the current rules we're talking about a very time intensive process. And as you will hear from these other panelists in the things that they would like, reforms they would like to be done, the most precious thing in the Senate is the time on the floor because that's the time that you need to put the healthcare proposal, the financial reform proposals, all these proposals onto the floor in order to move them along and so by killing time you stop that kind of thing. Give me your second question there because the first had a lot of parts to it there.

Q: It's mainly how would you argue to Norm Ornstein, who still seems to feel that in order to change the Senate rules you need the two-thirds of the Senate to vote for it.

SEN. UDALL: Oh, you mean the two-thirds.

Q: Yeah.

SEN. UDALL: Well, I wish Norm was here. Maybe one of our panelists is going to argue Norm's position. My answer would be look at the Constitution. Look at Article 1, Section 5. Each house may determine the rules of its proceedings. There's nothing in that provision that says it requires a supermajority. So you have that provision.

On top of that, this constitutional principle which is embedded and been ruled upon by the Supreme Court, one legislature cannot bind a subsequent legislature. The Supreme Court has ruled that over and over and over again. It's a standing parliamentary principle before our Supreme Court even existed. One legislature cannot bind a subsequent legislature, meaning – let's pick a little example.

Let's say you passed a piece of legislation and said in the future you're going to need 75 votes in the Senate in order to change this legislation. That would be held unconstitutional in a minute. What we have done with the Senate filibuster rule is exactly the same thing. In the Senate filibuster rule it says that you need 67 votes to change the rules.

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If you follow that logic, you're caught in the box where Norm Ornstein is caught. I want to free him, okay? Norm, you don't have to be caught in the box, Norm. You don't have to be caught in the box. We're going to free you.

You can just go to the Constitution and to the constitutional case law and constitutional principles and say that at the beginning of a Congress now, as I said, beginning of a Senate, right at the beginning there you have the authority to change the rules by a majority vote.

There are going to be two positions out here. if you go back and read the debate in 1917 and you read the debate in '59 and in '75 when the changes took place on cloture, there was always two sides. So there's room for Norm but I would suggest the better view and the better legal and constitutional view is that by a majority vote at the beginning of a Congress you can change – you can adopt new rules and change the rules or modify the rules. Yes sir?

Q: My name is Jim Connors and my question is has Vice President Biden expressed an opinion on this and going back a little further when the Republicans were in the majority, do you know whether Vice President Cheney offered an opinion?

SEN. UDALL: Yeah, the answer is Vice President Biden has not expressed an opinion on this. On specifically I'm saying the question can the Senate adopt rules at the beginning of a Congress by a majority vote. He has not taken a position on that.

Vice President Biden has said when he was asked recently, do you think the filibuster is being utilized in the way that it was historically designed, and he came out very strongly and said, this Senate that I was first elected to, I believe he was elected in 1972, is a completely different Senate and he pointed out that the filibuster has been abused and up until very recently it wasn't utilized many times, the 112 times that I talked about in the last Congress and we're going to break that record.

So he has not ruled and the prudent thing for him, because he's going to be sitting in the chair, is to not answer that question because he's going to have to answer it on the advice of the parliamentarian. Three other vice presidents, Rockefeller, Nixon, Humphrey, all answered the question, Democrats, Republicans, answered the question, yes, at the beginning of a Congress, majority vote, you can adopt rules.

That's the catalyst that we have here is the constitutional option is the catalyst for change. It's the fundamental part of reform. So if you hear anybody stand up and say, we want to put a new rule in on holds, make them more transparent, 24 hours, 48 hours your name comes out. It has to be public and it has to be for a reason related to the individual, for example, if it' a nomination rather than a policy issue that has nothing to do with the individual.

All of those reforms, the Harkin, where you lower the threshold on the filibuster, 60 for three days, 57, 54, and then down to 51, a declining threshold, none of those ideas can be put in place unless the constitutional option is utilized at the very beginning of a session.

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So if you're interested in this reform, the key is studying and knowing this constitutional option and advocating for it and then advocating for whatever reform you believe in, in the rules. Jim's standing here with the hook but I'm sure all of you that have questions you can throw them at us after we have panel presentation here.

MR. THURBER: Right, we're going to switch into a panel right now and after the statements from Tom and Scott and the senator, we'll go into Q&A again and so let's come forward for the panel please.

Well, it's my pleasure to introduce this panel and two colleagues that have written about this extensively. First, Scott Lilly to my immediate left has written a statement. Some of you have picked up the statement. For those of you that are viewing on C-SPAN, it's on the Center for American Progress Web site. He's a senior fellow at the Center for American Progress. He's been here since 2004.

He was chief of staff to Representative Dave Obey, spent 31 years in the service of Congress, clerk and staff director of the House Appropriations Committee, executive director of the House Democratic Study Group, and had other positions. He writes about governance, appropriations, budgeting. He writes also about the economy and in the context of governance he's expressed himself in writing and speaking on the filibuster and other reforms.

Tom Mann, to my immediate right, is the Averell Harriman chair and senior fellow of governance studies at Brookings. He was director of their government studies division for many years, 15 years. He has written a book that's relevant to this with Norm Ornstein. I guess Norm came out of his box in order to help you with the book and it's called "The Broken Branch: How Congress is Failing America and How to Get It Back On Track", Oxford University Press.

He's written almost a dozen other books. Several are relevant to the functioning of Congress: "The Permanent Campaign and Its Future", "Partly Lines: Competition Partisanship and Congressional Redistricting". Some think that redistricting has had an effect, especially on the House of Representatives and the nature of representation there.

Both will have short statements. There will be a response from Senator Udall and myself and then we'll open it up to the audience for questions and comments. I know several of you, I can see your faces, are experts on this topic and I will call on a couple of you that I know are expects. Walter Oleszek, quit hiding back there in the back. He has the best book on procedures in Congress. So Walter, be prepared to ask a question. We'll get to you later. Let's go to Scott Lilly.

MR. LILLY: Thank you. For only about four of the 31 years I worked on the Hill was I on Senate payroll. But it was Alan Drury's depiction of the Senate in "Advise and Consent" that I read as a teenager that really got me interested in politics and public service generally.

In college, I read Donald R. Matthews' "U.S. Senators and Their World," which I still think is one of the great books on American government and that further raised by esteem for the body. So I do not come at this as an embittered House staffer who is angry at the guys on the

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other side of the Hill. I have great regard. The Senate should not be the House. It should be the leavening force.

It should be a force for more measured consideration of events and policies and I've been in situations more than a few times during my career in Congress where I saw the Senate make a very valuable contribution by slowing down the pace of which we were moving on issues that had not been as carefully thought through as they should have been.

But having said that, I think there are some very serious issues with respect to the way the Senate works today. I think that anybody that is governed by a set of rules at one period of time has to review those rules as the workload on the institution changes, as the nature of the culture and the problems facing the country change, as the type of individuals who are members of the institution change. And I don't think that that has happened as frequently as it should and it's one of the reasons why I think we should take Senator Udall's advice very carefully.

The thing that I think is overlooked in much of the current discussion about the Senate is that while we may have strong views on issues like healthcare and we may be very angry that the deliberation is being slowed, our conclusion that we think the country has arrived at should be ratified by the legislative body and not blocked by a body.

Those are all important things. I feel those very strongly myself. But I also think that those are going to be quite difficult to change. What we do not view as carefully as I think we should is the fact that the Senate is just broken in a very standard workload diagnosis and I want to go through three areas where I think that we can see that.

First is the authorization process. I think that's kind of an arcane term but probably most Americans don't know that we create programs all across the government through passing legislation that establishes the structure of those programs, sets spending levels, but does not actually provide spending for those programs.

This year, according to the Congressional Budget Office, 50 percent of all spending outside of the Defense Department, 50 percent of all appropriations, were for programs that are no longer authorized. The authorizations have expired. CBO identified 250 authorizations that have expired and money was appropriated for them even though there was no authorization.

The leaders of the Senate were basically put in a situation where you either had to terminate major portions of the Department of Justice or other critical activities or fund them in the absence of an authorization. The reason that we don't have the authorizations is the chairmen of the authorizing committees in the Senate – there are 18 committees that do nothing but work on establishing the structure of government programs.

The chairmen of those committees cannot get the floor time from the leadership. The leadership does not have the floor time to give because so much time is consumed with appointments, appropriation bills, and various other business including the lengthy quorum calls that you see on C-SPAN all the time.

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I think not having authorizations is a much more profound problem than it might seem at first. You can see well, the Appropriations Committee goes ahead and funds it so what's the problem? I think first of all every program in the government needs to be looked at with a fresh eye every few years.

Government agencies need to come before the House and Senate and explain what they're doing and give the authorizing committees an opportunity to probe and try to find out if this is a place where we can make savings, is this a place that we can modernize and create efficiencies, are there programs that can be combined, are there authorities that these people in the bureaucracy need that they don't have in order to make the programs work better.

Those kinds of questions just are not being asked on a routine basis and the authorization process is what makes that happen and until we find a way to get the Senate to go back to a system where it can adopt authorizations, then it's very difficult to motivate authorizing committees in the House to move legislation that they know will die in the Senate which has been what will happen repeatedly.

The second area, and I think this is an area that really turns the whole notion that the filibuster is being used to give more measured deliberation, is in the area of appropriations. This year, of the 12 appropriation bills, nine actually were considered in the Senate. Three, including the biggest of all the domestic appropriation bills, the Labor-HHS bill, was not considered in the Senate.

It was reported by the Appropriations Committee in the Senate. But when Senator Reid decided that there simply was not the floor time to take up those bills, the committee reported bill was taken to conference with the House and conferenced as though the Senate had actually voted on it.

It was then wrapped into a conference report, voted on by the Senate at a point in the process where no amendments could be offered to change funding of any of the programs contained. They simply had an up or down vote on whether or not to continue the Departments of Health and Human Services, Labor, and Education or not continue them.

As bad as that sounds, three of the 12 bills actually never being considered on the Senate floor or subject to amendment, that's better than we've done most years for the last decade. On average over the last decade we have had five bills that never went to the Senate floor but that were enacted circumventing the floor because there was not time to get there.

I think that is necessary to get the work done, to get the government functioning. But it is about as big an abuse of process and the rights of the 70 senators who do not serve on the Appropriations Committee, as you can imagine.

Further, this process means that the bills that do come up cannot be considered in a timely way. The past year the House passed four bills in June, four of the 12 appropriation bills in June, the other eight in July. The Senate passed I believe two bills in July and were passing bills off the Senate floor through September, October, November and December.

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So what that meant was the final bill was not enacted until late December. We were almost 25 percent through the fiscal year that we were providing agencies with money to operate in. What that means was one, the agencies had to go on a restricted budget between the time that the fiscal year began and the time that the appropriation was actually put in place. That meant that agencies that have regulatory responsibilities had to cut back the travel of the people that perform those functions.

It meant that the program officers, the grant administrators in government agencies had nine months to do 12 months' work. Again, that may sound like a pretty lousy record. It's better than we've done most years in the past. Several years we have given agencies only six months to spend 12 months' worth of money.

That means that they have to restrict their contracting process. You can't go through the full, free, open bidding contract and do it in six months' time. You can't get it published in the Federal Registry. You can't take the awards and have them reviewed. So it means that you really have a prescription for waste, fraud, and abuse built into or resulting from the legislative calendar.

Now the final area that I think we have a huge problem is what I call the hollowing out of the scenario executives in the government. Right now, we have 228 empty positions in the federal government for appointments that are pending before the United States Senate. And there are a number of those – I think there are 12 of those – who have been pending for more than 10 months.

They can't get a vote up or down. I think it would be much better for the administration, the government and the country if the ones that there are serious objections to would be brought up and voted down so another appointee could be moved, but we sit in gridlock with very important positions unfilled.

In recent months or in the last months we've had a number of people that were confirmed. For instance, the under secretary for science and technology at the Department of Homeland Security was pending for over six months. When her nomination came to the floor, it passed on a voiced vote. For 10 months, we've had a vacancy in the administrator of the General Services Administration, which is a key position in terms of moving this administration's agenda on contract reform, which should not be a partisan issue. Nonetheless, she was held up for 10 months and then confirmed with 96 positive votes.

So there's a great deal of this that really does not have to do with the controversial nature of the appointment. It has to do with individual senators using their ability to put a stick in the spokes in order to get parochial concessions about things that may be totally unrelated to that nominee. The poster child for this activity has been Sen. Shelby in recent months, who, up until about three weeks ago, had a hold on every single one of the administration's appointees hoping that he would somehow influence their decision over buying an Air Force tanker plane that would be made in his district.

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And I think it's sort of funny, sort of aggravating, but in the end you have literally of hundreds of important positions across the government that are unfilled. The career people that are working there cannot get the information from the higher-ups in the executive branch because you've got a break in the link of communication with the policy people and the implementers in the government.

And as a result, you've got more waste and fraud and abuse and ineffective government. And that's a cost that we pay for not the big, major issues, but just the minor day-to-day functioning of the Senate in ways that do not make sense, that put the rights and prerogatives of individual senators above the functioning of the institution and above the wellbeing of the government. And I think that needs to change.

I have two – in this little paper, I've got two suggestions with respect to that, that I don't think do any great damage to the deliberative nature of the Senate. One is to simply put a limitation on how long it takes to consider an appropriation bill. I don't really think most of those bills should take more than two days, three days at the outside.

I would be willing to associate with that a guarantee that every senator gets to offer one amendment and debate it for an hour. You could have as many items in this amendment as he wanted, but that would be far more input and protection of minority rights than we have today, where we don't even take many of the bills to the Senate floor. And I think that's a very reasonable compromise.

Another thing that I think absolutely has to be done is some serious limitation on how long administrative appointees can be held up before a vote is taken on that. There are a lot of different ways to do it. I'm open to any of them, but I think some action has to be taken. Thank you.

MR. THURBER: Thank you very much, Scott. Tom, I'm getting depressed. I hope that you've got some answers for some of these problems.

THOMAS MANN: Of course.

MR. THURBER: We've talked about backdoor authorizations, the regular process for appropriations, holds on confirmations. I listed about 12 problems at the beginning. Scott has a couple of recommendations. So when you come with the problems, I like the spirit of coming up with solutions too.

MR. MANN: Got it. Hold on. Take notes, Jim.

MR. THURBER: I am.

MR. MANN: Listen, I'm delighted to be here at the Center for American Progress and to share this table with Sen. Udall. He gave, I thought, a really lucid discussion of and case for the fact that the Senate is not a mere waif amid forces; that its force is created, sometimes by absolutely inadvertent actions, like living out the previous question motion in 1806 in the rules.

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And that there is a sort of constitutionally grounded case for a new Senate, which he would classify as one whose membership has been changed, not completely re-elected to determine its own rules. And I think that really advances the argument very far.

And Scott Lilly has taken our eyes away from the drama and melodrama of health reform and these other major partisan ideological battles and pointed to the problematics in the functioning of one of our legislative chambers that get too little attention but go to the root of problems today.

Let me just say, I'm delighted with all of the attention being given to this. You know, there is this sense, a feel that all of government is dysfunctional. In fact, once the pundits got a hold of it, I knew it had to be wrong. Beware of conventional wisdom on almost all of this. But the element that's true is that much of the problem of government today is associated with the Senate.

We have seen, over recent decades, an extraordinary increase in the percentage of legislation and nominations that had been subject to delay-related problems from less than 10 percent to more than 80 percent. That's a change. This isn't just like the old days. It's a profound change. We have seen the routinization of the filibuster such that there is a basic acceptance that there is a 60-vote threshold for passing anything or doing anything in the Senate.

Now, that's not written into the rules. There is no democratic legislature I'm aware of that has a supermajority requirement for the routine actions of the body. There are exceptions, as Sen. Udall pointed out, in the Constitution, but not for the routine. Now, obviously that routinization of the filibuster has partisan roots and has everything to do with the changing character of the party system in recent decades. But we also have what has become a promiscuous use of holds.

Listen, it's been around for a long time and we know all about the need because of increased business and before the Senate, the use of the holds for the two-track system. But you know, we've had people use holds or really objections to unanimous consent agreements – Howard Metzenbaum, Jim Allen – who actually parked themselves on the floor of the Senate and, when they thought something nefarious was going through and no one knew what was in it, demanded some transparency. And that was a very healthy thing.

In any case, this has had consequences, as Scott said, for appropriations bills not getting passed, for the demise of authorizations, of the problems with nominations, with hundreds of House-passed measures being queued up in the Senate. The case for the filibuster is that it turns out, it leads to quote, "reasonable bipartisan negotiations that produces more moderate, more deliberative and better legislation." And yet, the evidence for that is sorely lacking in contemporary times.

Okay, Jim. Here it begins. What to do. Number one, you could abolish the Senate. (Laughter.) You know, how about a – Nebraska unicameral. It turns out it's really hard to abolish the Senate given its place in the Constitution, even to change its representational base. So I'll strike that one off the list.

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The second, you could change the party system. The ideologically polarized parties today make the filibuster more problematic than it's been in the past and the sort of parliamentary-like parties intersecting with a congressional set of rules creates particular problematics. Now, if I knew how to change the party system, I'd go ahead and do it, or if I could tell you how to do it. It's probably true that more lopsided majorities for one party or the other would probably produce more cross-party coalitions. But it's hard to do much about that.

Okay, next possibility: You could try to discredit filibusters and holds – politically discredit them, use the power of shame. That's what the senator and some of his colleagues were up to with Sen. Bunning, with Sen. Shelby. You could imagine presidents being engaged in this. The one thing that Tom made perfectly clear you can't do, as well, just go back to the old filibusters.

If you try to wait them out, force actual filibusters, the burden is on the majority, not on the minority that's filibustering. And it will – it simply won't work. But shame gets you something, and I think a more aggressive use of an effort to discredit the filibuster, which is happening now, is both useful in its own sense, but also as a predicate to moving toward more systematic change. Okay?

Fourth, use existing alternatives to dilatory tactics. And here, exhibit number one is, of course, reconciliation. Right now in the health-care debate, Republicans are crying foul, but I think any objective, fair-minded assessment of the budget empowerment control act, of Senate rules of history of reconciliation demonstrates that this particular use, which is a new twist but much more modest than previous uses, is not to enact the whole health reform.

Versions had passed the House and the Senate – in the latter with 60 votes for cloture. But to have the House adopt the Senate bill and then to approve, under the reconciliation process, a set of changes, amendments – that would be germane under reconciliation rules. Sometimes we have special trade authority which creates fast-track procedures. Occasionally it's written into the law.

The health reform law has – at one time or another, bills have looked for requiring an up or down vote on recommendations regarding Medicare practices. So it's perfectly legitimate. The Senate has looked for these alternatives in the past and they could do so again. The final opportunity is to change the rules. There, we need to talk about the substance of changes as well as the politics of it. Okay.

Quickly – you could carve out additional exceptions to unlimited debates. Scott has already suggested that. Extend the reconciliation process to appropriations bills; in effect, have time limits on debate, time for considering these matters. You could set up fast-track procedures for handling nominations, and you might do it differently for executive nominations and judicial nominations. You might treat district court different from appellant circuit courts from the Supreme Court, but there's nothing keeping the Senate from setting up such procedures. Okay. That's carving out exceptions.

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The second is to limit time-consuming requirements presently associated with invoking cloture. For example, you can filibuster at various stages of the process now. Even on the motion to proceed, of getting something to the floor on adopting the underlying measure, on going to conference, on approving a conference report.

Well, you could set up authority for the majority leader to have non-debatable motions both to proceed, to consider a matter on the agenda. Most leaders have the capacity to sort of bring measures to the floor still preserving the opportunity to filibuster the measure itself but that alone would make a different – you could do the same thing on a motion to proceed to conference, again, not a time at which you might do that.

You could do other changes like a quicker ripening of the cloture motion and just looking at the particular ways in which you can extend a filibuster on a bill to well over two weeks before it even goes to conference and you could get that down in certain ways. Okay. Third is to reduce the number of votes needed to invoke cloture. You could go from the present 60 of two, three-fifths of those present and voting.

That puts a little more burden on those who would filibuster because right now you don't need any votes against the cloture motion. All that matters is do you get 64. So present and voting would be a big change. And you could have, as Senator Udall reported of Senator Harkin's proposal as a sliding scale. There are various things you could do with that.

Finally, here's another sort of radical proposal. You could readopt the previous question motion and include it in the rules of the Senate and instruct the parliamentarian to say which other items in Senate rules and precedents must be struck to be consistent with that. But of course, that would very quickly potentially turn the Senate into the House and it's probably too radical a change. Okay.

Final point is, of course, the procedure and politics of filibuster reform. Is it required, as someone said – Norm argued that you have to have two-thirds. That is in the rules of the Senate. No one disputes that. But there is a contrary argument that no new legislative body can be bound by its predecessors. And I think a majority could do it, okay. A majority could pull it off at the beginning of the Congress.

But is there a majority in favor of doing much? That's really the question because it's partly partisan that is the current minority will see it as an outrage and a way to sort of weaken their power but on the other hand, they are thinking ahead, gee, Democrats have many more seats up in 2012. We might be back in the majority. That might be appealing and Democrats may say, we might be back in the minority. We may not want to do it. So I don't think there's a clear partisan case for producing it.

Finally, it's the individuals. What will individual senators give up – because as Sen. Udall made clear, this is the basis of some individual power within the institution and they're really reluctant to do it. But this is where we really have a breakdown in the system because when the norms governing the use of this power by individuals give way to its promiscuous use, the body breaks down.

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So I think the politics are really tough, but I think there are things that could be done and I think there is a constitutionally defensible route to the Senate acting at the beginning of a new session following an election.

MR. THURBER: Tom, thank you very much. Let's go to Sen. Udall. Please.

SEN. UDALL: Thank you very much, and very insightful comments. Let me just step back a little bit and look at the big picture here with all of these suggestions that are out there. I'd also like to say that many of the things that we're talking about in terms of the House – if you look at the House of Representatives, there are things broken over there, too. The attention right now is on the Senate, but many of things that have been mentioned here, we have the same problem. And so we have the bigger issue.

As a country, when you look at our legislature, when you look at the Congress, are we capable of governing? When we had this election, I talked about high expectations, a mandate for change, and here, we've seen it kind of all grind to a halt, and the Congress and the Senate playing a significant role in that. And that worries me a lot.

And so I think all of us, as senators, need to look and, as has been suggested here, and I think I've said this before, to be willing to give up a little bit for the good of all so that we can move along and get things done. One of the areas that troubles me – and I think it's been mentioned by Tom before in his book – is committee structure. It used to be – and now I'm going to try to follow, Jim, on your suggestion. Let's get solutions. Here's a solution from history.

It used to be, on committee structure, that the reason the committees worked so well – you wonder, when you have a big body – 100 or 435 – how do you get expertise? Well, the idea is you go on one committee, that's your major committee, and you really learn things. You specialize. And that's the reason you're given deference by all of the other senators or representatives, because you spend all of your time in terms of studying the issues.

My dad told me a story about how Archibald Cox came down in the 1950s and taught six or seven members of the House Education and Labor Committee labor law. If you even find a committee nowadays, fellows, that they're studying issues like that, let me know what it is. I want to get on it because when you get six or seven senators spending three and four hours at a time studying an issue, learning an issue, focusing on a committee, that's when you start producing very, very good legislation.

I asked several of these scholars, when was the last time we did committee reform in the Senate? Nineteen seventy-five, about the last time we had – we had 1976 – '76. So that was the last time we had filibuster reform, also, was in 1975. So the institution has become ossified and we need to break through.

The one final thing I just want to say is that it kinds of ties this all together is I remember, in the House, getting very frustrated with the schedule and the way – the House does get the

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appropriations bills out, Scott, you're right. But it's a brutal process and it's very quick. Why don't we get more time?

And an old-time parliamentarian told me, he says, change the fundraising. And what he meant was, is these extensive numbers of hours that are spent – it's just been highlighted with this congressman that just resigned where he went on television and talked about, I think he said, five to seven hours a day. Others have said that's higher or lower. It depends on how tough your race is.

But most people think that we were sent here to do the job of the American people, spend the time legislating. If they knew the numbers of hours that we spend on a phone dialing for dollars or over in a fundraising meeting or whatever it is, compared to what we're doing on the other side, I think they would say the balance is tipped the wrong way.

And so the solution is meaningful campaign finance reform. We need to try to get – and by the way, we're headed in the opposite direction. The Supreme Court opinion – we're opening the flood gates now for corporations to put in money. We're going to try to take care of that by the end of the year in the Senate if we don't have a filibuster. This is a huge, huge issue. So that's a couple of comments and I'm sure the audience has others here that they're – (inaudible, off mike).

MR. THURBER: Thank you, Senator. I'd like to ask a couple of questions, first of you and then the other two panelists. The lack of civility and comity in the Senate has been a problem for years. It's not that way on some committees. Some committees are pretty good. Do the members talk about the anger of the American public, the decline of confidence and trust in Congress linked to these problems to the filibuster and other things? And do they worry about the lack of civility and comity?

SEN. UDALL: Yes. And senators talk about it. We talk on it on an informal basis. It's a regular part of the discussion. The part that's really broken in Washington, I think, is that if you go back 30 years, the oil that kept everything going was the comity. It was having time to spend time with each other.

I'm sure Scott Lilly can tell many stories about how the Appropriations Committee or other committees would spend time with each other. There are stories about Saturday night – you know, Congress back in the '50s and '60s worked the full week, worked into the weekend. There would be a potluck on Saturday night and Democrats and Republicans would all show up with their families and have a dinner together.

And that was the oil that kept things going. You knew each other. You were very reluctant to step onto the floor of the House of Representatives and really nail somebody personally if you had dinner with him the night before and met the spouse and also knew the children. And the frustration, I think, is getting to know individuals in such a way that you get a relationship where you have a bond and you can trust each other and you know that you can move forward with things.

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And so that's very much missing. And we're trying, the younger members, trying to find ways where we can get together and talk with each other on an informal basis and try to do it in bipartisan way. But it's very, very difficult with the structure and the demand and the fundraising. And so we need major reform.

MR. THURBER: Let me ask one more question of you, Senator, and it's related to the committee system. Are the junior members concerned about the committee system? We have over 200 committees and subcommittees. Some would argue, indeed, you have too many committee assignments and too many committees in the Senate.

Is there an effort – is there a working group informally in the Senate that is pushing this? The last time it was done, it was 1976, and no one has really looked at it seriously in the Senate since then. The House has looked at it four times and they had limited success there.

SEN. UDALL: That's right. And the real issue in the way committees are treated today is, if you get on a committee, it's a feather in your cap. And with the numbers of committees, it's just so hard to spend the time and to get the specialization. And so there is concern. The senator from Delaware who was appointed after Joe Biden left – Sen. Ted Kaufman, who was a chief of staff here for 30 years – that's one of his passions. He and I talk about it. We're trying to talk how to build up the fires a little bit to get something going there.

But I think if you ask a question to senators or House members and had them answer it truthfully, are you serving on too many committees and have you become in one area really specialized so that you have something to offer to everybody else, have something to contribute to a better piece of legislation, I think most of them would truthfully answer, I'm spread too thin. And that's a problem.

MR. THURBER: Are you willing to give up some of your assignments?

SEN. UDALL: I think, as Scott said and I think some of you have said, if you look at the whole structure, whether it's appropriations, authorizations, committee structure, if all of us were willing, as a group, to give up a little bit, we could have a much better working institution. And I'm willing to do that with all of the others. And that's what part of the discussion is.

When we – you know, I came here to talk about the constitutional option and people have questioned, you know, why are you trying to do this? Well, the real core here is to spend – the reason I chose January of the second year is I thought we would need at least a year to pull everybody together, to have the discussion, to get working groups going.

We have going right now – Sen. Durbin has a working group. We're going to hold hearings in the rules committees that Chairman Schumer is going to have historical hearings on the filibuster and the state of the filibuster. The freshman and sophomore classes – the 2006-2008 classes – are working together on reform and have small working groups going, and we're trying to get together for lunch on a regular basis. So there's a lot happening that I think is going to bear fruit.

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MR. THURBER: If your constitutional option works, do you see some effort at that point to suggest that a committee be created to look at the committee system and some of the other procedural problems in the Senate?

SEN. UDALL: My guess, in the Senate, is a lot of that will be done in the Rules Committee. That's the responsibility of the Rules Committee. I'm on the Rules Committee. Much of the leadership of the Senate is on the Rules Committee.

And so I hope when we do these hearings on the filibuster that we also look a little more broadly at other ideas that have been raised today and other things that I've talked about today to try to see what kind of reform we can do. I imagine at some point it may get to the leadership saying, well, we're going to have a working group on this. There're already informal working groups on almost everything we've talked about here.

MR. THURBER: Final question for the three of you, I mentioned at the beginning, some people feel that the congressional budget process is really broken. It gets changed every year in terms of the procedures. We do now have PAYGO – pay-as-you-go – as part of the appropriations process that links to the budget process. Are there serious problems with the congressional budget process? If so, what are they? What should we do?

MR. LILLY: I often used a graph showing the increase and decrease of the public debt as a percentage of GDP, which I think is the correct way to look at it. At the end of World War II, we had the public debt that was 109 percent of GDP, which is very high, dangerously high debt. But over a period of 30 years, they were able to bring that down to 26 percent, which is very reasonable. We're at 50 percent added, toward 65 percent right now.

But the interesting part of that is that the lowest point that we have been, in terms of the public debt as a percentage of GDP, was in 1974, when we passed the Budget Act. And I don't think that there's – I think there is some connection between that. I think that the Budget Act, which was supposed to clarify budget choices, actually confounded the budget choices. I think it made it look like there were processes to deal with issues that really wasn't – you set up a whole legislative process which is engaged in planning what the real process is going to be like and it leans itself to members being able to posture that they favor one route on budget, which in fact is the opposite what they do when the appropriation bills get to the floor.

And so I think it has – it's undercut budgeting. I think it really does need some serious change. If no other change, limiting the amount of time the Congress spends on, which I think we really, in the end, only get one number out of that, which is the 301(a) budget allocation to the Appropriations Committee. We basically say you can spend $1.3 trillion, or $1.31 trillion and that number could really be arrived at by the leadership without eating up weeks of time in both houses doing that process.

MR. THURBER: So you do away with the budget.

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MR. LILLY: No, I don't think you can do away with it entirely, but you certainly could restrict the amount of time that is consumed doing it and bring it down to establishing that one number in an expeditious manner.

MR. THURBER: I heard, in 1974, Congressman Obey express similar views of why did we need it at that point. He wasn't supporting it at the time. Were you working for him in '74?

MR. LILLY: No.

MR. THURBER: Yes, right, okay. Tom?

MR. MANN: I think most budget process discussions are ways now of avoiding the real problems that we confront and because we have such a difficult time dealing with them, we imagine if we just get the process right, either within Congress or say we have to go outside Congress, or to have something beyond the regular order, be it a bipartisan commission to deal with the problems, I'm just skeptical that it's worth investing a lot of energy in process changes.

And I'd sort of – I think what's needed and our leaders ought to be doing is trying to educate the public to confront the nature of the problems we have. We have – and have had – an immediate short term need for big deficits, both created by sort of financial stabilization and stimulus programs, but also as a consequence of the worst recession since the 1930s.

And there's nothing wrong with them existing in the short term. In fact, it'd be nice if we could get people in Congress to speak to that in a clear fashion, but that in both the medium and long term, we've got huge imbalances that will require steps to be taken to certainly slow the rate of health care cost increases and to create additional revenues.

Instead, we sort of patrol at the margins and are having big fights over how much money we're going to save from earmark reform and talk about what PAYGO should apply to this and that. I think the problem now is one of party and ideology and that's the problem more generally – a party and ideology trumping institutional responsibility and straight talk. And I'd put all of my energies into the latter to try to overcome the former.

MR. THURBER: Senator?

SEN. UDALL: I think the American public would be shocked to know that most of our executive agencies don't have, at the beginning of the year, a budget that they know that they can spend. That is the reality of what's been described here. And Scott's proposal, which is to say, give limited time on the floor for appropriations with limited amendments, but for heaven's sake, get it done.

What we have right now is a situation where these appropriations bills don't get finished, are rolled into an omnibus. It usually takes place anywhere from three months to six months later. And so you have, as has been pointed out here, executive agencies who do not have the ability to know what they're going to spend. Talk about doing something about waste, fraud and abuse; you could really do something about waste, fraud, and abuse if, in fact, you focused on

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just getting the budget done every year, which is our major responsibility, is getting the budget done for the government so the government works for the American people.

MR. THURBER: Thank you. Let's go to the audience. I earlier mentioned Walter Oleszek. Walter, I see you back there. He's a national treasure when it comes to understanding the procedures and rules of the House and the Senate. He's written the best book on the topic. He's a senior analyst scholar at CRS. And he, for 27 years, has been associated with our center as a scholar also.

MR. MANN: And Jim gets 10 percent of his royalty.

MR. THURBER: And Tom is my agent. (Laughter.) Walter, do you have a question?

Q: (Off mike.)

MR. THURBER: Usually not with you, but let's do it anyway.

Q: (Off mike) – by all means. But in any event, maybe more a comment, maybe a question evolving into it and that is, in terms of the constitutional option, I'm just wondering why there are not – what Sen. Byrd might think of that?

I know that he would probably view the current situation as really sort of an abuse, but he's also on the record many, many times about how the Senate is really a supermajoritarian institution and that the House is really a majoritarian institution. And so he would, I would assume, be reluctant to go along with any really fundamental change because really big changes could potentially make the Senate more like the House.

If the principle is established – and it's certainly a legitimate one, as Sen. Udall has pointed out – at the start of every new Congress, you can change the rules of the Senate, then perhaps over time, the Senate would become more like the House, where every new Congress, as we all know, new rules are adopted in the House of Representatives. And how are they adopted? They are adopted by majority votes of the party in charge. And so this might lead to a circumstance where you would have constant changes in the rulebook of the House triggered by the majority party, who is upset with what the minority party is doing.

And more specifically, I guess, where – Tom alluded to this – but there are many – everything is filibusterable in the Senate, almost. And so there've been consensus in the past about establishing cloture on, or limiting the amount of time for the motion to proceed. You're certainly getting to conference committee is just an enormous task these days. You've got – you just can't do it because of the threat of the filibuster, given you have to have agreement on sort of the three parts – insist on your amendment, request, and authorize the presiding officer to name conferees. Each one of those is filibusterable.

If you limit those, there's an innumerable number of places to filibuster on the motion to instruct. So this is a huge issue. I'm not saying anything – it's not to be done. I think there're certainly lots and lots of room for improvement. And even if you curtail the ability of senators to

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use the filibuster, extended to be, there're lots of other avenues. You can filibuster by offering amendment the size of the Manhattan telephone directory.

And as we've seen when Sen. McConnell asked that the Sen. Reid's majority manages amendment be read, I think that took seven or eight hours. And so you have the clerk do the reading for you and you urge that clerk to read slowly because every word is important. So those are just sort of a few off the cuff comments and I don't want to filibuster myself, but that's it.

SEN. UDALL: Yes. When we talk about the House and say we don't want the Senate to become like the House, I think we first of all need to remember that in the Constitution, we designed the Senate so that it would not be like the House in a fundamental way. And that will always be there, unless we make a constitutional change. And that is that two thirds of the senators are always a fairly long ways from an election.

At this particular point in time, I am five years from an election. Two thirds of the senators are in my situation. So when we talk about the Senate being a cooling force, when we talk about the Senate slowing down things and being deliberative, but still doing something, it's the structure of a third elected two years, a third elected two years, a third elected two years that I think builds in that principle. That's the first thing that I think is important.

And the House has – and if you look at the House rules, the House has, every time there's a partisan change, dramatically changed the rules. It's usually when there is a reform movement, there is a change, but the House rules are tweaked a little bit, but they're the same rules. So there isn't a pattern necessarily over there.

The final thing I would say about your question about Sen. Byrd – and I know there're going to be other comments here, but just on the constitutional principle of one legislature binding a successor legislature. He is quoted as saying, "we should not be ruled by the dead hand of the past." And I think that that's a very appropriate comment in light of what we're trying to do in the constitutional option.

MR. MANN: I'd just simply footnote and underscore what Sen. Udall said. One of the quotes – one of my favorites, Walter, when Sen. Byrd was a majority leader in 1979, trying to push a change in the post-cloture debate, post-cloture filibuster matter, said, it is my belief, which has been supported by rulings of vice presidents of both parties and by votes of the Senate, in essence upholding the right in power of a majority of the Senate to change the rules of the Senate at the beginning of a new congress.

Now, as you know, that ended up being a threat. It produced the change. And then they kind of removed any hint of precedent there, but in fact Sen. Byrd has stated that. I also think it's interesting to know that there haven't been the radical changes in the House rules with the change of party control. And I have the feeling you will – as long as you don't sort of completely eliminate the possibility of some extended debate, that there're enough structural features and incentives to provide continuity in those in the Senate as well.

MR. THURBER: Scott?

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MR. LILLY: I – the point was well made.

MR. THURBER: Let's go to another question from the audience, comment, question, please. Let's go over here to the left first.

Q: Jack Liebowitz (sp). In talking about the financing, could we have – is it possible to get public financing of all senators and congressmen?

MR. THURBER: Let's go to the senator first.

SEN. UDALL: Yes, I – and that's what I was suggesting earlier. If you have a system – Dave Obey and I worked in the House of Representatives on a proposal that I'm considering right now on the Senate. And Obey was such a student of the process. And what he determined, he said, "let's look" – and we have these discussions. He said, "let's look at a system where you try to maximize the time being spent on legislation and minimize the time in fundraising." And so what you did is take out all of the private money, the corporate money, all of it, and ban it. That means you're taking head on Buckley v. Valeo, which I think you have to take that head on if you're serious about campaign finance reform.

Buckley v. Valeo, I believe, was wrongly decided. So you've got to take that head on. And so you pass a piece of legislation, but the one last hope, I think, is to pas a structure where you take all the money out. You have individuals contribute money to a clean campaign fund. What if you, at the beginning of every year for four months, you allow the FEC to advertise and say, citizens of America, you have a chance to get all the special interests money out, contribute money to a clean campaign fund?

And you fill up that fund and distribute it in general elections based on a formula. We would have much more competitive elections. We would return to elections being the marketplace of ideas, with citizens picking what they thought were the best ideas, rather than whoever has the biggest checkbook, whoever has the biggest checkbook.

So you all need to push for it. The American people need to push for this. It's a ways off right now, but I believe that that helps everything we're talking about up here. I want to underscore you want your legislators doing less fundraising, more time on legislating. And that – they're going to fulfill the wishes of the American people if you do that.

MR. THURBER: One follow up with you, Senator, do you think that Citizens United decision is helping that movement to have more reform?

SEN. UDALL: Yes, I do. Jim, I do. I think Citizens United has really crystallized the argument for everyone because for 100 years, we basically had no corporate money in the process. You allowed voluntary packs, which corporations which grew since the big reforms in the 1970s, but we were limiting.

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Now, the flood gates are open. The expectation – the other day, I was astounded. At our state level, our state races, when people run in a small state like New Mexico, for a statewide office, you're spending a couple of hundred thousand dollars. People are now expecting the flood gates of corporate money to come in and million of dollars be spent in those races by a variety of organizations.

So as people learn and know about that, I think it'll give us an impetus to try to tackle campaign finance reform regarding that decision. We're on the strongest footing constitutionally, the way that cases are now, for disclosure and transparency. That's – we can do that now. And so you can say the CEO has to be on television and you can disclose all the donors, but otherwise, if you want the big reform the gentleman asked about, you're going to have to take on Buckley v. Valeo.

You're going to have to send up the system. And then, if they declare it unconstitutional, you're going to have to amend the Constitution to allow the kind of regulations and legislating that the Congress needs to do in this area. And Sen. Dodd and I are on a constitutional amendment right now that I think forces that issue.

MR. THURBER: Tom Mann has written several books. He'd studied campaign finance for years. He's been involved in the reform. That's why it's working so well right now, Tom.

MR. MANN: We've done a brilliant job. Listen, this panel has been so agreeable. It's time we had a little disagreement. And I'm going to disagree with the senator on this. I don't think banning all private money in elections and campaigns would be a good thing. I also don't think it's constitutionally possible. It would take a constitutional amendment and it would, in my view – and it would seem very much to go against sort of free speech guarantee of the first amendment.

I also just think having citizens put a little skin in the game is something useful. Some market tests for candidates to raise money is a good thing, getting individual – my son got really excited this last time. And he doesn't – he makes very little money, but he made contributions on the internet to an unnamed presidential candidate several times and had a sense of engagement and participation.

Also, I think there's nothing attractive for most citizens to give to a fund that could go to one of the politicians they most despise, whose ideological views they detest. They want to give to people that they admire as individuals, as members of parties, as espousing of public philosophy. Therefore – but I'm for public funding. But I think we ought to be thinking of multiple public matches for small donations that increase the incentives of members of Congress who now get a very small percentage of their funding from small donations, to actually cultivate and go after small donors.

Give them four or 5-to-1 matches, up to a limit, not handing them a grant if they qualify by getting a few names on petitions. That's too vulnerable to charges of welfare for politicians. But let the individual citizen and donor be empowered. Let that contribution be magnified.

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Change the incentives of politicians. You're never going to eliminate the role of wealthy people in politics. They are – if they're prepared to act independently, they can do a lot.

Yes, I'm offered the transparency disclosure response to Citizens United. And I thought it was a lousy, awful decision. But in general, I think full public financing, as an idea, has come and gone just in terms of pure constitutional political feasibility and that we ought to get behind a plan to empower the small donors through matching public funds.

MR. THURBER: Let's go to another question. Let's go to Sarah Dufendach, who's head advocate lobbyist for Common Cause. She doesn't call herself a lobbyist, but do you have a question, Sarah?

Q: First of all, I'm just delighted with all the conversation of this panel. Congratulations to all of you. Common Cause is working on all these issues and private-public financing, just like the system you're talking about, Mr. Mann, is one of our big issues.

But kind of back to the filibuster, I agree that there is much to be said tbat rules in the Senate can be changed by a majority vote, just like it takes majority vote on final passage of bills to pass them. The problem is getting to final passage. And my fear is that in the beginning of next year, when you move to change the rules of the Senate, that that can be filibustered. That's what my fear is, and maybe you can comment on that.

SEN. UDALL: This is – I think I'm back to the Norm Ornstein box again, if I understand your question, which is true in the filibuster rule that it specifically says that 67 votes are required to change the rule. And if you just go by the confines of the rule, you basically are stuck there.

But as it's been pointed out, and more has been pointed out just in my opening comments, the Senate began – if you go all the way back to the history of the early Senate, from the beginning to 1806, there was a motion to order the previous question. For those of you that are real students of the House today, you see that. Every time you move to a vote on the final bill, there is a vote before that on the motion to order the previous question. It is normally a party line vote. It's considered a procedural vote, but it's cuts off debate and then you move.

The Senate had that in place until 1806. And then, it apparently was dropped aside because it wasn't used. It wasn't used. There was so much respect that if you were a senator, you were allowed to stand up and talk for how long you wanted to talk. And then the rest of the body went and legislated.

Now, we've got ourselves into the situation where a minority can determine what the majority will do. We've really given them the power to obstruct and to prevent us from doing anything. And so what the constitutional option is – is let's look over the next 10 months at how we can change the rules to allow the majority will to go forward, but also protect minority rights. And it's grounded in the Constitution, not in the Senate rule.

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You're jumping outside of the filibuster rule saying 67 votes to change the rules. You go to the Constitution. No place in the Constitution is it mentioned that a supermajority is needed to change the rules. In fact, it just says, "adopt the rules of its proceeding" and only seven places in the Constitution does it specifically mention supermajorities for things like override of a veto or adopting a treaty or something along that line.

So I think that this gives every senate the ability, at the beginning of a congress, to look at what happened in the previous congress and be able to tweak the rules. My hope is really, as you move down the road to doing this, it brings everybody closer together, Democrats and Republicans, to try to say, you know, let's be fair to the other side, but hey, when we got a majority, let the majority act. It was elected with a mandate to do something. Let them act. And then, they're accountable at the next election for how they acted. And if they overreact, then citizens can take that out at the ballot box.

MR. MANN: Just a procedural footnote to what the senator said. The way it would work is that the chair, the presiding officer would rule favorably on a motion by the majority leader to adopt a new set of rules, presumably someone would challenge that on the ground that it's in violation. The chair would deny it. There would – the chair's already made a statement. It's a motion to overrule the chair. The majority would then move to tabling. A tabling motion is non-debatable, and therefore can pass by simple majority. So you could, in effect, uphold the ruling of the presiding officer, creating the basis for changing the Senate rules by majority.

MR. THURBER: Let's go to another question over here on the left, the gentleman in the sweater. Right there, please.

Q: Hi, my name is Charlie Zito (sp). Is it on? I've just had my 75th birthday, so I've been around a while and I worked on a lot of campaigns. And a lot of intelligence up there and you're working the issue. I've also run a lot of companies. And let me just try a different stroke.

We're engaged in two wars. We're recovering from what we're disguising as a deep recession. It's a depression. We have a broken health care plan. And the people who are charge are acting like a French court. You're worrying about the rules. You're worrying about not hurting each other's feelings.

How about some humility? How about some patriotism? How about some understanding that we, the citizens, are getting angry? It scares the hell out of me that we're the most armed country in the world. We've got idiots running around with tea bags on their head and guns behind them.

And we're sitting around saying, well, let's change this rule or let's change that rule. Let's start moving with a sense of urgency. And Sen. Udall, I wish you the very best. I will pray for you. I'll work for you, whatever you need, but let's get moving, guys. Enough. I'm done. (Laughter.)

SEN. UDALL: Just a brief comment. And I understand the passion. And I think what you're going to see – this is a debate by a very skilled and talented panel to try to educate on an

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issue. You're going to see from the Congress and from the Senate, in the next couple of months, major pieces of legislation focusing on jobs and economic development and pulling this out of a recession, on financial reform to fix all that it never happens again, health care reform.

And the president has put out there his proposal and I think we're going to get that done. And my guess, by the summer, we're going to have some major things in place. It's going to be big fights. Some of it will be done under reconciliation. But it has to get done and it has to get done for the American people.

MR. THURBER: And with that, we're going to close. I want to thank the Center for American Progress and Scott Lilly and the staff here and the staff of the Center for Congressional Presidential Studies at American University for their work. Gentlemen, thank you very much for your remarks. (Applause.)

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Steven S. Smith
Responses to Questions for the Record from Chairman Schumer
Senate Committee on Rules and Administration

June 9, 2010

Question 1. Holds.

- **Your article on the "Procedural Senate" argues that Senator Lott, as a member of the Majority and serving as chairman of the Rules Committee, was frustrated by the Senate practice of holds and even held a Rules Committee hearing on the use of the hold. You also have argued that holds serve a useful purpose for the Majority Leader as well as for the Minority.**

  In your view, in what ways are holds damaging to the ability of the three branches of government to carry out their responsibilities, and what suggestions would you make for changing the practice of holds?

Answer

The problems created by holds are unlikely to be addressed effectively in isolation of a broader set of reforms addressing how the Senate uses its time and disposes of motions.

Time is a precious resource of the Majority Leader. Holds, as threats to unanimous consent requests to consider legislation or nominations, gain their effectiveness because of the Leader's unwillingness to delay action on the most important matters in order to overcome objections to the consideration of less important legislation and nominations. Recent majority leaders have said that they will not consider holds to be personal vetoes, but, in practice, leaders must give holds considerable weight when scheduling legislation and nominations of modest importance.

In recent decades, the hold gradually became an all-purpose hostage-taking device. To be sure, holds often are placed for quite innocuous purposes, such as seeking notice from the leader in order to preserve an opportunity to speak or offer an amendment. But by the late 1970s holds were used to gain leverage with committee, party, or administration leaders on unrelated matters.

Two more recent and related developments deserve emphasis. First, it appears to this outsider that holds have become far more common on the minority party side. Minority party holds are particularly troublesome for the Majority Leader because he often is unable to determine the identity of the Senator placing a hold and address the concerns of that Senator in an expeditious manner. Minority party holds are more likely to be "secret" holds by virtue of the insulation from disclosure that the Senators placing holds gain from being represented by Minority Leader on the floor.

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Second, holds on nominations have become more numerous. Once only occasionally subject to filibusters, presidential nominations for executive and judicial positions now are frequently the target of holds. It appears to this outsider that the expanded use of holds on nominations is generated primarily, although not exclusively, from the minority party side.

These developments have serious consequences for the administration of government and for the Senate. For executive agencies and the courts, delays in confirmation often slow the performance of basic agency and court functions. Long delays create a powerful disincentive for qualified individuals to agree to serve.

As you know, the Senate has attempted to address the "secret" hold. The 2007 reform (Section 512 of the Honest Leadership and Open Government Act) provides direction to majority and minority floor leaders that they recognize a "notice of intent" to object only if a senator, "following the objection to a unanimous consent to proceeding to, and, or passage of, a measure or matter on their behalf, submits the notice of intent in writing to the appropriate leader or their designee," and then "submits for inclusion in the Congressional Record and in the applicable calendar" a notice not later than six session days.

The 2007 rule has proven to be a failure. The 2007 rule establishes a convoluted process full of ambiguity, which reflects the difficulty of regulating what has been an informal, intra-party process for three decades. Disclosure is not required until after objection to taking up a bill is made publicly on the floor. The identity of the senator placing the hold need not be publicly disclosed for a minimum of six days (the rule does not specify how quickly the leader must be notified in writing and when the six-day clock starts). Until actual objection is made to a unanimous consent request, the hold remains secret and a private matter between a Senator and the leader, as it always had been. Senators have complained that holds have been removed within the six day period and reinstated by another Senator to avoid the required disclosure.

The most important development with respect to the 2007 rule is that Senators have failed, without repercussion, to place notices of intent in the *Congressional Record* after objections to the consideration of dozens of nominations were made on the floor.

Ultimately, a hold gains its effectiveness because receiving an objection to a unanimous consent request to consider a matter or pursuing cloture is costly to the Majority Leader in time, effort, and strained inter-personal relations. Any move that reduces that cost will reduce the value of placing a hold.

Proposals for reform fall into three categories.

Reform Rule XXII. Plainly, reliance on unanimous consent and observance of holds reflects the costliness of seeking cloture. Reducing the cloture threshold for cloture, at least on the motion to proceed, would undermine the threat of objection to unanimous consent requests to consider a measure or nomination. Moreover, placing limitations on debate on more measures and nominations would reduce the range of matters subject to holds.

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Reduce the number of nominations that are targets for holds. While the Senate has an institutional interest in maintaining its "advice and consent" function in the most important executive branch officers, the Senate also has an interest in managing its agenda in a manner that reflects its institutional priorities. The Senate could reduce the number of executive branch nominations subject to Senate confirmation. Some or all of deputy secretary, director, and other positions below under secretary might be designated inferior offices not subject to the "advice and consent" process.

Alternatively, the Senate could consider some executive nominations *en bloc*. The Senate often consents to several nominations *en bloc* by unanimous consent. This practice could be expanded by rule to all nominations below a certain level—say, below under secretary—for a given department or agency. That is, Rule XXXI could be amended allow executive nominations below under secretary for a department or agency to be grouped in a single advise-and-consent motion.

Finally, the Senate could establish a "fast track" process—creating non-debatable motions to proceed and debate limits—for some or all executive branch nominations upon the expiration of a 60- or 90-day period after receiving the nomination from the President, unless the period is extended by majority vote of the Senate.

It is hard to be enthusiastic about applying these reform proposals to judicial nominations (Article III judgeships). Life appointments for judges create a special obligation for the Senate to consent with care, but the effects of obstruction on the performance of the courts must be weighed in the balance.

Require timely publication of holds in the *Congressional Record.* I am pessimistic about the effect of requirements for the publication of holds. In practice, the Senate cannot regulate communications among Senators within either party or compel a Senator or leader to "come clean" with respect to announcing or publishing motivations and intentions.

The Wyden-Grassley proposal (see Amendment 4019, *Congressional Record*, May 13, 2010, p. 3693) requires Senators placing holds to provide written notice of a hold in the *Congressional Record* within two days of providing written notice to a floor leader, whatever further action the hold-placing Senator takes on the hold. By requiring notice in the *Record* soon after informing the floor leader, this proposal closes loopholes in the 2007 rule.

The Wyden-Grassley approach has three weaknesses.

First, proposal has a weak enforcement mechanism. The proposal provides that when notice is not made within two days of an objection "the Legislative Clerk shall list the Senator who made the objection to the covered request in the applicable 'Notice of Intent to Object to Proceeding' calendar section." Taken literally, as it should be, this provision requires all objections to proceed to a bill or nomination to be listed in the *Record* by the hold-placing Senator or the clerk. The Senate is likely to discover three problems with mechanism:

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a. The clerk's entries may leave the misleading impression that the objecting Senators had placed holds when no one Senator may have done so. For example, a Minority Leader may have objected for his own reasons without a hold being placed by a colleague.
b. The provision requires the clerk to keep a tally of objections and match them to subject entries in the "Notice of Intent" section of the calendar. It is not clear to me that the clerk can determine whether a particular objection matches a particular notice. For example, if more than one hold is placed on a nomination and only one of which is given notice in the calendar, the clerk cannot make entries for the other holds and they remain secret.
c. Given the clerk's other responsibilities, reporting "undeclared" holds is prone to error.

Second, like the 2007 rule, the approach gives formal recognition in the Senate rules of an informal, party-based process. The requirement of notice in writing for an intra-party communication may make sense for a leader to impose, but it is not enforceable by the Senate and cannot possibly be the only basis for a responsive floor leader to object to consideration of a bill or nomination. For example, a party conference may adopt a resolution insisting that its leader take steps to prevent action on a bill or nomination. By any reasonable definition, this is not a "hold" and plainly is not anticipated by the Wyden-Grassley proposal. Yet, if objection is made, the clerk will be required to list the floor leader's name in the "Notice of Intent" section of the calendar.

Third, as recent experience with the 2007 statutory rule shows, the approach will not generate the desired disclosure. If a floor leader or his designee chooses to object to a unanimous consent request to proceed, he need not disclose his reasons, which might include a signal from a colleague that it is inconvenient to proceed at that time. The experience with the 2007 rule indicates that the Senate cannot enforce the disclosure requirement and will instead turn the "Notice of Intent" section into a list of entries made by the Legislative Clerk. Most of these entries will be the names of the Minority Leader and Assistant Minority Leader. This will have no practical effect.

The 2007 rule has proven ineffective and should be repealed.

The solution rests in reducing the costs to the majority of overcoming objections to proceed by (a) creating more time to act on legislation and nominations and (b) having the votes to bring matters to the floor under Senate rules.

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Question 2. The 'Obstruct and Restrict' Syndrome in Action.

- **You describe what you call the "obstruct and restrict" syndrome, in which the majority anticipates obstruction and the minority tries to thwart legislation that it believes the majority is jamming through.**

  How can agreements on debate be structured so that the minority feels its ideas are considered seriously, and the majority is still able to bring matters to a vote?

Answer

I favor reform that allows the Senate majority to act while guaranteeing every Senator an opportunity to participate in a meaningful way.

Majority rule and minority (and individual) rights are competing values that every democratic institution attempts to accommodate. The obstruct-and-restrict syndrome of today's Senate has undermined both majority rule and minority rights. The minority forces a three-fifths majority cloture votes on legislation and nominations of only moderate significance and the majority responds by limiting minority opportunities to debate and offer amendments as much as the rules allow. The syndrome undercuts the role of the individual Senator, encourages partisan gamesmanship, and undermines accountability for the collective actions of the Senate.

A reasonable approach would be to pair a reduction in the cloture threshold with a guarantee that every Senator has the right to offer at least one amendment after cloture is filed and before the vote on cloture takes place. The right of amendment could provide that a Senator's amendment may a first- or second-degree amendment. If the rule further provided 30 minutes of debate (equally divided between proponents and opponents) on such amendments, Senators in the minority would be guaranteed a substantial opportunity for pre-cloture amendment and debate. This approach allows some of the amendments that are barred in post-cloture debate under the Senate's strict interpretation of germaneness. It also lends more order to the process once a cloture petition is filed.

By unanimous consent, of course, the Senate can agree to structure debate and amendments in some other way.

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Question 3. The Senate and Original Intent.

- **Some scholars argue that both the text of the Constitution and the accompanying historical record support the view that the Senate is able to change its rules by a majority vote.**

  Outside of the text of the Constitution itself, what do you believe are the strongest arguments to support that claim?

Answer

The most important argument for the right of a majority to consider and vote upon the Senate rules is a reading of the Constitution, but you ask about other considerations. There is one overriding consideration—adaptability. Every political institution must be able to adapt to new conditions.

The Senate's "tradition" of unlimited debate emerged in the early 19th century during the era of great debates on slavery when the Senate had a relatively light workload and usually waited for the House to act before giving legislation serious consideration. Once unlimited debate was used to defend against anti-slavery legislation and then the Senate's workload expanded in the decades following the Civil War, unlimited debate became a serious problem for many, if not most, majority parties.

In the modern era, even minority party Senators have shown a willingness to limit debate and amendments while adapting public policy to changing conditions in inter-branch relations. In the 1970s, the expanding power of the executive branch led the Senate to adopt debate and amendment limitations for a variety of purposes in its efforts to balance the delegation of policy-making authority to the executive branch while retaining congressional control. As a result, debate and amendment limitations have been accepted for approval and disapproval resolutions on a wide range of policy areas (Medicare, trade measures, arms control and export, natural resources, nuclear fuel and waste, and others). The budget process, which was a response to the budget battles with the Nixon administration, led the Senate to accept debate and amendment limits for budget measures.

The Senate now faces a new challenge, a challenge from within: Sharply polarized parties and the emergence of the obstruct-and-restrict syndrome. As much as we would like to structure the Senate's rules without regard to the way Senators organize themselves in parties and factions, modern Senate life no longer allows us that luxury. Senators must recognize a long-term condition of the institution. Going into a third decade, obstruction has been a central feature of minority party strategies and, in the last decade, the majority party has responded with efforts to limit the damage to its agenda. Together, these party strategies have altered the way the Senate has done its business and undermined opportunities for meaningful participation by individual

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Senators. They threaten creative work and undercut the capacity of the Senate to address serious threats to the nation's well being.

Of course, there are outside critics, and some inside, too, who argue that greater determination on the part of a Majority Leader to break filibusters is the answer to majority complaints about recent experience. Admonitions to force extended debate and around-the-clock sessions are common. To be sure, at times forced debate can draw attention to obstructionism and generate public approbation for the obstructing party. As all recent majority leaders have known, this is not an effective general solution. Minorities do not bend when there is an appreciative audience for their parliamentary tactics and, when extended debate is forced, the majorities often eventually get blamed for being unwilling to compromise or for failing to give up and move on to other pressing matters.

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Senate Committee on Rules and Administration
Hearing on "Examining the Filibuster: The Filibuster Today and Its Consequences."
Questions for the Record from Senator Tom Udall

Questions for Walter Moudale:

Q. At the beginning of the 94th Congress, you and Senator Pearson made a motion to end debate on adoption of the rules, arguing that only a simple majority was required for cloture. Majority Leader Mike Mansfield raised a point of order that your motion violated Rules XXII and XXXII. Vice President Rockefeller referred the point of order to the full Senate. Senator Javits then made a parliamentary inquiry and asked if a majority voted to table the Mansfield point of order, would that uphold the Mondale-Pearson motion to end debate by a simple majority? Rockefeller responded that it would – thus a majority of the Senate could end debate on adoption of the rules.

The Senate voted to table Mansfield's point of order three times, all by a majority vote. This was an endorsement of the constitutional option – that a majority of the Senate could invoke cloture to change the rules at the beginning of a Congress. Several Senators feared that the votes to table Mansfield's point of order created a new precedent in favor of the constitutional option. Because of this, the Senate voted to reconsider the third tabling vote, and then voted 40-51 to defeat the underlying motion to table.

Some argue that this did away with the precedent you helped create, while others contend that the precedent still stands. What are your views on this issue?

Answer:

Rule XXII, as it stands today, ultimately was the product of a bipartisan compromise in 1975. Then, we first established the precedent that the Senate could change its rules by majority vote, and we did that three separate times—each time tabling a point of order that, in effect, said we needed as many as 67 votes to change the rules. Once that precedent had been established, both sides in the rules debate recognized that a compromise made sense. Under the agreement, the Senate changed Rule XXII to require 60 votes for cloture and, in the spirit of compromise, we agreed to revisit the series of tabling motions that had defeated the point of order. On that last occasion, a majority voted against the motion to table.

The proponents of change in 1975 repeatedly made the point—illustrated by the comments from Senator Cranston that I quoted in my testimony—that the reconsideration of the point of order did not change the three prior majority votes. Indeed, because the Constitution permits the Senate to change its rules by majority vote, the reconsideration could not change the fundamental principle we had established. The reconsideration did not change the majority votes that preceded it, in other words, and reconsideration could not change the Constitution. The last vote may well have been the "latest word," in a precedential sense, but the Constitution is always the last word.

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Q. Rule V states that, "the Rules of the Senate shall continue from one Congress to the next unless they are changed as provided in these rules." This provision was not included in the original Senate rules – it was added as a political compromise in 1959 to appease the minority party when the cloture threshold was amended. What do you think of this provision? Should it be struck from the Rules as part of a comprehensive reform effort?

Answer:

Rule V need not be changed to amend Rule XXII. A challenge to Rule V would only raise issues not essential to the question of cloture. In one sense, Rule V simply states the obvious: only one-third of the Senate is elected every two years and, as a result, there is always a quorum of the Senate. Unlike the House of Representatives, the Senate is a continuing body and, by inference and tradition, if not literally by rule, its rules continue—until they are changed. When the Senate has considered changes in its rules, it traditionally has done so at the beginning of a new Congress. That practice is not attributable to any literal requirement but, rather, to basic concepts of notice and good order.

Rule V does not impose a supermajority requirement—only Rule XXII does that. In fact, Rule V provides a framework by which the Senate, under the Constitutional principle of majority rule, could change Rule XXII. Without these basic rules, continuing from Congress to Congress, there would be neither a precedent nor a mechanism for closing debate. In the absence of some cloture rule, any one Senator could prevent by filibuster any measure from coming to a vote (the practice in the Senate's earliest days). By leaving Rule V unchallenged, and focusing on Rule XXII, the issue is narrowed to only the number of votes needed to close debate.

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Steven S. Smith

Responses to Questions for the Record from Senator Tom Udall
Senate Committee on Rules and Administration

June 9, 2010

Q. Several critics have stated that if the Senate amended the cloture requirement, it would make the Senate no different than the House of Representatives or that it is contrary to the intent of the founders. How would you respond to that?

Answer. The Founders were silent on this issue of cloture. The Constitution does not mention super-majority cloture and, except for the Senate's "advice and consent" role, is treated simultaneously with the House on procedural matters.

The Senate's distinctiveness, of course, was a feature of a central political bargain reached at the constitutional convention. The Founders provided for state-based representation and long, staggered terms, which, along with selection by state legislatures, were expected to create a legislative body with a different perspective on public issues than the House of Representatives. It is in these features of representation, not in the internal parliamentary procedures, that the Founders created a distinctive legislative institution in the Senate.

Relying on the judgment of the Founders is a weak justification for continuing a practice that no longer meets the needs of the nation or Senate. The Constitution, after all, has been amended many times. As the 17th Amendment shows, American eventually rejected the Founder's guidance about how Senators were to be selected.

As you know, the Founders provided that "each house may determine its own rules." They did not specify any special rules, or special means for determining its own rules, for either house, except in the exercise of the Senate's unique advice-and-consent role.

The true spirit of the Constitution is reflected in Jefferson's admonition that each generation adapt its political institutions to its needs. It is in this spirit that the Senate should approach the subject of reform.

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Q. Several critics portray the current attempts to reform the Senate rules as a "power grab" and claim that Democrats are trying to abolish the filibuster. However, many Senators recognize the need to protect minority rights in the Senate, and it is unlikely that a majority of Senators would ever vote to completely end the filibuster. Many Senators simply want reform – to preserve the rights of the minority, but to curb the abuse of the rules.

Do you believe that the current Senate Rules can be modified to make the Senate a more efficient body, but still protect the views of the minority? Do you have any recommendations for such changes?

Answer. I favor reform that allows the Senate majority to act while guaranteeing every Senator an opportunity to participate in a meaningful way.

Majority rule and minority (and individual) rights are competing values that every democratic institution attempts to accommodate. The obstruct-and-restrict syndrome of today's Senate has undermined both majority rule and minority rights. The minority forces a three-fifths majority cloture votes on legislation and nominations of only moderate significance and the majority responds by limiting minority opportunities to debate and offer amendments as much as the rules allow. The syndrome undercuts the role of the individual Senator, encourages partisan gamesmanship, and undermines accountability for the collective action of the Senate.

A reasonable approach would be to pair a reduction in the cloture threshold with a guarantee that every Senator has the right to offer at least one amendment after cloture is filed and before the vote on cloture takes place. The right of amendment could provide that a Senator's amendment may a first- or second-degree amendment. If the rule further provided 30 minutes of debate (equally divided between proponents and opponents) on such amendments, Senators in the minority would be guaranteed a substantial opportunity for pre-cloture amendment and debate. This approach allows some of the amendments that are barred in post-cloture debate under the Senate's strict interpretation of germaneness. It also lends more order to the process once a cloture petition is filed.

By unanimous consent, of course, the Senate can agree to structure debate and amendments in some other way.

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Q. A clause in Senate Rule V, added in 1959 as part of a political compromise, states that "the rules of the Senate shall coutinue from one Congress to the next Congress unless they are changed as provided in these rules." Rule XXII requires an affirmative vote of two-thirds of Senators voting to invoke cloture on a rules change. Taken together, these two rules effectively bar a majority of the Senate from ever being able to reach a vote to amend or adopt its rules, thus preventing it from exercising its constitutional right under Article I, section 5.

In testimony before the United States Senate Judiciary Committee, Subcommittee on the Constitution, several constitutional law scholars agreed that the entrenchment of Senate rules is unconstitutional (S. HRG. 108–227, May 6, 2003).

At that hearing, Northwestern University Law School Professor Steven Calabresi stated:

> **"The Senate can always change its rules by a majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that, Acts of parliament derogatory to the power of subsequent parliaments bind not…". Thus, to the extent that the last Senate to alter Rule XXII songht to bind this session of the Senate its action was unconstitutional."**

Similarly, in submitted testimony for the same hearing, Professor John McGinnis of Northwestern Law School and Michael Rappapport of University of San Diego School of Law wrote:

> **"We write to express our opinion, based on several years of research, that the Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, an entrenchment of the filibuster rule, or of any other legislative rule of law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional. … Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching it."**

Do you believe these constitutional scholars are correct in their understanding of entrenchment of the Senate rules? Do you have any additional comments about this issue?

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A. I agree with these assessments of the constitutionality of Rule XXII. Let me add that Senators should distinguish between the continuity of the rules from Congress to Congress and the right of the Senate to determine its rules at any time. The continuity of the rules from one Congress to the next is a constitutional and reasonable provision. It does not deny the right of the Senate to consider revision of the rules at any time.

The plain meaning of Article I, Section 5, which grants to each house the power to determine its own rules, is that each house, *at any time*, has the power to determine its own rules. For this reason, I do not find persuasive the argument made by reformers in 1975 that the Senate may, *at the beginning of a Congress*, reconsider its rules. Rather, the Constitution implies that the Senate may reconsider its rules *at any time*.

Moreover, the Senate's power to determine its own rules is to be exercised by a simple majority. In every other part of Article I, except where specified, each house is assumed to act by simple majority. Thus, *the Senate cannot adopt a rule that effectively prevents a simple majority from changing the rules at any time.*

A final point: The Senate has modified the effect of Rule XXII on many occasions by placing provisions for limitations on debate and amendments in statute. Legislation incorporating these "rules," under the precedents of the Senate, are subject to three-fifths majority cloture or, in the case of budget resolutions, to debate limitations. The reason is that the provisions do not directly "amend the Senate rules," as Rule XXII specifies. Nevertheless, these rules, often adopted without objection from Senators, are explicitly adopted under the Senate's constitutional authority to determine its own rules, have the effect of Senate rules in other respects, and limit the application of Rule XXII. Plainly, the Senate has successfully, and usually without argument, circumvented the two-thirds majority threshold for cloture on amendments to Rule XXII on many occasions.

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Q. If Rule VIII of the Standing Rules of the Senate was amended to make motions to proceed non-debatable, or specified a two hour maximum period of debate, how do you feel this would impact the protection of minority rights in the Senate? How would it impact the ability of the Senate to proceed to a bill or nominee? How would it impact the use of "holds"?

A. A limit on debate for the motion to proceed, without other changes in Rule XXII, would have modest effects on minority rights and may alter the practice of holds.

A large minority has the ability to block action on a bill or nomination at several stages in the process—the motion to proceed, a vote to pass or confirm, motions to go to conference, and motions to approve conference reports and House amendments. Thus, a limit on debate for the motion to proceed preserves the right of extended debate on the substance of policy and the qualifications of nominees at other stages in the process.

From the Majority Leader's perspective, any reduction in the number of stages at which filibusters occur will save time, one of his most precious resources. The time saved may accumulate over a session and prove to be of considerable importance to the completion of the majority's agenda. Of course, minorities realize this and so have resisted proposals to limit debate in any way.

Holds, as threats to unanimous consent requests to consider legislation or nominations, gain their effectiveness because of the Leader's unwillingness to delay action on the most important matters in order to overcome objections to the consideration of less important legislation and nominations. Recent majority leaders have said that they will not consider holds to be personal vetoes, but, in practice, leaders must give holds considerable weight when scheduling legislation and nominations of modest importance. A limit on debate for the motion to proceed will reduce reliance on unanimous consent requests to bring up bills and nominations and undermine the established informal role of holds.

The Majority Leaders' need to anticipate filibusters of bills and nominations will keep some clearance process in place. In turn, a clearance process creates opportunities for the minority and individual Senators to register their objections. My guess is that Senators will eventually call these threats to filibuster "holds" and little change in the practice will have occurred.

Holds are a difficult problem that are unlikely to be addressed effectively in isolation of a broader set of reforms addressing how the Senate uses its time and disposes of motions.

It has been argued that Senators will be less likely to obstruct action by filibuster once debate and amending activity on a bill has begun than they are on the procedural motion to proceed. Thus, it is argued, limiting debate on the motion to proceed will reduce the frequency of filibusters. In the context of today's Senate, that argument is not persuasive. Most persuasive is that some time savings can be achieved that are valuable to the Senate.

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Q. If the affirmative vote reqnirement for cloture in Rnle XXII were changed from "three-fifths of the Senators duly chosen and sworn" to "three-fifths of the Senators present and voting," would this still preserve minority rights, but also shift some of the burden to the minority to prevent cloture?

A. This is a most modest but desirable change that will allow the threshold for cloture to be reduced for absentees. Illness, emergencies, and other developments are inevitably responsible for necessary absences and make the threshold more difficult for a majority to reach.

A count of the cloture votes for the 96th-110th Congresses (1977-2008) shows that seven percent of the defeated cloture votes under the existing "duly chosen and sworn" threshold would have passed under the suggested "present and voting" threshold. I would like to see this count confirmed, but plainly the effect of the change is modest but hardly insignificant.

Whatever the count, the change is justified on the grounds that a large majority should not be prevented from acting because some Senators are necessarily absent.

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EXAMINING THE FILIBUSTER: SILENT FILIBUSTERS, HOLDS AND THE SENATE CONFIRMATION PROCESS

WEDNESDAY, JUNE 23, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Murray, Pryor, Udall, Warner, Bennett and Alexander.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Okay. The hearing will come to order, and first I want to thank my good friend, Bob Bennett. He is always here, always diligent, always thoughtful. And all of my other colleagues for participating, Lamar Alexander who is here regularly and Mark Pryor who is here regularly, so thank you both for being here.

And I also want to appreciate the participation of our most senior member, Senator Byrd, who watches these proceedings like a hawk. He knows the rules better than anybody else, and so I would ask unanimous consent that his written statement be submitted for the record.

[The prepared statement of Senator submitted for the record:]

Chairman SCHUMER. Now today I am also very glad to welcome Senators Wyden, McCaskill and Grassley as our first panel. All three of them have been leaders in efforts to end anonymous or secret holds and shine light on the kinds of long-term delays that can hold up a nomination or a bill or weeks or months or even longer, and it is done in the dark of night.

I applaud Senators Wyden and Grassley for their sustained commitment over more than 10 years to this issue, again and again and again urging the Senate to take action.

I also congratulate Senator McCaskill for her energetic and now successful campaign in this Congress to break loose nominations that have gotten stuck. I say "successful" because more than two-thirds of Senators have signed her letter, pledging not to use secret or anonymous holds themselves.

I look forward to hearing from these three witnesses in our first panel.

Now this is the third in a series of hearings I have called for this Committee to examine the filibuster and its impact on the Senate. Our first hearing in April focused on the history of the filibuster. Our second hearing in May dealt with the impact of the filibuster in the current Congress and on the functioning of the government. Today's focus is on this, the title, "Silent Filibusters, Holds, Secret and Otherwise, and Senate Confirmation Process."

Now we did have some good news on this front yesterday with the passage by unanimous consent of 64 stalled nominations. Three of them, who nobody voted against, were first nominated on July 9th of 2009. That is almost a year ago. Why were they blocked for so long? That illustrates vividly the problem we are examining in this hearing.

Despite the easing of the logjam yesterday, what we have seen overall in this Congress is the worst obstruction of presidential nominations in recent memory, and the delays in confirmation are affecting the ability of both the Judiciary and the Executive Branch to do their jobs. Even under a Senate that flipped to Democratic control, President Bush's nominations fared far better than have President Obama. President George Bush's Cabinet was fully confirmed in 13 days; President Obama's took 99 days.

As this Congress has progressed, the President's nominees continue to language, often when they have little or no real opposition. As of June 17th, President Obama had 137 nominations pending on the Executive Calendar. At the same point in his first term, President Bush had only 45.

Here's another indicator, judgeships. As of June 21st, of 84 judges nominated by President Obama 34 had been confirmed; that is 40 percent. For President Bush in the same period, 57 out of 105 judges had been confirmed; that was 54 percent. Now if this pace keeps up, President Obama will have the lowest judicial confirmation rate for his first Congress of any modern President. That is not a superlative that any of us should be proud of.

As for nominations to the executive agencies, at the end of 2009, President Obama had more than one-third pending confirmation than President Bush had at the end of his first year, one-third more. That meant that almost a quarter of all Obama nominations were carried over to the second session of this Congress, and they are waiting longer to be confirmed than the typical nominee in previous administrations.

For too many nominees, like some of those confirmed yesterday, it is months, even a year longer. Clearly, something is wrong, and we need to do something about it. Many of these delays relate to current Senate procedures, and here we can get into a back and forth where I think neither party is blameless. But there is a logjam, and we are trying to work in a bi-partisan way to figure out our way out of it.

What do we mean by hold or silent filibusters when we talk about Senate procedures? While there is no single definition, it generally refers to the indication by an individual Senator a party that if a bill or nomination is brought up in the future they would object to debating it. This threat of a filibuster is what gives holds

their strength even though there is no requirement for a Majority Leader to honor a hold request. So it is sort of the first step backed up by the filibuster, which is what we have been talking about, whether they are silent, whether they are secret, or not.

As the use of anonymous holds has escalated over the last 35 years, there have been repeated attempts to address their use, as our first panel of witnesses will discuss today. Under the Advice and Consent Provisions of the Constitution, the Senator is responsible for confirming or rejecting presidential nominees. But it appears that the Senate, an institution designed to be deliberative and slow, is now dangerously close to gridlocked.

When we are not able to get good, qualified people to be confirmed to government positions in a timely manner, it hurts the Country. We will hear more from our second panel about how the excessive delays are devastating to the operation of government and to the efforts to recruit people to Federal jobs. If it is known that once you are nominated and leave your job you are going to have to wait months and months and months, and then you might not be confirmed, who is going to take a Federal job in the future? And that is going to hurt all of us.

Today's hearing will continue what I hope is a thoughtful, deliberative examination of issues related to the filibuster by this Committee. As I said before, we are not trying to put blame on one party or the other; we are trying to deal with the problem that has brought us close to gridlock. We hope it will serve as a basis for future discussions. I believe it will show that we need to consider reforms to improve the confirmation process.

[The prepared statement of Chairman Schumer submitted for the record:]

Chairman SCHUMER. All Committee members and witnesses are asked to limit their remarks to five minutes. We will not have questions after the first panel, but we will, time permitting, have questions for the second. I look forward to listening to our colleagues and the experts who have come to share knowledge and experience with us, and now turn to Senator Bennett.

OPENING STATEMENT OF THE HONORABLE ROBERT F. BENNETT, A U.S. SENATOR FROM UTAH

Senator BENNETT. Thank you very much, Mr. Chairman. I welcome our colleagues here.

I do not have an opening statement but will respond just briefly to the comments that you have made, particularly to the numbers with respect to those that have been held up. Speaking, if I may, however presumptuous it may sound, on behalf of my Leader, Senator McConnell, who has been Chairman of this Committee, I would point out that prior to Memorial Day Senator McConnell asked unanimous consent to approve over 60 people who had been held, and it was a Senator of the Majority Party who objected to that.

And there were 64 nominations cleared yesterday by unanimous consent, with Senator McConnell's support. Most of them were on the list of those that he offered on the 27th of May to be cleared, and, as I say, they were objected to by a member of the Majority.

So I do not dispute in any way, Mr. Chairman, the numbers that you have cited, but I do not want to leave the impression that all of the obstruction that has come as a result of the use of holds has come from the Minority side. If indeed these 60 that Senator McConnell tried to get through by unanimous consent had in fact been approved in May, the statistics you have referred would have taken the number of people being held down from 108 to 48, which is very close to the ballpark of that that you had cited for previous Presidents.

That does not change the import of this hearing because the hearing is to talk about holds generically, without respect to party. I think it is an appropriate hearing to be held, and I appreciate your having called it and look forward to the testimony of our colleagues.

Chairman SCHUMER. With the indulgence of my other colleagues here, we usually have opening statements from all of the members of the panel, but we have three members waiting. Would it be all right to go forward with our three panel members?

Do you want to say something, Lamar?

Senator ALEXANDER. I would, but I will be glad, could I do it after they make their statements.

Chairman SCHUMER. Is that okay with everybody?

Senator PRYOR. Yes, I would like to do the same thing.

Chairman SCHUMER. Great. Okay. Terrific.

Okay. Well, we have three panel members who all really deserve to be here by their work and their records.

Since 1977, Senator Ron Wyden has been a powerful force in the crusade to changing Senate rules that allow Senators to block nominations and legislation anonymously. Since that time, along with Senator Grassley, Senator Wyden has been undeterred in his efforts to end secret holds. His current initiative, the Secret Holds Elimination Act, reduces the disclosure deadline from six days to two, requires disclosure whether or not the bill or nomination has been brought to the floor. As a matter of practice, Senator Wyden publically announces any hold he has placed on a nominee or a piece of legislation by inserting that statement in the Congressional Record.

Senator Chuck Grassley, for over a decade, has been one of the primary voices to increase transparency and accountability in the Senate by strengthening the disclosure requirement for holds. In 1999, Senator Grassley sent a letter to the Senate leaders that outlined a provision where any Senators placing a hold must notify the sponsor of the legislation and the Committee jurisdiction. In both the 109th and 110th Congresses, along with Senator Wyden, he authored the initiative to require the public disclosure of holds in ethics reform bills.

Senator Claire McCaskill has been a vocal critic of the use of secret holds since she has been here and is currently calling for changes in Senate rules that would end the use of secret holds definitively. She has spearheaded a letter to the Senate leadership requesting them to bring an end to the practice of permitting secret holds. This letter also serves as a pledge for Senators to sign, promising that they will not place secret holds on legislation or

nominations. As of yesterday, 68 Senators had signed the pledge, and Senator McCaskill told me she expects the number to grow.

Senators, your entire statements will be read into the record, and proceed as you wish.

Senator Wyden, you may begin.

STATEMENT OF THE HONORABLE RON WYDEN, A U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you very much, Mr. Chairman, and there certainly should not be a filibuster at any Senate reform hearings. So I am going to be very brief, and I thank you and colleagues for your courtesy.

As you indicated, Mr. Chairman, for more than a dozen years, Senator Grassley and I, a Democrat and a Republican, have sat at tables just like this one, pulling out all the stops to persuade the United States Senate to stop doing public business in secret, and we are very pleased to be joined by Senator McCaskill who brings us energy and passion and skilled advocacy to the cause.

What I thought I would do, Mr. Chairman, is just take a few minutes and walk the Committee through the odyssey that this reform journey has been on. The fact is the United States Senate has already voted repeatedly—repeatedly, Mr. Chairman and colleagues—to ban secret holds. In 1997 and again in 1998, the Senate actually voted unanimously for amendments to ban secret holds. This is not an abstraction. It is not a question of what you ought to do. The Senate voted twice to ban holds, unanimously. In fact, seven years almost to this date, I was before this Committee as well, talking about how we were finally going to get this done.

But every time the Senate voted to pass legislation ending holds in the Senate, bills ending secret holds would then get changed in secret, usually in a conference committee.

So the question is would you not think that a bill reforming Senate procedure, that the Senate passed overwhelmingly, would come back from a conference with the House with a ban on secret holds being intact? That would be logical, and it would be wrong.

Now we have tried, Senator Grassley and I, a whole host of efforts to finally ban these holds. In 1999, we actually got personal commitments from both the Democratic and Republican Leader that neither Leader would honor unless it was formally made in writing. That commitment was made in a letter to colleagues. It was published in the Congressional Record. So the Democratic and Republican Leaders, Mr. Chairman, said they would not honor a secret hold.

However, that pledge was not enforced, and, as Senator Grassley and I have pointed in this 12-year-long odyssey, both Democrats and Republicans continued to employ secret holds in the 106th Congress.

Now that year, Senator Grassley and I got another amendment passed here in the Senate to ban secret holds. This was a recorded vote, colleagues, 84 to 13. That was included in the House, in the Honest Leadership and Open Government Act, and it was passed into law.

That also came back from conference riddled with loopholes. The practice of secret holds has continued.

So, Mr. Chairman, our message, and it is a bipartisan one, is the stalling on secret holds reform has gone on long enough. It is time to end this stranglehold on the question of public business being done in public. It ought to be non-negotiable. If you cannot do it in public, you really should not be doing it, and that ought to be the rule with respect to Senate procedures.

And thanks to Senator McCaskill's good work, we have got new strength for this final push to stop flouting the public's right to know. The American people want accountability.

You have outlined the fact that this has gone on, on both sides of the aisle, and let me just touch on a couple of additional arguments.

First, some claim that a secret hold does not prevent the Senate from considering a nomination or piece of legislation. The reality is it actually does, Mr. Chairman and colleagues. If the Leader has to file cloture, go through all of the procedures, especially at this time of the year, as a practical matter, it is not going to happen.

So a secret hold, in effect, is one of the most powerful tools that a United States Senator has. It can be exercised in secret, and for all practice purposes it means that the American people will not even get a peek at a bill or a nomination. It was an incredible power that Senators have picked up. It has never been written down anywhere.

The history of these holds, there is the hostage hold, the rolling hold, the Mae West "come up and see me sometime" hold. The Senate has as many versions of holds as pro wrestling, and the power to tie the Senate in knots is just as incapacitating as a smack-down wrestling move.

Let me close with one last point that is not really brought up, Mr. Chairman. Secret holds and ending them will take a weapon out of the arsenal of lobbyists. The fact is that at lobbyist's dream is to get some Senator to put a secret hold on something. The lobbyist's fingerprints are not on it. There is no public debate. If you can get a United States Senator to put an anonymous hold on a bill, it is a lobbyist's jackpot. And some of them are so good they can play both sides of the street as a result of being able to do it.

So I close, Mr. Chairman, with this: The essence of holds reform is eliminating them altogether, requiring public disclosure of any hold or objection in the Senate and consequences if a Senator fails to disclose a secret hold.

Mr. Chairman, it is time to end this dozen-year debate in the United States Senate about whether or not public business is going to be done in public. Senator Grassley and I are going to prosecute this cause until it actually happens, and we are very, very happy to have the passion and energy of Senator McCaskill.

Thank you, Mr. Chairman.

[The prepared statement of Senator Wyden submitted for the record:]

Chairman SCHUMER. Thank you, Senator Wyden.

Senator Grassley.

STATEMENT OF THE HONORABLE CHUCK GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. The three of us, Mr. Chairman, just want to bring some transparency to the practice of holds in the Senate. It is a very informal process in the Senate, so it is easier said than done, just how to make them public, but I think our proposal does the trick.

You know a hold arises out of a Senator's right to withhold when unanimous consent is asked. A Senator has a right to object to a unanimous consent request if the Senator does not support it or he needs more information. A Senator, in fact, has an obligation to object if he feels an item is not in the interest of his constituents or if he has not had the opportunity to make an informed decision.

Now in the old days, it was quite simple to do this, when Senators did most of their business at their desk on the Senate floor, just to stand up and say, I object. But now since most of us find the necessity of being off the Senate floor, in committee hearings or meetings with constituents and for a lot of other reasons, we rely on our Majority and Minority Leaders to protect our rights and prerogatives as individual Senators by asking them to object.

Just as any Senator has a right to stand up on the Senate floor and publically say, I object, it is perfectly legitimate to ask another Senator to object in his behalf if he cannot be there. Senators have no inherent right to have others object on their behalf, however, if they want to keep that fact secret, and particularly if it is motivated out of secrecy.

So what I object to is not the use of holds, because I do that myself, but the word "secret" in secret holds. If a Senator has a legitimate reason to object to proceedings, to a bill or a nominee, then he ought to have the guts to say so publically.

A Senator because he does not agree with the substance of the bill or because the Senator has not had adequate opportunity to review the issue. Regardless, we should have no fear of being held accountable by our constituents or anybody else if we are acting in their interest. I have certainly not experienced any negative reaction from my policy of making public the fact of who it is, Chuck Grassley, and why I put a hold on a nomination or a bill.

So, over a decade ago, as Senator Wyden has said, we started with a simple proposed rule that any Senator placing a hold must publish that hold in the Congressional Record, which Senator Wyden and I have done voluntarily ever since. That proposal was blocked in the Senate, but we were offered a non-binding policy by the Leaders instead. Of course, as Senator Wyden, that did not really do the job.

We kept trying, and when Senator Lott became Chairman of the Rules Committee he took an interest in the issue as former Majority Leader, to deal with the issue of secrecy. In fact, we had a hearing like this, as Senator Wyden said, seven years ago.

Senator Lott offered to work with us, and, along with Senator Byrd, we crafted a proposal that was more workable and enforceable. That proposal was adopted, as Senator Wyden said, 84 to 13. But you know what, even with that outstanding vote, it never got enacted.

Then our proposal was included in the so-called Honest Leadership and Open Government Act. Ironically, in a move that reflected neither honest leadership nor open government, our provisions were altered so substantially behind closed doors before the bill became law that they were not workable.

Our current proposal would restore important features that were in that very amendment as originally adopted in the Senate and make it even more enforceable. In our proposed standing order, in order for a Majority or Minority Leader to recognize a hold, the Senator placing the hold must get a statement in the record within two days and must give permission to their Leader at the time they place the hold to object in that Senator's name. Since the Leader will automatically have permission to name the Senator on whose behalf they are objecting, there will no longer be any expectation or pressure on the Leader to keep the hold secret.

Further, if a Senator objects to a unanimous consent request and does not name another Senator as having the objection, the objecting Senator will then be listed as having that hold.

So this will end entirely the situation where one Senator objects but is able to remain coy about whether it is in their own objection or some other unnamed Senator. All objections will have to be owned up to.

Again, our proposal protects the right of individual Senators to withhold their consent but makes it public. The public's business ought to be public.

Thank you.

[The prepared statement of Senator Grassley submitted for the record:]

Chairman SCHUMER. Thank you, Senator Grassley.

Senator McCaskill.

STATEMENT OF THE HONORABLE CLAIRE MCCASKILL, A U.S. SENATOR FROM MISSOURI

Senator MCCASKILL. Thank you, Mr. Chairman and Ranking Member Bennett and the other members of the Committee, for having this hearing.

I, first and most importantly, want to thank Senator Wyden and Senator Grassley. I am clearly standing on their shoulders. They have been tilling in this field for years and years, and they have been the leaders on this issue. I am happy to join their cause and perhaps provide some of that obnoxiously pushy passion that can maybe get this across the finish line. I have a feeling that this is one of the traditions of the Senate that is going to take some obnoxiously pushy passion to actually end.

This practice reminds me of my kids when they were very little, when I would watch them play in the back yard, and one of them would try to get the other one to do something, and then they would stick out their tongue, put their hands on their hips and say, try to make me.

This is an issue where Senators have voted shamefully—shamefully. Senators have voted for Senator Grassley's and Senator Wyden's proposals, and taken on the cloak of accountability and reform, and then behind closed doors have participated in the very practice they voted to end. That is the definition of cowardice. That

is the definition of a tradition that really smears the good name of the United States Senate. That is not what this body is about. That is not the kind of people that should be in the Senate. And that is the kind of practice that we need to finally, once and for all, end.

Imagine the public humiliation that would have occurred yesterday when there was unanimous consent that was successfully shepherded through the Senate, and there were 64 people that were confirmed, and there were a handful of them that had been on the Executive Calendar for months and months and months, and yet there was not one negative vote against their nomination. Not one negative vote. They hung out on that Executive Calendar for months on end because someone wanted them to, but we will never know who it was.

And what would have their explanation been to the press yesterday and to the people they represent, when they voted to confirm after months and months and months? They do not want to have to make that explanation. That is why the secret hold has such a powerful hold on the body, because you can avoid accountability.

This is a very simple message. This is not about ending the hold. I respect the tradition of the Senate on holds. It should be a Senator's prerogative to object to anything that is trying to be done unanimously, but there is no good reason for it to be done in the darkness of night.

The simple message is there are now 68 Senators I am representing at this microphone this morning: 56 Democrats, 2 Independents that caucus with the Democratic Party and 10 Republicans. They have all said in writing, they want to abolish the secret hold and they will not participate in secret holds.

The secret holds a courtesy granted to Senators at the expense of our democracy, and democracy is only as strong as the faith the American people have in it. They must believe that it truly is a democracy, and the hit our democracy is taking at the expense of secret holds is not worth the convenience to Senators to avoid the accountability.

This is a political era where I think it is obvious that secret holds have been used by both sides of the aisle as a political tool, not as a method to take more time to learn about a nominee or to get questions answered, but as a political tool in the overarching game of the success of our team is the failure of the other team. And I indict both parties for this conduct. It is not just the Republican Party that is now in the Minority. I think both parties are guilty of it.

And it is that game, that the success of our party is defined by the failure of yours, that is leading to the cynicism that is rampant in America right now about what we have chosen for careers, and I cannot blame them, especially if we cannot find it within ourselves to do away with the secret hold.

If we can do away with the secret hold, then I think we maybe will be striking the note that America is looking for—that we can, on a bipartisan basis, say there are certain traditions here that maybe are not such a good idea anymore, that openness and transparency is what the people of this Country deserve. This is an urgent matter.

We have laws on the books, but they are not enforceable. I look forward to working with this Committee, and with Senator Grassley and Senator Wyden, to find the right approach that is enforceable. The attempts have been incredibly important, that Senator Grassley and Senator Wyden have made to end this practice, but the problem is the enforcement. That is where the rub is. That is where Senators want to avoid those uncomfortable moments that they are going to be called on the carpet and enforced to name who they are holding and why. That is the key here.

And in the coming days, I will be working as hard as I know how, with Senator Grassley and Senator Wyden, through their leadership and the leadership of this Committee, to find the right approach, so that we can get this done once and for all. I think America deserves it.

Thank you, Mr. Chairman.

[The prepared statement of Senator McCaskill submitted for the record:]

Chairman SCHUMER. Well, I want to thank all three of our colleagues for really excellent and passionate testimony.

I have to say after all the years that Senators Wyden, Grassley and McCaskill have worked on secret holds, I believe it is an idea whose time has truly come in not de jure, if you will, but de facto, relating to Senator McCaskill's point. So we are going to work together to end secret holds, and I commit to the three of you today that I will work with you to achieving that end.

With that, I thank our three witnesses for coming, and we will now go to opening statements.

Senator Udall, would you like to say something?

OPENING STATEMENT OF THE HONORABLE TOM UDALL, A U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Schumer, and thank you for holding this hearing. I very much appreciate——

Chairman SCHUMER. Before you begin, Senator Udall, and then after you, Senator Alexander, I have to step out for a brief second.

Senator UDALL. [Presiding.] Okay. I appreciate the testimony today of our three colleagues.

Over the past few months, during this series of hearings, we have discussed and debated example after example of how the filibuster in particular and the Senate's incapacitating rules in general too often stand in the way of achieving real progress for the American people. Today's topic, secret holds and the confirmation process, is just one more example of how manipulation of the rules continues to foster a level of gridlock and obstruction unlike any we have ever seen before.

I want to commend Senator McCaskill for her dedication to transparency and government. Her fight to end the practice of secret holds is a worthy one that I wholeheartedly support.

Earlier this year, I was proud to sign onto her letter, and today we have heard from her, and she has gathered enough to support to surpass the 67-vote threshold required to consider and amend the Senate rules. That is no small task, as everyone in this Committee would attest. She should be congratulated for her work, as

should all of our colleagues, Democrat and Republican, who have signed onto this effort.

This bipartisan effort is proof that we are capable of working together. But the mere fact that we have to have this conversation, that Senator McCaskill had to work for months for 67 votes, to change rules that the Constitution clearly authorizes us to do with a simple majority vote, illustrates that secret holds are just another symptom of a much larger problem.

The problem is the Senate rules themselves. The current rule, specifically Rule V and Rule XXII effectively deny a majority of the Senate the opportunity to ever change its rules, something the drafters of the Constitution never intended. As I have explained numerous times throughout this series of hearings, a simple majority of the Senate can adopt or amend its rules at the beginning of a new Congress because it is not bound by the rules of the previous Congress. Many colleagues, as well as constitutional scholars, agree with me.

It is through this path by a majority vote at the beginning of the next Congress that we can reform the abusive holds, secret filibusters and the broken confirmation process. We can end the need for multiple cloture votes on the same matter, and we can instead begin to focus on the important issues at hand.

Now critics will argue that the two-thirds vote requirement for cloture on a rules change is reasonable. They will say that Senator McCaskill managed to gather 67 Senators, so it must be an achievable threshold. As I said a moment ago, I commend her for her diligence in building support to end secret holds, but I think it is also important to understand that other crucial reform efforts have failed because inexplicably it takes the same number of Senators to amend our rules as it takes to amend the United States Constitution.

The effect of holds on both legislation and the confirmation of nominees is not a new problem. In January, 1979, Senator Byrd, then Majority Leader, proposed changing the Senate rules to limit debate to 30 minutes on a motion to proceed. Doing so would have significantly weakened the power of holds and thus curbed their abuse. At the time, Leader Byrd took to the Senate floor and said that unlimited debate on a motion to proceed "makes the Majority Leader and the Majority Party the subject of control, and the will, of the Minority. If I move to take up a matter, then on Senator can hold up the Senate for as long as he can stand on his feet."

Despite the moderate change that Senator Byrd, it did not have the necessary 67 votes to overcome a filibuster.

Efforts to reform the motion to proceed have continued since. In 1984, a bipartisan study group recommended placing a 2-hour limit on the debate of a motion to proceed. That recommendation was ignored.

In 1993, Congress convened a Joint Committee on the Organization of Congress to determine how it could be a better institution. Senator Peter Domenici, my immediate predecessor, was the Co-Chairman of the Committee and at the hearing he said, "If we abolish the debatable motion to proceed, we have gone a long way to defusing the validity of holds because a hold is predicated on the fact that you cannot get a bill up without a filibuster."

Despite a final recommendation of the Joint Committee to limit debate on a motion to proceed, nothing came of it.

Talking about change and reform does not solve the problem, but we can hold hearings, convene bipartisan committees and study the problem to death. But until we agree that the Constitution provides the right for each Senate to adopt its rules of proceedings by a majority vote, there will be no real reform.

Thank you, Chairman Schumer.

And I would just ask that a Roll Call article on motion to proceed be included in my statement. Thank you.

Chairman SCHUMER. [Presiding.] Without objection.

[The prepared statement of Senator Udall and information submitted for the record:]

Chairman SCHUMER. And again I want to thank Senator Udall, not only for his excellent testimony today, or his excellent opening statement, but for his interest in this whole issue which helped importune this Committee to call this series of hearings.

Senator ALEXANDER.

OPENING STATEMENT OF THE HONORABLE LAMAR ALEXANDER, A U.S. SENATOR FROM TENNESSEE

Senator ALEXANDER. Thanks, Mr. Chairman, and thank you for having the hearing.

To put matters in perspective from my point of view, to begin with, one, I have supported abolishing secret holds and will again and was one of ten Senators to write the conferees in 2006 in saying do what we voted to do.

Two, there is nothing new about them. I have told the story here of how when President Bush, the first, nominated me for Education Secretary, Senator Metzenbaum held me up for three months, and how Senator Rudman was held up by a Senator. He found out who made the hold and ran against him and beat him. So this all goes back through history.

And at the beginning of this Congress I convened a couple of bipartisan breakfasts on the subject of slow confirmations, and I wrote an article and made a floor speech called "Innocent Until Nominated" out of concern that President Obama and other Presidents were not being allowed to get people in place. I found it was a little more complicated than it seemed. One reason was the President was slow making nominations.

But I am willing to do more of all that and would like to see us address that in a bipartisan way, and I ask consent to include my article "Innocent Until Nominated" in the record of the hearing.

Chairman SCHUMER. Without objection.

Senator ALEXANDER. I also appreciate Senator Bennett's comments on numbers. As I heard the Chairman's numbers, the 65 executive nominations that were approved yesterday bring down to 45 or 53; the number is still pending. That is about the same as President Bush had at this time, 45.

And we do know who was holding those up. It was the President. It was the White House. According to the Republican Leader, the White House persuaded Senator Reid to object to moving those nominations unless they included Craig Becker, who in a bipartisan vote was not approved to go on the NLRB because of the fear

that he might eliminate the secret ballot in union elections by administrative fiat. So the White House then agreed to remove his name from the list, and all 64 nominations went through.

So there was no Senator holding up those 64. It was the White House, and we do know who did that. So that is important to say.

I think Senator McCaskill is right, that the problem with this idea is not the idea of getting rid of secret holds; it is enforcing that.

And I would suggest that a better way to approach the problem, if the problem is delayed nominations, is simply to use the rules that we have. Senator Byrd suggested that might work.

We did a little computation, and let's look at this month. The Senate has accomplished nothing in the last three weeks except by unanimous consent. So Senator Reid could have moved on any controversial nomination on the 7th—that was the Monday we came back—to bring up nominees, and by the end of this week he could have forced through 8 controversial nominations if he had 60 votes.

That would have respected the weekends, that would have respected the no-vote days, and it would have required a few all-night sessions. So that might have persuaded those who objected not to object to others.

If Senator Reid wanted to continue to do that next week, he could have had 12 done, respecting weekends and no-vote days.

So the Majority Leader can bring up a motion. No motion to bring up an executive nomination requires 60 votes; it just requires 51. So the Majority Leader already has the authority.

And insofar as legislation goes, the nature of the Senate is that it is a place to have unlimited debate and the right to amend, and so it is not a place where a freight train is supposed to run through. It is just the reverse of that. It is a place that operates by unanimous consent for a reason.

If we change things, as the Senator from New Mexico would propose, we would have two Houses of Representatives operated by a majority vote. That might seem fine when you are in the Majority, but the shoe can quickly be on the other foot. It might be on the other foot by next year.

And what if the freight train running through the Senate is not the Democratic freight train, but the Tea Party Express? There might be some members who are on the other side of the aisle who would like to use their Minority rights to protect, say, privatization of Social Security or John Bolton as the United Nations Ambassador, which is exactly the way they used those votes before.

So secret holds, we should get rid of them. Getting rid of the Senate's ability to protect Minority rights and defend against the tyranny of the Majority and slow things down so we can have a consensus as we did on Social Security, Medicare, civil rights, rather than run things through with a partisan vote as we did on health care, that is really what the debate is about, and that is why these hearings are important.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you.

OPENING STATEMENT OF THE HONORABLE MARK R. WARNER, A U.S. SENATOR FROM VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. I apologize about being late and missing our colleagues' comments.

I have to preface this by just saying as a new guy here and somebody who has never been a legislator—I have been a CEO in business and a CEO at the State level—I have enormous respect for the Senate and its traditions. Some of the traditions just do not seem to make sense. I mean I think, and I do believe that we can respect the traditions of this institution, that we can respect the rights of the Minority. I concur with Senator Alexander's comments about protecting those rights, but I cannot in any way explain to folks in Virginia, why in a kind of a secret way someone can put somebody's future on hold indefinitely makes any sense.

When the American public questions what we are doing in the first place up here, to explain that this courtesy that was my understanding historically created back in the time when folks came to Washington on horseback and they wanted to have a courtesy to make sure that they could have somebody put on hold until the Senator got here, to say that in the 21st Century, even as bad as air traffic may be, that that needs to be maintained, and that people are not willing to fess up and explain why they are against someone being confirmed and then have that vote on someone, makes no sense to me.

I have been proud to be with Senator McCaskill and Senator Whitehouse as we collected those colleagues' efforts. I know we are at 67 right now. I think there are a number of other colleagues who may join us. I would love to see this hit 75 or 80 and truly be a bipartisan effort. It is long overdue, and the sooner we can act on this the better.

Again as somebody new, I hesitate to counter Senator Alexander's comments, but this idea that we should be spending all our time going through cloture votes and 60-vote margins for nominees that are supposed to be viewed as somewhat controversial because they have either been put on hold or someone wants to filibuster them, and then they pass, as the case of a judge that we had up for the Fourth Circuit that was a former Supreme Court in the Commonwealth of Virginia, supported not only by both Senator Webb and I but also by our Republican Governor, Governor McDonnell—to have Barbara Keenan left in limbo for months on end and then confirmed 99 to nothing.

I may not be a total student of American history, but my memory of civics class in American history is that the filibuster has been traditionally reserved for issues of great consternation and requiring that supermajority and requiring being able to protect the rights of the Minority. It is a sham to me when we have the time of the Senate delayed to go through all this process and then time and again these judges are confirmed, and others are confirmed, at north of 90 votes. I do not get it.

And again, respectful of the Senate's rules, it seems to me to be a waste of time. It seems to be an abuse of power. It seems to me to be reflective of if we are going to attract good people. Whether there is a Democratic President or a Republican President, I think we will not attract quality folks.

I think Senator Alexander's comments about innocent until nominated reflect a lot of the feeling around here. Yes, it is true that perhaps majorities can turn, but if this becomes the rule de jour on a going forward basis, we are going to, I think, undermine the ability for any administration to get their people in place in a timely manner.

It is ridiculous that 18 months into this President's Administration, we have so many senior members of this Administration still waiting to see whether they are going to be able to serve. As a business guy and as a former governor, that is simply unacceptable.

So I look forward to working with my colleagues on both sides of the aisle to try bring a little—while respectful of the Senate's traditions and respectful of Minority rights—a little more rationality to this process.

Thank you, Mr. Chairman.

Chairman SCHUMER. Well, I thank you, Senator Warner, for your excellent comments, and again you are right. Senator Alexander, you know, calculated it would take us eight days to do four nominees, or four days to do eight nominees. They need 60 votes, and that is your point here. And they do not give us the 60 votes, and then we have wasted all that time and not nominated.

Senator WARNER. And if they do get 60 votes, then——

Chairman SCHUMER. Well, once they come to a hold agreement, but you cannot do them seriatim without 60 votes, the way it has proceeded.

Okay. Well, we have three excellent witnesses, and I would like to call them forward, and I will introduce them as they come forward.

We first have G. Calvin Mackenzie. Professor Mackenzie is currently the Goldfarb Family Distinguished Professor of Government at Colby College. He is author of several books including The Politics of Presidential Appointments and Innocent Until Nominated: The Breakdown of the Presidential Appointment Process. Professor Mackenzie is a graduate of Bowdoin College and has Ph.D. in Government from Harvard.

W. Lee Rawls is on the faculty of the National War College, is an adjunct professor at the College of William and Mary. He is the author of the book In Praise of Deadlock: How Partisan Struggle Makes Better Law. Professor Rawls served as Chief of Staff to Majority Leader Bill Frist, as Chief of Staff to Senator Pete Domenici and as Assistant Attorney General for the Office of Legislative Affairs at the U.S. Department of Justice.

Finally, Thomas Mann is the W. Averell Harriman Chair and Senior Fellow in Governance at Brookings. He has also served as the Executive Director of the APSA, the American Political Science Association, and co-authored the book The Broken Branch and many articles on congressional reform. He has taught at Princeton University, Johns Hopkins University, Georgetown University, the University of Virginia and American University.

We thank all three of our distinguished witnesses. I have read the testimonies. They are excellent. They will all be submitted to the record. Each of you may proceed as you wish, and if you can

limit your statements to five minutes the Committee would appreciate it.

Professor Mackenzie, you may begin.

STATEMENT OF G. CALVIN MACKENZIE, THE GOLDFARB FAMILY DISTINGUISHED PROFESSOR OF GOVERNMENT, DEPARTMENT OF GOVERNMENT, COLBY COLLEGE

Mr. MACKENZIE. Thank you, Mr. Chairman, Ranking Member Bennett and members of the Committee, for having me here.

For almost 40 years, I have been a student of the presidential appointments process, and in that time I have interviewed hundreds of presidential appointees, observed scores of confirmation hearings, collected and analyzed reams of data on this process. That is the work of scholarship, and that is my business. I am not partisan. I have no ox to gore and no one's axe to grind.

What has carried me through all of these years is a simple notion, and that is that in a democracy the purpose of an election is to form a government. Those who win elections ought to be able to govern. That is, to say simply, there ought to be a presidential appointments process that works swiftly, effective, rationally, to permit the President to recruit and emplace the talented Americans whose help he or she will need to govern this country. Nothing, it seems to me, could be more basic to good government, but we do not have a presidential appointments process that works.

In fact, in this wonderful age when new democracies are blooming all over the world, many of them have copied aspects of our Constitution and our government, but one process that no other country has chosen to copy is the way we fill the top executive posts in our government, and for good reason. Even those untutored in democracy know a lemon when they see one.

Our appointments process now undermines the very purposes it was designed to serve. It does not welcome talented people to public service; it repels them. It does not smooth the transition from the private to the public sector; it turns it into a torture chamber. It does not speed the startup of new administrations elected by the American people; it slows that process to a standstill.

Blame for this, for the deterioration of the appointments process, lies at both ends of Pennsylvania Avenue. This Committee's jurisdiction does not extend to the other end of the avenue, so let me focus on the Senate confirmation process.

There are problems with this process, but primary among those are delay, redundancy, inconsistency and uncertainty. The confirmation process is not the sole source of delay in filling executive or judicial positions, but the simple fact is that it takes far too long to confirm presidential appointees. The time required for a typical confirmation, not a controversial one, a typical one, has steadily grown over the last three decades. Even with a Senate controlled by his own party, as the Chairman indicated in his opening remarks this morning, President Obama's appointees have been confirmed more slowly than any of his predecessors.

Why is this? Well, first there are too many appointees and too many hearings. For the first 130 years of our history, there were no confirmation hearings at all. Now we hold them for even for the lowest ranking nominees in all agencies, creating scheduling night-

mares for Senate committees, overworked staffs, and long delays for many nominees.

That problem is compounded by the growing use of holds, which you have a heard a lot about here this morning. For scholars like me, holds are a formidable research problem. Counting them is a little like counting moonbeams or weighing fairy dust; they are awfully hard to see. But we all know that holds, especially in the confirmation process where nominees make especially convenient hostages, have become epidemic in the Senate.

Filibusters are another source of delay. Nominations are rarely filibustered in practice, but the threat of a filibuster has become so common and constant that we now know that it takes 60 reliable supporters in the Senate to get almost anybody confirmed.

Delay occurs as well because every nominee must now endure an obstacle course that is littered with questionnaires, reports, investigations and vetting. These are inconsistent in the information they seek, and they are often redundant, especially of similar investigations and questionnaires managed by the White House.

All of this imposes a heavy burden of uncertainty on those who are willing to be nominees. Once they agree to enter the appointment process they never know when, or if, they will emerge. When a friend says I have been nominated by the President to a position in government, is it congratulation or commiseration which we offer?

These are human lives, and I think this is a very important part of this concern that is overlooked. Good people have agreed, often at significant personal sacrifice, to serve their Country. Far too often, we treat them like pawns in a cruel game. They are forced to put their lives on hold, to step aside from their careers and jobs, to forego income, and then to twist in the wind while the fates of their appointments are decided by a Senate with little or no sense of urgency.

We must do better than this, and I believe that we can. We have recognized the ailments of the confirmation process and the cures for those ailments for a long time. I have suggested some of those in my written testimony, and I would be pleased to talk about those in our question period after this.

But what is needed now, more than anything else, is simply some common sense, some commitment to undertake this task and, most importantly, some leadership. I commend this Committee and its Chairman and its members for taking on that task, and I hope you are successful in doing it.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mackenzie submitted for the record:]

Chairman SCHUMER. Thank you, Professor Mackenzie.

Mr. Rawls.

STATEMENT OF W. LEE RAWLS, FACULTY, NATIONAL WAR COLLEGE AND ADJUNCT PROFESSOR, COLLEGE OF WILLIAM AND MARY

Mr. RAWLS. Thank you, Mr. Chairman. Thank you, Senator Bennett. My pleasure to be here.

I think of the three folks before you, I will be the minority voice with respect to the nominations process, both judicial and for the Executive Branch nominees. My written testimony is basically an unrepentant defense of extended debate. My view is that whatever bipartisanship, moderation, continuity and consensus that are anywhere to be found in the American legislative process come from the filibuster. Absent that leverage, it will not exist. So my feeling is the Senate plays an extremely important role where this point of leverage from the Minority requires that all parties sit down and negotiate, and sometimes it works, sometimes it does not.

I have in my mind the filibuster as a two-sided coin. On one side, you have the virtues I have just mentioned. The other side, you have the fact that matters are slowed down to the point that individual members, as expressed here today, feel extremely frustrated.

My belief is the U.S. Senate is unique in the known legislative universe. It is unique because of the permissive rules involved and Minority rights, and that any change with respect to the rules, with respect to extended debate, would fundamentally alter the DNA of the United States Senate and how it works.

In addition, America, despite all the failings indicated, is still the richest, most powerful Nation in the world, and so I think the Committee should be very cautious when it considers any changes to one of the key branches in the constitutional scheme for separation of powers, recognizing that the filibuster was not in the original Constitution.

With my defense of first principles on the filibuster on the record, let me just turn quickly to the issues before the Committee today, basically the nominations process, and I will say my counterpunching views on several matters.

First, when I was nominated to be Assistant Attorney General for Legislative Affairs, I was held up. I was held up by a member of today's Majority. And, lo and behold, it was for good reason. Now I felt that it was something of a waste, but it took us a while to negotiate, to get through, but I certainly recognized the rights of that particular member, and he had a particular gripe with respect to the department at the time.

I was held with two other members' nominees of the department. My view at the time was he should have held them and not me because my job is to go down to the Legislative Affairs and take phone calls from the members. I felt like I deserved something like combat pay rather than to be held, but we will leave that as a personal view.

I would like to echo Professor Mackenzie's view that there are just too many nominees that come to the Senate for review. It would not take much to cut that by a third to a half. It has become very elaborate. We have tax documents. We have investigators. I was at the FBI for a while. We have all sorts of people. We spend a lot of time.

I think the members should just ask, who do we really want to talk to? And my criteria would be if a member of a committee wants to talk to the individual nominee, is willing to meet with them and goes to their hearing, then that nominee should be subjected to advice and consent. Absent that, I hate to say it, but

something like Assistant Dogcatcher at the FEC, I do not see why the members are spending their time on that many nominees.

Generally, the Cabinet goes pretty quickly, and then we just lose track somewhere with respect to middle management, and I think there is a compelling case to be made for moving faster with respect to middle management. One of the things is just to focus, set priorities. And if I had a gut instinct it would be that the problem really comes mostly from committee staff on both sides that are reluctant to surrender nominees and the member themselves would be really quite willing.

On judges, my view is, having been here in the Senate as Chief of Staff for Senator Frist when we had a 51–49 margin, that I have a tough time kind of pulling out the violin for folks who have a 59–41 margin. So I will, in a sense, take a pass on that. The judges are lifetime appointees, and I think some close scrutiny is completely in order. Again, I think it is a matter of focus.

The last point I would make is that when I was with Senator Frist we spent a lot of time on nominees. We even kept some of the members of the Majority and Minority in all around the clock on one occasion. So, given that, I am probably on a different wavelength than some of my colleagues here.

Given that, I would be prepared to discuss any nuances in question and answer.

[The prepared statement of Mr. Rawls submitted for the record:]

Chairman SCHUMER. Thank you for your counterpunches, Mr. Rawls.

Mr. Mann.

STATEMENT OF THOMAS E. MANN, SENIOR FELLOW, GOVERNANCE STUDIES AND THE W. AVERELL HARRIMAN CHAIR, THE BROOKINGS INSTITUTION

Mr. MANN. Mr. Chairman, Mr. Ranking Member, Senators Udall and Warner, first of all, I want to commend you for holding this series of hearings on filibusters and holds.

We have seen now through the testimony that has come before us, through statements by Senators and discussions, that changing norms and practices regarding use of filibusters, holds and cloture petitions have produced something very different than what my dear friend Lee Rawls has been talking about—that in fact, in recent years there has been an extraordinary increase in the frequency of extended debate-related problems on major measures and nominations that come before the Senate.

We also ought to face up to the fact that this is driven by the ideological polarization of the parties in the Country and in the Senate, combined with the increased partisanship that flows from it and the fact that Majority Party control can change in an election. The stakes are so high that the incentives are powerfully driving a form of behavior that a colleague who testified earlier, Steven Smith, called a procedural arms race by both the Minority and responses by the Majority, that have diminished the Senate as an institution and weakened the Country's capacity to govern. Those are serious charges, and I commend you for wrestling with them because the Country depends upon it.

My testimony adds to the evidence, the statistics that the Chairman gave, that my colleague Cal Mackenzie has given on judicial nominations and senior executive positions, and I will not take the time to go through those now.

The reality is that, of course, there are thousands, tens of thousands of nominations that come before this body, and 99 percent are routine and confirmed, but there are problematics with circuit court judicial appointments and with senior level executive appointment that cannot be denied. Confirmation rates have declined dramatically in the courts. These delays in confirming appellate judges have led to increased vacancy rates which have produced longer case processing times and rising caseloads per judge on the Federal dockets. Moreover, the controversies and delays over appellate judges are spilling over into district court appointments, which used to be a pretty routine process.

The same evidence is available on senior executive positions. The delays are really quite extraordinary, but you know the statistics actually understate the problem because it does not look at the variability across agencies.

Some Senate committees have a practice of doing full-fledged IRS tax investigations that depopulate, or disallow, a new administration from populating, staffing the Treasury Department when the financial system is on the verge of collapse. It really is a tragedy in some of the stories. One nominee, a former colleague of mine at Brookings, nominated for a crucially important position, waited 13 months in the Senate—13 months over, we think, a minor tax matter that was the same as her husband's. They filed a joint return. He was confirmed in less than two months a year earlier, but somehow her nomination was held up. These stories are legendary and are a real problem.

Listen, Senators have long viewed the confirmation process as an opportunity to express their policy views and to get the administration's attention on matters of importance today. But the culture of today's Senate provides no restraints on the exercise of this potential power, no protection of the Country's interest in having a newly elected President move quickly and effectively to form a government. You just cannot allow old rules to be so twisted by new norms and a culture of permissiveness that really damage our capacity to govern.

There are things to be done. Secret holds are a start, but let me just suggest that in many confirmations actually many holds are public, but they are extended and do as much damage as private holds.

So what I urge you to do, in conclusion, is think about increasing the burden on those who wish simply to delay action—maybe 60 percent to get a cloture vote of those present and voting, maybe fast-tracking nominations as we have done in various other aspects before the Senate. Think ambitiously. This is a serious problem.

[The prepared statement of Mr. Mann submitted for the record:]

Chairman SCHUMER. Thank you, Professor Mann, and I thank everyone for their really excellent testimony.

I have to make a quick phone call, so I am going to call on Senator Udall to ask the first round of questions. Then we will go to Senator Bennett. Then we will finish up.

Senator UDALL. [Presiding.] Thank you, Senator Schumer, and I thank all of three of you for your very, very thoughtful testimony here today.

Professor Mackenzie, you discuss in your testimony the negative consequences of the filibuster on the confirmation process. One possible reform you mention is the resolution considered by this Committee in the 108th Congress, Senate Res. 138, and that resolution would have altered Rule XXII by placing a steadily decreasing threshold for cloture on nominations until after successive votes. Cloture could be achieved by a majority.

The lead sponsor of that resolution was Majority Leader Frist, and its co-sponsors included three current Republican members of this Committee.

Do you see any negative consequences with this proposal, and what if it was extended to cover all matters and not just the confirmation of nominees as Senator Harkin has proposed?

Mr. MACKENZIE. Thank you, Senator. I do not profess expertise on all matters before the Senate, so let me just address the question of confirmations.

One can understand that there may be a time when a Senator or several Senators would like more time to contemplate a nomination. They would like to get more facts. They would like to carry through an investigation that has not been completed, or something of that sort. So there may well be a time when postponing action on a nomination, whether it is through a hold or a filibuster, is appropriate.

But where is the end game in all of that? You see these processes through the eyes of those Americans who have committed no crime other than saying yes when the President asked them to serve their Country, and they have no idea when the end game is going to occur, if it is ever going to occur.

I think a process like the one that would have a decreasing majority needed to sustain a filibuster or to bring it to cloture would make a good deal of sense, just to force those who wanted more time to use that time in some profitable way and get it done, and then let's have an up or down vote on the nominee.

Senator UDALL. Now Professor, and you heard a member of this Committee say earlier that if we make any of these changes like you have just talked about, that we are going to turn the Senate into the House and thus become exactly like the House. Do you have any comment on that?

Mr. MACKENZIE. It was the first time I had ever heard the words "freight train" in the same paragraph with "the Senate." That is not a fear that most Americans kept awake at night about.

I would ask those of you who have to make decisions on this: What does a filibuster really accomplish other than delay and, in some cases, defeat of a nomination?

Does a filibuster change people's minds?

Does it convert doubters into supporters for a nomination?

Is there an actual debate that occurs on a filibuster that people listen to and are open-minded about?

I think anybody who follows this body knows the answers to those questions are usually no, and that a filibuster is a procedural tactic designed to prevent, or at least delay, a nomination from

being confirmed. That is problematic for new administrations, it is problematic for old administrations, and it is certainly problematic for the people whose nominations are under consideration.

Senator UDALL. Thank you.

Tom Mann, would you also respond to this idea that if we change the rules, respecting Minority rights, that somehow we are turning the Senate into the House?

Mr. MANN. I do not. The filibuster, the routine filibuster was never anticipated by the framers when they purposely set out to design two very different institutions. The length of term, the method of appointment, the size of constituency—they expected the Senate to be the saucer to cool the hot tea or coffee of the House, even without this. So I think there are other safeguards built into the system.

Having said that, you can go a long way in adjusting the rules of the Senate without completing eliminating the possibility of a determined Minority to stop some action in the Senate. You can do many things short of a blanket ultimate Majority cloture vote, although I am not arguing against that or for it. I am saying there are many things you can do.

You could say the nomination process to staff an administration should be so routine a part of a new presidency or a new governorship that that is going on to a separate track. It is already on the Executive Calendar. You could set up rules that have a time limit associated with that, and you would not have to go through the trouble of filing cloture motions.

It seems to me there are various ways of making adjustments in the rules to confront the new reality that they are producing, in this new world of polarized politics and self-indulgence of individual Senators, a very destructive pattern of behavior.

Senator UDALL. Thank you, Chairman Schumer. Thank you very much.

Chairman SCHUMER. [Presiding.] Thank you.

Senator Bennett.

Senator BENNETT. Thank you very much, and thank you for your testimony, all of you.

I wish this were a college seminar where we could get more deeply into all of the issues that you raise because I have a number of reactions to some of the things that you are saying. The first one, coming out of my own experience, is that there is a judgment call that is made in this situation, and it is made by the Majority Leader.

Let me give you an example out of my own experience. I do not use holds as a regular device. Very, very seldom, do I put a hold on any nomination, and I always do it publically. I do not play the secret hold game.

This Administration performed something—we will not get into the details and take the time—that I thought was absolutely egregious and outrageous, and the only way I could demonstrate my concern about that was to put a hold on a nomination. It was David Hayes, the Deputy Secretary of the Interior, against whom I have absolutely nothing, no objection whatsoever, but the only way I could demonstrate my outrage at what the Administration

and the Secretary of Interior had done was put a hold on Mr. Hayes's nomination.

You say you do not see the point? I immediately got everybody's attention to the issue that I was talking about, and I had no other leverage with which to do that.

I got a phone call from the Majority Leader: Bob, what is the problem?

I described the problem.

He said, that is legitimate. See if you can work it out.

I had a phone call from Ken Salazar. We talked the thing through. As it turns out, we cannot work it out, at which point I get a phone call from the Majority Leader: Bob, I am going to have to file cloture on David Hayes's nomination.

All right, fine. He files cloture.

I go to my fellow Republicans, make a presentation to them as to what had been done by the Department. Republicans who have absolutely no understanding of a public lands State, who come from the East Coast original 13 colonies, do not have the slightest idea what I am talking about, said to me, well, if they could do this to your State, maybe they could do this to mine, and we are going to stand with you.

And we defeated that cloture petition, whereupon I get some more phone calls, and some more negotiation goes on. Ultimately, while I did not get a reversal of the proposal, pardon me, a reversal of the action, I get a commitment that David Hayes will go to Utah, sit down with the constituents, experience firsthand—and he has told me rather ruefully it was not the happiest experience of his life—the outrage that was there in the State, and we got some kind of a progress going forward on it.

I do not think that that is a violation of anything the founders had in mind, and I do think that is something that a member of the House could never, ever do. So I do suggest that we might be turning the Senate into the House if we get rid of this.

Now, by contrast, do any of you know the individual whose nomination from President Obama, in a Democratically-controlled Senate, whose nomination has been on the calendar the longest?

Mr. MANN. A member of the FEC.

Senator BENNETT. Right, John Sullivan, who has been nominated for the FEC.

Do you know who is holding him? It is not a secret hold.

All right. It is Senator Feingold and Senator McCain.

All right. Take the example I just gave of my experience with David Hayes. The Majority Leader made a decision to file a cloture petition because he felt David Hayes's nomination was sufficiently important that he move forward, and he ultimately prevailed because I could not hold of the Republicans all of the time on that one. We got the attention we wanted, and then there were Republicans who said I cannot keep voting against cloture on this, Bob, and the thing moved forward.

The Majority Leader has made a decision not to proceed for John Sullivan, and he has been on the list longer than any other nominee. This is not a decision the Minority has made. This is a decision the Majority Leader has made, and I am not questioning (A)

his right to make it or the fact that he may have made the right decision.

But let us understand that the way the institution works is not quite the way it may sound in a classroom. And there are ways to break a filibuster, there are ways to move a nominee forward, and there are ways to make political points.

Back in the time when I was in the Minority the first time, we had a Majority member who was mad at the Department of Interior, who put a blanket hold on every nomination out of the Department until he got what he wanted in terms of a National Park designation. And it was very frustrating to every one of us on the Committee.

I was on the Interior Committee. Now it is called the Natural Resources and Energy. I am old enough to call it the old Interior Committee.

Every nominee before that Committee was held up by this Senator, and the hold was honored. That blanket hold on every nominee regardless of who they were—he did not even know their names—was honored by the then-Majority Leader, George Mitchell, and as a consequence nothing moved forward until the Senator got what he wanted.

So I am opposed to secret holds, but I recognize in the volume of things—and I think your point about the volume of nominations is legitimate—the Majority Leader gets to make decisions here. I will shine the spotlight on this one, and I will quietly endorse the position of the Senator who says nobody from this department can go forward until that Senator gets what he wants, and it is the Majority Leader who plays a role here that a lot of us are not paying attention to.

Not a question, but a reaction to our excellent panel of witnesses and the comments that they have made to us, and if they want to react, I will assume that I will take the time of the others who are not here and allow them to react on their time.

Chairman SCHUMER. Well, that would be a change in the Committee rules if that is okay.

Senator BENNETT. All right. Never mind.

Chairman SCHUMER. Go ahead. Do you guys want to react to that?

Mr. MANN. Well, I just wanted to say, Senator, it is a classic collective action problem. You tell a legitimate story of trying to get a foothold, some attention, to be the squeaky wheel that gets the grease, that brings an administration's attention to a problem that you see.

What if every Senator does that, multiple times, sometimes for less serious matters than you have raised? And we can come up with a lot of examples of those. Then it begins to do real damage to the capacity of the Senate to operate, and to an administration to get up and running.

You have other resources. You powerfully sit on committees. You have effects over appropriations. You can hold press conferences. You can get attention other than taking nominations hostage. And it may just be that the cost of you and 99 of your colleagues doing this on a regular basis is too great, and you ought to use other resources.

Chairman SCHUMER. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

A couple of comments, first of all, Senator Bennett, you started I think very good comments with something that increasingly seems to be absent. You said it has to be used with judgment. I have enormous respect for you, and I could live with the situation as long as we got rid of the secret holds, as long as there were 99 Bob Bennetts all exercising some level of judgment.

I do want to try to let Mr. Rawls, who I know is chomping at the bit. I am going to give you good time to weigh in here.

But I have to tell you, again as a new guy and never been a legislator, I am increasingly concerned. I hear it on my side. I hear it on your side. This is an institution where it seems like people start to hold grudges that have nothing to do with policy, and I have heard time and again from Minority members now, well, we are doing this because you guys did it.

You know, I am trying to be this bipartisan guy, and they are: Well, we are doing this because you guys did it when we were in the Majority.

Lord knows if it flips back and the Republicans are in the Majority, you are going to have an awful lot of Democrats who go through this litany of people. I just do not know how you run a modern, 21st Century government in that fashion.

I am very biased as a non-legislative background, that I think, in short, the chief executive ought to have their team in place. If there is something wrong with somebody, it ought to be debated and the person ought to be voted up or down. And if they stink, the CEO ought to replace that person with somebody else.

I am not sure it is an all or nothing proposition. There may be a proposition that says get rid of secret holds, and then you have some judgment, and if you go beyond X you only got so many cards you got to play. I do not know what the right, but there should be some way we could sort through this.

I do want to make sure Mr. Rawls, who I would have gone to even earlier because as a William and Mary adjunct professor I want to honor that, if he actually lived in Virginia as opposed to Kensington, Maryland.

Mr. Rawls, I guess the thing I want you to respond as the counterpuncher is the use of filibuster. I do not see it as anything, agreeing with our other witnesses, in most cases, other than delay when the person is then confirmed 99 to nothing, or 95 to nothing. If the person is confirmed even 80–20, even 90–10, there is still somebody felt strongly enough to make the case, and they may have lost the case, but they made the case for some reason.

There was no case made when people are confirmed unanimously after being held in limbo for extended periods of time, whether you are judges or as Professor Mackenzie said.

I have had the challenge of trying to recruit people to government. It is a hard, hard challenge. Never before have we needed more quality people to be willing to serve. If you are left in limbo for months, and now going on years on end, I do not care whether it is a Republican or Democratic President, we are not going to get good folks.

So I just ask you this; how do you jar that need to have a thorough examination with these unanimous or near unanimous votes on these items?

Mr. RAWLS. Strangely enough, there is consensus at the table on the need to severely pare the number of nominees that get advice and consent. Once you say advice and consent in the Constitution, and then you have any form of delay and extended debate, you are going to get various examples.

I have to say that Senator Bennett's world that he described is more than my world during my 13 years of staff on the Hill, where there are lots of negotiations. Usually nominees have a mentor or godfather, either in the Executive Branch or here. When that nominee is in trouble, the first thing the mentor does is get to the Hill and start talking and work it through. I have personally been part of a fair number of examples where things have worked through. So I just say that is more my world.

Senator WARNER. I would ask you to do a real-time check with some of your colleagues right now. As a new guy, that is not my experience of what is happening.

Mr. RAWLS. So my reaction would be, first, get the number of nominees down. As an executive for the State of Virginia, if you were having trouble with the legislature and they had 100 and you said to them: Why don't we really look at 10 and let's fight those fights, like Senator Bennett fought? Then get rid of the other 90. They do not need to come up.

I am not an expert on the number of military that come up here, but you get dumped thousands.

Mr. MANN. Sixty-five thousand.

Mr. RAWLS. Sixty-five thousand from the U.S. Military, that is some monster waste. Then occasionally a member of one side or the other holds them all for some purpose, and you have a flap.

So I think that not to put the full burden on the Senate, but I think the Senate itself should take a look at the nomination process. At the Department of Justice, there are five or six folks you need to be concerned with. You do not need 20 or 30 and all that machinery that goes with it. So I suggest that for starters. Then if you have a problem after that, then you can keep grinding away.

I would say there was one point made with respect to circuit court nominees. So that is the real issue on the judges' side.

Districts move, they get slowed, but they go through, and usually they have a home State Senator that starts fighting and holding the other guys' stuff at some point.

Supreme is so in the public that you play that. It is at a higher order.

The circuits are where the risk is. I do not have an easy piece for it because in fact both sides have activated large-scale groups that follow these nominees very closely and come on in when there is a nominee they do not like and urge one side or the other to limit those circuit court nominees. So that is the dilemma before the Committee. Because it is a lifetime appointment, I do not think you are going to get around that. And to the extent that the courts have become more activist over the years, it just seems to me it is part of a fact of American life.

I would like to make one last——

Senator WARNER. Can I just add one. I mean my time is way over, and the Chairman is probably not going to invite me back.

Mr. RAWLS. Yes, I am probably over too.

Senator WARNER. We have just done a lot of district court nominees that have had to have been filibustered with 90 unanimous nominees. So it is not just circuit court.

Mr. RAWLS. Right. The only thing I would say is that this is a function of the U.S. Senate has so much time each year in setting its priorities for nominees, legislation. The focus has been legislation. I do not think the Nation has been diminished. Anybody that can do TARP, stimulus, major health care reform and getting financial reform is actually not broken and is not diminishing the United States of America. If the fact is that a limited number of judicial nominees have been held along the way because there has not been floor time, that comes with it. That is the role of the Senate—is setting those priorities.

And the only other point I would make is if you give up Minority resistance to this, the role of the Senate vastly changes within the entire legislative machine. The Majority of the Senate determines what gets conducted, strategically and operationally. If you take away Minority resistance, the role the Majority Leader and his senior leadership plays vastly changes in the whole game.

That is just a tirade on the side there.

Chairman SCHUMER. Thank you, Senator Warner and Mr. Rawls.

Senator Murray.

Senator MURRAY. Mr. Chairman, I just want to thank you for having this hearing, and Senator Bennett and all of the panelists who have participated. I have watched a little bit from my office, and I just wanted to say I think this really an important discussion. It affects not just our quality of life but a whole lot of people who have been hung up in this process and any administration's ability to get anything done.

I have joined with the majority of my colleagues in pledging to not use the secret hold procedure. I think that is a good first step.

Particularly though, I find it very troubling that a single Senator hiding behind an arcane rule of the Senate can obstruct the nominations of literally dozens of presidential appointments usually, we are finding, for reasons that have nothing to do with that person or their background or the issue at hand. Earlier this year, there was a Senator who put a blanket hold on 70 nominees, and it was widely reported that the reason was that he was focused on 4 of those 70 and really just 2 issues within their entire purview.

So to me, this is out of control, and we have to look at how we can change this, so the Senate can function, so these individuals can be appointed. And really to me, part of the problem is this secret hold. You do not even know who to go talk to, to work out an issue at this point.

So I think this hearing is very important, and I am really pleased that the Chairman and Ranking Member are having hearings and looking at how we can move this.

I do not have a lot of questions. I just wanted to ask the panelists sort of both sides of this. What is a valid reason for a secret hold? And secondly, are there other examples of the extremist use of this procedure besides the one I just mentioned?

Mr. MACKENZIE. I do not think there is a valid reason for a secret hold.

I can imagine a circumstance when there might be a valid reason for a hold. I have argued over the years that holds ought to be time-limited, say 14 days. Then if the person placing the hold wanted to extend the hold, if they could get the concurrence of the majority of the Senate to do that, they could extend that.

Senator MURRAY. So with 50 percent?

Mr. MACKENZIE. But if—excuse me, Senator. Go ahead.

Senator MURRAY. A majority, 51 Senators?

Mr. MACKENZIE. Yes, a simple majority.

But in a situation like the one that Senator Bennett described earlier, of having a substantive policy reason for wanting to work something out with the Interior Department, if 14 days is not long enough to do that and it is important enough to the Senate to hold up that nominee, that person going through this process, for a longer period, and a majority of the Senate would go along, that does not seem unreasonable to me.

Secret holds, it is hard to make a brief for those.

Senator MURRAY. Mr. Rawls.

Mr. RAWLS. Well, I have no defense on secret holds. I would have to say, and maybe just because I am a little bit of a dinosaur, but usually when somebody, as one of the staff when I was working in the Majority Leader's office used to say, if somebody takes a hostage, wait for the ransom note.

So, as a general rule, at some point you can figure out who has the hold because at least—and I will just defer to Senator Bennett on this—on the Minority side the procedure is that the Majority Leader can find out who the hold is and, if it affects another Minority member, will inform them. So, within the Minority, they are not secret.

If on a Committee, let's say the Judiciary Committee, if the Majority member were to go the Minority and the Minority member supported him, then it will not be secret. We will let that Minority member know.

So I do not really know. I have to say at this stage I cannot say that I know exactly how the hold process is working in the Senate. But it used to be you would eventually penetrate, and you would know who it was, and then you would go over and negotiate.

Senator MURRAY. But I do not get the point of secret. If I put a hold on somebody, I want the world to know what I am fighting for, and I also want my constituents to know what my logic is. I represent them. I do not come here uniquely, just somebody with a grudge. I represent people. So everybody has a right to know why I have placed a hold on somebody, and I need to make that public and make my arguments.

So I do not understand the reason for secret.

Mr. RAWLS. I do not either. I was just saying as a matter of course, and maybe it is a lot worse today. Historically, you would find out who held, and then you would go talk to them. But if it is a real problem, then I do not have a brief on the secret side.

Senator MURRAY. Mr. Mann.

Mr. MANN. It has become a problem, much more so in recent times. It is complicated. The holds are informal processes, right?

They are an indication of the possibility of objecting to a U.C. if it is raised on the floor. So Majority Leaders have to manage this information, and right now it is not in their interest in managing the floor to publicize and embarrass an individual Senator who wants it to be secret.

So having the full body take some action, taking a moral stand if you will, even though it is difficult implementing it and you have be wary of building a hold into the rules, which does not now exist, and therefore legitimizing it to an extent it would not otherwise be legitimized. That is a very important matter, and so I urge caution.

But sometimes moral suasion and shame can go a long way. If you build a strong norm, with support on both sides of the aisle, that this is not the way to do business, you may have some luck. But I think you are going to have to go beyond that if you are really going to discipline this process.

Senator MURRAY. Okay. Thank you.

Thank you very much, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Murray, and thanks for coming.

I guess I am questioning last here because I did not go first. You are all against secret holds. I want to thank all of you for testimony.

Senator McCaskill, I think made the point that it is the enforcement that is difficult, if not impossible. You could make sure, if you wanted, that someone's name was attached, but you know you could end up with the tradition that the Majority or Minority Leader would just put their name on all the time. Then there is an argument, well, the opprobrium that would attach to a Minority or Majority Leader who just blocked everything might discourage it. I am not so sure that is true.

Of course, I want to get rid of secret holds. I think they are wrong, and at least having someone's name attached is better than having nobody's name attached.

I also think your comments make a lot of sense, Professor Mann. To actually do a rule, we would have to put a hold. We would make it official that holds exist, which is now more by tradition. I am not sure that is good idea.

So what would you think of the idea—and I would ask, again I am going to ask all three witnesses about this general question—the idea of a standing order as opposed to a rule change which might do the same thing?

So those are my questions to you all. Any thoughts on what would happen if it was just the Majority or Minority Leader who became de facto the only objector ever? Obviously, you can write in the law that if someone asked them to do it that person would have to put their name in. Very hard to enforce, and there is a way of not asking: Oh, gee, Majority Leader, I am not asking you to do this, but this would really hurt my State, kind of thing.

Views about a rule versus a standing order, and general views about enforceability on secret holds. We are not arguing about holds now, but secret holds.

So would you like to begin, Professor Mackenzie?

Mr. MACKENZIE. Sure. I do not have an informed opinion on the difference between a standing order and rules change, but I think

you are exactly right that the Senate is never more ingenious than when it is trying to avoid constraints on the behavior of individual members. I would expect that.

There used to be a Senator here who some people called Senator No. One can imagine there might be a Senator Hold, who if you wanted to have a hold but did not want to have it identified with you, you might go to this Senator and he or she would willingly stand up and take the heat for that.

So one does not know. Enforceability is always going to be a problem, but I do not think that ought to be a deterrent to going ahead and trying to make good rules.

Chairman SCHUMER. Mr. Rawls.

Mr. RAWLS. I would put myself down as agnostic on rule versus standing order. I had not thought about the Majority/Minority Leaders becoming the official holders, and my gut is that is where you will end up. So that would be a substantial problem.

I had in fact even envisioned there might be that each side would have an official Senator Hold, but I do think it will flow then down to the leadership. So I see that as a fundamental problem, not one that I think is easily solvable.

So I think you are going to have a continuing problem with enforcement.

Chairman SCHUMER. Mr. Mann.

Mr. MANN. Mr. Chairman, I do believe there are enormous problems in enforcing any kind of a prohibition on secret holds.

I think your best—there are two things you can do. One is to retreat back to Rule XXII and make changes in that that would achieve the objective, but that would probably lead you to move in a more aggressive reform action than you may be prepared to do.

The other is really a matter of moral suasion, of building an expectation. I mean norms change all the time in the Senate, and getting behind an effort to say what is legitimate and sort of moral, and we live in an era in which transparency is increasingly important in all aspects of our lives and of governance more generally.

So it may be that is the direction, which would lead me to say a standing order, or a sense of the Senate, rather than trying to—I recommend against giving a hold a formal standing in the rules. I think that would do real damage.

Chairman SCHUMER. Thank you.

One final question and then we will call it a day. Mr. Rawls mentioned limiting the number of nominees who actually came before the Senate. He proposed, actually I guess it would be object as you go, or something. People would have to demand a hearing or whatever, and otherwise they would go through. Could you each talk about that, just limiting who actually has to be confirmed?

Mr. RAWLS. And I was not for being that formal. I was just thinking that the committee themselves should ask themselves which of these nominees do we want to hear from, who do we actually want to meet.

Chairman SCHUMER. But did you mean generically or specifically, in other words, the Assistant Secretary of Defense for Procurement? I do not even know if there is one.

Mr. RAWLS. I was going to say generically.

Chairman SCHUMER. Generically.

Mr. RAWLS. I think the committees should look at their nominees and then make a concerted effort to reduce the number, so that there is a focus on the senior folks that provide oversight, and I would leave that really——

Chairman SCHUMER. And then we would somehow institutionalize that, that only these six people in the Department of Interior would need confirmation.

Mr. RAWLS. Yes, yes, along those lines.

Chairman SCHUMER. What does Professor Mackenzie and Mr. Mann think of that?

Mr. MACKENZIE. I have argued for almost 30 years that there are too many presidential appointees. I wish we could go back to 30 years ago when the number was a lot smaller than it is now. What we thought was a nightmare then looks like the golden of presidential appointments now.

The system is overwhelmed. It is not just the system down here. In many ways, it is the system at the other end of the avenue. The ability of a President, new to government, to come into office, to find the hundreds of very good people with enormously different skills sets—a lot of these are very technical jobs—and to get them into the pipeline and down here, and then for all of you to deal with them, I think we simply have not been able to do it very successfully. At some point, we ought to say maybe there are just too many of these.

Chairman SCHUMER. Mr. Mann, last word.

Mr. MANN. I strongly urge you to look into this. The Constitution gives the Congress, under its advice and consent authority, to power to delegate to others, including the President, the lone appointment of other offices of the Executive Branch. So it is done by statute.

You could explicitly reduce the number of presidential appointees that require Senate confirmation. That would still retain enough for the Senate to have, as Senator Bennett's examples, where they could go get the administration's attention. But it would clear up the process a great deal. It would be a huge advance.

Chairman SCHUMER. Great. And on that harmonious note, concurrent note, first, the record will remain open for five business days for additional statements and questions from Rules Committee members. Since there is no further business before the Committee, we are adjourned.

I want to thank all the witnesses here and our colleagues, as well as my colleagues who came today.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

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Statement of U.S. Senator Robert C. Byrd
Senate Committee on Rules and Administration

"Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process"

June 23, 2010

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Mr. Chairman,

I commend the Committee for this third hearing on the filibuster and cloture rule, with today's focus on secret holds and nominations.

When a small minority – often a minority of one – abuses Senatorial courtesy, and indefinitely delays action on a matter, then I am as adamant as any of my colleagues insisting that Senators should come to the Senate floor and make their objections public.

When such abuses have occurred, I have supported efforts by others, (and proposed some ideas of my own), to ignore requests for holds after a designated period of time. As Majority Whip, I supported the Democratic Caucus policy not to honor holds after three days. As Majority Leader, I cautioned Senators that I would not delay action on a bill indefinitely because of a hold. In the 108th Congress, I cosponsored, with Senators Wyden and Grassley, Senate Resolution 216, which would have required holds to be disclosed in the Congressional Record after three days. I supported the Honest Leadership and Open Government Act of 2007, which requires Senators to publicly disclose their intent to object to proceeding to a matter after six days. I am ready to support any reasonable proposal that will do away with indefinite holds.

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However, there are situations when it is appropriate and even important for Senators to raise a private objection to the immediate consideration of a matter with the Leadership, and to request a reasonable amount of time to try to have concerns addressed. I declined to sign the pledge that has been circulated by Senator McCaskill, because it does not differentiate between temporary and permanent holds. There are times when Senators put holds on nominations or bills, not to delay action, but to be notified before a matter is coming to the floor so that they can prepare amendments or more easily plan schedules. Certainly, Senators should not have to forswear requesting private consultation and advanced notification on a matter coming to the floor.

If the Committee pursues changes to the Senate rules, we must avoid impinging on common sense Senatorial courtesy. We must also realize that if Senators persist in abusing Senatorial courtesies like holds, and taxing the patience of their colleagues by objecting to noncontroversial matters, then Senators are flirting with the loss of those privileges.

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Statement of Chairman Charles E. Schumer
U.S. Senate Committee on Rules and Administration
Hearing on "Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process"
June 23, 2010

Good Morning. I would like to thank my friend, Ranking Member Bennett, and my other colleagues present for participating in this hearing on filibusters and the confirmation process. We especially appreciate the attention and participation of our most senior Member, Senator Byrd, and I ask that his written statement be submitted for the record.

Today I'm also very glad to welcome Senators Grassley, Wyden and McCaskill as our first panel. All three of them have been leaders in efforts to end anonymous, or secret, holds and shine some light on the kinds of long-term delays that can hold up a nomination or a bill for weeks, or months or even longer.

I applaud Senators Wyden and Grassley for their sustained commitment over more than ten years to this issue, again and again urging the Senate to take action. I also congratulate Senator McCaskill for her energetic and successful campaign in this Congress to break loose nominations that have gotten stuck. More than 2/3 of Senators have signed her letter, pledging not to use secret or anonymous holds themselves. I look forward to hearing from them in our first panel.

This is the third in a series of hearings I've called for this Committee to examine the filibuster and its impact on the Senate. Our first hearing in April focused on the history of the filibuster. Our second hearing in May dealt with the impact of the filibuster in the current Congress and on the functioning of the government. Today's focus is on "Silent Filibusters, Holds (secret and otherwise), and the Senate Confirmation Process."

We did have some good news on this front yesterday, with the passage by unanimous consent of 64 stalled nominations. Three of them – who nobody voted against – were first nominated on July 9, 2009 – almost a year ago. Why were they blocked for so long? That illustrates vividly the problem we are examining in this hearing.

Despite the easing of the logjam yesterday, what we've seen overall in this Congress is the worst obstruction of Presidential nominations in recent memory, and the delays in confirmation are affecting the ability of the judiciary and the executive branch to do their jobs.

Even under a Senate that flipped to Democratic control, President Bush's nominations fared far better than have President Obama's. President George W. Bush's cabinet was fully confirmed in 13 days; President Obama's took 99 days.

As this Congress has progressed, the President's nominees continue to languish, often when they have little or no real opposition. As of June 17, President Obama had 137 nominations pending on the executive calendar. At the same point in his first term, President Bush had only 45.

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Here's another indicator: judgeships. As of June 21, of 84 judges nominated by President Obama, 34 had been confirmed – that's 40%. For President Bush in the same period, 57 judges out of 105 nominated had been confirmed—or 54 %.

If this pace keeps up, President Obama will have the lowest judicial confirmation rate for his first Congress of any modern President. That is not a superlative any of us should be proud of.

As for nominations to executive agencies, at the end of 2009, President Obama had one-third more pending confirmation than President Bush had at the end of his first year. That meant that almost one-quarter of all Obama nominations were carried over to the second session of this Congress, and they are waiting longer to be confirmed – almost three weeks longer on average – than the typical Bush nominee. For too many nominees, like some of those confirmed yesterday, it's months, even a year, longer.

Clearly something is wrong – and we need to do something about it.

Many of these delays relate to current Senate procedures. What do we mean by a 'hold' or 'silent filibuster?' While there is no single definition, it generally refers to the indication by an individual Senator or a Party that if a bill or nomination is brought up in the future, they would object to debating it. This threat of a filibuster is what gives 'holds' their strength, even though there is no requirement for a Majority Leader to honor a hold request.

As the use of anonymous holds has escalated over the last 35 years, there have been repeated attempts to address their use, as our first panel of witnesses will discuss today.

Under the "advice and consent" provisions of the Constitution, the Senator is responsible for confirming (or rejecting) Presidential nominees. But it appears that the Senate, an institution designed to be deliberative and slow, is at times dangerously close to gridlocked. When we are not able to get good, qualified people confirmed to government positions in a timely manner, it hurts the country.

We will hear more from our second panel about how excessive delays in confirmation are devastating to the operation of government and to efforts to recruit the best people to federal jobs.

Today's hearing will continue what I believe to be a thoughtful, deliberative examination of issues related to the filibuster by this Committee, and serve as a basis for future discussions. I believe it will show that we need to consider reforms to improve the confirmation process.

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Senate Rules Committee
Hearing on "Examining the Filibuster: Silent Filibusters, Holds, and the Confirmation Process"
June 23, 2010
Opening statement of Senator Tom Udall

Thank you, Mr. Chairman, for holding this hearing.

Over the past few months during this series of hearings, we've discussed and debated example after example of how the filibuster in particular – and the Senate's incapacitating rules in general – too often stand in the way of achieving real progress for the American people.

Today's topic – secret holds and the confirmation process – is just one more example of how manipulation of the Rules continues to foster a level of gridlock and obstruction unlike any we've seen before.

I want to commend Senator McCaskill for her dedication to transparency in government. Her fight to end the practice of secret holds is a worthy one that I wholeheartedly support. Earlier this year I was proud to sign on to Senator McCaskill's letter to the Majority and Minority leaders, in which we pledged to no longer place anonymous holds … and asked for Senate leadership to end the practice altogether.

Today … as we will hear from Senator McCaskill … she has gathered enough support to surpass the 67-vote threshold required to consider and amend the Senate rules. That is no small task, as everyone on this committee would attest.

She should be congratulated for her work … as should all of our colleagues – Democrat and Republican – who have signed on to this effort. This bipartisan effort is proof that we ARE capable of working together.

But the mere fact that we have to have this conversation … that Senator McCaskill had to work for months for 67 votes to change rules that the Constitution clearly authorizes us to do with a simple majority vote, illustrates that secret holds are just another symptom of a much larger problem.

That problem is the Senate rules themselves.

The current rules – specifically Rule V and XXII – effectively deny a majority of the Senate the opportunity to ever change its rules … something the drafters of the Constitution never intended.

As I've explained numerous times throughout this series of hearings, a simple majority of the Senate can adopt or amend its rules at the beginning of a new Congress because it is not bound by the rules of the previous Congress.

Many colleagues, as well as constitutional scholars, agree with me. It is through this path – by a majority vote at the beginning of the next Congress – that we can reform the abuse of holds,

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secret filibusters, and the broken confirmation process. We can end the need for multiple cloture votes on the same matter, and we can instead begin to focus on the important business at hand.

Now, critics will argue that the two-thirds vote requirement for cloture on a rules change is reasonable. They'll say that Senator McCaskill managed to gather 67 Senators, so it must be an achievable threshold.

As I said a moment ago, I commend Senator McCaskill for her diligence in building support to end secret holds. But I think it is also important to understand that other crucial reform efforts have failed because, inexplicably, it takes the same number of Senators to amend our rules as it takes to amend the United States Constitution.

The effect of holds, on both legislation and the confirmation of nominees, is not a new problem. In January 1979, Senator Byrd – then Majority Leader – proposed changing the Senate Rules to limit debate to 30 minutes on a motion to proceed. Doing so would have significantly weakened the power of holds – and thus curbed their abuse.

At the time, Leader Byrd took to the Senate Floor and said that unlimited debate on a motion to proceed, quote, "makes the majority leader and the majority party the subject of the control and the will of the minority. If I move to take up a matter, then one senator can hold up the Senate for as long as he can stand on his feet."

Despite the moderate change that Senator Byrd proposed, it did not have the necessary 67 votes to overcome a filibuster.

Efforts to reform the motion to proceed have continued since.

In 1984, a bi-partisan study group recommended placing a two-hour limit on debate of a motion to proceed. That recommendation was ignored.

And in 1993, Congress convened the Joint Committee on the Organization of Congress to determine how it can be a better institution. Senator Pete Domenici, my immediate predecessor, was the co-vice chairman of the committee.

At a hearing before the Committee, he said, Quote "If we abolish [the debatable motion to proceed], we have gone a long way to diffusing the validity of holds, because a hold is predicated on the fact that you can't get [a bill] up without a filibuster, and if you take that away from the inception and then establish some kind of guidelines, I think that we will be moving in the right direction." End quote.

Despite a final recommendation of the joint committee to limit debate on a motion to proceed, nothing came of it.

And here we are again today – 31 years after Senator Byrd tried to institute a reform that members of both parties have agreed is necessary.

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Talking about change, and reform, does not solve the problem. We can hold hearings, convene bi-partisan committees, and study the problem to death. But until we agree that the Constitution provides the right for each Senate to adopt its rules of proceedings by a simple majority vote, there will be no real reform.

Thank you again Mr. Chairman, and I ask unanimous consent that an April 19 Roll Call article titled, "In Senate, 'Motion to Proceed' Should be Non-Debatable" be included with my statement in the record.

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Statement by Senator Ron Wyden on Ending Secret Holds

Hearing before the Senate Committee on Rules and Administration

Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process

Mr. Chairman, Senator Grassley and I have sat at tables like this for more than a dozen years trying to persuade our colleagues to end secret holds in the United States Senate.

Almost exactly seven years ago, on June 17, 2003, I testified before the Rules Committee about our bipartisan proposal to end secret holds in the Senate. When I gave that testimony, Senator Grassley and I had already been working to reform secret holds for almost seven years.

The Senate has now gone on record several times in support of our legislation to end secret holds. In 1997 and again in 1998, the Senate voted unanimously for Wyden-Grassley amendments to ban secret holds.

But each time, after we passed legislation ending secret holds in the Senate, bills ending secret holds would get changed in secret in a conference committee. Wouldn't you think that a bill reforming Senate procedure that the Senate passed overwhelmingly would come back from the House with the ban on secret holds without a change? Well, you would be wrong.

We next tried to end secret holds by working with the bipartisan Senate leadership. In 1999, we elicited personal commitments from both the Republican and Democratic leaders that neither leader would honor a hold unless it was formally made in writing. The commitment was made in a "Dear Colleague" letter which was published in the Congressional Record on March 3, 1999. However, the pledge was not enforced and both Democrats and Republicans continued to employ secret holds in the 106th Congress.

And in 2006, Senator Grassley and I passed another amendment to end secret holds by a vote of 84-13. Then in 2007, that amendment was included in the Honest Leadership and Open Government Act, which passed by a vote of 96-2 in the Senate.

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Unfortunately, when that secret holds reform came back from conference it had some loopholes and the practice of secret holds has continued.

Mr. Chairman, this has gone on long enough. It's time to end the stranglehold of secret holds once and for all.

The American people want accountability from their elected officials. But there is no accountability when the Senate operates in secret.

That's why the bipartisan Wyden-Grassley proposal for reforming secret holds has received favorable editorials in newspapers ranging from The New York Times and Washington Post to the La Grande Observer in Eastern Oregon. I ask consent that copies of these editorials be made a part of the record.

Because of secret holds, there are literally dozens of qualified nominees for important positions in the Obama administration and in the Federal courts who can't get a vote on the Senate floor. There are currently 73 nominees on the Executive Calendar who have been reported out of committee and cannot get a vote on the Senate floor, even though their nominations were reported unanimously or with strong bipartisan support. In all but a handful of cases, no one knows who is blocking these nominees or why.

Some colleagues have claimed that a secret hold doesn't prevent the Senate from considering a nomination or piece of legislation. They point out that the Majority Leader can always file cloture on the nomination or bill to overcome a hold.

That may be true in theory but, as a practical matter, it can't be done in most cases. The process of filing cloture on a bill can eat up an entire week of the Senate schedule. So the Senate could easily spend the remainder of this session with votes on just the nominees now on the Executive Calendar and still not clear the backlog of nominations.

In reality, a secret hold can effectively kill a nomination or piece of legislation. And it can be done without anyone – colleagues in the Senate or the public – knowing who did it or why.

This is an incredible power that senators have that was created by an informal Senate custom that is not written down in the Constitution or the Senate Rules. But it has gone on so long that it has become a tradition, with such memorable

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variations as the "hostage hold," the "rolling hold" and the "Mae West come up and see me sometime" hold.

The Senate has almost as many versions of holds as pro wrestling and the power to tie the Senate in knots is just incapacitating as a smackdown wrestling move.

But, frankly, one of the other points that need to be made is that a secret hold is a very powerful weapon that is available to a lobbyist. I expect that practically every Senator has gotten a request from a lobbyist asking if the Senator would put a secret hold on a bill or nomination in order to kill it without getting any public debate and without the lobbyist's fingerprints appearing anywhere. If you can get a U.S. Senator to put an anonymous hold on a bill, it is like hitting the lobbyist jackpot. Not only is the Senator protected by a cloak of anonymity but so is the lobbyist.

A secret hold lets lobbyists play both sides of the street and can give lobbyists a victory for their clients without alienating potential or future clients. Given the number of instances where I have heard a lobbyist asking for secret holds, I am of the view that secret holds are a stealth extension of the lobbying world.

In the U.S. Senate, there has been an effort to improve the rules and have stricter ethics requirements with respect to lobbyists. It seems to me it would be the height of irony if the Senate were to adopt a variety of changes to curtail lobbying, as we have done in the past, without doing away with what, in my view, is one of the most powerful tools that can be available to lobbyists.

What Senator Grassley and I have been working for more than a decade, what I have heard colleagues talk about is we believe now is the time, once and for all, to permanently eliminate the use of secret holds the Senate.

I want to express my appreciation to Senator Grassley for working with me over this past decade to end what I think is simply an indefensible denial of the public's right to know. That is what this is all about. This is a denial of the public's right to know.

With bipartisan support from colleagues on both sides of the aisle, we are determined to eliminate secret holds, to require public disclosure of all holds and to ensure there will be consequences if a Senator fails to disclose a secret hold.

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I urge the members of this Committee and all our colleagues to work with Senator Grassley, Senator McCaskill, myself and other reformers to bring greater transparency and accountability to the Senate by eliminating secret holds.

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United States Senator Chuck Grassley
Iowa
http://grassley.senate.gov

Prepared Testimony of Senator Chuck Grassley
Senate Committee on Rules and Administration
Secret Holds
Wednesday, June 22, 2010

Thank you Mr. Chairman, Senator Bennett,

I appreciate the opportunity to give my perspective on the work Senator Wyden and I have been doing for many years now to bring transparency to the practice of holds in the Senate.

Holds are an informal process outside the Senate Rules so it is easier said than done to just make them public, but we have a proposal now that I think does the trick.

Before I get into specifics, I think it's important to talk about what a hold really is.

A hold arises out of the right of all senators to withhold their consent when unanimous consent is asked.

It goes without saying that a senator has a right to object to a unanimous consent request if the senator does not support it.

Something is not really unanimous unless all senators support it.

In fact, you could argue that a senator has an obligation to object if he feels an item is not in the interest of his constituents, or if he has not had the opportunity to make an informed decision.

In the old days, when senators conducted much of their daily business from their desk on the Senate floor, it was a simple matter to stand up and say, "I object" when necessary.

Now, since most senators spend most of their time off the Senate floor in committee hearings, meeting with constituents, etcetera, we rely on our majority and minority leaders to protect our rights and prerogatives as individual senators by asking them to object on our behalf.

Just as any senator has the right to stand up on the Senate floor and publicly say, "I object," it is perfectly legitimate to ask another senator to object on our behalf if we cannot make it to the floor when consent is requested.

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By the same token, Senators have no inherent right to have others object on their behalf while keeping their identity secret.

So, what I object to is not the use of holds, but the word "secret" in "secret holds".

If a senator has a legitimate reason to object to proceeding to a bill or nominee, then he or she ought to have the guts to do so publicly.

A Senator may object because he does not agree to the substance of the bill and therefore cannot in good conscience grant consent, or because the senator has not had adequate opportunity to review the matter at hand.

Regardless, we should have no fear of being held accountable by our constituents if we are acting in their interest as we are elected to do.

I have certainly not experienced any negative reaction from my policy of public holds, either from the people of Iowa or my fellow senators.

So how did we get to where we are today?

Over a decade ago, Senator Wyden and I started with a simple proposed rule that any senator placing a hold must publish that hold in the Congressional Record, which Senator Wyden and I have done voluntarily ever since.

That proposal was blocked in the Senate, but we were offered a non-binding policy by the leaders instead. That didn't work.

We kept trying, and when Senator Lott became chairman of the Rules Committee, he took an interest in this issue as a former majority leader who had to contend with secret holds.

In fact, we had a hearing like this almost exactly 7 years ago.

Senator Lott offered to work with us and along with Senator Byrd, we crafted a proposal that was more workable and enforceable.

That proposal was adopted as an amendment to the Ethics Reform bill in the 109th Congress by a vote of 84-13, but that bill never got enacted.

Our proposal was then included in the so called "Honest Leadership and Open Government Act".

Ironically, in a move that reflected neither honest leadership nor open government, our provisions were altered substantially behind closed doors before that bill became law.

Our current proposal would restore some important features that were in the amendment as originally adopted by the Senate and make it even more enforceable.

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In our proposed Standing Order, in order for the majority or minority leader to recognize a hold, the Senator placing the hold must get a statement in the Record within two days, and must give permission to their leader at the time they place the hold to object in their name.

Since the leader will automatically have permission to name the senator on whose behalf they are objecting, there will no longer be any expectation or pressure on the leader to keep the hold secret.

Further, if a senator objects to a unanimous consent request and does not name another senator as having the objection, the objecting senator will be listed as having the hold.

This will end entirely the situation where one senator objects, but is able to remain coy about whether it is their own objection or some unnamed senator. All objections will have to be owned up to.

Again, our proposal protects the rights of individual senators to withhold their consent.

I am certainly not arguing that any bill or nominee is entitled to pass by unanimous consent or that we should be passing more legislation that way.

In fact, Senator Coburn has raised a valid point about how the so called "hotline" process can be abused, thus denying senators adequate time to review items before unanimous consent is requested.

Since the hotline is another informal process of the Senate outside the rules, it may prove as difficult as secret holds to find the best way to reform it, but I support his goal of doing so.

All I seek to do is bring some transparency to the Senate and let the people's business be done in public.

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G. Calvin Mackenzie

**Goldfarb Family Distinguished Professor
of American Government**

Colby College

**Testimony
Before
The Committee on Rules and Administration
United States Senate**

June 23, 2010

Let me express my gratitude to the chairman and members of this committee for inviting me to testify on this important matter.

For almost 40 years, I have been a student of the presidential appointments process. In that time, I have had frequent and often lengthy conversations with almost everyone who has served as a principal personnel advisor to all of our presidents back to President Truman. I have spent many days up here observing confirmation hearings and debates and asking questions of members of this body and the staff directors and chief counsels of these committees. I have served on or directed most of the blue-ribbon commissions that have studied the appointment process over the past three decades.

In these years, I have interviewed hundreds of presidential appointees, collected and sorted and analyzed data, probed for patterns, sought broader meanings. That is the work of scholarship, and that is my business. My work is not partisan; I have no one's axe to grind nor ox to gore.

What has carried me through all these years is a simple notion: that in a democracy the purpose of an election is to form a government. Those who win elections should be able to govern.

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But in a democracy as large and complex as ours, no one leader can govern alone. It is fundamental and essential that victory in a presidential election should be swiftly followed by the recruitment and emplacement of the talented Americans who will help a president to do the work the American people elected him or her to do.

That is to say, simply, there ought to be a presidential appointments process that works -- swiftly, effectively, rationally. Nothing could be more basic to good government.

But we do not have a presidential appointment process that works. In fact, we have in Washington today a presidential appointments process that is a less efficient and less effective mechanism for staffing the senior levels of government than its counterparts in any other industrialized democracy. In this wonderful age of new democracies blooming all around us, many have chosen to copy elements of our Constitution and the processes that serve them. But one process that no other country has chosen to copy is the one we use to fill our top executive posts. And for good reason. Even those untutored in democracy know a lemon when they see one.

In the early 1980s, I helped to write a book called America's Unelected Government that complained about some of the flaws in the presidential appointments process. Watching the travails of the Reagan administration as it sought to get its appointees in place, it was hard then to imagine that things could get much worse. But in retrospect that seems almost like a golden age for presidential appointments.

Steadily ever since then, the presidential appointments process has deteriorated. Can you imagine in your wildest fantasies any group of rational people sitting down and designing an appointment process like the one we're discussing today, a process:

- Where an average position requires more than six months, and frequently a year or more, to fill.

- That reaches down so deeply into the federal hierarchy that new administrations have to come up with thousands of recruits and somehow hope to meld them into effective management teams.

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- That imposes on potential appointees so many torturous, humiliating and invasive questions and investigations that far too many refuse to accept the president's call to service, and many who do so come through it feeling bloodied and abused.

- That virtually ensures that a fifth or more of the top positions in the government will, at any moment in time, be without an incumbent who is a confirmed presidential appointee.

How did we get into this mess?

The answer is not simple, but there is one explanation we can reject out of hand. No one planned this appointment process, no one designed it, no one approved it. I can tell you that in several decades of conversations with presidents, their personnel advisors, senators, their committee staffs, and appointees themselves, I have never heard a single person praise the appointments process. I have heard many, however, who would like to bury it.

We have let our appointments process fall into a desperate state of disrepair so that now it often undermines the very purposes it was designed to serve. It doesn't welcome talented leaders to public service; it repels them. It doesn't smooth the transition from the private to the public sector; it turns it into a torture chamber. It doesn't speed the start-up of administrations just elected by the American people; it slows the process almost to a standstill.

Blame for the deterioration of the appointments process lies at both ends of Pennsylvania Avenue. This Committee's jurisdiction does not extend to the other end of the avenue, so let me address some of the flaws in the Senate confirmation process which I hope the Committee will address. Primary among those are delay, redundancy, inconsistency, and uncertainty.

The confirmation process is not the sole source of delay in filling executive or judicial positions, but the simple fact is that it takes far too long to confirm presidential appointees. The time required for a typical confirmation—not a controversial one—has steadily grown. My friend

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Anne Joseph O'Connell of the Law School at Berkeley has done wonderful recent research on this. She reports that:

> The Senate took an average of 60.8 days to confirm President Obama's nominees in the administration's first year, compared to 48.9 for President Clinton, 51.5 for President George H.W. Bush, and 57.9 for President George W. Bush. The gap between the number of nominations and number of confirmations was larger for the Obama administration than any previous administration after one year. President Obama had submitted nominations for 326 cabinet department and executive agency positions after one year, and the Senate had confirmed 262 of those nominations, leaving 64 pending. There were 46 nominations pending at the end of President George W. Bush's first year and 29 pending at the end of President Clinton's.[1]

Why is this? In part, because there are too many appointees and too many hearings. The number of presidential appointees requiring Senate confirmation seems to grow like Topsy. While President Obama was able to fill more PAS positions in departments and executive agencies in his first year in office than his 4 immediate predecessors, the percentage of PAS positions he was able to fill was the lowest of any of them because the overall number of such positions had grown by more than 40%.

And, while formal hearings are not universal for all presidential appointees, the number of those has grown as well. For the first 130 years of our history, confirmation hearings rarely occurred. Until 1929 nearly all were closed to press and public. Now we hold public hearings for even the lowest ranking nominees in all agencies—creating scheduling nightmares for Senate committees, over-worked staffs, and long delays for many nominees.

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[1] Anne Joseph O'Connell, Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process (Washington, DC, Center for American Progress, April 2010), p. 2.

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The problem is compounded by the growing use of "holds" by individual senators seeking to postpone—or prevent—confirmation. For scholars like me, holds are a formidable research problem. Counting them is a little like counting moonbeams or weighing fairy dust. They're awfully hard to see. But we all know that the use of holds—especially in the confirmation process where nominees make very convenient hostages—has become epidemic.

Filibusters are another source of delay. Nominations are rarely filibustered in practice, but the threat of a filibuster has become such a constant of the confirmation process that it is now taken for granted that no nominee can be confirmed without 60 reliable supporters in the Senate. Filibusters are a recent development in the confirmation process. For most of our history, Senate practice and protocol held that there were not filibusters on nominations. According to the Congressional Research Service, there were no cloture votes on judicial nominations until 1968 nor on executive nominations until 1980. But then the floodgates opened and cloture votes occurred on 35 judicial and 36 executive branch nominations between 1968 and 2006.

Delay occurs as well because every nominee must now endure an obstacle course that is littered with questionnaires, reports, and investigations. These are inconsistent in the information they seek and they are often redundant, especially of similar investigations and questionnaires managed by the White House. Every committee has its own forms and its own investigative practices. Little effort has ever occurred to coordinate those internally or with the White House, nor to make them more consistent and thus more predictable.

The delay, the redundancy, and the inconsistency impose a heavy burden on nominees. That is the burden of uncertainty. In hundreds of conversations I have had with nominees over the years, this is the complaint I've heard most often. Once they agree to enter the appointment process, they never know if—or when—they will emerge. When there is no action on their nominations, they often cannot find out why or what the likely length of the delay will be.

Imagine what this means to these nominees. A professor who today agreed to accept a presidential appointment would have to inform her dean that she would not be teaching this fall or for the next several

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years. Income from her university would soon stop flowing; health insurance would be up in the air. Should she move her family to Washington and rent out or sell her house in St. Louis?

And what about the attorney in a large New York law firm? Once he's agreed to accept an appointment, he needs to shed all the clients who might pose a conflict of interest and he can't accept any new clients. Soon his partners begin to wonder why he's still in the office since he's making no rain for the firm. His income stream begins to dry up and he, too, faces numerous practical questions about relocating, children's schooling, and spouse's career impact. Delay and uncertainty hurt—they hurt the very people the government seeks to recruit, and often for no reasons that have anything to do with their fitness for the positions to which they've been nominated.

It is important for all of us to keep this powerful fact in mind: these are human lives. Good people have agreed, often at significant personal sacrifice, to serve their country. And far too often we treat them like pawns in a cruel game. They are forced to put their lives on hold, to step aside from their careers and jobs, to forego income, and then to twist in the wind while the fates of their appointments are decided by a Senate with little sense of urgency.

We must do better than this and we can do better. The confirmation process is not irreparably broken, not by a long shot. We have recognized its ailments for some time, and the cures are not hard to identify.

While reasonable people can admit that there may be times when one or more senators would like more time to gather information before voting on an appointment, that is rarely the true explanation of filibusters or holds. Much more often, their motivation is political and usually in ways that have little to do with the qualifications and character of the nominee. So an important step toward speeding up the confirmation process is to truncate both holds and filibusters.

On the subject of holds, there have been many reform proposals from senators in recent years.[2] The most promising of these, it seems to me,

[2] See CRS Report RL31685, Proposals to Reform "Holds" in the Senate, by Walter J. Oleszek.

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are to limit the length of time that any member may hold up a nomination (perhaps 14 days) and to require that a hold must have the support of some minimum number of senators (perhaps 10). The actual number of days or the minimum number of supporting senators can be worked out once the principle has been established that holds should not unduly delay the business of putting an administration in place.

Filibusters have little place in the nomination process, at least on nominations to cabinet departments and executive agencies. We lived without such filibusters for nearly all of our history before 1980, and we can live without them now. If the Senate is unwilling to bar filibusters completely on executive appointments, it might reconsider a resolution reported by this Committee in the 108th Congress (S. Res. 138) that would have altered Rule XXII by placing a steadily-decreasing threshold for cloture on nominations until, after a time, cloture could be achieved by majority vote.

My personal view is that every nomination and every nominee deserves an up-or-down vote and that filibusters have no place anywhere in the confirmation process. But some make the argument, not unreasonably, that lifetime appointments to the federal courts demand greater scrutiny and a broader base of support before being confirmed. In their view, this justifies the occasional deployment of filibusters to delay or defeat such nominations. I find little basis for that view in the Constitution, and I don't share it.

I believe the best way to reduce delay and uncertainty in the confirmation process is to place time limits on each of its stages. The clock would start when the nomination is received from the president. Then there would be limits on how long it could linger in committee before being reported to the floor, perhaps 30 business days for most executive appointments. Committees might be encouraged as well to adopt the standard practice of holding no formal hearings on nominees except those of greatest importance, perhaps those holding positions paid at Executive Level III or above. If the committee had not acted at the end of 30 days, it could be automatically discharged and the nomination brought to the Senate floor unless a majority of the Senate voted to give the committee an additional (and fixed) amount of time for consideration.

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Once on the floor, the nomination would be guaranteed an up-or-down vote within 45 days. A simple majority of the Senate could vote to extend the time for floor consideration, but there would be no holds and no filibusters.

If it were deemed desirable to permit filibusters on judicial nominations, a procedure like that in S. Res. 138, described above, would limit their duration by steadily decreasing the number of votes necessary to invoke cloture.

The problems in the confirmation process directly affect what happens in the selection and recruitment processes. The actions of the Senate are often determinative in shaping the actions of the White House. The selection process has thickened over the years because presidents are often playing defense. Not wanting controversy or embarrassment and unable to know with certainty what the standards of any Senate committee are likely to be at any given time, they undertake investigation after investigation, vetting after vetting to protect themselves. This significantly slows the entire appointments process and makes it especially inhospitable to talented Americans.

An approach that might help to lower the level of conflict in the entire process, to speed it up, and to make it less repellent to potential appointees would be for the leaders of both parties in the Senate and the chairs and ranking members of the committees with large confirmation jurisdictions to meet with the President at the beginning of each Congress and negotiate a "treaty" in which they would both agree to a timetable for action on normal appointments and in which they would seek to identify the standards of fitness they will apply in seeking and confirming nominees. The appointments process has long suffered from a shortage of good will and mutual understanding. Any effort to overcome that would help to improve the administration of government and the quality of the public service.

I hope these suggestions contribute to the discussion of the important issues that inspired these hearings. The problems in the confirmation process are clear and deeply troubling. Solutions are at hand. What is needed now is some common sense, some commitment to undertake this task—commitment that reaches across party and institutional lines—and, most importantly, some leadership.

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I hope these hearings will be the incubator for these reforms and that this committee will be their shepherd. That is noble and important work. I commend you for initiating it, and I wish you every success in accomplishing the reforms for which the Senate confirmation process so desperately cries out.

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Testimony of Lee Rawls
Faculty, National War College
Adjunct Professor, College of William and Mary

Before the
Committee on Rules
U.S. Senate
June 23, 2010

"These opposed and conflicting interests which you considered as so great a blemish in your old and present constitution interpose a salutary check to all precipitate resolutions. They render deliberation a matter not of choice, but of necessity; " Edmund Burke

"the disposition of people to impose their own opinions can only be restrained by an opposing power." John Stuart Mill

"Partisan competition has been at the center of our struggle to advance as a people and as a nation. It has been our most important engine for adaption and change – one that remains in full motion." John Hilley (Chief of Staff to Majority Leader Senator Mitchell, and Legislative Affairs Director for President Clinton)

Chairman Schumer, Ranking Member Bennett and members of the Committee. My name is Lee Rawls and I am currently a member of the faculty at the National War College. I appreciate the opportunity to testify today on the relationship of the filibuster to the nominations process. Before joining the War College faculty, I was Chief of Staff at the FBI, but I am here today because of my previous life as Chief of Staff to Senator Frist when he was Senate Majority Leader and also as an Assistant Attorney General for Legislative Affairs at the Department of Justice in the early 1990's. Among my responsibilities at the Department were nominations for the Federal Judiciary, along with nominees for all the senior positions at the Department itself, including that of Attorney General.

I have opened my prepared remarks with several quotes to telegraph my general view of the value of the filibuster, and to preclude me from having to inflict my full philosophical theories of the filibuster on the members. Moreover, my longer musings can be found in my 2009 book In Praise of Deadlock – whose title captures much of my thinking.

Instead, I will open with a quote from the famed journalist Eric Sevareid, who wisely noted that "the chief cause of problems is solutions". I have taken a look at the Committee's previous hearings on the filibuster which in the aggregate present a

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thorough review of the filibuster and during which many former members, scholars and practitioners have offered a wide range of possible solutions. My advice to the Committee on these proposals comes down to one word: Don't.

At the War College, we train the senior military commanders who attend to ask one question at the start of any discussion on a problem: So What? What is it about a situation that demands a remedy, and what assurances are there that the proposed solution will not make the problem worse.

The filibuster is a perfect candidate for this line of questioning. The Committee has been told that both partisanship and the use of the filibuster are on the rise. You have been told that the American legislative system is "broken", that the nominations process, particularly for the federal judiciary is in disarray, and that strong medicine is necessary to cure the situation.

Let me make 5 points in response, and leave any nuances to questions the members of the Committee may have.

1. Any legislative system that in the face of a deep financial recession and two wars that can enact in the space of two years TARP legislation, $750 billion dollars in stimulus funding, a major overhaul of the world's largest health care system and is preparing to enact a far-reaching reform of its financial system is by definition not broken. Moreover, any nomination process that has not had a single nominee for the federal judiciary rejected as the result of an unsuccessful cloture vote is by definition not in disarray.

2. If rising partisanship is a concern, the sole source in the entire American legislative system of bipartisanship, moderation, continuity and consensus is found in the United States Senate because of the role of the filibuster. The leverage provided to the minority by the filibuster is a two-sided coin. On one side it is the source of bipartisanship throughout the entire legislative process. On the other, it slows down the legislative process that in turn leads to inaccurate cries of "gridlock" which are loudly echoed by the press. In Burke's words, quoted above, the filibuster renders deliberation a "matter of necessity, not choice". This moderating, consensus forming role of the filibuster has been going on for 170 years. As Sarah Binder told the committee, organized use of the filibuster by the political parties started in the 1840's, and as Senator Byrd noted in his remarks, "bitter partisan periods in our history are nothing new." In fact, scholars note that parts of the 19th century were clearly more partisan than today.

3. The United States Senate is the most intricate legislative body in the known universe, unique for its permissive rules. At the core of its genius is its ability to moderate a large number of vital political forces all of which have their dark side For example, the filibuster is an essential element in moderating the extremes of our competitive party system. It also moderates the hubris and moral aggression noted by the Mill quote above in those who actually make the rules. Of particular importance it lessens the risks of united government when one party "hijacks" the Constitution's separation of power

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system and in the name of all Americans exercises power in all branches of government at the same time.

The First amendment explicitly provides for special interests to engage in the political process. These groups range from economic interests to single-interest advocates, all of whom have a narrow focus, and who usually are not interested in compromise. The filibuster, by providing resistance within the legislative system, often smoothes out the worst abuses of this special interest participation. .Thus, although the First Amendment guarantees special interest participation, it is often the filibuster that protects the public interest in the legislative process. Professor Smith in his remarks to the Committee lamented the "obstruct and restrict syndrome" that he believes the filibuster has caused. From my vantage point as a practitioner within the system, I believe that the "continuous resistance" that the filibuster provides on a daily basis to these vital, but occasionally dangerous forces, is the essential component in the genius of the United States Senate.

4. The above points lead to the conclusion that if you change the filibuster rule, you unalterably change the nature of the Senate. Chairman Schumer has been quite fair-minded in his quest for answers to the filibuster riddle. In particular, because he has been both in the majority and minority, he has asked the right question as to whether one's views of the filibuster are completely dependent on one's political status of the moment, or whether there are more fundamental issues at stake. I believe such larger issues are at stake. These relate to what it means to have a full and productive Senate career. Such a career requires continuous involvement; namely a full body of legislative work that gives personal satisfaction and contributes to the public needs of the American people. Moreover, such a career requires the full engagement of one's skills whether one is in the majority or minority. A career where minority status means effective banishment falls short of these criteria. In fact, for those who have had acknowledged successful careers, such as the late Senator Kennedy or the recently retired Senator Domenici, the key to their success has often been the important role they played as leaders of the minority skillfully negotiating with the majority.

For the members of the minority, the value of filibuster in achieving a full career is obvious. I believe it is worth noting that the members of the Majority also run some risks if the filibuster were abolished. The first is that the power of the president would be substantially increased, particularly in united government. Given his visibility and power to influence grass roots forces, members of a Senate devoid of a filibuster would be under increased pressure to toe the line of a president of the same party.

Members of the Senate Majority may not appreciate how much they are in control of the entire legislative machine in the American system. The resistance provided by the Minority makes their political judgments the essential ingredient in establishing and implementing legislative strategy. Without such resistance, they will lose their strategic function and their role becomes one of either supporting or opposing the policies of an executive branch of the same party.

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The other risk that a Majority party without a filibuster runs is being overwhelmed by the special interests. Every year thousands of bills that reflect strong special interest input are introduced but are not addressed by the Senate because of the filibuster. Absent such a constraint, it is difficult to conceive of the Majority party in the Senate resisting the whole range of special interest legislation that is introduced on an annual basis. For Majority Senators who do not conceive of themselves as handmaidens of special interests, this change would be an unwelcome shock.

5. With these first principles in mind, let me make 2 concluding remarks on the nominations process.

a. The virtues of the filibuster in fostering moderation and consensus are important in picking the federal judiciary. These are lifetime posts vested with immense importance in our system. Trust is perhaps the most important element in the Rule of Law which the federal judiciary overseas. Brilliance and other intellectual virtues are second order virtues, particularly if they come wrapped in strong ideological packaging. Anything that forces matters to the middle is a virtue, and the filibuster certainly does that. Every member here has had discussions as to whether a nominee will face opposition and what a minority armed with a filibuster is likely to do.

In addition, the leverage provided by the filibuster allows for a more thorough examination of candidates for the federal bench. Documents, extensive hearings, additional face-to-face meetings, all these flow form the leverage of a minority armed with the filibuster. As with any tool, or instrument, mistakes and abuses occur. But my view is that in the aggregate, given the importance of the federal judiciary, and their lifetime appointments, the leverage of the filibuster provides for a more thorough vetting process of the federal judiciary than a process without such leverage.

As an aside, I also wonder how much of an issue this is at present. During 2003-4 when I was Senator Frist's Chief of Staff, the Senate was split 51-49. We spent a lot of floor time on judicial nominees, winning some and losing some. Today's Majority of 59 votes has a perfect record on judicial cloture votes which leaves me wondering what part of the puzzle I am missing, if any.

b. Some of the same considerations hold for executive branch nominees. Here the problem is numbers. My experience is that the Senate is reasonably prompt in providing the President with his senior cabinet leadership. With exceptions, usually cases where the nominee has self-infllicted problems, the Senate does a good job on the Cabinet. Where matters get off the rails is the mid-level management of the executive branch on which the Senate insists on providing advice and consent. There are a variety of ways to address this issue, but overall the Senate insists on confirming too many nominees. The problem is not the filibuster; it is the Senate's inability to set priorities.

In my own case, I was held up for a period of time with two other nominees after our nominations to the Justice Department. The Senator who held us had a perfectly legitimate beef with the Department, and after some negotiations, the issue was resolved. Since the post of Assistant Attorney General for Legislative Affairs is really a fancy title

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for flak-catcher, it seemed to me that the elaborate gyrations surrounding my nomination was wasted effort. In my view, if the nomination is important enough for a Senator to personally meet with the nominee and attend the confirmation hearing then the confirmation process is appropriate. If not, then drop the Senate confirmation requirement. In my case, no courtesy visits were asked for, and one poor junior member of the committee had to be dragooned into chairing the hearing. If following such an effort at establishing priorities to determine which positions actually need confirmation, there is still a substantial problem, then perhaps other measures could be considered.

Having taken more than my fair share of time, I am prepared to answer any questions that the committee may have.

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Testimony of Thomas E. Mann
W. Averell Harriman Chair and Senior Fellow, The Brookings Institution

Before the
Committee on Rules and Administration
U.S. Senate
June 23, 2010

Chairman Schumer, Ranking Member Bennett, and members of the Committee. Thank you for inviting me to testify today in the third in your series of important and informative hearings on the filibuster.

Testimony presented at the first two hearings usefully clarified the origins of unlimited debate in the Senate, circumstances surrounding the adoption of Rule XXII in 1917 and its subsequent amendment, changing norms and practices regarding the use of filibusters, holds, and cloture petitions, and in recent years the extraordinary increase in the frequency of extended-debate-related problems on major measures before the Senate.

I concur with the scholarly consensus that the emergence of an ideologically polarized Senate, with sharp party differences on most important issues, appears to be a major force behind the routinization of the filibuster. The striking unity within each of the party caucuses reflects this ideological separation but also arises from the rough parity between the parties. Control of the Senate is now regularly up for grabs. Both parties have powerful incentives to use the available parliamentary tools to wage a permanent campaign to retain or regain majority status. The resulting procedural arms race has served individual and partisan interests but has diminished the Senate as an institution and weakened the country's capacity to govern.

The focus of my testimony at this hearing is the impact of the increasing use of filibusters and holds on the Senate confirmation of presidential appointees.

The Constitution provides that the President "shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all Other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ." The Framers differed amongst themselves on the proper role of the Senate in the nomination and confirmation process so it is no surprise that this has been a bone of contention between the branches throughout the course of American history. Because it holds the constitutional authority to withhold its approval of presidential appointments, the Senate can wield formidable negative power. How responsibly the Senate exercises that power importantly shapes the performance of the executive and judicial branches.

All presidential appointments subject to Senate confirmation are not equal. Approximately 65,000 military appointments and promotions are routinely confirmed

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each Congress, with very few (though occasionally prominent) delays or rejections. Many of the roughly 4,000 civilian nominations considered each Congress are handled by the Senate in a similar fashion. These include appointments and promotions in the Foreign Service and Public Health Service as well as many nominations to part-time positions on boards and advisory commissions. In many other cases (U.S. attorneys, U.S. Marshals, and U.S. district judges), a long-standing custom of "senatorial courtesy" gives home-state senators support to object if they are not fully consulted by the White House before nominations are submitted. In addition, a number of fixed-term appointments to commissions, boards, and other multi-member entities are required by their enabling statutes to maintain political balance in some way or to follow an explicit selection procedure. In both cases, these consultations and selection processes go some distance in limiting the potential friction between the branches in resolving their shared responsibility. (Not the entire distance, to be sure. Nominees to the Federal Election Commission have often been subject to prolonged delays, even denying it the ability to have a quorum to conduct business during much of the 2008 election campaign. Similar examples can be found with the Election Assistance Commission and other regulatory bodies and boards.) Consequently, it is no surprise that 99% percent of presidential appointees are confirmed routinely by the Senate.[1]

More problematic are appellate judicial nominations (numbering roughly 25 to 50 per Congress) and the 400 or so Senate-confirmed senior positions in cabinet departments and executive agencies (excluding ambassadors) who serve at the pleasure of the president. In the case of the former, the confirmation process over the last three decades has become increasingly prolonged and contentious. The confirmation rate of presidential circuit court appointments has plummeted from above 90% in the late 1970s and early 1980s to below 50% in recent years.[2] A particularly acrimonious confrontation over the delay of several judicial nominations in 2005 led then Majority Leader Bill Frist to threaten to use the so-called "nuclear option" – a ruling from the chair sustained by a simple majority of senators to establish that the Constitution required the Senate to vote up or down on every judicial nomination (effectively cloture by simple majority). Before Frist's deadline for breaking the impasse arrived, a group of 14 senators (seven Democrats and seven Republicans) reached an informal pact to oppose Frist's "reform-by-ruling" and to deny Democrats the ability to filibuster several of the pending nominations.[3] This diffused the immediate situation but did little to alter the long-run trajectory of the judicial confirmation process. Lifetime appointments and high ideological stakes provided ample incentives for senators whenever feasible to use holds and silent filibusters to prevent a majority of their colleagues from acting on judicial nominations.

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[1] Elizabeth Rybicki, "Senate Consideration of Presidential Nominations: Committee and Floor Procedure," Congressional Research Service, May 8, 2009.
[2] Rutkus, Steven and M. A. Sollenberger, "Judicial Nomination Statistics: U.S. Districting and Circuit Courts, 1977-2003," Congressional Research Service, February 23, 2004.
[3] Binder, Sarah, A. J. Madonna S, S, and Smith, "Going Nuclear, Senate Style,"*Perspectives on Politics*, Vol. 5 (4, December): 729-40.

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Theses delays in confirming appellate judges have led to increased vacancy rates, which has produced longer case processing times and rising caseloads per judge on federal dockets.[4] Moreover, the conflict over appellate judges is spilling over to the district court appointments, which are beginning to produce similarly low rates of confirmation.

Even more disconcerting has been the impact of the changing confirmation process on the ability of presidents to staff their administrations. My colleague on this panel, Cal Mackenzie, this country's preeminent student of the presidential appointments process, has in his prepared testimony made a powerful case that "we have in Washington today a presidential appointment process that is a less efficient and less effective mechanism for staffing the senior levels of government than its counterparts in any other industrialized democracy." Professor Mackenzie summarizes the longstanding flaws in the present system and documents how it has steadily deteriorated over the last several decades. That deterioration has occurred at both ends of Pennsylvania Avenue. In fact, delays in filling senior executive positions are substantially larger at the nomination than the confirmation stage. This reflects in substantial part a defensive posture by new administrations seeking to reduce or eliminate any possibility of adverse publicity about any of their nominees surfacing after they are chosen. But the trends over the last four administrations place an increasing responsibility for delays with the Senate. As Professor Mackenzie, drawing on important new work on this subject by Professor Anne Joseph O'Connell of the University of California, Berkeley School of Law,[5] notes, the average time taken to confirm nominees in the first year of new administrations has steadily increased (from 51.5 days under George H.W. Bush to 60.8 days under Barack Obama) while the percentage of presidential nominations confirmed by the end of the first year declined (from 80.1% under Bush 41 to 64.4% under Obama).

These discouraging statistics actually understate the problem. Cabinet secretaries are usually confirmed within a couple of weeks while top noncabinet agency officials take on average almost three months. Some nominees have been subject to much more extended delays, putting their personal lives on hold for many months and critical positions unfilled for much or all of a president's first year in office. Some cabinet secretaries have had to manage with only skeleton senior staffs, with few empowered with the formal authority that is contingent on Senate confirmation. Recent administrations have many horror stories associated with the absence of timely confirmation of its top executives.

The Obama administration is no exception. Indeed, its stories are more numerous and telling than those that came before it. Consider just a few examples. In the midst of a financial meltdown and critical decisions to be made on the implementation of TARP,

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[4] Sarah Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington, D.C.: Brookings, 2009).

[5] Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," Southern California Law Review (2009) and "Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process," Center for American Progress (April 2010).

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the Treasury Department had no Senate-confirmed officials in many high-ranking policy positions, including: Deputy Secretary, Undersecretary for International Affairs, Undersecretary for Domestic Finance, Assistant Secretary for Tax Policy, Assistant Secretary for Financial Markets, Assistant Secretary for Financial Stability, and Assistant Secretary for Legislative Affairs. One of those nominees, Lael Brainard, a former colleague of mine at Brookings, was nominated for the key position of Undersecretary for International Affairs on March 23, 2009 but did not get confirmed until April 20, 2010, over a year later. Her problem was tax-related, reportedly over a deduction she claimed on a home office. Yet her husband, Kurt Campbell, was nominated for a post at the State Department and confirmed by the Senate in about two months, even though they filed a joint tax return.

Other critical positions with urgent responsibilities for a Senate-confirmed appointee subject to extended vacancies included Commissioner of U.S. Customs and Border Protection, director of the Transportation Security Administration, head of the National Highway Traffic Safety Administration, and director of the Centers for Medicare and Medicaid Services. To be sure, delays associated with filling these and other senior executive positions often arose during the nominating process and sometimes were associated with genuine concerns about the nominee. But the evidence strongly supports the view that many nominees get caught in ideological and partisan battles in the Senate or become hostages to the personal agendas of individual senators, often unrelated to the nominee or the position to be filled.

Currently, there is no foolproof way of discerning how many nominations are subject to holds by individual senators. The effort to limit secret holds initiated by Senators Wyden and Grassley as part of the 2007 ethics bill has loopholes that have rendered it largely ineffective. One can, however, examine the list of nominations that have been approved by committees and placed on the Senate executive calendar. One presumes that absent a hold or other signal of a filibuster, the Majority Leader would move expeditiously to call up these nominations. Not that long ago it was rare that nominees would linger on the list of pending confirmation for days, weeks, and months. On Memorial Day 2002, during George W. Bush's administration, 13 nominations were pending on the executive calendar. Eight years later, under Obama, the number was 108.[6]

Senators have long viewed the confirmation process as an opportunity to express their policy views and to get the administration's attention on a matter of importance to them or their constituents. But the culture of today's Senate provides no restraints on the exercise of this potential power and no protection of the country's interest in having a newly-elected president move quickly and effectively to form a government. One telling indicator of the arbitrary and self-indulgent use of holds on nominees is when a successful cloture vote to overcome a longstanding hold is followed by a near-unanimous vote for confirmation. This happens with increasing frequency in the Senate.

[6] "You Really Got A Hold On Me," National Public Radio, June 2, 2010.

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In my view and that of virtually the entire policy and scholarly communities, the costs of the serious flaws on our appointment and confirmation process outweigh the benefits. Government agencies are ill-equipped to operate effectively and to be held accountable by Congress; able individuals willing to serve their country are subject to uncertainty and major disruptions in their personal and professional lives; huge amounts of precious time in the White House and Senate are diverted from much more pressing needs.

I understand that subsequent hearings will deal more directly with remedies to the shortcoming of governance associated with obstruction in the Senate. Let me conclude by urging you to consider two proposals: an effective end to anonymous holds on nominations and, more ambitiously, a fast-track system that sets time limits on committee and floor action for the confirmation of senior executive nominations.

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Stevenson: In Senate, 'Motion To Proceed' Should Be Non-Debatable

April 19, 2010
By Charles A. Stevenson
Special to Roll Call

There's a simple step the Senate could take that would prevent a lot of the current delay and obstruction, while still permitting lawmakers to debate some controversial matters at length.

The "motion to proceed" should be made non-debatable and subject to an immediate majority-rule vote.

This may seem like an arcane parliamentary matter, but in practice the chance to kill a bill or nomination before it is open to debate and amendment is a key weapon in the hands of obstructionists. They don't even have to oppose the measure; they just argue that "now is not the time" to take it up. In fact, in the past 20 years, more than one-fourth of the cloture petitions to end debate have been on motions to proceed.

Maybe the Senate, under pressure from voters and stymied by the recent surge in filibusters, will change or repeal the current rule that requires a 60-vote supermajority to cut off debate. But that isn't likely, since it takes 67 votes to change the rules and since all Senators can envision circumstances when they might want to fight even though outnumbered.

Even if lawmakers eliminated the 60-vote rule, obstructionists would retain numerous tools to block or delay action.

A compromise might be found on the motion to proceed, which would have substantial additional benefits while still preserving the right of extended debate on substantive matters.

Right now, the motion to take up legislation is non-debatable only in very special circumstances: if the Senate has adjourned rather than recessing at the end of the previous day, if it has a period of morning business the next day and if it is in the second hour of the session. Even then, the bill goes back to the calendar if debate continues at the end of morning business.

The biggest problem in the Senate's current rules isn't that the majority can't work its will, but that a handful of Senators can clog the legislative stream, preventing action even on broadly supported measures.

Cutting off debate requires a day's wait after the first cloture petition is filed, and then 30 more hours of debate even if cloture is invoked. This means that the leadership needs at least four days just to end debate on the motion to proceed, plus many more on controversial amendments.

Four days on one measure is four days that can't be devoted to other matters — and the Senate has averaged only 167 days in session each year this decade.

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Making the motion to proceed non-debatable would not only reduce the opportunities for filibusters but would also end the practice of individual "holds" on bills and nominations.

Those holds aren't in the rules, but they are the result of rules that require, for example, the Senate to take up bills and nominations in the order they were added to the calendar — that is, oldest first, with more urgent matters or more recent versions delayed until all previous matters have been disposed of.

A non-debatable motion to proceed could still be rejected by majority vote, and a matter being debated could still be filibustered, but the opponents would have to muster their troops, whereas now a single Member can hold the whole Senate hostage.

There are other rules changes that the Senate might adopt to have a more orderly and businesslike legislative process.

It could change the rule (XIX) that requires that "all debate shall be germane and confined to the specific question then pending before the Senate" for only the first three hours and it could enforce more rigorously the section of that rule that "no Senator shall speak more than twice upon any one question in debate on the same legislative day."

Senators could also drop the provision saying that the rules continue from one Congress to another unless changed by a two-thirds vote. That was added in 1959 under pressure from Senators fighting civil rights bills in order to overturn a ruling that would have allowed each new Congress to adopt rules by majority vote – as the House of Representatives does every two years.

But if Senators are unwilling to change the basic rule on filibusters, they should at least make the motion to proceed non-debatable so that the Senate can get to work without petty delays.

Charles A. Stevenson was a Senate staffer for 22 years; he now teaches at the Nitze School of Advanced International Studies at Johns Hopkins University.

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Senate Committee on Rules and Administration
Hearing on "Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process."
Questions for the Record from Senator Tom Udall

Questions for Tom Mann:

Q. Several critics portray the current attempts to reform the Senate rules as a "power grab" and claim that Democrats are trying to abolish the filibuster. However, many Senators recognize the need to protect minority rights in the Senate, and it is unlikely that a majority of Senators would ever vote to completely end the filibuster. Many Senators simply want reform – to preserve the rights of the minority, but to curb the abuse of the rules.

> Do you believe that the current Senate Rules can be modified to make the Senate a more effective body, but still protect the views of the minority? Do you have any recommendations for such changes?

I strongly believe that constructive changes can be made in Senate rules without compromising legitimate rights of the minority. The extraordinary increase in the frequency of filibusters, holds, and cloture petitions in recent years has diminished the Senate as an institution and weakened the country's capacity to govern. But one needn't make the Senate like the House (by, for example, adding a previous question motion to the Senate rules) in order to deal with harmful changes in Senate norms and practices. Among the changes you might consider are the following:

- **Set reasonable time limits for committees to consider and act upon presidential appointments to executive positions and for the full Senate to debate them before coming to a vote.**

- **Limit the stages of the legislative process subject to unlimited debate. Allow the majority leader to have his motion to proceed with a legislative measure and to appoint conferees with the House resolved within a limited period of time by a simple majority vote.**

- **Require 40 senators to be present on the floor of the Senate to extend debate beyond some reasonable fixed period time in lieu of the present requirement of 60 senators to end the debate.**

Q. A clause in Senate Rule V, added in 1959 as part of a political compromise, states that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Rule XXII requires an affirmative vote of two-thirds of Senators voting to invoke cloture on a rules change. Taken together, these two rules effectively bar a majority of the Senate from ever being able to reach a vote to amend or adopt its rules, thus preventing it from exercising its constitutional right under Article I, section 5.

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In testimony before the United States Senate Judiciary Committee, Subcommittee on the Constitution, several constitutional law scholars agreed that the entrenchment of Senate rules is unconstitutional (S. HRG. 108–227, May 6, 2003).

At that hearing, Northwestern University Law School Professor Steven Calabresi stated:

> "The Senate can always change its rules by a majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that, Acts of parliament derogatory to the power of subsequent parliaments bind not…". Thus, to the extent that the last Senate to alter Rule XXII sought to bind this session of the Senate its action was unconstitutional."

Similarly, in submitted testimony for the same hearing, Professor John McGinnis of Northwestern Law School and Michael Rappapport of University of San Diego School of Law wrote:

> "We write to express our opinion, based on several years of research, that the Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, an entrenchment of the filibuster rule, or of any other legislative rule of law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional. … Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching it."

Do you believe these constitutional scholars are correct in their understanding of entrenchment of the Senate rules? Do you have any additional comments about this issue?

I do believe that these constitutional scholars are correct in asserting that one legislative body (including the Senate) cannot bind its successor. Notwithstanding the provisions of Rule V and Rule XXII, a majority of the Senate has the constitutional right to change its rules.

The widespread recognition of this constitntional right (and the threat to invoke it) would likely go a long way toward curbing abuses of extended debate in the Senate without entirely eliminating the filibuster.

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EXAMINING THE FILIBUSTER: LEGISLATIVE PROPOSALS TO CHANGE SENATE PROCEDURES

WEDNESDAY, JULY 28, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:40 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Durbin, Nelson, Udall, Goodwin, Bennett, Alexander, and Roberts.

Staff Present: Jean Bordewich, Staff Director; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Rules Committee will come to order. I apologize to my colleagues for being late.

I want to first thank my friend, Ranking Member Bob Bennett, and my other colleagues present for participating in this hearing. Bob, I apologize. We were at the Archives dedicating the Roosevelt papers, which have finally been brought back to Hyde Park. There was a grand ceremony with all the members of the Roosevelts family.

Senator BENNETT. Having wrestled with Washington traffic, I understand your excuse exactly.

Chairman SCHUMER. I apologize for that.

Senator BENNETT. And I accept it.

Chairman SCHUMER. But I am sorry for my delay.

Before we begin, I do want to thank Bob and my other colleagues for participating in this hearing. This is the fourth in our series of hearings to examine the filibuster. There is one person whose contributions I think we would all like to recognize, and that is our friend, Senator Robert Byrd. Senator Byrd served on the Rules Committee longer than any Senator in history. He became a Committee member on February 25, 1963. That was before Michael Bennet was born. Is that true?

Senator BENNET. That is true.

[Laughter.]

Chairman SCHUMER. That is true. How about before Frank Lautenberg was born?

Senator LAUTENBERG. Mr. Chairman, please, order.

[Laughter.]

Chairman SCHUMER. Thank you. In any case, he gave service to his State and country much longer than that, but today we honor his 47 years on this Committee. Senator Byrd's knowledge of the Senate rules and procedures was unsurpassed. He took a very active interest in this series of hearings on the filibuster. He made a moving personal appearance at our hearing in May and submitted written statements for our April and June hearings. No one who was here on May 19th, and I know a few of you were—Senator Udall, Senator Bennett, and Senator Alexander, I think we were all here—will ever forget Senator Byrd's words to us that day. He leaves to this Committee a legacy that will long be remembered in the history of our Nation.

And now it is my pleasure to welcome to this Committee a new member taking Senator Byrd's place, and that is Senator Carte P. Goodwin, Senator from West Virginia. Carte was appointed to our Committee last week, and on behalf of my colleagues, I would like to say we all look forward to working with Senator Goodwin for his tenure on the Rules Committee. Thank you and welcome, Carte. We are glad you are here.

Senator GOODWIN. Thank you.

Chairman SCHUMER. Over the course of these hearings, we have looked at the development of the filibuster since the beginning of our country and the growing challenges that it presents to the Senate. And today we are going to look at two of the very interesting solutions to the problem created by abuse of the filibuster. The first two proposals we are going to examine are Senate Resolution 465, introduced by Senator Lautenberg, and Senate Resolution 440, introduce by Senator Michael Bennet. I am very pleased to welcome both Senators to our panel.

I read Senator Lautenberg's resolution. It is ingenious, and many people say, well, if you are going to filibuster, you ought to get up there and be required to talk about it. And everyone says, well, there is no way that can happen. You will hear about Senator Lautenberg's proposal from him as he speaks, and I think people will be very interested. He addresses the problem of unnecessary delay by expediting a cloture vote under certain circumstances and requiring those who are opposed to cloture to take responsibility for continuing debate on the floor.

Senator Bennet's resolution is also extremely interesting, and he has worked long and hard on this issue for much of the time since he has been here. It contains half a dozen key provisions aimed at changing the way filibusters and cloture votes are handled and also addresses secret holds, the topic of our last hearing.

Both proposals remind us the Senate is designed as a place for debate. We want full, fair, and robust debate. We know that with actual debate minds are changed, positions are moved, compromise is reached. However, often we see the filibuster being used merely to delay or obstruct Senate action. Some delays are not even intended to block the underlying bill, but to delay consideration of other legislation. Senator Lautenberg's bill addresses this problem.

We also want Senators on both sides of the aisle to work together and for the views of a minority to be heard. And when you sit through our hearings, each side has expressed legitimate complaints. We say—Democrats say, "It is delay, delay, delay, even

over trivial things." Republicans say, "We have no choice but to delay, unless we are allowed the opportunity to offer amendments because, in general, the majority sets the agenda, but then the minority can offer amendments. And, of course, though we hope not, every one of us knows we might be sitting on both sides of the majority and minority divide. So we are trying to be fair and down the middle of this issue.

Senator Bennet addresses the abuse of the filibuster when it is used as a tool for pure partisanship, rather than a tool for discussion and thought.

Our second panel is going to include several experts in Senate procedures—Professor Barbara Sinclair of UCLA and Professor Gregory Koger from the University of Miami. They are going to share their thoughts about the context for these reform proposals. We are also going to hear on the second panel from Elizabeth Rybicki, an analyst on Congress and the legislative process at CRS. Although the Committee's practice is not to have staff members from CRS testify at hearings, I have agreed to our Republican colleagues' request to have her appear in this circumstance to provide informational testimony related to these two proposals.

I believe the first three hearings that we have had have shown the filibuster has been abused more and more in recent Congresses, and it is time for the Senate to consider what to do about it. Our first hearing focused on the history of the filibuster. The second looked at the impact of the filibuster on the Senate today and on the functioning of our Government. Our third hearing examined the problem of secret holds and delaying impact. A special note is given to a member of our Committee, Senator Udall, who has been long pushing that we have these series of hearings and explore these issues.

With the groundwork we have laid in past hearings, we are going to turn today to consideration of specific proposals for reforms. I plan future hearings to consider resolutions proposed by Senator Tom Harkin and Senator Udall, a member of this Committee. I look forward to listening to my colleagues and experts who have come to share their knowledge and experience with us.

I am now going to turn to Ranking Member Bennett for his opening statement. Then we will go to our two witnesses. After Senator Lautenberg and Senator Bennet have testified, we will have other members make opening statements. I know both Senators have busy schedules after they testify.

Senator BENNETT.

OPENING STATEMENT OF THE HONORABLE ROBERT F. BENNETT, A U.S. SENATOR FROM UTAH

Senator BENNETT. Thank you very much, Mr. Chairman. I do not have an extended opening statement. I welcome our two colleagues both for their willingness to testify and for their thought they put into their proposals.

The whole question of minority rights in the Senate is one of the most significant ones we can deal with, and the filibuster has changed over the years. I have discovered, as I have said in these hearings before, that the Senate has rules and the Senate has precedent, and basically the precedent trumps the rules. That is,

the way we do things seems to be more important than, well, the rule says you can. And I have witnessed a sea change in precedent with respect to the filibuster in the relatively brief time I have been in the Senate. Comparing me to Robert C. Byrd, it is a brief time indeed. And we have seen the filibuster go from, when I first came, a tool that was used relatively rarely and on only the most significant issues to a standard understanding between both Leaders that anything significant requires 60 votes. And I have heard my colleagues lament this change and will not take the time of the Committee to go back in my view of history and where it came from and from whom it came. But it has been an interesting thing for me to see the precedent shift quite dramatically in the period of time that I have been here.

So we are faced now with the reality that it takes 60 votes to get anything through the Senate. Is that a good thing or a bad thing? And do we want to move in a direction that leaves the minority more in the position of the minority in the House of Representatives? And I remember a Speaker once asked—I cannot remember which speaker it was—"What are the rights of the minority?" And he said, "The minority have the right to draw their paychecks and to make a quorum." And, fortunately, in the Senate that has not been the case. The minority has had the right to be heard. The minority has had the right to have an influence and an impact. And as we go forward in this effort, we need to be very careful, I believe, not to create a circumstance where the minority in the Senate is reduced to the status of the minority in the House.

So I am looking forward to the specifics of the proposals made by our two colleagues and to the commentary of the other witnesses on those specifics and how these proposals would really work in practice.

So I thank you for calling the hearing and look forward to what it is we have to learn.

Chairman SCHUMER. Thank you, Senator Bennett.

Now we will proceed to Senator Lautenberg. Your entire statement will be read in the record, and you may proceed.

STATEMENT OF THE HONORABLE FRANK LAUTENBERG, A U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman and Ranking Member Senator Bennett. Senator Bennett, you, I know, are kind of in the twilight of your service in the Senate, but you were always someone who I saw got down to business and did not use a lot of time casually. And I have always respected that and your thoughtfulness as well. So your presence certainly will be missed.

This is not a picture of me in a younger day, but it is Jimmy Stewart, and his performance here was really iconic.

We have got to improve the pace with which the Senate moves its legislative agenda. There is no doubt about that. We have managed to alienate the public for all kinds of things, and one of the things they say frequently is, "Nothing happens there." And I guess that is from watching a TV screen and a digital clock ticking away.

To maintain his filibuster, Mr. Smith stood on his feet on the Senate floor and spoke continuously for 23 hours, and we know that there were actually Senate filibusters here that took longer

than that, one Bob Byrd, another one Senator Strom Thurmond. But eventually Mr. Smith's passion, fortitude, and arguments won the day. The movie's portrayal of a filibuster has seeped into Americans' consciousness, but few realize that the movie version of the filibuster bears little resemblance to what is going on in the Senate today.

The filibuster was intended to extend debate, but today the filibuster is not about debate at all. The filibuster, which used to be an extraordinary event, has become nothing more than routine dilatory tactic, and it is now a silent filibuster. You can expend next to no effort to slow down and stop the Senate from considering legislation. These days you do not even have to come to the floor or even be in Washington to launch a filibuster. And a silent filibuster is not just being used to thwart contentious bills. Legislation is often stalled, and non-controversial nominees are often blocked for no other reason than to delay the Senate calendar.

And, by the way, I have served in the majority and the minority and know that what goes around comes around, and the fact that any rules we make now with the majority as it is structured could shift. We are hopeful that it does not, obviously, but the fact is that that is real life.

Now, here is the effect of the silent filibuster. We are not getting the people's business done, and ordinary Americans are losing faith in our Federal Government and the legislative process. The Framers of the Constitution intended the Senate to be a deliberative body, not a chamber of silence.

The filibuster itself was meant to keep the flow of the debate going, not to stop the Senate dead in its tracks. And my bill—common sense, I believe—the Mr. Smith Act, is a modest measure that will bring Mr. Smith back to Washington by bringing the Senate back to its roots. My bill preserves the rights of the minority and maintains a 60-vote threshold to end debate. It simply requires Senators who want to filibuster to actually filibuster.

Once cloture is filed on a motion, nomination, or legislation, Senators who wish to keep the debate going are going to have to come to the floor and voice their position to their colleagues and to the country at large. And if at any point these Senators give up the floor, we can move to an immediate cloture vote.

The Mr. Smith Act will bring deliberation and seriousness back to the world's greatest deliberative body, and it will end the practice of delay solely for delay's sake and to try to restore America's confidence in the legislative process.

Mr. Chairman, there are few people that I have met in my lifetime that I have had more respect for than Senator Robert C. Byrd of recent memory. And as we all know, his knowledge of Senate rules and procedure were unmatched. While Senator Byrd never stated a position on my bill specifically, he was a fierce defender of the Framers' intention that the Senate be a model for debate, discussion, and deliberation.

This past April, in a statement submitted to this very Committee, Mr. Chairman, he said Senators should—and I quote him here—"be obliged to actually filibuster, that is, to go to the floor and talk instead of finding less strenuous ways to accomplish the same end.

And I believe the minority rights are a hallmark of the Senate, but I do not believe that we are doing the right thing for this body or for our country by allowing legislative tools to be misused. We must put the public good ahead of partisan politics, and we must insist that Senators take a stand, come out in the open, and let the public know what you really think, instead of just wiling away their time and patience as we lose their confidence.

Thank you, Mr. Chairman and members of the Committee, for inviting me to testify today and, more importantly, thanks for holding this critical meeting.

[The prepared statement of Senator Lautenberg was submitted for the record.]

Chairman SCHUMER. Thank you, Senator Lautenberg, for your excellent testimony and even more excellent idea.

Senator BENNET.

STATEMENT OF THE HONORABLE MICHAEL BENNET, A U.S. SENATOR FROM COLORADO

Senator BENNET. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Bennett, my fellow witness Senator Lautenberg, and members of the Committee, I am pleased to have the opportunity to talk with you about solutions I propose to an important problem that impedes our Government's ability to respond to the needs of American families. I am talking about the Senate's rules. The Senate's rules are intended to encourage the body to function collegially, protect the rights of individual Senators, and foster debate. Yet a few of these rules are actually having the real-world outcome of inhibiting all of those legitimate purposes.

The pervasiveness of the filibuster deployed every day for multiple purposes in this body has started to cause the Senate to descend into complete dysfunction. I am not here to advocate banning the filibuster. The Senate can and must protect individual or small groups of Senators, and filibusters, used properly, can extend debate on important matters while members advocate for their constituents and engage in the battle of ideas that is the hallmark or should be the hallmark of this body.

Yesterday's failed procedural vote on Chairman Schumer's campaign finance legislation is the perfect example, in my view, of the abuse of Senate rules. The filibuster, deployed for years to extend debate in the Senate, sometimes for a whole day at a time, actually is now being used to undermine ever even having debate. By filibustering the ability of the Senate to begin debate on the DISCLOSE Act, yesterday's minority denied the American people a full airing of the recent Supreme Court decision in *Citizens United v. FEC* and how that decision might affect our democracy.

I have introduced Senate Resolution 440 that in a very practical way would have ensured that we could have moved ahead to the debate stage on the DISCLOSE Act. By making motions to proceed undebatable, my resolution eliminates filibusters that, rather than extend debate, actually are abused to prevent debate. My resolution would help the body operate more efficiently. Making motions to proceed non-debatable is a practical step in the right direction

that is worth incorporation in a larger Senate Rules Committee package of suggested rules amendments.

Another type of filibuster that prevents rather than extends debate is the hold. Holds are the most antidemocratic form of the filibuster because just one Senator can, even in a secret manner, block Senate business for long stretches of time.

Senate Resolution 440 makes significant improvements to the holds process, including eliminating the secret hold.

My approach would require holds to be published in the Congressional Record, require them to be bipartisan at that time. They would be limited to 30 days.

Neither party will be able to place secret holds. It is important that citizens have the ability to find out why things do not get done in Washington.

Mr. Chairman, my fellow witness Senator Lautenberg has some very interesting ideas about how to ask more of the filibustering Senators who seek to block legislation. I would like to discuss the reform proposal in my resolution on this matter as well.

The Senate's rules effectively require an affirmative 60 Senators to vote to end debate on an item. Yet members in the minority do not even have to show up or vote to continue on with a filibuster.

My resolution would actually require at least 41 Senators to show up and vote to block cloture, or else the legislation could move forward. If you want to block the majority from moving ahead, then you at least ought to be required to show up for the vote.

An atmosphere of overly bipartisan gridlock has rendered this body too often at an impasse. I think the rules are contributing to this hyper-partisanship, only making a difficult environment for working across the aisle that much harder.

Mr. Chairman, the American people want to see their elected representatives work together. There is a sense, often a correct sense that the parties are trying to score political points instead of attending to the people's business.

We conduct votes with very, very partisan outcomes, and filibusters serve only to dig members in on one side or the other.

My resolution is in part an effort to build in some incentives to help the Senate work through legislative impasses in a more constructive, bipartisan manner.

These proposed rule changes address situations where the legislative process has already begun to break down. Following three failed attempts at ending a filibuster, new incentives are activated that should encourage the parties to negotiate.

First, the 41-vote threshold that the filibustering minority must meet in order to maintain the filibuster under my proposal would increase to 45 Senators unless the minority is able to attract at least one Senator who caucuses with the majority to vote for the filibuster. This provides considerable incentives to the minority to keep an open dialogue and work with members of the other party. I believe building in this incentive can have a positive marginal effect on minority negotiations with members of the majority.

A second piece of the resolution builds on this first one. Once the minority has convinced a member of the majority party to support a filibuster, then the threshold necessary to block cloture can still

rise to 45 if the majority is able to attract three members of the minority to support cloture. So the Majority Leader, able to make substantive changes to the legislation at hand, now has incentives to negotiate with members of the minority in the hope that he can break the filibuster with their help.

While rules changes cannot fix Washington culture, they can reduce the incentives for the inertia that too many times since I have gotten here has left the Senate in paralysis.

Encouraging bipartisanship through the Senate rules is at best only a partial answer, but I believe that improving some of the rules under which this body functions can begin to replace some of the bad habits Washington has developed with better ones.

The single most important thing we can do to improve the chance for success of a reform proposal is to get the partisan intent out of it. We need substantial bipartisan support to update the Senate's rules, so let us put together a package that would improve the rules whether you are in the majority or in the minority. And let us make it crystal clear that that is our intent.

My resolution has been cosponsored by Senator Shaheen, and it is my sincere hope that some of them will be incorporated in a bipartisan reform package that can pass this body.

Thank you again, Mr. Chairman, and to all the members of the Committee, for conducting this important hearing.

[The prepared statement of Senator Bennet was submitted for the record.]

Chairman SCHUMER. Again, these are very interesting ideas. I know you, Senator Bennet, have been pushing this for a long time, even before most people have focused on it. Speaking, I think, for all of us, we are going to pay careful attention to the ideas that you have put forward as well as the proposal of Senator Lautenberg. These are two excellent testimonies that will help guide us. We thank both of you for being here.

Senator BENNET. Thank you, Mr. Chairman.

Senator LAUTENBERG. Thank you, Mr. Chairman.

Chairman SCHUMER. Okay. Do any other members wish to make opening statements? Feel free.

[No response.]

Chairman SCHUMER. Okay. Then let us move on to our second panel of witnesses.

Senator UDALL. Thank you, Mr. Chairman. I would just ask to put my opening statement in the record.

Chairman SCHUMER. Thank you, and without objection, it will so be put, if that is grammatically correct.

[The prepared statement of Senator Udall was submitted for the record.]

Chairman SCHUMER. Okay. Well, welcome to our three panelists, and let me introduce all three of you, and then we will proceed.

Our first witness is Professor Gregory Koger. Professor Koger is an associate professor of political science at the University of Miami. He specializes in the study of Congress, elections, political history, and political institutions. He recently authored the book, very timely for these hearings, Filibustering: A Political History of Obstruction in the House and the Senate. Professor Koger pre-

viously worked in Congress and received his Ph.D. in political science from the University of California at Los Angeles.

Speaking of the University of California at Los Angeles, Professor Barbara Sinclair is the Marvin Hoffenberg Professor of American Politics Emerita at UCLA. She previously served as Chair of the Legislative Studies Section of the American Political Science Association. Professor Sinclair is the author of several books on the U.S. Senate, including Party Wars: Polarization and the Politics of National Policy Making and Transformation of the United States Senate.

Our third witness is Ms. Elizabeth Rybicki. Ms. Rybicki is an analyst on the Congress and legislative process for the CRS. She was previously a research fellow at the Brookings Institution and a specialist in congressional history and political science at the National Archives and Records Administration, where I was just at, dedicating the Roosevelt papers, which, by the way, I would note to my colleague Senator Durbin, Anna Roosevelt was there and said to say hello and thank you for your help in that regard. She is your constituent.

So each of you will have your entire statement read in the record. Please proceed as you wish. We will try to limit each testimony to about 5 minutes. Thank you. Professor Koger, you go first.

STATEMENT OF GREGORY KOGER, ASSOCIATE PROFESSOR POLITICAL SCIENCE, UNIVERSITY OF MIAMI, CORAL GABLES, FLORIDA

Mr. KOGER. Thank you, Senator Schumer, and thanks to the Rules Committee for the opportunity to discuss filibustering and the Lautenberg proposal.

I want to briefly stress two points I make in my written testimony. First, filibustering, as you know it, is a very recent development. If this Committee wants to make reforms, it is important to understand how and why filibustering became the norm and not the exception in the U.S. Senate.

Second, I want to discuss Senator Lautenberg's proposal, which I think would help to even the playing field by simplifying the cloture process.

First, how did we get here? For the first 170 years of Senate history, a filibuster meant that Senators had to actually occupy the floor of the Senate to prevent a final vote on a bill or nomination. Senator Byrd stated this nicely in his testimony before this Committee this year when he said, "For most of the Senate's history, Senators motivated to extend debate had to hold the floor as long as they were physically able. The Senate was either persuaded by the strength of their arguments or unconvinced by either their commitment or their stamina. True filibusters were, therefore, less frequent and more commonly discouraged due to every Senator's understanding that such undertakings required grueling, grueling personal sacrifice, exhausting preparation, and a willingness to be criticized for disrupting the Nation's business.

This classic style of filibustering is portrayed fairly accurate in the movie "Mr. Smith Goes to Washington." They actually consulted with the Senate Parliamentarian as they were doing the movie. However, by the 1960s, Senators no longer had the patience

to wage these classic wars of attrition. The Senate had too much public business to attend to, and individual Senators were too busy traveling back to their States or around the country to take part in prolonged floor fights.

Instead, they began using a then-dormant cloture rule that had been around since 1917 but had fallen into disuse. This shift from attrition to cloture had severe unintended consequences.

First, filibustering became less visible, so Senators were less accountable for their obstruction.

Second, filibustering became much easier. As Senator Byrd said, just the whisper of opposition brings the world's greatest deliberative body to a grinding halt. It is cheap and effective to prevent actions, so Senators do it more often.

Third, the current cloture rule was designed for us on rare occasions in a slow-paced chamber. The delays built into the cloture process are too long and too costly given the breadth of obstruction in the modern Senate. This is the problem that the Lautenberg proposal addresses. Essentially it reduces the delay built into Rule XXII in cases where no Senator is interested in discussing the targeted measure.

After cloture has been filed, it is in order for the Majority Leader to move that the vote on cloture begin immediately as long as, A, no Senator seeks recognition to speak and, B, Senators have had a full opportunity to file amendments. Furthermore, if cloture is invoked on a nomination or a motion to proceed—which, of course, cannot be amended—the same principle applies. If no Senator seeks recognition to speak, the Majority Leader can initiate a final vote on the nomination or motion.

In my view, this is exactly the sort of proposal the Committee should be considering. Like many members of the Committee, I appreciate the benefits of selective obstruction to ensure fair and open debate, to promote moderate and bipartisan solutions, and to force new issues onto the Senate's agenda. But the current system is far too biased towards inaction by the ease with which Senators can filibuster and the difficulty and delay in bringing debate to a close.

The resolution, Senator Lautenberg's resolution, does not alter the three-fifths threshold for cloture but merely helps the Senate to decide if a bill or nomination has enough support to clear that threshold.

This proposal would ensure that delay occurs only as long as there is some sort of debate on the Senate floor. If Senators are not speaking against the obstructive measure, then no one is deprived if debate time is cut short.

Personally, I think this proposal would be most effective and fair when combined with enforcement of the Pastore rule, which requires that debate be germane to the pending measure for at least 3 hours a day. That way Senators who are opposed to a measure could only delay a cloture vote by providing an explanation for their obstruction.

Thank you.

[The prepared statement of Mr. Koger was submitted for the record.]

Chairman SCHUMER. Thank you, Professor Koger.

Professor Sinclair.

STATEMENT OF BARBARA SINCLAIR, MARVIN HOFFENBERG PROFESSOR OF AMERICAN POLITICS EMERITA, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF CALIFORNIA, LOS ANGELES, CALIFORNIA

Ms. SINCLAIR. Thank you for inviting me to testify. My task, as I understand it, is to tell you what my research reveals about the impact of Senate extended debate rule and practices on Senate decision making and about how partisanship has conditioned that impact.

Your task is especially difficult because it involves weighing cherished values against one another. Most everybody agrees that, to function well, a legislative process needs to strike a balance between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other. Now, there is a lot less consensus about what the optimal balance is and about what rules would best implement that balance.

Well, to summarize my research briefly, I find that the use of extended debate and of cloture to cope with it began to increase well before the parties became highly polarized. However, as partisan polarization increased, so did the likelihood of major legislation encountering some sort of extended debate-related problems in the Senate, and this is a big increase, from 8 percent in the 1960s, to 27 percent in the 1970s and 1980s, then to 51 percent for the 103rd through the 109th and 70 percent in the 110th. That is, the last full Congress, 70 percent of major legislation encountered some sort of filibuster-related problem.

Second, the Senate, at least according to the measures that I have available, is more likely to produce legislation that incorporates minority preferences than the House. That can be seen as the upside of current Senate rules. However, heightened partisan polarization has significantly affected legislative productivity in the Senate. The Senate has a lot more difficulty passing legislation than the House does. In the pre-1990s period, major measures were just about as likely to pass the Senate but then not pass the House as vice versa. In the more partisan period—and I mean the 103rd through the 110th—this has really changed dramatically—from only 1 percent of major measures pass the Senate but not the House; 20 percent pass the House but not the Senate. The House Democrats' frustration is understandable in those terms. Finally, partisan polarization depresses legislative productivity in the Senate mostly through the increased use by the minority party of extended debate.

Now, because it is still in session, I do not have data for the 111th, but it does look likely there some of these records will be broken. So my research suggests that if current minority party practices continue when the majority party's margin is smaller, whichever party is the minority and the majority, the Senate really is in danger of near gridlock, of being incapable of legislating without so much difficulty that nothing much of significance gets done. The chamber already fails to pass most of its appropriations bills as individual bills simply because it does not have the floor time. So perhaps it is time for the Senate to consider whether the balance between deliberation and decisiveness has tilted too much away from decisiveness. Certainly supermajority requirements

have a much greater impact on the chamber's ability to legislate in a context of high partisan polarization than it did when the parties were polarized.

So rules that encourage by bipartisanship or ways of encouraging bipartisanship are certainly worth looking at. I am a little unclear about the extent to which rules can do that because I think the roots of partisanship are deeper than that. I think both the Bennet and Lautenberg rule proposals are very useful to look at in the terms of putting more of the burden on those who want to stop legislation versus those who want to actually move it. Now the burden tends to be all on the side of those who want to go further.

Thank you.

[The prepared statement of Ms. Sinclair was submitted for the record.]

Chairman SCHUMER. Thank you, Professor Sinclair.

Ms. Rybicki.

STATEMENT OF ELIZABETH RYBICKI, ANALYST ON THE CONGRESS AND LEGISLATIVE PROCESS, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WASHINGTON, DC

Ms. RYBICKI. Mr. Chairman, Senator——

Chairman SCHUMER. Could you move the microphone? Thank you.

Ms. RYBICKI [continuing]. Mr. Chairman, Senator Bennett, and members of the Committee, I am truly honored to have been invited to testify before you today on these two proposals to amend Senate rules.

I would like to say at the outset that the procedure experts at the Congressional Research Service work as a team, and I want to thank them, first and foremost among them Rick Beth, for their assistance.

Both of the resolutions under discussion today—Senate Resolution 440 and Senate Resolution 465—require some clarification and elaboration before the Committee could fully evaluate their impact. To assist the Committee in this evaluation, in my submitted testimony I ask a series of questions to indicate possible areas of ambiguity in the implementation and interpretation of these rules.

For example, Senator Resolution 440, submitted by Senator Bennet of Colorado, proposes a way for a supermajority of the Senate to expedite the cloture process. It first creates a motion to reduce the 2-day ripening period by a two-thirds vote. Would this motion set the date and time for the cloture vote? Or would it specify the number of hours remaining? Would the motion be amendable? Could the ripening time be reduced to zero, allowing an immediate vote on cloture and preventing any amendments from being filed? Perhaps more centrally, is the motion itself debatable? I assume it is intended to be non-debatable because otherwise you would need the cloture process to end debate on the motion, and that would kind of defeat the purpose.

This same resolution also creates a motion to reduce the 30-hour post-cloture time by a three-fifths vote. The resolution in this case explicitly states that the motion is not debatable. But is it amend-

able? And could this motion reduce the post-cloture debate time to zero and prevent Senators from offering amendments?

Depending on the interpretation of the resolution, it might be the case that, taking the various provisions together, a supermajority of the Senate could prevent debate and amendments and bring the chamber to a vote on a measure with just four votes: First, the vote on the motion to proceed, which under Section 1 is not debatable, as we heard. The Senate would then be on the matter, cloture could be filed, a motion could be made to reduce the ripening period, and a two-thirds vote of the Senate could reduce that to zero. The Senate would then vote on cloture, and then a motion could be made to reduce the post-cloture consideration time to zero. And in this way, with four votes, the Senate could immediately vote on the question of final passage, something the Senate does in terms of passing measures quickly, but by unanimous consent under current procedures. And this on one interpretation might allow a supermajority to do that.

The other resolution under discussion today, Senate Resolution 465, submitted by Senator Lautenberg, similarly seeks to create a method to expedite the cloture process. This resolution provides that the Majority Leader can "move the question on cloture" if no Senators are willing to engage in floor debate during the 2-day ripening period. Is the intent of the resolution to create a new motion that the Senate would then vote on whether or not to vote on cloture? Or is it the intent of the motion that the Majority Leader would effectively announce that it is time to vote and the Senate would vote immediately, as long as no Senator is seeking recognition?

Under current Senate procedures, it is already the case that if no Senator is seeking recognition, the presiding officer will put the question—a natural practice, of course, as Senators know, an accommodation generally made to allow Senators who wish to speak to come to the floor at their convenience.

How, then, will this resolution alter existing practice? Is it the intent of the resolution that by giving this new authority to the Majority Leader this will discourage these practices that have developed in the Senate? And if it does discourage the practice, will it expedite the cloture process?

One effect of the process established in the resolution could be to increase the actual floor time spent on a matter before a cloture vote. Under current Senate practice, the Senate often conducts other business during the 2-day ripening period, and then the vote to invoke cloture brings that matter back before the Senate.

The resolution as submitted would require that the matter remain pending before the Senate during that 2-day ripening period. Is it the intended operation of the rule that if the Majority Leader wanted to reduce the ripening time, the Senate could not conduct other business and the Senate Majority Leader would have to stay on the floor the day after cloture was filed from 1:00 p.m. until adjournment, hoping that Senators stop speaking so that he could make this proposal to move the question on cloture.

In the interest of time, Mr. Chairman, I will stop there. My submitted testimony has additional questions about other provisions, including those concerning Section 3, which deals with holds, which

is the subject of another hearing. I will be happy to discuss other provisions of the resolutions if you have questions.

I would conclude by saying, as members of the Committee know better than I, that evaluating the effect of any rules change on Senate procedure and practice can be very challenging. The impact of rules in the Senate is sometimes not directly observable since much of the time Senators do not need to actually exercise their procedural rights because they are accommodated in negotiations over unanimous consent agreements as well as in norms of Senate practice.

It is also difficult to assess the proposed consequences of rules because it is hard to anticipate all courses of proceeding and context in which the new rule may be applied.

I hope posing these questions concerning implementation and interpretation of the submitted resolutions here today and in my written testimony can assist the Committee in its evaluation.

[The prepared statement of Ms. Rybicki was submitted for the record.]

Chairman SCHUMER. Well done. There are a lot of questions, as you have posed. Okay.

My first question, and we will try to take 5 minutes and then we will go to a second round if members so wish, is to Professor Koger. Do you actually believe that Senator Lautenberg's proposal would change the number of actual filibusters? That is the fundamental question. And, second, would it alter the number of secret holds as well?

Mr. KOGER. I am not sure. I think the——

Chairman SCHUMER. I think Senator Lautenberg would probably argue it would. I cannot speak for him, but I am sure he would say yes, at least on the first and probably on the second, too.

Mr. KOGER [continuing]. To reduce the number of filibusters, I think that is certainly the intent. In practice, yes. I mean, so any Senator who is—especially placing a hold that that Senator would not want to defend publicly or argue on behalf of, that sort of hold would probably—Senators would probably think twice about filing that sort of hold.

Chairman SCHUMER. A secret hold.

Mr. KOGER. Right.

Chairman SCHUMER. And what about on filibusters themselves?

Mr. KOGER. I do not know that it would reduce the number of filibusters. It would probably make it easier for the Senate to churn through sort of—filibusters against minor legislation, so the Senate has to spend less time, you know, on nominations to lower-level positions, Cabinet positions. So I think the primary goal is to make it easier for the majority to deal with the filibusters that it has now.

Chairman SCHUMER. Do either of you have an opinion on that, Professor Sinclair or Ms. Rybicki? Go ahead, Ms. Rybicki. Assuming the answer to most of your questions, which were very good, is answered in the way of shortening the amount of time necessary, and not saying, well, we could go for another vote on deciding this, this, or the other thing.

Ms. RYBICKI. Mr. Chairman, I was just going to say the Congressional Research Service does not take an opinion, and I cannot answer the question.

Chairman SCHUMER. I know.

[Laughter.]

Chairman SCHUMER. How about Ms. Rybicki? No. I do not want to put you on the spot. Go ahead.

Ms. RYBICKI. My mentor at the Congressional Research Service was once asked by the House Rules Committee Chairman what he thought, and he responded, "I am not allowed to think."

[Laughter.]

Chairman SCHUMER. Professor Sinclair, you are allowed to think?

Ms. SINCLAIR. As Elizabeth Rybicki said, if we——

Chairman SCHUMER. Just pull the microphone forward, please.

Ms. SINCLAIR [continuing]. It really can be difficult to kind of trace the effects of a rule because it—I mean, all those little ramifications that seem so minor initially might come back and bite you. But it does seem as if the likelihood is that you would, in fact, get debate. You know, I posed it as kind of deliberation versus decisiveness, but it seems in many cases now you have the worst of all possible worlds.

Chairman SCHUMER. We do not have much deliberation, and we do not have much decisiveness.

Ms. SINCLAIR. Right, right. And often you are not even talking about what it is that is at base in contest. And while pretty clearly if the Majority Leader has to get 60 votes for everything, well, that is an enormous incentive then to use procedures like filling the amendment tree so as to prevent amendments. I mean, you have got to do the 60 anyway. Why should you then allow the others to amend things?

Chairman SCHUMER. And that is the debate we have been having back and forth on each side here as we have gone through these hearings.

Let me ask you a separate question. Senator Bennet makes a real effort to say, well, if you are going to use this process, there ought to be an incentive for some degree of bipartisanship. What did you think of his specific proposals and more broadly the idea of saying, well, if you get someone or a small number from the other party, there is an incentive for you?

Ms. SINCLAIR. I am a little pessimistic of the ability of rules to promote bipartisanship. I do think that the roots of the current partisanship are, you know, much greater and deeper than simply a matter of something that could be solved by rules. You know, if it were easier to change Senate rules, one might say, well, why not try it? And shall we say at this point I am grateful that this is your decision and not mine.

As I said, I think that both of these proposals have the intent and I think probably the effect of putting more of the burden in this process on those who want to stop things, and I think that is a good idea, and also to some extent make that more transparent.

You know, to the extent that you get a robust debate, there is at least some chance that there will be some public engagement

and that things will be decided on the basis of, if not rational arguments, at least arguments.

Chairman SCHUMER. Thank you.

Senator Bennett.

Senator BENNETT. Thank you very much. I have enjoyed your testimony.

A quick comment Professor Sinclair. You made reference to the appropriations bills and how in recent years they have ended up in either an omnibus bill or a continuing resolution. I am a member of the Appropriations Committee, and I can remember the first time we got to an omnibus bill. It was not because the Senate did not pass the bills. It was because the House did not appoint conferees, and we never got bills that could go to the President. So the ability to delay—and, frankly, it was a Republican House and a Republican Senate, so I am criticizing my own colleagues here. The ability to obstruct is not unanimously and solely part of the United States Senate.

The core here of what I think we have been talking about is the decision to move to a dual track. If we go back to "Mr. Smith Goes to Washington" and Senator Lautenberg that was the way filibusters always were. When I was a staffer here and my father was in the Senate and a filibuster would come, he would get out the cots. Everybody has to be on the floor. It was "Mr. Smith Goes to Washington" time. And at some point—and I do not know who the Majority Leader was—we got into the position of a dual track so that, okay, we file a cloture motion; now we move—the Majority Leader has the right to move to other business, and so you can have what you have been decrying here: the circumstance where a filibuster has been set in motion, but the Senate continues to function. And if we did away with the dual track, which is what the Lautenberg proposal does, says as soon as a filibuster has started, nothing else is in order, then you do have the "Mr. Smith Goes to Washington," but the Senate cannot function, cannot take up any other business.

I would like you to comment about the wisdom of being in that situation. I remember as a very freshman Senator we mounted a filibuster against one of President Clinton's proposals, and Senator Dole said, Okay, we are in it, and put up the chart, and we all signed up for a time. And I was junior enough that my time was 2 o'clock in the morning.

[Laughter.]

Senator BENNETT. And so I showed up just before 2 o'clock, took that whole hour. There was one Democrat on the floor to make sure I did not make some outrageous unanimous consent request so that he could object. He came out of the cave in the Democratic cloakroom to complain that I was reading a newspaper column and, therefore, it was not germane and should be struck down. And I pointed out that the newspaper column was on the subject we were debating, and the Chair ruled in my behalf.

You know, so, yes, we have done that and we can do that and the minority can mount that, but the Senate cannot function when we are doing that.

Comment on whether or not moving to that single track that used to be the norm is really going to improve getting legislation through the Senate.

Ms. SINCLAIR. I think it was Mansfield, Majority Leader Mansfield that went to the dual track.

Senator BENNETT. It would not surprise me. He was a very reasonable man.

Ms. SINCLAIR. And your point, I think is extremely well taken, and, you know, a lot—and this gets back to, say, all these attempts to deal with holds. Well, you know, holds are not in Senate rules. The Majority Leader does not ever have to, in fact——

Senator BENNETT. If we could move—we held a whole hearing on holds.

Ms. SINCLAIR. Yes.

Senator BENNETT. I do not mean to be disrespectful.

Ms. SINCLAIR. Oh, yes.

Senator BENNETT. But let us talk about this other question rather than holds.

Ms. SINCLAIR. But the real problem, of course, is the Majority Leader is trying to get things through the Senate. There is limited time on the floor, and so you end up going to things like the dual track because it makes it a little more possible to get certain business done. But it then encourages these other uses of the rules to stymie other things, including this kind of hostage taking where you are stymieing one nomination or one bill because you really are upset about something else. So the question is: How can you somehow get this all where the incentives are not to use the rules to block unless it is really something very important that you are willing to go to the mattresses on?

Senator BENNETT. Mr. Chairman, could we Professor Koger—I know my time is up, but——

Chairman SCHUMER. That is okay.

Mr. KOGER. Yes, please. Quickly, on the Lautenberg proposal, the way I understand it is it would create an option for the Majority Leader to require what you would call a single track debate, you will stay on the issue that is being filibustered. But as Ms. Rybicki has noted, often the Senate will switch to other issues after the cloture petition has been filed, and that would still be around as an option.

If the majority party would prefer to stick on an issue and compel the obstructionist to actually debate the issue, then that would be an option that they could use. But it would not be mandatory in every single case.

Senator BENNETT. So the Lautenberg proposal preserves the right to move on the dual track.

Mr. KOGER. Yes.

Senator BENNETT. I see.

Thank you, Mr. Chairman.

Chairman SCHUMER. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

I guess when I moved from the House to the Senate I was looking forward to Senate debate. Think about it, the greatest deliberative chamber in the world and all the history that went with it. And the first time I had a chance to offer an amendment on the floor, and the staffer came up to me and said, "You have one hour," I said, "Is that equally divided?" And she said, "No. You have one hour."

[Laughter.]

Senator DURBIN. I thought, "What am I going to do with one hour?" So I said the Republican Senator on the other side, can I ask unanimous consent that we split this up and that we debate this back and forth?" And he said, "I object." And I started to realize that this may not be the great debate chamber.

So today I would argue that the Senate is not only not functional, it is not very interesting. To have debate break out on the floor of the Senate is—you know, somebody put out a press release. Two Senators are actually engaging one another in exchange of ideas. And so I think there is something that we have to get to, and it is not just whether this place functions and produces debt which leads to votes and perhaps legislation, but actually has a process that engages thinking and expression of thought. And I do not think this process does it.

Now, the fear that all of us have, whether we are sitting on that side or this side, is, What if the tables are turned? What if they become the majority and we want to stop them? You know, if we change the rules, we are going to have to live with it. We may accommodate changes on the rules that make it easier.

So it is that basic fear, concern, that I think guides us on this in terms of how far we want to go. But I would argue at this point we have to do something. There is something fundamentally wrong with this institution.

I read a book which some friends sent to me. Francis Valeo, who is a former Secretary of the Senate, if I am not mistaken, wrote this biography of Mike Mansfield, and the most interesting thing I ran across was a story in 1962 when Wayne Morse decided to filibuster the Communications Satellite Act of 1962. And the interesting thing was this was odd that a liberal was going to initiate a filibuster. To that point, the conservatives and Southern Democrats had been using filibusters to stop civil rights. In comes Morse who said, "I am going to filibuster the Communications Satellite Act because I think it is a monopoly, and I am for public ownership," and so forth. And so they test it.

Well, here is how it ended. I thought the ending was the best part of it. He lost. Cloture was invoked. And the interesting—it was 73–27. Another consequence, Valeo writes, of the Morse cloture vote was that the entire Senate had witnessed the successful operation of Rule XXII to end the filibuster. Previously, only Hayden of Arizona could claim that distinction. It was the first time in 35 years that the Senate had voted to shut off debate and only the fifth time in its history, 1962.

Now look where we are. We face it every day, almost every day.

Can I get to a practical question? One of the things that stops movement of debate and discussion on the floor is the quorum call, and right now the Majority Leader can come in and he can lift the quorum call. But ordinary Senators cannot. One Senator can object, and the quorum call just continues.

I will ask Ms. Rybicki first. Did you find in any of these rule changes a way to address that question about how you actually get the floor?

Ms. RYBICKI. Senator Bennet's proposal, Senate Resolution 440—no, I am sorry. It is Senate Resolution 465, Senator Lautenberg,

does have in it against dilatory quorum calls. That term is not defined, so I just have more questions whether the intent is to have the presiding officer decide whether it is a dilatory quorum call and, if so, on what grounds. Would that decision be subject to appeal? Is that appeal debatable? But it is mentioned in Senate Resolution 465.

Senator DURBIN. Back in a previous life, I was a Parliamentarian of the Illinois State Senate for 14 years, and I wrote the rule book, and it was such a joy. It was like writing the Tax Code. I could always find a provision to take care of my needs.

[Laughter.]

Senator DURBIN. And I loved your questions because they start thinking about where we go. We now are embarking on a new thing that is being used by the Republican side, and that is suspend the rules after cloture is invoked. We are getting a long list of motions to suspend the rules to bring up a lot of different topics.

The point I am making is you raise a lot of practical, good questions about how these things will work, and if we are not careful, there will be some other opening in our rule book which will allow more efforts to delay, divert the efforts of the Senate to reach some sort of conclusion.

But I have come to the point, even though I think we have had one of the most productive sessions in history, I have come to the point that if this is going to be an enjoyable experience for Americans as well as for Senators, I think we need fundamental change. I think Michael Bennet and Frank Lautenberg are on the right track, and I thank you for your testimony.

Chairman SCHUMER. Senator Roberts.

Senator ROBERTS. Thank you, Mr. Chairman. I was just wondering what a repeat performance would be like by Robert C. Byrd, our great colleague and Senator who made an appearance before this Committee. You were very eloquent in describing his contributions to the process. And if there was ever a person who defended the filibuster, it was Robert C. Byrd and what he would be saying. I am not trying to say I am going to emanate that example or try to duplicate what he would say.

Mr. Koger, you state in your testimony filibustering has skyrocketed. You describe it as obstructionism. There are others of us that would say that it would be better to stop a bill, i.e., it is important to pass legislation, but it is also to prevent bad legislation from passing. And if this is the only tool you have in your toolbox, then it is not obstructionism. It is preventing something that we do not want to see happen.

But based on the research you have conducted for your book, can you tell me about the practice of filling the amendment tree, which I think is a big contributor to why we have the filibuster?

Mr. KOGER. Thank you, Senator. Briefly, I use the term "obstruction" just as a descriptive term.

Senator ROBERTS. Yes, I know.

[Laughter.]

Mr. KOGER. No, I mean, I use the term "filibustering" and "obstruction" just to refer to the strategic use of delay to prevent an outcome on an issue. There is no pejorative sense.

Anyway, filling the amendment tree. So one of the classic reasons for filibustering both in the modern Senate and going back into the 19th century House is because the minority of any sort is trying to prevent the majority from curtailing their opportunity to—I will not say "debate," but to offer amendments. And, yes, I understand that filling the amendment tree——

Senator ROBERTS. Well, how would you describe your relationship between filling the tree and filibustering? One contributes to the other, I think.

Mr. KOGER. Well, if you look at time trends, the explosion in filibustering started at the end of—you know, starting in the 1960s, increased in the 1970s, precedes the increased use of filling the amendment tree. So it may very well be true that one of the incentives to filibuster in the contemporary Senate is a reaction against filling the amendment tree. But certainly the explosion that we observe is not simply——

Senator ROBERTS. Wait. Wait a minute. Wait a minute. May be contributing. We have in 18 months here—I serve on the HELP Committee, on the Finance Committee, and have been through hundreds of hours of testimony, had 13 amendments that I wanted to offer, all in relation to health care rationing. All were defeated on a party line vote or just said they were not germane. And the only vote that I ever got was during reconciliation when I introduced an amendment that was first introduced by Senator Schumer, who then turned around and voted against his own amendment. Shame on the Chairman. But, anyway, I thought he had a great idea. But at any rate, I had 1 minute. One minute. That was it. And today you can have a very major overhaul of legislation. You do not go back to Committee. You do not have hearings. We had the DISCLOSE Act. The Chairman did at least have some debate on the floor, but we did not really debate it here in Committee, and I find that true in almost every Committee I serve on.

So, consequently, the bill goes to the floor, and then we really do not have debate on it on the floor. The Majority Leader and Charlie Rich, sitting behind closed doors, and all of a sudden the bill appears, and we have not seen it. And it could be 2,000 pages, 2,300 pages, 2,600 pages, whatever. Usually the manager of the bill indicates, well, we will find out when we pass it. And then we do not have any chance to make any amendments. And so, consequently, what else do we do other than, you know, file cloture? I mean, what do we do in this instance when regular order has really sort of broken down?

Now, I understand that the people who are for this have an agenda, and they believe in that agenda. They obviously would not do it if they did not believe in it. Some may have a different point of view, like myself. And just as an example, we have a situation here where we have a small business reform bill coming up, and the Leader is considering amendments. One amendment I had was a sense of the Senate that we at least ought to vote in the Finance Committee on the confirmation of Dr. Donald Berwick, who is going to un health care. You would think that we would want to have a vote on the confirmation. Well, the answer to that is no, we are not. We may have a hearing on how he might run CMS. The

distinguished Chairman is a member of that Committee. But I want my vote.

Now, what recourse do I have? I guess I could go to the floor and I could put the place in a quorum call, and if I have a lot of fortitude and can sit there for a long period of time—or maybe pass it off to somebody else, but I am not sure that would happen—I could maybe tie it up. We just had that example with Senator Lincoln in regards to a bill where, in order to get out, we had to accommodate her down the road in regards to an agriculture disaster bill. But she had to shut down the Senate, put a crowbar in the whole place. And that is on the other side. I still want my vote on Dr. Berwick, and what would you advise I could do here? Because we are filling the tree, and one leads to the other.

Mr. KOGER. Actually, this may be a case for Dr. Sinclair, because it gets to——

Senator ROBERTS. Well, please tell me what you think. I understand the distinguished——

Chairman SCHUMER. Time has expired, so decide who should answer the question, and we will move on.

Mr. KOGER. Briefly, I mean, these are the problems of the combination of a highly polarized congressional environment and rules that allow minority obstruction and, you know, the majority then trying to short-circuit the exercise of minority rights by the minority. And so these are the sort of things we observe.

Senator Durbin mentioned that, you know, he wonders what sort of rules changes he would want if he were in the minority, and I think this is—since there has been some switching back and forth of chairs and gavels, I think this might be an opportunity for people to see the world from both sides.

Senator ROBERTS. Ms. Rybicki.

Chairman SCHUMER. Okay. Senator Udall.

Senator ROBERTS. Mr. Chairman, could I just make one observation? Ms. Rybicki, I think it is, if you are not allowed to state what you think, you might want to think about employment in the intelligence community.

[Laughter.]

Senator ROBERTS. Just a thought.

Chairman SCHUMER. Coming from the former Chairman of the Intelligence Committee. Senator Udall.

Senator UDALL. Thank you very much, Chairman Schumer, and thank you for holding this hearing. I very much appreciate the witnesses today.

When I first arrived here—I also spent a number of years in the House, as some of the other members that are on the Committee, and I was surprised—I had been observing the Senate, but I was surprised when I arrived here about you talk about decisiveness and deliberation, the lack of both. And I think that is really the key issue here, is how we bring accountability back to the institution. And what I want to ask you about in talking about accountability has to do with how hard it is to change the rules.

I think, Ms. Sinclair, you at one point in your testimony said if it were easier to change the Senate rules. Well, you know, who made these rules? Why are they here and who voted on them? One of the remarkable things to me is that of the entire Senate body,

when we deal with Rule XXII, the last time it was changed was in 1975. So two Senators were here, Senator Inouye and Senator Leahy, and that is it, of the sitting Senator. Ninety-eight of us had nothing to do with the rules.

So if you had rules which could be established with every Congress every 2 years, as the House does and most legislative bodies around the world or parliaments do around the world, would you get more accountability? And what I am referring to there is what I call the constitutional option. In the Constitution of the United States, it says each House may determine the rules of its proceedings. Three Vice Presidents as presiding officers have ruled that at the beginning of a Congress, you can, by a majority vote, adopt the rules. And so if we proceed at the beginning of the 112th Congress—which I intend to do. I am going to offer a motion to adopt rules for the 112th Congress on the first day. Wouldn't you think if we had a tradition of adopting rules every 2 years, that would bring accountability to the system more than anything, because each side would know if you really abuse the rules, you are going to have the possibility they are going to be changed in 2 years.

Please, any of the witnesses who would like to answer.

Ms. SINCLAIR. Well, yes, I think that that is by far the most likely way of being able to change the rules without doing, you know, serious damage to the institution, to essentially reverse that precedent, whether it is the rule of the Senate or the continuing body. And it would certainly provide a certain amount of flexibility, and in the end, yes, I think one of the real problems is that with supermajorities required for just about everything, it does make it hard for the public to hold anybody accountable for what does or does not get done.

You cannot expect people, you know, who have to work and take care of their kids and all that sort of stuff to become experts in Senate procedure. And so there is that kind of "a pox on all of you" sort of sentiment when it seems that the Senate cannot function.

Senator UDALL. Mr. Koger.

Mr. KOGER. Well, Senator Udall, the part I liked about the standing body strategy in the mid-20th century was that it was an effort to force a critical vote on a parliamentary ruling about whether or not—that if the reformers won, it would promote their effort to change the rules of the Senate.

I think one of the problems they ran into is that when they put themselves in a box of saying we can only do this at the beginning of a Congress, that then limited them. What if actually their real incentive to change the rules happened in the middle of the Congress and that is when they got really angry? Well, then, they would have to wait. And often there are things to be done at the beginning of a Congress that then butted up against their effort to have a long, prolonged debate about the rules.

As Dr. Gregory Walrow mentioned earlier, I mean, I hold the view that if you have a committed and creative majority of Senators willing to go to the floor of the Senate and vote for, you know, the right to parliamentary rulings, you can do that any day, and I would not necessarily constrain yourself to the first few days of a Congress.

Chairman SCHUMER. Well, thank you. Senator Udall has been sort of pushing this idea for a long time.

Senator Bennett and I talked about this. It is very relevant to the question that Tom asked and you answered, Professor Koger. Is this different than the moments with Bill Frist and the nuclear option? And the one big difference, if it makes a difference, is this—the nuclear option was attempted in the middle of a session. And at least it is my reading—and now I have read a lot on this, and I will be reading more and we have had a hearing on this. But if there is a conflict between the two-thirds rule and the constitutional provision that the Senate shall make its own rules, it is the only time, in my judgment, and I guess I would disagree with you. I think Tom is in agreement with me. I am not sure of this. The only time where the constitutional provision might trump the Senate rule is in between sessions of Congress, because it is awfully hard to do otherwise. Because you have an ongoing rule in the middle of a session, but you just do not necessarily have an ongoing rule between sessions, although I know the way the rule was constructed it almost goes in perpetuity.

But that is a debate we will be having. It is a fundamental question that we are going to have to address. And I have to say this, there is even division within our own caucus about this. So it is going to be something that is going to take a lot of work and a lot of thought. I just wanted to say, before I call on Carte, about Ms. Rybicki's many questions. It is true, we asked you a question and we get five back, and that is good.

[Laughter.]

Chairman SCHUMER. It shows how difficult this is and how much thought it all involves, not just thought but there may be unintended consequences as well if you do not think it through very carefully.

Do you want to say something, Senator Bennett, before we call on Senator Goodwin?

Senator BENNETT. When you said there are divisions in your caucus, I simply wanted to add, "As there are in ours.

Chairman SCHUMER. Great. Senator Goodwin, is this your first time asking questions at a hearing?

Senator GOODWIN. I believe we are up to number three, Mr. Chairman.

Chairman SCHUMER. Number three, good. Well, so you are an old hand already.

Senator GOODWIN. A seasoned vet.

Senator UDALL. And he was in the chair yesterday, so, you know, we are really breaking them in here.

Senator GOODWIN. That is right. Thank you, Mr. Chairman, and I would also like to thank our panelists, including our Senate colleagues, Senators Lautenberg and Bennet, for giving their time today and sharing their testimony.

I would also be remiss if I did not also acknowledge Senator Byrd's long service to this Committee and to the State of West Virginia. Senator Byrd was a stalwart of Senate procedure in history. He quite literally wrote the book on it, or at least a book on it. And as a dean of the Senate, Senator Byrd understood the rules and procedures of this body as well as anyone, and his love of this body

was rooted in the deep appreciation of those rules and procedures, including the filibuster.

I know that this Committee has been holding a series of hearings to examine this issue, and I certainly look forward to getting up to speed and getting a better understanding of the issue in the days ahead.

I have one very brief question for Professor Koger. In your testimony, you refer to a shift from attrition to cloture. Talk a little bit about what prompted that shift and to what extent the shift became formally embodied in the rules of the Senate.

Mr. KOGER. Certainly, thank you. Well, if you remember back—I do not have it here, but the picture of Mr. Smith filibustering, your focus is drawn to Smith, but in the background there is a majority of the Senate waiting for him to collapse. And that is the trick, right? Because you had to have a quorum of the Senate present——

Chairman SCHUMER. Those are called "extras."

[Laughter.]

Mr. KOGER. But in real life, they are duly elected extras, you know, and you have to wait around day and night for whoever is filibustering to be exhausted.

We have actually been talking about it indirectly. The critical period, I think, was in the 1960s when Mike Mansfield took over as Majority Leader and said that is a really stupid way to run the Senate because, you know, we have gotten to the point where it just does not. You cannot keep a majority around as long as, you know, 10, 15, 20 people are holding the floor. They will always win, because we are just too busy. We have other things to do. They have other places to be, and it is just not an effective way.

Senator Durbin mentioned the COMSAT filibuster of 1962. Well, that was a pivotal moment because it was the first time cloture had been invoked in decades, and that moved—and part of that was that Senators who had always proclaimed that they were philosophically opposed to invoking cloture—"I would never do that," freedom of debate—well, lo and behold, when it is liberals doing the filibustering, their attitudes shifted a bit, and they voted for cloture. And that sort of changed the context in the Senate, and then the next big step would be the 1964 Civil Rights Act when for the first time you had cloture invoked on the Civil Rights Act, which had always been sort of in the background of people's thinking about cloture.

So those two events then moved the Senate and the realization that attrition was just numbingly ineffective moved the Senate away from, you know, waiting out filibusters and towards, "Eh, we will see if we have enough votes."

But as I argue in my testimony, that then had unintended consequences because they did not think through how that would change Senators' calculations as they are deciding whether or not to filibuster. It makes it too easy, and the existing cloture rule made it too difficult to invoke cloture on particularly minor things, you know, minor nominations, bills to change the names of post offices. I mean, anything that can be used as a hostage that does not invoke the passion of a majority of the Senate becomes an easy victim in this game.

Senator GOODWIN. Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator, and thank you, Panel. Thank you to my colleagues on behalf of the Rules Committee. Anyone have a second round? Tom?

Senator UDALL. I would like to just ask one question, Chairman Schumer.

Chairman SCHUMER. Go ahead.

Senator UDALL. You know, one of the arguments that is made—and all three of you might weigh in on this because I think you have experience in this area. One of the arguments that is made is that if we change the Senate rules, somehow the Senate will become identical to the House. And there is this great fear, you know, that the Senate will be identical to the House. And that is expressed in a number of different ways.

And so I guess my question to you today is: If either Senator Lautenberg's or Senator Bennet's proposals, which you both seem very up on at this point, were adopted, do you believe it would make the House and the Senate identical institutions?

Ms. SINCLAIR. No.

Senator UDALL. And could you explain why?

Ms. SINCLAIR. Well, both work actually to encourage real debate, and neither makes it easy, the way it is in the House, to simply put very stringent time limits on debate or to make decisions by a simple majority right off the bat. I mean, that would—I had always thought that if you wanted to do something, some kind of variation of—I think it is the Harkin proposal, with——

Senator UDALL. The declining threshold you are talking about, from 60 to 57.

Ms. SINCLAIR. Yes, but I think that the important thing also would be to guarantee the minority some real debate time so that, you know—I mean, there you would not want the Senate to be able or the Majority Leader to be able to simply say, well, we will move to something else, and then, you know, we have the vote and then we did move to something else, and we have the second vote, et cetera. I mean, the minority—because what you want is if this is so important an issue that we are going to insist that a supermajority is required from both the opponents' and the proponents' point of view, I think it is important that you actually have debate and that there is a real chance for the minority to make its point.

Chairman SCHUMER. Any other comments?

Senator UDALL. Yes, any other thoughts?

Ms. RYBICKI. Senator, even the Congressional Research Service can say that these reforms will not make the Senate and House identical.

Senator UDALL. I thought you would be willing to comment——

[Laughter.]

Ms. RYBICKI. The fundamental premise of House procedures that the same majority that could pass a bill can set the terms for its debate. Neither Senate Resolution 440 or 465 establishes the way for a simple majority of Senators to end debate.

Chairman SCHUMER. Well put.

Senator UDALL. Good. Mr. Koger.

Mr. KOGER. That is exactly what I was going to say. I would just add that—I mean, I think the intent of both of these proposals is

to make the Senate more like the Senate and actually require debate about the topic that is being filibustered.

Senator UDALL. Okay. Thank you very much.

Mr. KOGER. Without changing the cloture threshold.

Chairman SCHUMER. That was a good and appropriate ending. On behalf of the Rules Committee, I would like to extend special thanks to both Senators Lautenberg and Bennet. We appreciate that they took time to appear before us to explain their proposals.

To our panel of academics and scholars, thank you for your presentations on these legislative proposals.

The record will remain open for 5 business days for additional statements and questions from the Rules Committee members. Since there is no further business before the Committee, the Committee is adjourned subject to the call of the Chair. Thank you, one and all.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

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Senate Rules Committee
Hearing on "Legislative Proposals to Change Senate Procedures"
Opening statement of Senator Tom Udall
July 28, 2010

Thank you, Mr. Chairman, for convening this fourth hearing allowing us to take another look at the state of our Senate's rules.

Today's hearing on "Legislative Proposals to Change Senate Procedures" highlights once again why our Rules are in desperate need of reform. I have been speaking for months about reforming the Senate Rules – not just the filibuster – and I believe that the proposals offered today by Senators Lautenberg and Bennet deserve serious consideration.

As my distinguished colleagues here well know, I believe that our rules are broken, and I'm not alone. Over the past few months, we've seen proposals for rules changes from several senators. I would like to echo the Chairman in praising Senators Lautenberg and Bennet for sharing theirs here today.

A trend you'll see in these proposals is that they're not limited to just reforming the filibuster. I think many of my Republican colleagues, as well as some in the press, have improperly portrayed our efforts to reform the rules as an attempt to completely abolish the filibuster. But as today's witnesses will discuss, the proposals by Senators Lautenberg and Bennet do not eliminate the filibuster, but are instead meant to end needless obstruction and encourage debate.

The filibuster is a symptom of a larger issue. The real problem – the issue we must address comprehensively – is a system of rules that make the Senate a place where dysfunction reigns and accountability suffers.

I believe the Constitution provides a solution to this problem. Many of my colleagues, as well as conservative and liberal constitutional scholars, agree with me that the Constitution guarantees the Senate the right for a simple majority to adopt or amend its rules at the beginning of a new Congress. While the current rules requires two-thirds of Senators voting to invoke cloture on a rules change, the Senate of the 112th Congress is not bound by our rules.

So first thing in January, at the beginning of the next Congress, I will move for the Senate to adopt its rules by a simple majority. This is the Constitutional Option. It's what the House does. It's what nearly every legislature in the world does. And it's what the U.S. Senate should do to make sure we're accountable, both to our colleagues, and to the American people.

The Constitutional Option is our chance to fix rules that are being abused, like the filibuster and secret holds. But without it, reform is unlikely. Many of the ideas we've heard during this series of hearing have come up before.

Let me use one of Senator Bennet's proposals as an example. His bill would make most motions to proceed nondebatable. This idea, in various forms, has had bipartisan support for decades and

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is often mentioned as a way to weaken the power, and abuse, of holds. Yet we are discussing it again today.

Our late steward of the Senate, Senator Byrd, himself tried to make the same change when he was Majority Leader. He even discussed it during his last appearance before this committee, just weeks before his passing.

In January 1979, Leader Byrd took to the Senate Floor and said that unlimited debate on a motion to proceed, "makes the majority leader and the majority party the subject of the minority, subject to the control and the will of the minority."

Despite the moderate change that Senator Byrd proposed – limiting debate on a motion to proceed to thirty minutes – it did not have the necessary 67 votes to overcome a filibuster.

Efforts to reform the motion to proceed have continued since. In 1984, a bi-partisan "Study Group on Senate Practices and Procedures" recommended placing a two hour limit on debate of a motion to proceed. That recommendation was ignored.

In 1993, Congress convened the Joint Committee on the Organization of Congress. The Committee was a bipartisan, bicameral attempt to look at Congress and determine how it can be a better institution. Senator Pete Domenici, my immediate predecessor, was the co-vice chairman of the committee. Senator Domenici stated at a hearing before the Joint Committee, "If we abolish [the debatable motion to proceed], we have gone a long way to diffusing the validity of holds."

But here we are again today – more than thirty years after Senator Byrd tried to make a reform that members of both parties have agreed is necessary.

And that's just one example. After unprecedented obstruction over the past few years, the time for reform is now. The ability of this body to address the important issues facing our nation depends on it. Talking about change, and reform, does not solve the problem. We can hold hearings, convene bi-partisan committees, and study the problem to death. But until we agree that the Constitution provides the right for each Senate to adopt its rules of proceedings by a simple majority vote, there will be no real reform.

The predecessor of my Senate seat, Clinton Anderson, was one of the early proponents of the Constitutional Option. In 1957, he said on the Senate floor that, "It is our duty to take responsibility for the rules which will govern our procedures, and not to cast that responsibility upon the dead hands of past Congresses." I hope my colleagues will join me in January to carry out this critical responsibility.

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SENATOR FRANK R. LAUTENBERG
RULES COMMITTEE HEARING
Wednesday, July 28, 2010

Mr. Chairman and Ranking Member Bennett,

I want to thank you for holding this important hearing, and I'd like to thank my fellow witnesses for joining us here today.

In the iconic movie, "Mr. Smith Goes to Washington," Jimmy Stewart plays a United States Senator who launches a filibuster to stop a bad piece of legislation from moving forward. To maintain his filibuster, Mr. Smith stood on his feet on the Senate floor and spoke continuously for 23 hours.

Eventually his passion, fortitude and arguments win the day.

The movie's portrayal of a filibuster has seeped into the American consciousness, but few realize that the movie version of the filibuster bears little resemblance to what is going on in the Senate today.

The filibuster was intended to extend debate—but today the filibuster isn't about debate at all. The filibuster—which used to be an extraordinary event—has become nothing more than a routine dilatory tactic.

And it is now a silent filibuster—you can expend next-to-no effort to slow down and stop the Senate from considering legislation.

These days, you don't have to come to the floor—or even be in Washington—to launch a filibuster.

And the silent filibuster is <u>not</u> just being used to thwart contentious bills.

Legislation is often stalled and noncontroversial nominees are often blocked for no other reason than to delay the Senate calendar.

Now here's the effect of the silent filibuster—we are not getting the people's business done.

And ordinary Americans are losing faith in our federal government and the legislative process.

The framers of the Constitution intended the Senate to be a deliberative body—not a chamber of silence.

The filibuster itself was meant to keep the flow of debate going—not to stop the Senate dead in its tracks.

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My common sense bill—the "Mr. Smith Act"—is a modest measure that will bring Mr. Smith back to Washington by bringing the Senate back to its roots.

My bill preserves the rights of the minority and maintains the sixty *(60)* vote threshold to end debate.

It simply requires Senators who want to filibuster to actually filibuster.

Once cloture is filed on a motion, nomination or legislation, Senators who wish to keep debate going will have to come to the floor and voice their position to their colleagues and their country.

And if at any point these Senators give up the floor—we can move to an immediate cloture vote.

The Mr. Smith Act will bring deliberation back to the world's greatest deliberative body.

And it will end the practice of delay solely for delay's sake and restore America's confidence in the legislative process.

Mr. Chairman, there are few people I have met in my lifetime that I have had more respect for than Senator Robert C. Byrd.

As we all know, his knowledge of Senate rules and procedure were unmatched.

While Senator Byrd never stated a position on my bill specifically, he was a fierce defender of the Framers' intention that the Senate be a model for debate, discussion and deliberation.
This past April, in a statement submitted to this very Committee, he said Senators should—QUOTE—"be obliged to actually filibuster, that is go to the floor and talk, instead of finding less strenuous ways to accomplish the same end."

I believe minority rights are a hallmark of the Senate.

But I do not believe we are doing the right thing for this body or for our country by allowing legislative tools to be misused.

We must put the public good ahead of partisan politics, and we must insist that Senators take a stand, come out in the open and debate their differences.

Thank you again for inviting me to testify today—and more importantly, thank you for holding this critical hearing.

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MICHAEL F. BENNET
COLORADO

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Senate Committee on Rules
Testimony of Senator Michael F. Bennet
July 28, 2010; 10:30am

I. Introduction.

Mr. Chairman, Ranking Member Bennett, my fellow witness Senator Lautenberg, colleagues and guests, I am pleased to have an opportunity to talk with you about solutions I have proposed to an important problem that impedes our government's ability to respond to the needs of American families.

I am talking about the Senate's rules. The Senate's rules are intended to encourage the body to function collegially, protect the rights of individual Senators and foster debate. Yet a few of these rules are actually having the real world outcome of inhibiting all of those legitimate purposes.

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The pervasiveness of the filibuster – deployed every day for multiple purposes in this body – has started to cause the Senate to descend into complete dysfunction.

I am not here to advocate outlawing the filibuster. The Senate can and must protect individual or small groups of Senators. And filibusters –used properly – can extend debate on important matters while members advocate for their constituents and engage in the battle of ideas that is the hallmark of this body.

Yesterday's failed procedural vote on Chairman Schumer's campaign finance legislation is the perfect example of the abuse of Senate rules. The filibuster – deployed for years to extend debate in the Senate – sometimes for a whole day at a time -- actually is now being used to undermine ever even having

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debate. By filibustering the ability of the Senate to begin debate on the DISCLOSE Act, yesterday's minority denied the American people a full airing of the recent Supreme court decision in *Citizens United v. FEC*, and how that decision might affect our democracy.

II. Filibusters now prevent – not extend debate.

A. The motion to proceed.

I have introduced S.Res.440, that in a very practical way, would have ensured that we could move ahead to the debate stage on the DISCLOSE Act. By making motions to proceed non-debatable, my Resolution eliminates filibusters that – rather than extend debate – actually are abused to prevent debate. My Resolution would help the body operate more efficiently.

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Making motions to proceed non-debatable is a practical step in the right direction that is worth incorporation in a larger Senate Rules Committee package of suggested rules amendments.

B. Holds.

Another type of filibuster that prevents, rather than extends debate, is the hold. Holds are the most antidemocratic form of the filibuster, because just one Senator can – even in a secret manner – block Senate business for long stretches of time.

S.Res.440 makes significant improvements to the holds process, including eliminating the secret hold. There is substantial bipartisan agreement on the principle of ending the secret hold, and whether the Committee adopts my approach on how to do it, or whether it adopts another way to get there, I certainly hope the Committee will do this as soon as is practicable.

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My approach would require holds to be published in the Congressional Record and would require them to be bipartisan at that time. They would be limited to 30 days.

Neither party will be able to place secret holds. It's important that citizens have the ability to find out why things don't get done in Washington.

III. **Efficiency.**

Filibuster Supporters Must Actually Show up to Vote.

Mr. Chairman, my fellow witness Senator Lautenberg has some interesting ideas about how to ask more of the filibustering Senators who seek to block legislation. I would like to discuss the reform proposal in my Resolution on this matter as well.

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The Senate's rules effectively require an affirmative 60 Senators to vote to end debate on an item. Yet members in the minority do not have to show up and vote to continue on with a filibuster.

My Resolution would actually require at least 41/100ths of Senators to show up and vote to block cloture, or else the legislation can move forward. If you want to block the majority from moving ahead, then you at least should be required to show up for the vote.

IV. **Spurring bipartisan compromise.**

An atmosphere of overly partisan gridlock has rendered this body too often at an impasse. I think the rules are having a negative impact on partisanship that is only making a difficult environment for working across the aisle that much harder.

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The American people want to see their elected representatives work together. There is a sense – often a correct sense – that the parties are missing the point.

We conduct votes with very, very partisan outcomes, and filibusters serve only to dig members in on one side or the other.

My Resolution is in part an effort to build in some incentives to help the Senate work through legislative impasses in a more constructive manner.

These rules changes address situations where the legislative process has already begun to break down. Following three failed attempts at ending a filibuster, new incentives are activated that should encourage the parties to negotiate. First, the 41 vote threshold that the filibustering minority must meet in

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order to maintain the filibuster under the S.Res.440's new standard, would increase to 45 Senators, unless the minority is able to attract at least one Senator who caucuses with the majority to vote for the filibuster. This provides considerable incentives to the minority to keep an open dialogue and work with members of the other party. I believe building in this incentive can have a positive marginal affect on minority negotiations with members of the majority.

A second piece of the Resolution builds on this first one. Once the minority has convinced a member of the majority party to support a filibuster, then the threshold necessary to block cloture can still rise to 45 if the majority is able to attract three members of the minority to support cloture. So the Majority Leader – able to make substantive changes to the legislation at hand –

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now has incentives to negotiate with members of the minority in the hopes that he can break the filibuster with their help.

While rules changes cannot fix Washington culture, they can reduce the incentives for inertia that – too many times since I've gotten here – have left the Senate in paralysis.

Encouraging bipartisanship through the Senate rules is at best only a partial answer. But I believe that improving some of the rules under which this body functions can begin to replace some of the bad habits Washington has developed, with better ones.

V. A word About Practicality.

The single most important thing we can do to improve the chance for success of a reform proposal, is to get the partisan intent out of it. We need substantial bipartisan support to update

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the Senate's rules. So let's put together a package that would improve the rules, whether you're in the majority or the minority. And let's make it crystal clear that this is our intent.

My Resolution has been cosponsored by Senator Shaheen. And it's my sincere hope that some of them will be incorporated in a bipartisan reform package that can pass this body.

Thank you again, Mr. Chairman and to all the members of the Committee for conducting this important hearing.

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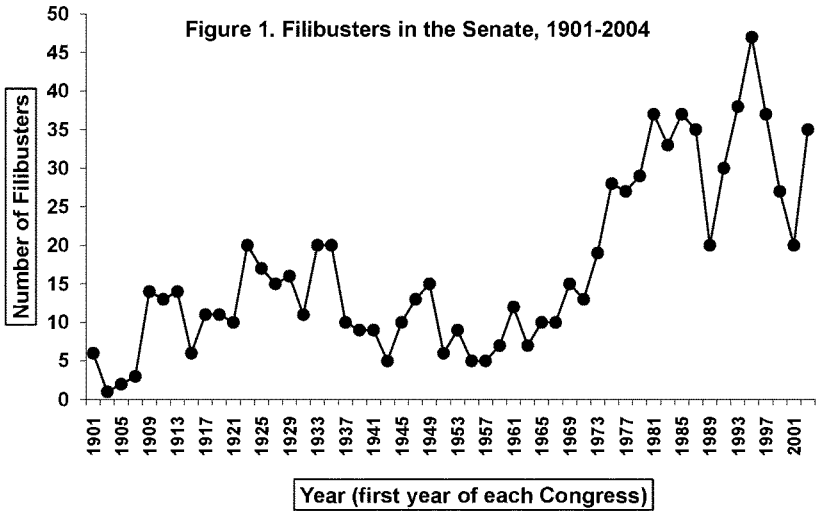
Testimony of Gregory Koger to the U.S. Senate Rules Committee
Associate Professor of Political Science, University of Miami
July 28, 2010

For ten years, I have studied filibustering in Congress and efforts to restrict obstruction in the House and Senate. My testimony makes three main points:

- The biggest difference between the classic Senate and the modern Senate is that filibustering has become much easier and therefore more frequent.
- The best strategy to restrict filibustering is to make it more difficult to obstruct and easier to cut off a filibuster.
- I then discuss Senator Lautenberg's proposal.

I. The Increase in Filibustering

In my recent book, *Filibustering*, I measure the number of filibusters and threatened filibusters by combing through the *New York Times*, *Time*, and some Congressional Quarterly publications.[1] I find a dramatic increase in Senate obstruction beginning during the 1960s, as shown in Figure 1.



[1] Recent commentators have focused on the number of cloture petitions and votes as a measure of obstruction. This is a reasonable measure of the majority party's frustration with filibustering over the last two decades, but for the pre-1960 Senate it understates the level of obstruction because senators were less likely to attempt to invoke cloture against a filibuster.

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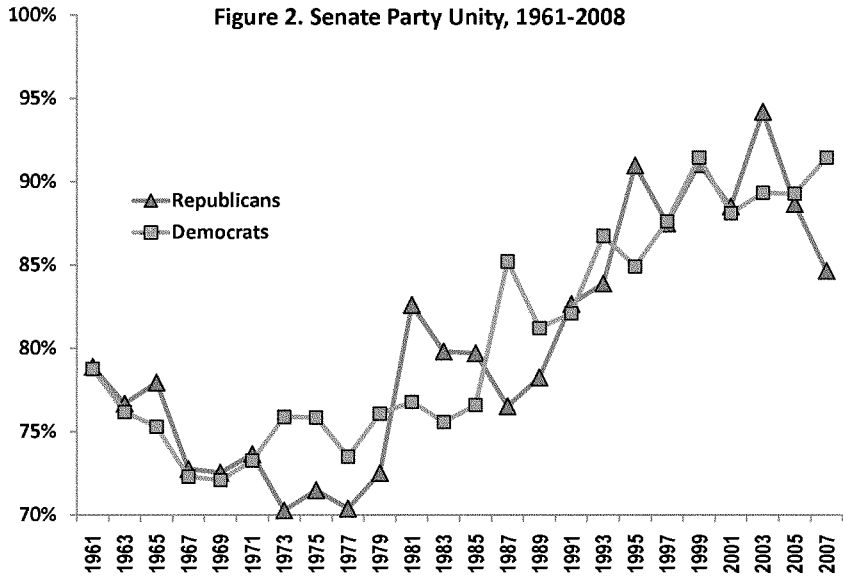
This increase in filibustering over time has overlapped with an increase in partisanship in Congress, shown below. In my analysis, this increase in partisanship has not *caused* the increase in filibustering, but it shapes the nature of the filibusters that occur. As Binder and Smith (1997) show, voting on cloture has increasingly broken down along party lines. In the current Congress, cloture votes on the stimulus bill, financial regulation, and other key issues have hinged on whether *any* members would cross party lines.



Of course, this is consistent with the testimony provided to the committee by other scholars. The real question is, why has filibustering skyrocketed over the last 40 years?

II. The Rise of the Silent Filibuster

For the first 170 years of Senate history, the typical response to a filibuster was patience. "Let him talk," senators would say, "and we'll pass the bill when he's through." This tactic is illustrated fairly accurately in the 1939 film, *Mr. Smith Goes to Washington*. If there were several senators willing to filibuster, they would take turns while the majority sat silently, day and night, ensuring a quorum was present for the marathon.

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While this was somewhat juvenile, the patience of the majority ensured that any filibuster would be conducted openly so that the obstructionists could be held accountable. It also ensured that obstructionists paid a real, physical toll for their illegitimate veto: standing and talking for hours can be exhausting. However, the senators on the other side paid a price as well, since they had to be in or near the Senate chamber day and night as long as the battle of attrition lasted.

This system gave rise to the popular impression that Senate filibusters were rare (true, although there were often free-for-alls at the end of a short session) and reserved for "matters of great importance," which was somewhat true. Senators did occasionally wage war for petty causes, but usually it took an important and controversial issue to motivate a team of senators to hold the floor of the Senate indefinitely.

The adoption of the first cloture rule in 1917 did not alter this system (see Koger 2007, 2010; but also Wawro and Schickler 2006). The majority's ability to outlast a filibuster was a great deterrent, except at the end of each Congress, and even in those cases the new cloture rule was too unwieldy to apply. Instead, the 20th amendment to the Constitution, adopted in 1933, revised the Congressional calendar to eliminate the post-election "short" session and reduced the problem of end-of-session obstruction.

However, by the mid-20th century, it was apparent that the old system was falling apart. The critical problem was that it was too easy for obstructionists—especially well-organized teams of southerners resisting civil rights bills—to outlast a majority of the Senate (Oppenheimer 1985). For individual senators, the time spent in the chamber was time taken away from family, from fundraising, and from travel. In particular, the advent of trains and planes that could take senators back to their states, to give speeches in major cities, and on overseas trips made a prolonged battle on the Senate floor insufferable. And for the Senate collectively, the days or weeks spent on filibusters were a luxury they could ill afford as the role of the federal government increased as a response to the Great Depression and then World War II and its aftermath.

One way to measure the value of senators' time is to trace the emergence of the Tuesday to Thursday in the Senate. This is shown in Figure 2, which shows a) the percentage of all days with at least one roll call vote that were Tuesday, Wednesday, or Thursday, and b) the percentage of all votes that occur on Tuesday, Wednesday, or Thursday.

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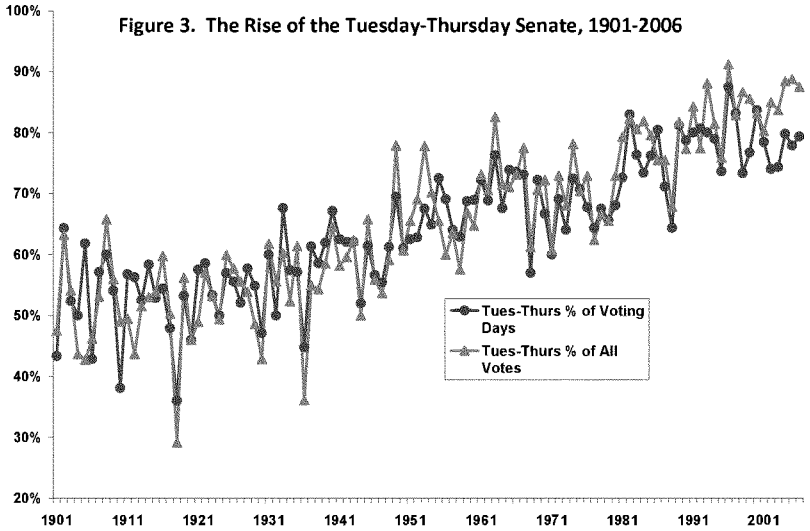

As shown in Figure 4, the workload pressure on the Senate can be measured in terms of the number of calendar days in a session, or the number of days the chamber actually meets, or the number of days on which the Senate held a roll call vote.

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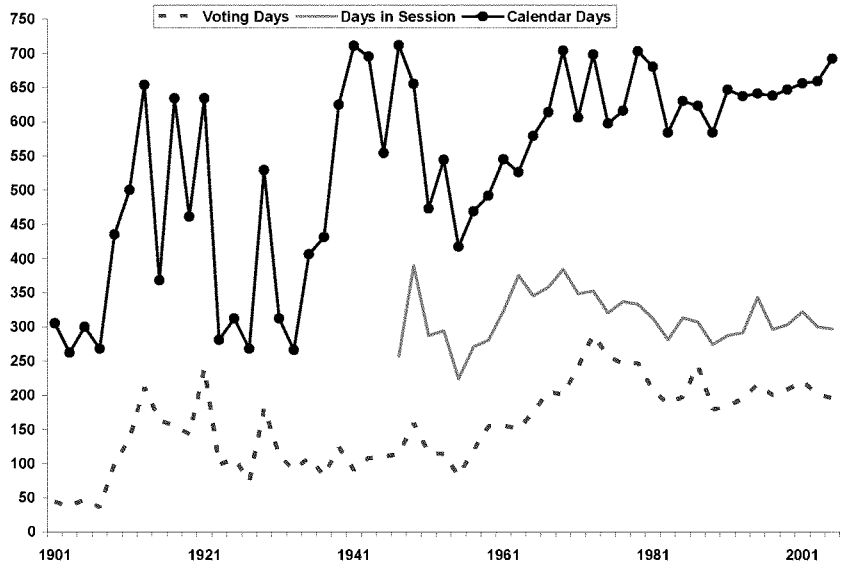
Figure 4. Days Worked in the Senate, 1901-2004



The turning point in the Senate was 1960. Majority Leader Lyndon Johnson led a determined effort to outlast Southern opposition to the 1960 Civil Rights Act while resisting attempts to invoke cloture. This effort failed on both counts. By the end of 1960, Johnson had been elected as vice president and the job of majority leader fell to Mike Mansfield of Montana. Mansfield was chagrined at the spectacle of the 1960 civil rights filibuster and determined not to repeat it. Over the next few years, the Senate gradually shifted to using the previously dormant cloture process as a response to filibustering.

This tactical shift from attrition to cloture was the critical event that brings us here today. First, the cloture rule, from 1917 to the present, was designed for an occasional mammoth issue, with ample safeguards for debate and amending before and after cloture is invoked. This is more appropriate for the Treaty of Versailles (1919) financial regulation (2010) than the dozens of appropriations bills, reauthorizations, minor bills, and nominations that make up the bulk of the Senate's agenda. For less salient bills and nominations, the cloture process imposes costs on the chamber that can exceed the reward of success.

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Second, the shift from attrition to cloture dramatically reduced the costs of filibustering. Obstructionists lost no more hours of physical effort—now a threat and a vote is sufficient. And, since it is less visible (and more boring for the media), senators are less accountable for their obstruction. This is especially true for low-salience bills and nominations for which the costs of overcoming a filibuster exceed the benefits of winning, so a simple threat of a filibuster (public or private) is sufficient to keep them off the Senate floor.

In sum, the modern Senate is dramatically different from the Senate of the mid-20th century. While senators valued compromise and cooperation, the default practice was that a simple majority was sufficient to pass legislation. Filibusters were rare and spectacular exceptions. Now the default assumption is that a cloture-sized majority is necessary for any action (Krehbiel 1998; Sinclair 2002).

III. How Can the Senate Restore the Classic Balance of Power?

One of the surprising findings of my research is that, for all the efforts senators have invested in debating the threshold for invoking cloture, *changing the cloture threshold does not reduce filibustering*. The adoption of the cloture rule in 1917 had essentially zero effect on final passage margins or appropriations bills (Koger 2007), or on the number of filibusters (Koger 2010). Subsequent reforms in 1949 and 1959 had minimal effects on the number of filibusters, while the 1975 revision to lower the cloture threshold from 2/3 of voting senators to 3/5 of the chamber may have actually increased the number of filibusters. Unless senators impose simple and immediate majority rule, any further reductions in the cloture threshold will likely lead to senators filibustering *more often* to regain any leverage they lost with the reform.

Nor is it possible to simply revert to old school attrition, as pundits occasionally suggest. There were reasons that senators abandoned attrition as a strategy: their lives are too busy, and the Senate is too busy, to exhaust every threat of obstruction. As long as one speaking senator has the right to demand a quorum of his colleagues on the floor at any time, day or night, attrition will rarely be effective under the present rules.

Instead, a more promising approach would be to address the root cause of the current crisis: the strategic imbalance between the majority and minority embedded in the rules and practice of the Senate, including the delays embedded in the cloture rule. In general terms, there are three options:

- Ensure that filibustering senators are publicly responsible for their obstruction
- Require that senators invest time and effort into their filibusters
- Reduce the delays required to invoke cloture

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IV. The Lautenberg Proposal

Senator Lautenberg has introduced a resolution, S.Res. 465, to amend Senate Rule 22 that would accomplish all three goals: increased public responsibility, forcing obstructionists to invest effort in their filibusters, and likely reducing the delay between filing and voting on cloture. S.Res. 465 has three main components:

- It prohibits dilatory motions and quorum calls once a cloture petition has been filed, pending an outcome for the petition
- It permits an immediate vote on a pending cloture petition as long as a) any deadline for filing amendments has passed; and b) no senator seeks recognition to speak.
- Once cloture has been invoked on a motion to proceed or a nomination, it permits an immediate vote on the motion or nomination if no senator seeks recognition to speak.

This seems like a moderate and reasonable proposal to help restore balance to the Senate without changing the cloture threshold. Senators would still be able to obstruct to ensure adequate deliberation and to promote compromise, but this proposal would reduce the ability of single senators or small groups to consume the time of the Senate without actively participating in floor debate.

I have three additional thoughts about this proposal. First, its modesty is a virtue; senators of both parties can embrace this proposal without fearing that it grants too much power to the majority. Second, while the resolution is written to *permit* an immediate vote, in practice it would not be mandatory that a cloture vote occur whenever there is a lapse in debate. The majority leader may choose not to press for a vote, or take the opportunity to propose a unanimous consent agreement to hold the vote before the deadline for the vote but at a mutually convenient time. Third, this proposal could be especially effective if used in conjunction with the Pastore rule, Senate Rule 19(1b), which requires that debate during the first three hours following morning business be germane to the pending measure. In this case, the only way a senator could stave off a cloture vote would be to discuss the measure and, preferably, give his or her reasons for objecting to it.

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Testimony of Barbara Sinclair
Professor of Political Science, Emerita
University of California, Los Angeles

Before the Committee on Rules and Administration
U.S. Senate
July 28, 2010

Thank you for inviting me to testify. My task, as I understand it, is to tell you what my research reveals about the impact of Senate rules concerning extended debate on Senate decision-making and about how partisanship has conditioned that impact. I hope my research will help you in your decision-making but, of course, it can only contribute to the compilation of facts, the evidence, upon which you bring your values to bear. Your task is especially difficult because it involves weighing cherished values against one another and determining a course that strikes the best balance you can.

Democratic legislatures perpetually confront the problem of how to balance deliberation and decisiveness. Most participants and outside experts agree that, to function well, a legislative process needs to strike a balance between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other, even if there is no consensus about what the optimal balance is. Deliberation requires time, information, and at least enough inclusiveness that a range of views is heard and considered. Inclusiveness is valuable in its own right because members who are included in the decision-making process, even if their views do not prevail, are more likely to consider the policy results legitimate. If the minority party is excluded from meaningful participation in the legislative process, the range of views that is heard and considered is artificially narrowed, partisan hostility and bitterness are exacerbated, and—especially in a period of partisan polarization—minority partisans in the electorate are likely to feel unrepresented and consider the policy produced less legitimate. Yet a legislature must be able to legislate, to make decisions and respond to public needs and wishes with reasonable expeditiousness. Republican senator and PhD political scientist Henry Cabot Lodge Sr. wrote in 1893, "To vote without debating is perilous, but to debate and never vote is imbecile."[1] Perhaps even worse, a legislative body that cannot make decisions eventually becomes irrelevant.

What does my recent research reveal about the impact of extended debate on the legislative process in the Senate and the Senate's capacity to make decisions? To summarize briefly, I find that the use of extended debate and of cloture to cope with it began to increase well before the parties became highly polarized. However, as partisan polarization increased so did the likelihood of major legislation encountering extended-debate related problems in the Senate. The Senate, at least according to the measures I have available, is more likely to produce legislation that incorporates the minority's preferences than is the House; one measure, how frequently a group is on the winning side on floor votes on passage and final disposition, shows that the minority party does

[1] "The Struggle in the Senate", North American Review vol. 157 (Nov 1893), p527.

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win more often in the Senate than in the House. Heightened partisan polarization has significantly affected legislative productivity in the Senate; the Senate has much more difficulty passing legislation than the House does. Partisan polarization depresses legislative productivity in the Senate mostly through the increased use by the minority party of extended debate.

The next paragraphs lay out the data and analysis on which I reached these conclusions. For more details see my "Partisan Polarization, Rules and Legislative Productivity," paper prepared for delivery at the Annual Meeting of the American Political Science Association, Toronto, Canada, September 3-6, 2009 and available from the author.

My analysis requires data on individual bills at a number of stages in the legislative process. My cases are the major measures considered during a Congress as defined by the list of major legislation in the CQ Weekly (before 1998 Congressional Quarterly Weekly Report), augmented by those measures on which key votes occurred (again according to the CQ Weekly).[2] This definition yields for each Congress about forty to sixty bills (and some other measures such as budget resolutions) that close contemporary observers considered major-- both substantively and in the sense that they are central to the legislative agenda. The data set consists of such major legislation for 15 Congresses from the early 1960s (87th Congress 1961-62) through the late 2000s (110th Congress 2007-08).[3] The number of cases is 759. One should be aware that CQ's criteria include not only substantive and political significance but also at least implicitly an expectation by the Washington community of congressional action; the rate of enactment of these measures is much higher that that of all legislation introduced.

1) Major Legislation Much More Frequently Encounters Extended Debate Related Problems than it Used To

Table 1 shows the now familiar data on the increase in filibusters, mostly defined by bills or nominations on which there were cloture votes, and in cloture votes.

Table 2 is based on another methodology. Using mostly secondary sources such as CQ and CongressDaily but when those were unclear also the Congressional Record, I coded for each major measure whether it encountered an extended-debate related problem at any point in the Senate. A hold, a threat to filibuster as well as an actual filibuster are coded as a filibuster-related problem.

Major measures were seldom subject to extended debate related problems in the 1960s (8%); the likelihood increases substantially in the 1970s and 1980s (27%), before the

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[2] Those key vote measures on which the controversy was on an amendment and the bill itself was not controversial were excluded as were 7 other measures for which the bicameralism analysis makes no sense.

[3] The congresses included are 87, 89, 91, 94, 95, 97, 100, 101, 103, 104, 105, 107, 108, 109, 110.

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parties became so highly polarized; in the 1990s forward, the period of high polarization[4], filibuster problems have become routine on major legislation (51% for the 103rd through the 109th and 70% in the 110th.)

2) The Senate according to the measures I have available, is more likely to produce legislation that incorporates the minority's preferences than is the House; one measure, how frequently a group is on the winning side on floor votes on passage and final disposition, shows that the minority party does win more often in the Senate than in the House.

Table 3 shows the frequency with which a majority of the majority party and a majority of the minority party were on the winning side on initial passage and final approval votes in the Senate and the House. Although a very few of these votes are ones on which the minority party defeated a measure supported by the majority, most of these are successful passage and approval votes. As Table 3 demonstrates, the majority party almost always wins and there is little difference between the chambers; more relevant here, the minority party wins much more frequently on passage votes in the Senate than in the House, suggesting that the minority's concerns have been taken into consideration to a greater extent.

3) Heightened partisan polarization has significantly affected legislative productivity in the Senate; the Senate has much more difficulty passing legislation than the House does.

In the 87th-101st period, 88% of major measures passed the House and 88% (though not exactly the same measures) passed the Senate. In the highly partisan period--the 103rd-110th--92% of major measures passed the House but only 75% passed the Senate.

In the pre-1990s period, 6% of the major measures passed the House but not the Senate, while 5% passed the Senate but not the House. That is, the chambers were quite similar in their propensity to block the other chamber's legislation; and a little more that one in ten major measures failed as a result. In the partisan period (103rd -110th Congresses), this changes rather dramatically; only 1% of major measures pass the Senate but not the House; 20% pass the House but not the Senate.

I have avoided examining enactment of legislation here because doing so systematically requires bringing in another major actor--the president. Bills require the president's assent or an override vote by two-thirds of each chamber and most though not all of the major measures in the data set are bills (the exceptions are mostly budget resolutions.) Still a little data show the impact of the Senate in the partisan period. In the pre-1990s period,

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[4] Here I define the period of high partisan polarization as extending from the 103rd to the present (103rd-110th). Elsewhere I showed that the systematic and routine use of extended debate as a explicitly partisan weapon in the Senate dates from the 103rd Congress. See Sinclair, Barbara. 2006. Party Wars: Polarization and the Politics of the Policy Process. Julian Rothbaum Lecture Series, University of Oklahoma Press.

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72% of major measures were successfully enacted; the rate of enactment falls to 58% in the partisan era. Furthermore in the partisan era, almost half of the measures that failed enactment died in the Senate after passing the House.

I have reviewed my recent research for findings you may find relevant to your endeavor. It is, of course, clear that there is much that I have not dealt with. My scholarly colleagues who have testified before you in your previous hearings have touched on many other important points about how Senate rules and practices affect the legislative process and policy outcomes.

Because it is still in session, I do not have data for the current congress. It seems highly likely, however, that a new record will be set for the proportion of major legislation that encountered an extended-debate related problem. The proportion of major legislation that passed the House but not the Senate is also likely to be high.
Certainly the 111th Congress will have a record of very significant legislative accomplishment, but the time and effort required to pass major bills in the Senate has been extraordinary because of the exploitation of extended debate by the minority. One may well argue that extraordinarily important legislation such as health care reform deserves extraordinary time and effort devoted to it and that it did, after all, pass. The question one needs to consider, however, is what happens when the size of the majority party shrinks as it very likely will.

If current minority party practices continue when the majority party's margin is smaller, the Senate is in danger of near gridlock, of being incapable of legislating without so much difficulty that nothing much of significance gets done. The chamber already fails to pass most of its appropriations bills as individual bills because it does not have the floor time. Perhaps it is time for the chamber to consider whether the balance between deliberation and decisiveness has tilted too much away from decisiveness. Certainly supermajority requirements have a much greater impact on the chamber's ability to legislative in a context of high partisan polarization than they did when the parties were less ideologically homogeneous and less far apart in their views of what constitutes good public policy.

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Table 1

The Increase in Filibusters and Cloture Votes, 1951-2009

Years	Congresses	Filibusters (per Congress)	Cloture Votes (per Congress)	Successful Cloture Votes (per Congress)
1951-1960	82d-86th	1.0	.4	0
1961-1970	87th-91st	4.6	5.2	.8
1971-1980	92d-96th	11.2	22.4	8.6
1981-1986	97th-99th	16.7	23.0	10.0
1987-1992	100th-102d	26.7	39.0	15.3
1993-1998	103d-105th	28.0	48.3	13.7
1999-2002	106th-107th	32.0	59.0	30.5
2003-2004	108th	27	49	12
2005-2006	109th	36	56	36
2007-2008	110th	54	112	61
2009	111th	25	39	35

Sources: Data for 82d-102d Congresses: column 3, Congressional Research Service, comp., "A Look at the Senate Filibuster," in Democratic Studies Group Special Report, June 13, 1994, app. B; columns 4-5, Norman Ornstein, Thomas Mann, and Michael Malbin, Vital Statistics on Congress 1993-1994 (Washington, D.C.: CQ Press, 1994), 162. Data for 103d Congress: Richard S. Beth, "Cloture in the Senate, 103d Congress," memorandum, Congressional Research Service, June 23, 1995. Data for 104th-107th Congresses: Congressional Quarterly Almanac for the years 1995-2007 (Washington, D.C.: Congressional Quarterly). 108th-111th CQ on line.

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Table 2
The Increasing Frequency of Extended-Debate-Related Problems on Major Measures

Years*	**Measures Affected** (in percentages)[a]
1960s	8
1970s-1980s	27
1990s-mid-2000s	51
2007-2008	70

*Congress included
1960s--97,89,91
1970s-1980s 94, 95, 97,100,101
1990s-mid-2000s 103,104,105,107,108,109

Source: Author's calculations.

[a]Figures represent percentage of "filibusterable" major measures that were subject to extended-debate-related problems.

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Table 3

Majority and Minority Party Win Rates on Initial Passage and Final Approval Roll Calls on Major Measures
(%)

	House	Senate
Passage--Majority won	94	96
Passage--Minority won	50	74
Final--Majority won	95	99
Final--Minority won	60	68

Source: authors calculations

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STATEMENT ON PROPOSALS TO CHANGE SENATE PROCEDURES (S.RES. 440 AND S.RES. 465, 111TH CONGRESS)

HEARING BEFORE THE SENATE COMMITTEE ON RULES AND ADMINISTRATION JULY 28, 2010

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Mr. Chairman, Senator Bennett, and members of the Committee, I am honored to have been invited to present testimony on two proposals to change Senate procedures. As the Committee requested, I am going to begin with a concise statement about pertinent Senate procedures and practices. I will then briefly review the components of the proposals before us and, as requested, indicate through a series of questions possible areas of ambiguity in the implementation of the proposed rules.

As the Committee is well aware, there is no Senate rule that allows a simple majority of Senators to end debate when it is ready to vote. Instead, if the Senate wants to end debate when faced with a determined coalition in opposition, it must use the "cloture process," which requires three-fifths of the Senate (60 votes, if no more than one vacancy) and often approximately a week of floor time to implement.

More specifically, to end debate on a matter:

- The matter must be pending before the Senate. In this context, pending means that some formal action has occurred to make the matter the business immediately before it, such as agreeing to a motion to proceed to a bill.
- A cloture motion, signed by 16 Senators, can then be filed on the matter.
- Two days of session later, the Senate votes on the cloture motion. This two-day period is sometimes called the "ripening" or "maturing" period for the cloture motion.
- If 60 Senators (assuming no more than one vacancy) vote to invoke cloture,[1] then consideration of the matter can continue for a maximum of 30 additional hours. During that 30 hours, consideration of any other business is prohibited, except by unanimous consent.

[1] A two-thirds vote of Senators present and voting, 67 if no vacancies and all Senators vote, is required to invoke cloture on a measure or motion to amend the Senate rules.

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Both of the resolutions that are the subject of this hearing propose changes to the Senate cloture process. S.Res. 440, submitted by Senator Michael Bennet, proposes several changes, most of which aim to either create a method for a supermajority to reduce the time necessary to implement cloture, or to adjust the size of the supermajority necessary to invoke cloture. S.Res. 465, submitted by Senator Frank Lautenberg, also seeks to create a method to reduce the time necessary to implement cloture, although the method could only be used if no Senators are engaging in floor debate.

The lack of a method to end debate immediately and with a simple majority has greatly affected the development of Senate proceedings. In general, the Senate relies on informal practices in order to accommodate the procedural rights of all Senators. As the Committee again knows, the Senate often finds it can conduct business most efficiently if all 100 Senators agree to set aside the standing rules. This is not because unanimous consent is actually required under the rules; it is because in many circumstances Senate leadership prefers to seek unanimous consent to set aside the rules rather than devote the time necessary to operate under the rules. For example, unanimous consent is often sought to take up a bill. A motion to proceed to the consideration of the bill would be in order, and a simple majority could agree to take up the bill if it could get to a vote on the motion. But in nearly all instances Senators could engage in extended debate on the motion to proceed, and the only way to end that debate without unanimous consent is through the time-consuming cloture process described above. When unanimous consent can be secured, however, the Senate can swiftly process legislation, and hundreds of bills and resolutions are actually considered or even approved this way each year. To facilitate communication with their caucuses about unanimous consent requests, both parties have developed informal practices, including the cloakroom telephone "hotline" and the "holds" process, as methods for tracking whether Senators are ready at that time to give up their rights to engage in debate or, for that matter, to offer amendments.

Similarly, under the standing rules and procedures, if no Senator seeks recognition to speak on the floor, the Presiding Officer will put the question before the Senate for a vote. In actual practice, the understanding is that such votes will not occur at unannounced times, and accommodations are generally made to allow Senators who wish to speak to come to the floor at their convenience. If no Senator wishes to speak at a particular moment, the Senate is likely to enter into a quorum call, a slow calling of the roll that keeps the Senate in session but halts proceedings until Senators are ready to continue debate or propose other actions.

To some Senate observers, informal practices such as these may seem inefficient. Why allow one Senator to call the cloakroom and forestall proposed action on a bill? Why does the Senate conduct quorum calls instead of forcing those not ready to vote to come to the floor? Attempting to prevent such practices might seem likely to improve efficiency, but the underlying rules that encouraged the development of the practices would still remain.

If all Senators exercised all of their rights under the rules all the time, the Senate could accomplish very little. Senators choose to set their procedural rights aside on a case-by-

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case basis. The practices that have developed to protect those Senatorial choices might appear overly accommodating, but they nevertheless reflect the significant procedural powers of each Senator under the rules. In many cases, they are tools to facilitate communication about how best to move forward on legislation, given the ability of each Senator under the rules to debate and propose changes to the measure.

Because efforts are often made to accommodate the procedural rights of Senators prior to formal floor action, the effects of the standing rules are not necessarily directly observable. For example, last week during consideration of the unemployment extension bill, the Senate agreed to allow five votes on motions to suspend the rules.[2] Those votes were arranged by unanimous consent; procedurally, all that was observable was every Senator agreeing to allow those votes. From one perspective the standing rules were not in operation; they were set aside by unanimous consent. But those Senators likely would not have been granted the opportunity to offer their motions if the Senate standing rules and precedents did not already give them the right to do so, even absent unanimous consent. What was gained through unanimous consent was offering those motions at a time and sequence convenient to Senators.

In short, what each Senator or coalition of Senators has the potential to do under the standing rules gives each of them leverage in negotiations seeking unanimous consent to set aside the rules. Any change to the standing rules, including the two proposals under discussion today, has the potential of altering the authority Senators have under the rules, and therefore has the potential to affect the negotiating leverage of individual Senators and of coalitions of Senators.

The task before the Committee, to evaluate the procedural impact of these two resolutions, is a challenging one, for several reasons. First, as I've been describing, the impact of rules in the Senate is often played out not in observable floor practice, but in negotiations about how or when to set aside the rules by unanimous consent. Both of these resolutions, for example, propose a method to reduce the current maximum of 30 hours post-cloture consideration time. In practice, the Senate usually does not consume the full 30 hours after cloture has been invoked. Instead, the time for floor consideration is adjusted by unanimous consent. Based on these observations of Senate practice, one might conclude that a method to allow the Senate to reduce post-cloture debate time would not have a significant impact on proceedings. But because it is the authority granted under the rules that affects Senators' leverage in negotiations, the change might have a considerable impact. It is, one might argue, the possibility of forcing the consumption of the full 30 hours that encourages policy compromise or at least opportunities to propose policy alternatives.

A second challenge to evaluating the impact of these resolutions is that no written rule can possibly account for all courses of procedural action that could arise in the future. We therefore cannot fully predict the effect of Senate rules; instead, the Senate interprets its rules by establishing precedent through rulings of the chair, often with the guidance of the Senate Parliamentarian. Rules are also interpreted through votes on appeals of such

[2] *Congressional Record*, July 21, 2010, daily edition, p. S6061.

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rulings and, to some degree, through repeated practice. To some extent, expecting absolute clarity and predictability regarding the application of new rules to future situations is unrealistic.

In addition, in the case of these two resolutions, the lack of detail and, in some cases, the use of unconventional terminology complicates any attempt to understand their intended consequences. Before the Committee could fully evaluate the impact of these proposed reforms, both resolutions might require some clarification and elaboration to address questions concerning their intended procedural effects.

In my testimony today, I therefore cannot say what the procedural consequences would be if the Senate agreed to the resolutions in their present form. What I hope to do, by posing a series of questions, is identify possible areas of ambiguity in the implementation of the proposed rules changes. In some cases, these questions could illuminate where the literal text of the resolution might not reflect the intended effect of the rules change. In other cases, these questions might serve to identify elements of the proposals that could be subject to various interpretations, leaving their consequences undetermined. The questions will hopefully assist the Committee in evaluating the intended procedural effects of the resolutions.

S. Res. 440

S. Res. 440, a resolution "Improving the Senate cloture process," submitted by Senator Michael Bennet on March 4, 2010, proposes six changes to Senate procedures.

Eliminates debate on the motion to proceed to consideration of a matter (except proposals to change Senate rules)

First, the resolution proposes that motions to proceed to the consideration of matters not be subject to debate, with the exception of motions to proceed to proposals to change Senate rules. Under current Senate procedures, motions to proceed to most bills and resolutions are debatable. As a result, in the face of determined opposition to a measure, a coalition of three-fifths of the Senate might need to go through the cloture process twice to get to a final passage vote on a bill: once on the motion to proceed to the bill, and again on the bill itself.

The current cloture process, as mentioned above, can be quite time consuming. After cloture is filed on a motion to proceed, the vote to invoke would not occur until two days of session later. If cloture is invoked, the matter is still debatable for up to 30 hours. Unless otherwise arranged by unanimous consent, those 30 hours are only consumed when the Senate is in session, and the Senate cannot consider any other matter during the 30 hours except by unanimous consent. Only after the expiration of the 30 hours would the Senate vote on the motion to proceed to the bill, and only at that point could the second cloture process on the bill itself begin (requiring the same two-day ripening period and 30 hours of consideration). Thus, even with the support of 60 or more

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Senators, it could take the Senate approximately seven days to reach a final passage vote (assuming the Senate stays in session around the clock to consume the 30 hours post-cloture; if 12 hour days are assumed, it could take approximately nine days to reach a final passage vote).

If Section 1 of S.Res. 440 were to be approved, then in nearly all circumstances it would no longer be necessary for the Senate to spend time on the motion to proceed to the consideration of legislation. Instead, in the absence of unanimous consent to take up a measure, the motion to proceed could be made and a simple majority of Senators voting could immediately agree to bring the measure before the chamber for consideration. While the apparent intent of S.Res. 440 is to preclude any debate on a motion to proceed to most measures, the Committee could consider the effects of allowing some limited debate as an alternative.

One question the Committee might explore concerns the applicability of the exception granted in S.Res. 440 for proposals to "change the Standing Rules." What would qualify as a proposal to change the Standing Rules? Would a long, comprehensive bill that contained one minor provision affecting the rules qualify? Further, would the proposal have to literally amend the standing rules or would any proposal affecting Senate proceedings qualify? The current cloture rule (Rule XXII) refers to a "measure or motion to *amend* the Senate rules" (emphasis added), which has been interpreted to mean matters that actually propose amendments to the standing rules of the Senate. That rule does not apply to proposals that might affect Senate proceedings, or even override them, such as simple resolutions that become standing orders of the Senate or expedited procedures enacted into law.[3] The phrase "*change* to any of the Standing Rules of the Senate" (emphasis added) appears in the current Rule VIII, paragraph 2, and its applicability does not appear to have been subject to interpretation by the Senate in recent years. The Committee might want to ascertain if it is the intent of the resolution to refer to proposals to "change to the Standing Rules" instead of "to amend the Senate rules" in order to allow debate on motions to proceed to a broad class of measures affecting Senate proceedings. For example, under S.Res. 440, would a motion to proceed to a bill containing an expedited procedure be debatable?[4]

Creates a motion to allow two-thirds of the Senate to reduce the two-day ripening period of a cloture motion

Second, the resolution creates a motion that would allow two-thirds of the Senate, or 67 Senators if there are no vacancies, to reduce the two-day ripening period for a cloture motion. Under the current Senate Rule XXII, a vote on a cloture motion occurs an hour after the Senate meets the second day after the cloture motion is filed. For example, if the Senate is in session Monday through Friday, a cloture motion filed on Monday will be voted on Wednesday. Any proposed amendments to the legislation on which cloture was

[3] For a recent parliamentary inquiries concerning this Senate practice, see *Congressional Record,* December 21, 2009, daily edition, p. S13709.
[4] Senators may recall that several recent legislative proposals have contained provisions creating expedited procedures, including the health care reform law (Section 3403(d)(1) of P.L. 110-148).

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filed must be submitted by 1 p.m. the day after cloture was filed, and any proposed amendments to those amendments (second-degree amendments) must be filed one hour before the cloture vote occurs. If cloture is invoked, only amendments that were filed by these deadlines can be offered. To modify the time of the cloture vote under current Senate rules requires unanimous consent. The Senate need not consider the matter on which cloture was filed during the two-day ripening period, however. Other business can be conducted in the mean time, and if the Senate votes to invoke cloture it brings the question back before the Senate. In practice, the Senate very often conducts other business during the ripening period.

The intent of this proposal appears to be that a very large majority could bring the Senate to a cloture vote without waiting the full two-day period. As the resolution is currently written, however, it could be interpreted to allow extended debate on the motion to reduce the cloture ripening period. The resolution as submitted is silent on the debatability or the amendability of the motion, and the Senate generally considers questions debatable unless the rules state otherwise. If the motion were debatable, and the cloture process was needed to end debate on it, then the ripening period for the initial matter would not be shortened. If it is not the intent of the authors to allow debate, it might be necessary to specify in the resolution that the motion is not debatable.

Assuming it is the intent that the motion not be subject to debate, additional questions concerning the proposed motion remain. How would the time be reduced--would the motion specify the number of hours required for ripening, for example, or would it set a date and time for the cloture vote? Would it be possible for the motion to reduce the ripening time to zero? Is it the intent to allow amendments to the motion?

Furthermore, is it the intent of the resolution to allow a supermajority of the Senate in some circumstances to preclude Senators from filing amendments to a matter? For example, under one interpretation of the rule, as soon as the Senate agreed to proceed to a bill, a Senator could offer a full-text substitute amendment for the bill, file cloture on it, and move that the cloture vote occur immediately. If two-thirds of the Senate agree, then cloture would be invoked on the substitute and no amendments to the substitute would be in order because none could have been filed.

Creates a motion that allows three-fifths of voting Senators to reduce post-cloture consideration time

A third related change proposed by S.Res. 440 would allow three-fifths of Senators present and voting (60 Senators if all vote and there is no more than 1 vacancy) to reduce the maximum 30 hours of post-cloture consideration by nondebatable motion. The proposal preserves the ability of the Senate, currently allowed under Senate Rule XXII, to increase post-cloture consideration time by motion. Under the proposed new rule, a motion to increase or to decrease the time could be offered once per calendar day. If the Senate agreed to adjust the post-cloture debate time, that time would be divided and controlled by the Majority and Minority Leaders, or their designees. The existing Senate

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rules do not allow the Senate to reduce the post-cloture debate time by motion, although it is often done by unanimous consent.

The intent of the proposal appears to be to allow a supermajority to reduce post-cloture debate time. One question of interpretation is whether debate time could be reduced by any amount, including to a period short enough to prevent any debate or amendment.

Another question is whether it is an appropriate interpretation of the resolution that, if the time for consideration were reduced, the entire remaining time for debate would then be controlled by the Leaders. The existing Senate Rule XXII includes a motion to *increase* the 30 hours, and provides that any *additional* time agreed to be divided and controlled by the Leaders. Creating a motion to decrease the time and having the time controlled by the Leaders could mean all consideration time is controlled. For example, the resolution could be read as meaning that if the Senate were to reduce the post-cloture time to ten hours, those ten hours would be controlled and distributed in blocks by the Leaders, and therefore individual Senators could not gain an hour to speak simply by getting recognized by the Presiding Officer.

The Committee might also wish to determine why a different threshold is used to reduce the time (three-fifths of Senators present and voting) than to invoke cloture (three-fifths of the Senate). Is the intent to make it easier to reduce the time if Senators who would vote in favor are absent from the vote? Would this mean that the support of 60 Senators would be required to limit debate, but fewer than 60 could reduce the time?

Furthermore, the limit of one motion to increase or decrease the time per calendar day could mean that if any Senator moves to increase consideration time, then even if the motion is defeated no other Senator could propose decreasing the time on that calendar day. Is this how the resolution is intended to operate? Or was the intent to allow one motion to increase time and one motion to decrease time? Or is the single daily motion amendable, thereby potentially allowing votes to both increase and decrease the time?

Each of the three proposals discussed so far appears intended to reduce the time required to bring the Senate to a vote on a matter, and two of them require supermajority support to do so. Is it the intended effect of S.Res. 440 to allow a supermajority of the Senate to prevent amendments and bring the chamber to a vote on a measure after conducting four votes:

- majority vote on the nondebatable motion to proceed,
- 2/3rds vote of the Senate to reduce time for cloture motion to ripen to no time
- vote to invoke cloture,
- 3/5ths vote of a quorum to reduce 30 hours post-cloture time to no time?

If this is the intended effect, is it also a proper interpretation of the proposal that Senators who were not allowed to speak would still be guaranteed up to 10 minutes of debate time as is currently allowed under Rule XXII?

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Under current rules, the Senate can only act this swiftly with the consent of all 100 Senators, and negotiations therefore often involve, to some degree, all Senators. If approval of S.Res. 440 would afford the opportunity for a supermajority to swiftly take actions currently done by unanimous consent, then the Committee may wish to evaluate the effect of such rules changes on the negotiating leverage of individual Senators.

Provides that cloture is invoked unless 41% of Senators vote to continue debate

A fourth change proposed by S.Res. 440 alters the threshold necessary to invoke cloture. Instead of requiring three-fifths of Senators duly chosen and sworn to vote in favor of cloture to invoke it, the resolution requires that "41 hundredths", or 41%, of Senators duly chosen and sworn vote against cloture to prevent it from being invoked. In other words, cloture would be invoked unless 41% of Senators voted to continue consideration of the matter. As long as there are no vacancies in the Senate and all Senators vote, S.Res. 440 apparently would not change the number of Senators (41) needed to prevent cloture from being invoked.

Is the intended effect of S.Res. 440 to switch the burden of attendance at cloture votes to those opposing cloture, instead of those in support of cloture? Put differently, is the intention of the proposed change to allow Senators who support cloture to abstain from voting? According to one interpretation of the resolution, as many as 19 Senators in favor of cloture could miss the vote, since the Senate could invoke cloture on a vote of 41 for and 40 against cloture.

Under current procedures if a Senator opposed to cloture is absent, this does not affect ease of getting to cloture. It is still necessary to secure the support of 60 Senators. The absence of a Senator in support of cloture does make it more difficult to invoke cloture, however, because it is still necessary to gain the support of 60 even though supporters are down one Senator. Is it the intent of S.Res. 440 to reverse this situation? Under one interpretation of the proposal, the absence of a Senator opposed to cloture could make it harder to prevent cloture because 41 Senators would need to vote to continue debate. The absence of a Senator in favor of cloture, however, would apparently not make it harder to invoke cloture.

Another possible minor consequence to be explored is that it appears that the effect of vacancies on the Senators opposing cloture will be slightly greater under the new proposal than they are on those supporting cloture under existing rules. More specifically, if there are two vacancies under current rules, the number needed to support cloture is lowered by one to 59 Senators. But if there were to be two vacancies under the new proposed rule, those opposed to cloture would still need 41 to end debate.

After three cloture votes on a question, raises to 45% the proportion necessary to oppose cloture to prevent it on a fourth attempt, if the majority party is united in favor of cloture

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The fifth change to Senate procedures proposed by S.Res. 440 also affects the threshold for invoking cloture. The submitted resolution would increase the threshold necessary to oppose cloture to 45% on a fourth and any subsequent cloture vote if all or nearly all majority party Senators voted for cloture. The number needed to oppose cloture would rise on a fourth cloture vote if 1) *all* majority party members voted to invoke cloture or 2) *just one* majority party member voted against cloture *and* three minority party members voted in favor of cloture.

Put differently, under the proposed new procedure it appears that if only minority party members wish to continue debate, then on the fourth cloture vote on the same question 45% of the Senate, instead of 41%, would need to oppose cloture to prevent it from being invoked. If more than one member of the majority party voted to continue debate, then the threshold required to oppose would remain at 41%. If just one member of the majority party voted to continue to debate, however, then the threshold required to oppose could rise to 45% if three minority party members voted to end debate.

If this interpretation is correct, then it appears that under the proposed resolution, an individual Senator's decision to vote with or contrary to the rest of his or her party could alter the required threshold for cloture. The Committee might wish to examine the possible consequences of this, if any, on Senators' voting behavior.

Another element of this proposal that might be worthy of the Committee's attention concerns the definition of a majority party Senator and a minority party Senator. S.Res. 440 provides that the Majority Leader submit a list of Senators caucusing with the majority party to the *Congressional Record*, and gives the authority to the Majority Leader to submit a new list at any time. Is it the intent of the resolution to allow the Majority Leader to assess, on an issue by issue basis, who shall be considered to caucus with the majority? No similar provision is included in S.Res. 440 to allow the Minority Leader to submit a list of members of that caucus. Was there intended to be a similar provision in the resolution concerning a list of members caucusing with the minority party?

A further potential area of ambiguity in the proposed rule is how to count the "3 attempts to bring the debate to a close." The resolution does not define an attempt, nor does it place any restrictions on the filing of cloture motions. Under current Senate procedures, a Senator can file multiple cloture motions on the same matter on the same day. Does the resolution intend to allow a Senator to file four cloture motions on one day, and then two days of session later conduct four sequential votes (the first three achieving the required 41% opposed, but the fourth potentially failing to get the required 45% to prevent cloture from being invoked)?

If the resolution is not intended to operate this way, then elaboration may be necessary to address additional questions. Is it the intent of the resolution that an "attempt" only count toward the four if it is a cloture motion filed after the disposition of a cloture motion on the same question? Or could it count toward the four as long as it is filed on a different day, so that they would each mature on four successive days?

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A further related question concerns whether second and subsequent cloture votes on a question that arise due to motions to reconsider an earlier cloture vote would count for purposes of reaching the fourth vote and lowering the threshold to invoke cloture. Under current Senate procedure, after a failed cloture vote, the Majority Leader sometimes enters a motion to reconsider the vote. By doing so, he creates an opportunity to vote again on the same cloture motion at a time of the Senate's choosing, and without the need to wait two days for a new motion to ripen. (The Majority Leader can move to proceed to the consideration of the motion to reconsider the cloture vote at any time. That motion is not debatable, and if agreed to, the Senate would then vote on the motion to reconsider, and if that is agreed to the vote would occur again on the cloture motion.) A vote can only be reconsidered once. In sum, would the "3 attempts" to bring debate to a close described in the resolution include reconsidered cloture votes?

Depending on the interpretation of "3 attempts to bring the debate to a close," the Senate could reach the lowered threshold for cloture in as few as three days (if, as under current rules, four cloture motions are filed on one day and all are voted on two days of session later) or only after nine days of session (if a subsequent "attempt" includes only motions filed after a failed cloture vote on the same question and does not include any reconsidered cloture votes).

Attempts to eliminate anonymous "holds" and to prevent the Senate from honoring a "hold" except under certain circumstances

The sixth and final change proposed by S.Res. 440 seems intended to 1) eliminate anonymous holds and 2) prevent the Senate from honoring holds on legislation unless both a majority party member and a minority party member support the hold. The resolution further appears to aim to prevent even a bipartisan hold on a nomination from lasting more than 30 days unless it is renewed by a different Senator from each party. This provision of S.Res. 440 needs considerable clarification before the Committee could evaluate its impact on Senate procedure.

As discussed earlier, existing Senate rules and procedures create incentives for the Senate to take various actions by unanimous consent. When a Senator indicates to leadership that he or she would object if unanimous consent were requested to take action on a matter at that time, this is sometimes called a "hold."

In part because leadership staff have in the past kept somewhat systematic track of these "holds," they have come to be conceived in the minds of many as a procedural right that Senators have. The shorthand sometimes used by journalists implies that a "hold" takes place when a Senator takes some kind of formal action, but that is not the case. The ability of a single Senator to prevent action from being taken actually stems from the fact that the Senate typically operates most efficiently by unanimous consent. The formal, procedural way to determine if all 100 Senators agree to something is to propound a unanimous consent agreement on the floor. For example, the Leader might say, "Mr.

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President, I ask unanimous consent that the Senate proceed to S. 1234." And the formal, procedural way to stop this action from happening is for a Senator to say, "I object."

But Senators do not spend all of their time on the floor. Therefore, the Leaders develop informal tools—like the telephone hotline, or a system for recording holds—to help them determine whether or not all 100 Senators are prepared to take an action. It is a fundamental role of leadership to be aware of the preferences of members of their respective caucuses. If the Majority Leader is aware of Senators in his caucus in opposition, he might choose not to propound a formal unanimous consent request. Likewise, the Minority Leader knows the preferences of the Senators in his caucus and based on this knowledge he can often object on the floor, or privately inform the Majority Leader that unanimous consent would not be granted.

For these reasons, attempting to regulate "holds" can be extremely difficult. It is challenging to define what constitutes a "hold" and likewise to develop a method to identify them and therefore enforce any proposed requirements. The current Senate directive, section 512 of P.L. 110-81, requiring the disclosure of a hold, or what is termed a "Notice of Intent to Object to Proceeding," identifies holds or "notices" by actions on the floor.[5] To trigger the disclosure requirements of the Senate directive, a unanimous consent request must be propounded on the floor, and a Senator must object—again, on the floor—on behalf of another Senator. Only then is a Senator (the one on whose behalf the objection is being made) required to place his or her name in the *Congressional Record* and comply with the other requirements.

Many Senators have argued that the current Senate directive has not ended the practice of anonymous holds, in part because the disclosure requirements are rarely triggered by formal unanimous consent requests. If a Senator indicates to his Leader that she is opposed to taking action on a measure, or if the Leader is simply aware of opposition, then the Leader is unlikely to ask unanimous consent to take up that measure, or can object if someone else attempts to take it up. Under these circumstances, the Senator or Senators opposed can remain anonymous.

Section 3 of S.Res. 440 might be attempting to address this issue by stating that any Senator who gives notice either "to leadership" or "during open public debate" that they intend to object to proceeding to a matter must disclose this in the *Congressional Record.* One question the Committee may wish to consider is what action under the proposed new rule would trigger the disclosure requirements? Put differently, what would qualify as notice to the leadership? Would it have to be in writing, or would any spoken communication qualify? If the resolution intends to require Senators to disclose any communication to their Leader, then the question remains, how would the Senate enforce this requirement?

Even if the assumption is that Senators would follow the rule without an enforcement mechanism, it might be worth considering whether it would be helpful to provide

[5] For more information, see CRS Report RL34255, "Senate Policy on "Holds": Action in the 110th Congress," by Walter J. Oleszek.

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additional guidance as to what kind of communications about policy preferences would qualify as a hold under the new rule. As written, S.Res. 440 would seem to include only an "intention to object to proceeding to a motion or matter." Is the intent then only to require disclosure if Senators indicate they would object to a unanimous consent request to proceed to a measure or a nomination, and not require disclosure if they would object to a unanimous consent request to, for example, approve the measure or arrange for a vote on a nomination? The distinction is important because leaders are often seeking unanimous consent not just to proceed to a matter, but instead to arrange for its final disposition without having to use the time-consuming cloture process. If the current language is broadened or interpreted to apply to more than just requests to proceed to a matter, questions would still remain regarding what qualified as a communication to the Leader. If a Senator said to his Leader that he would object to passing any bill on a certain subject, would that qualify as a hold or even as multiple holds? If a Senator indicated she was opposed to a particular policy, is that a hold on bills proposing that particular policy?

Section 3 of S.Res. 440 does not just attempt to require the disclosure of anonymous holds. It also attempts to prevent the Senate from honoring them if certain conditions are not met. As explained above, a hold is a communication to a Leader that a Senator would object if unanimous consent were sought to take certain actions. The Senate as an institution does not acknowledge these communications among Senators. Only if and when unanimous consent is requested on the floor, and a Senator states, "I object," is the hold "recognized" in any formal sense by the Senate.

It is not clear, therefore, what is meant in S.Res. 440 when it states that the Senate shall only "continue to recognize" a hold if both a majority party Senator and a minority party Senator have disclosed them. Is the intent to somehow prevent individual Senators from stating that they object when a unanimous consent request is actually made? This seems an unlikely interpretation given the lack of elaboration in the submitted text of S.Res. 440, but it is not clear how the resolution means to establish a way for the Senate either to recognize a hold or to decline to do so.

Past reform proposals have attempted to reduce the effectiveness of a Senator threatening to object to a unanimous consent request by altering the rules so that unanimous consent would not need to be sought to take certain actions. For example, some have proposed that making the motion to proceed nondebatable, as Section 1 of S.Res. 440 does, will reduce the effectiveness of holds because a simple majority could quickly take up a bill, and thus would not be faced with the choice of securing unanimous consent or using the time-consuming cloture process. One question for the Committee could be whether Section 1 of S.Res. 440 nullifies the need for Section 3.

Others have argued, however, that as long as the option of filibustering a matter exists and the Senate agenda remains crowded, individual Senators will still have some power to hold up measures by threatening to object to unanimous consent requests. After all, under current rules a simple majority could quickly take up a nomination by agreeing to the nondebatable motion to enter executive session to consider it. Yet "holds" are still

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said to be placed on nominations, because a Senator has basically indicated that he or she would object to any unanimous consent request arranging for its disposition.

S.Res. 465

S. Res. 465, a resolution "To permit the Senate to avoid unnecessary delay and vote on matters for which floor debate has ceased," submitted by Senator Frank Lautenberg on March 19, 2010, proposes two changes to Senate procedures.

Proposes a method to reduce the two-day ripening period of a cloture motion

S.Res. 465 seems to be proposing a method for the Majority Leader to bring the Senate to a cloture vote prior to its full two-day ripening, under certain specified conditions. The conditions appear to be: 1) any deadline for submitting first-degree amendments has passed (under Rule XXII, the deadline is 1 p.m. on the day following the day cloture was filed); 2) that the matter on which cloture has been filed has remained "the pending matter"; and 3) that no Senator is seeking recognition on the floor. If all the conditions are met, then the Majority Leader can "move the question on cloture," according to the text of S.Res. 465 as submitted. The resolution further attempts to prohibit any "dilatory" motions, including "dilatory quorum calls," presumably to encourage actual debate during the ripening period.

The intent of the rule appears to be to allow the Majority Leader to expedite the cloture process if no Senators are willing to engage in floor debate on the question. Several questions might need to be addressed before the procedural implications of the proposal could be fully evaluated. To begin with, what does it mean to "move the question"? No such motion exists in current Senate rules and procedure. No such motion exists in House procedure either, although in the House it is possible to "move the previous question," the effect of which is to bring the House immediately to a vote on whether or not to end debate on the main question. Is it the intent of S.Res. 465 to create a similar motion in the Senate, in which case the Majority Leader would "move the question" and the Senate would vote on whether to vote on the filed cloture motion at that time? If it is a motion, is it debatable and amendable? Or is the intent of the resolution to allow the Majority Leader effectively to announce that it is time to vote on cloture?

Another question concerning implementation is how the requirement that "no Senator seeks recognition on the floor" before the ripening period can be reduced is expected to interact with existing Senate practices for putting a question to a vote. Under current Senate procedures, if a matter on which cloture was filed remained pending, and no Senator sought recognition to debate it, the Presiding Officer would put the question on the matter under debate (*not* on the cloture motion). As I explained in detail at the start of my testimony, in current practice the Presiding Officer generally does not put the question, even if at some point in time no Senators are seeking recognition, because the Senate has developed a system of cooperation and accommodation to allow votes to occur at predictable times and Senators to speak on matters at their convenience. Is it the

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intent of the resolution to give this new authority to the Majority Leader in order to discourage this informal custom of accommodation? If so, how long is the Majority Leader expected to wait, if at all, to ensure no Senator wishes to speak on the matter? Is it an appropriate interpretation of the resolution as submitted that only the Majority Leader himself can "move the question"? In which case, would the Majority Leader need to be present on the floor in order for Senators to have the procedural incentive to continue debate? And then would the debating Senators effectively control the time of the vote, since only when they chose to stop speaking could the Majority Leader "move the question"?

Furthermore, how is S.Res. 465 intended to impact the actual floor time spent on a matter during the ripening period? Under current Senate rules, as mentioned in the discussion of S.Res. 440, the Senate need not consider a matter on which cloture has been filed during the ripening period. In fact, the Senate often conducts other business during the two days; the vote to invoke cloture brings the matter on which cloture was filed back before the Senate. S.Res. 465 requires that the matter on which cloture was filed must have "remained the pending matter" from the point it was filed until at least until 1 p.m. the following day, after which the ripening period could be reduced. Is it the intended effect of the resolution to increase actual floor time spent on a matter before a cloture vote? It is also the case that under current rules, the amendment deadline of 1 p.m. remains the same even if a cloture motion is filed late in the day. Therefore, if the resolution is not expected to alter that rule, a cloture motion could be filed shortly before adjournment, leaving little actual floor time to debate the matter if the Majority Leader is able to "move the question" at 1 p.m. the following day. (Absent any order of the Senate to the contrary, the Senate convenes at noon each day).

Relatedly, under existing Senate rules, debate does not generally need to be germane unless cloture has actually been invoked. Is the intent of the proposed rule that Senators be required to debate the subject of the cloture motion during the ripening period? Under one interpretation of the resolution as submitted, a coalition of Senators could preclude the reduction of the two-day ripening period by arranging to speak on topics of their choice after 1 p.m. until adjournment on the day after cloture was filed. Is this the intended operation of the proposal?

More specific questions to be addressed include what the term "pending" means, because under current Senate rules and precedents, "pending" is used in several different senses and is not a term with a defined parliamentary meaning. In this context does it mean that the Senate cannot conduct other business, even by unanimous consent? Or can the matter be considered to have remained pending as long as it is not displaced (meaning that its consideration resumed automatically after other business was conducted)?

The resolution also prohibits dilatory motions, including dilatory quorum calls. The intention again appears to be to encourage actual debate, but the brevity of this provision creates uncertainties that might need to be resolved. The resolution neither defines a dilatory motion nor provides a method for how it could be determined by the Senate. Does the resolution presume the Presiding Officer will decide what is dilatory with the

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advice of the Senate Parliamentarian? If so, would the Chair's decision be subject to appeal? Would the appeal be debatable? Would a motion to proceed to consider another matter be dilatory? Although Senate Rule XXII currently prohibits dilatory motions under cloture, it is not clear whether or how the limited precedents concerning what has been held dilatory in those circumstances would apply. And what is a dilatory quorum call? Does S.Res. 465 intend to prevent any quorum calls during the two-day ripening period? Does it intend to prevent the Senate—in any situation after cloture has been filed on a matter under consideration—from using quorum calls as a way to keep the Senate in session when negotiations are occurring off the floor and no one wishes to make a public statement at that time?

Finally, questions remain concerning what effect the resolution intends to have on the ability of Senators to file second-degree amendments. Under current rules, the deadline for submitting second-degree amendments is one hour before the cloture vote. S.Res. 465, as submitted, does not alter this deadline. Is it the intent of the resolution that if a second-degree amendment is filed, but the Leader "moves the question" within an hour of its filing, that the second-degree amendment will not be in order because it was filed after the deadline?

Proposes a method to reduce the 30-hour post-cloture time on nominations and motions to proceed

The second change proposed by S.Res. 465 also appears to be creating a method for the Majority Leader to bring the Senate to a vote after cloture has been invoked on a nomination or a motion to proceed prior to the expiration of the 30-hours if no Senator is seeking recognition to debate the matter. As before, it is made in order for the Leader to "move the question."

As discussed above, to "move the question" is not an option under current Senate rules and procedures, and its precise operation could be clarified. In addition, as also discussed above, it is already the case that, post-cloture, if no one is seeking recognition, that the Presiding Officer will put the question. How then is this intended to differ from current procedure? Is the expectation that this resolution will discourage the current practice of accommodating Senators' schedules to allow them to speak on the floor at times of their choosing?

Closing Comment

Mr. Chairman, as you and the members of this Committee know far better than I, evaluating the effect of any rules change on Senate procedure and practice can be challenging. The impact of rules in the Senate is sometimes not directly observable, since much of the time Senators do not need to actually exercise their procedural rights because they are accommodated in negotiations over unanimous consent agreements and norms of Senate practice. It is also difficult to assess the consequences of proposed new rules because no one can anticipate all courses of proceeding and contexts in which a new

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rule might be applied. I hope posing these questions concerning the interpretation and implementation of the submitted resolutions can assist the Committee in its evaluation. My colleagues and I at the Congressional Research Service are available to offer any additional assistance.

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EXAMINING THE FILIBUSTER: LEGISLATIVE PROPOSALS TO CHANGE SENATE PROCEDURES

WEDNESDAY, SEPTEMBER 22, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in Room 305, Russell Senate Office Building, Hon. Charles E. Schumer, chairman of the Committee, presiding.

Present: Senators Schumer, Nelson, Pryor, Udall, Goodwin, Bennett, Alexander, and Roberts.

Also Present: Senator Harkin.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The hearing will come to order. Good morning everyone. As always, I want to thank my friend Ranking Member Bennett and all my other colleagues for participating in this legislative hearing. It is the fifth in our series of six hearings to examine the filibuster. I particularly want to thank our first panels, Senator Harkin and Senator Udall, who have been very active in this issue for agreeing to be witnesses here today.

It is clear that the topic of right to debate and the use of the filibuster are of deep interest to members of this Committee. Only yesterday afternoon several of our Republican colleagues participated in what I felt was a very thoughtful and wide ranging discussion on these issues on the Senate floor after the vote on the motion to proceed on Defense Authorization Bill failed.

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

I appreciate the participation of Senators Bennett, Alexander, and Roberts, who are members of this Committee, and others who have attended these hearings and provided their comments and input. They have raised important issues during our discussions, as

have the Democratic members of this Committee, Senators Udall and Nelson. We welcome Carte Goodwin, who has been here for every hearing we have had since he has become a member and thank him for that.

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

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

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

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

Over the course of the hearings, we have looked at a number of issues—the development of the filibuster since the earliest days of the Senate, the growing challenges that the use and some would say abuse of the filibuster presents to the Senate, the impact of the filibuster on nominations, and other matters. Our last hearing in July examined filibuster-related legislation introduced by Senators Frank Lautenberg of New Jersey and Michael Bennet of Colorado. Today we take a look at two other Senate Resolutions that have been introduced to address concerns about abuse.

The two proposals we will examine today are Senate Resolution 416, introduced by Senator Harkin, and Senate Resolution 619, introduced by Senator Tom Udall. Senator Harkin has been a leader for more than a decade in trying to make the Senate function better and fulfill its purpose as a deliberate body. His resolution, as I am sure he will explain, was introduced more than a decade ago when he and the Democrats were in the minority.

So it goes back to what I mentioned before. His legislation contains what is known as a "ratchet" where the threshold to achieve cloture is decreased after successive cloture votes. It certainly is

time for us to listen to Senator Harkin's thoughts about how to make this institution better.

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

Senator BENNETT. He.

Chairman SCHUMER [continuing]. It was Senator Udall——

[Laughter.]

Chairman SCHUMER [continuing] Who suggested that we have these hearings and start delving into this issue. So I thank him for that. He has been to every hearing we have had. He has actively questioned almost every witness. As a new member of the Rules Committee, he has urged this Committee to look seriously at the problems associated with the filibuster, and he is an advocate for the so-called Constitutional option, which is not a specific change, but sort of opens the door to allow specific changes.

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

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

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

Senator Bennett.

OPENING STATEMENT OF THE HONORABLE ROBERT F. BENNETT, A U.S. SENATOR FROM UTAH

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

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

As many of you know, I was an intern here as a teenager. My father was a senator for 24 years. I served on his staff as his chief

of staff. Back in those days it was not assumed that every senator was automatically dishonest and every member of his family automatically corrupting. Several senators found that having members of their family work for them ensured loyalty and security and I hope, in my case, some degree of competence.

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

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

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

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

I do not think that is what the original filibuster rule had in mind, but it has become the norm. And however much Senator Roberts and Senator Alexander and I complained about it on the floor yesterday with respect to the Defense Authorization Bill, since I am leaving the Senate, I can——

Chairman SCHUMER. Regrettably.

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

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

All of us have served in the minority and many of you will serve in the minority again regardless of your party, and making sure that the minority is protected from the kind of absolutism that ex-

ists in the House of Representatives is a very important challenge that we have here on this Committee.

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

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

STATEMENT OF THE HONORABLE TOM HARKIN, A U.S. SENATOR FROM 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 gone up. As sure as I am sitting here, we may be in the majority now.

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

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

Quite succinctly, Mr. Chairman, my proposal, as you said, would be relatively simple. On the first cloture vote it would take 60. If 60 votes were not obtained, two days but one, as they say in the book, two days but one or three days would pass and then you

would have another vote. And then you would need 57 votes. If you did not muster 57 votes, two days plus one, but one would pass, and you would have another vote and that would be 54 and then finally 51. So it would be about an eight-procedure if it was drawn out.

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

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

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

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

So I think it would bring both sides together to compromise. Now, Mr. Chairman, you have gone to—been a lot of people have talked about the history of Rule 22 and the history of the filibuster. I am not going to go into that in any great detail, but I think there is one takeaway from all the history of Rule 22 and the takeaway is this, it is not written in stone. It has been changed many times and we can change it again. The world will not come to an end or anything like that. No damage will happen if we change Rule 22.

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

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

Now to achieve this purpose, citizens from small states have the same representation as large states. Furthermore, we are elected

every six years. All those things, they give the Senate a different flavor and a different approach than the House of Representatives. The provisions in the Constitution, I believe, are ample to protect minority rights and restrain pure majority rule. What is not necessary and what was never intended is an extra Constitutional empowerment of the minority through a requirement that a super majority of senators be needed to enact legislation or even to consider a bill.

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

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

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

Well, Mr. Chairman, I am not going to say that the minority is a turbulent or corrupt junta anymore than I would say the former minority of the Senate was a corrupt junta, but I think his point is well taken. And as James Madison said, that there has to be a way for the majority to eventually determine legislation, but a procedure whereby the minority rights are protected, where the minority can be heard, where they can cast their votes, offer amendments and where the majority just can't run roughshod over them, over the minority. I believe that my approach, I think, covers that adequately and that is why I am still after 15 years, and have been ever since promoting it, whether I am in the minority or in the majority.

Thank you, Mr. Chairman.

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

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

Senator Udall.

STATEMENT OF THE HONORABLE TOM UDALL, A U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you very much, Senator Schumer and Ranking Member Bennett. Mr. Chairman, I want to thank you in particular for convening this fifth hearing and doing a total of six on this very important subject and I want to thank you also for your very kind words at the beginning.

But you have shown real leadership in terms of tackling an issue and moving it forward. As members of this Committee over the past few months, we have heard from a distinguished group of men and women who have come before us to testify about the state of the Senate rules. I thank them for sharing their knowledge and expertise. They have helped us further define the challenges we face. As I take my turn in the chair today, I believe more strongly than ever that our Senate rules are broken. And from the testimony we have heard over the last few months, and Senator Harkin's today, and from all the feedback I have received on my own proposal, I know that I am not alone.

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

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

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

Five years ago, those roles were reversed. Rather than continue on this destructive path, we should adopt rules that allow a majority to act while protecting the minority's right to be heard. Rule 22 is the most obvious example of the need for reform and the one my colleague's proposals focus on. It also demonstrates what happens when members of the current Senate have no ability to amend the rules adopted long ago. The rules get abused.

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

Chairman SCHUMER. Interesting.

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

Many of my colleagues, as well as constitutional scholars, agree with me that a simple majority of the Senate can end debate and adopt its rules at the beginning of a new Congress. Critics of my position argue that the rules can only be changed in accordance with the current rules and that Rule 22 requires two-thirds of sen-

ators present and voting to agree to end debate on a change to Senate rules.

But members of both parties have rejected this argument on many occasions since the rule was first adopted in 1917. In fact advisory rulings by Vice Presidents Nixon, Humphrey and Rockefeller, sitting as the president of the Senate, have stated that a Senate at the beginning of a Congress is not bound by the cloture requirement imposed by a previous Senate and may end debate on a proposal to adopt or amend the Senate standing rules by a majority vote.

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

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

At a previous hearing, one of my colleagues on the Republican side questioned whether I would be willing to still do this if my party is in the minority. The answer is yes. This is not a radical idea. It is the constitutional option. It is what the House does. It is what most legislatures do and it is what the U.S. Senate should do to make sure that we are accountable both to our colleagues and to the American people. And it is not, and I want to really emphasize the not here, it is not the nuclear option, which was a recent attempt to have the filibuster declared unconstitutional in the middle of a Congress.

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

So in January, on the first day of the new Congress, we should have a thorough and candid debate about our rules. We should discuss options for amending the rules, such as Senator Harkin's proposal, and after we identify solutions that will allow the body to function as the founders intended, a majority decides that we have debated enough, we should vote on our rules. And even if we adopt the same rules that we have right now, we are accountable to them. We cannot complain about the rules because we voted on them and if someone is considering abusing the rules, they will

think twice about it because they will be held accountable. We need to come together on this for the good of the Senate and the good of the country. It is the job the American people sent us here to do.

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

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

Chairman SCHUMER. Without objection.

[The information of Senator Udall included in the record]

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

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

Thank you. And then it is so ordered.

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

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

Chairman SCHUMER. You guys decided who is going first?

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

Chairman SCHUMER. Great. Senator Alexander.

OPENING STATEMENT OF THE HONORABLE LAMAR ALEXANDER, A U.S. SENATOR FROM TENNESSEE

Senator ALEXANDER. Thank you, Mr. Chairman.

Chairman SCHUMER. We just try to limit each statement to five minutes.

Senator ALEXANDER. Thank you, Senator, from Kansas, and I thank Senator Udall and Senator Harkin for their——

Chairman SCHUMER. I do not have to ask you to do that, Senator Alexander. I know that.

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

Second thing he said, the second thing I would like to say is that if there has been any abuse of the existing rules it has been by the Majority Leader, who has 39 times during the last two Congresses

used procedural maneuvers to limit amendment and limit debate. That is called filling the tree and then filing a motion for cloture on the same day that the major was raised. He had done the lateral 141 times.

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

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

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

The voices of the country were heard. I would like to see that happen again. It is hard to say this is a dysfunctional Senate when it has passed a healthcare law, a financial regulation law and a trillion dollar stimulus. Some Democrats say it is the most productive Congress in history, maybe the most unpopular too because of what they got done. But it was not dysfunctional. It achieved a lot.

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

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

tyranny of the majority and Rule 22 and the right of unlimited debate and amendment have historically in our country been the way to avoid that.

So I think it is a fair point to say that the enthusiasm for allowing the Senate to become the House of Representatives where a majority can run over the minority by one vote may not be so attractive to those on the Democratic side when the freight train is running through the Senate is the Tea Party Express.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, and Senator Pryor, we are doing opening statements now. We have heard great testimony from Senators Harkin and Udall. If you would like to say something, feel free and then we will call on Senator Roberts.

Senator PRYOR. I do not, Mr. Chairman, but thank you and I am really here to listen more than anything. Thank you.

Chairman SCHUMER. Senator Roberts.

OPENING STATEMENT OF THE HONORABLE PAT ROBERTS, A U.S. SENATOR FROM KANSAS

Senator ROBERTS. I would like to follow the example of my friend from Arkansas, but obviously will not. This will be somewhat repetitive, but there is a personal twist that I would like to add in. And thank you, Mr. Chairman.

This is the fifth hearing this Committee has held on the filibuster and I think, as you indicated, we are going to have a sixth hearing. Maybe during the lame duck we can have the seventh and eighth.

But at any rate, I think it is somewhat counterproductive to hold multiple hearings on and on and on on filibusters, which is nothing more than the right to debate legislation without understanding the wider context in which they occur. I am talking about the practice which you have referred to, and my friend from Tennessee has referred to, of filling the amendment tree. It is time for this Committee, I think, to hold a hearing specifically on that practice. It is appropriate in light of the multiple hearings we have had on——

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

Senator ROBERTS. I appreciate that.

Chairman SCHUMER. There is right on both sides.

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

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

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

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

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

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

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

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

Chairman SCHUMER. Without objection.

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

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

It was over, and the incumbent was declared the winner on a partisan vote by the House. We walked out. The Republicans walked out and it became a situation where I said at that particular time and I had to go back and figure it out here because I think this is what would happen if the distinguished senator from

New Mexico's resolution was adopted, "this wound will not heal without a terrible price and a scar that will be with this House for many years," just substitute Senate, "it would appear, Mr. Speaker," Mr. President, "there are two kinds of members within your majority. We have those who listen and work with the minority and those who do not believe we are fully-fledged partners in this House. In baseball terms, they are the ones who call for their pitcher to stick it in the batter's ear. The unmitigated gall occurs when once you make us hit the dirt, you take offense when we come up swinging."

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

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

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

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

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

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

I yield back. I'm done.

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

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

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

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

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

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

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

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

Ms. MARZIANI. I was not going to correct you there. Mr. Chairman and members of the subcommittee——

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

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

First, there has long been robust support for the constitutional argument offered today by Senator Udall and me. For example, when Senator Henry Clay confronted the Senate's very first filibuster in 1841, he threatened to stop debate by "resorting to the Constitution and acting on the rights ensured in it to the majority."

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

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

As the Supreme Court recognized long ago in cases like *Ohio Life Insurance v. Debolt*, this principle is vital to our democratic structure. Each legislature made up of representatives elected by the people must be equally able to serve the public good. If yesterday's senators are allowed to use the Senate rules to reach into the future, today's senators can no longer effectively serve their constituents' current desires, plus, by insulating the 60-vote cloture rule from amendment, the rules perpetuate similar accountability problems now posed by the filibuster itself. Blunting accountability is a serious constitutional problem because it cripples the most important check on government power, which is the voters.

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

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

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

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

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

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

Chairman SCHUMER. Thank you, Ms. Marziani.

Mr. Dove or Professor Dove, whichever you prefer.

Mr. DOVE. Bob.

Chairman SCHUMER. We will now call on witness Bob.

STATEMENT OF ROBERT B. DOVE, PARLIAMENTARIAN EMERITUS, U.S. SENATE, PROFESSOR, WASHINGTON UNIVERSITY

Mr. DOVE. I normally teach a class at this time on Wednesday and I suggested to the members of that class that this would be far better than any class I could teach them and I am really glad that they could come.

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

Mr. DOVE. As my class will not be surprised to hear, I hold a contrary view to this first witness. I do believe that the Senate is a continuing body and I have always loved the statement, I believe, of Justice Oliver Wendell Holmes that the life of the law is not logic but experience.

The experience of the Senate is that it has always considered itself a continuing body. It was mentioned that with regard to bills that die at the end of a Congress, that is evidence that the Senate does not consider itself a continuing body, that the nominations which by specific rule of the Senate not only die at the end of a session, they die when the Senate goes out for more than 30 days.

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

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

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

My experience has only been working for the Senate. I never worked for the House of Representatives, but my experience in working for the Senate has been one in which I saw the great value of a kind of enforced comity between the two parties because of Rule 22. I remember so well a conversation with a presiding officer, a member of Congress who had been in the House. He was a very conservative senator from the Republican Party and he told me that when he was in the House he had never spoken to any Demo-

crat. He had no reason to speak to Democrats. They were irrelevant to his life. They could do nothing for him.

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

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

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

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

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

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

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

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

Mr. SMITH. Well, it is a great pleasure to be here again. I was here in May when I spoke of a syndrome of the expansive use of parliamentary rules and precedents by both the minority and the majority in such a way that it has really changed the character of the Senate over the last few decades. I know there is a tendency to see this as a minority versus majority matter, but in fact, both parties have been behaving strategically, that is, that they are be-

having in a manner that anticipates the behavior of the other. They are connected at the roots.

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

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

So what has changed since the 1960s? Well, for one thing, 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 so as to avoid more impetus, more reform. They more freely joined with the minority to pursue filibusters in the early 1970s, which was a primary impetus for the reform of 1975.

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

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

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

It has led to the demise of standard amending opportunities on the Senate floor. It has elevated packaging strategies and the use of omnibus bills. It has contributed to the demise of the appropriations process as majority leaders do not dare bring most appropriations bills to the Senate floor. It has stretched the reconciliation process, my dear Bob, beyond recognition and it has led to the avoidance of conferences on a wide range of important legislation.

Add it up. Fundamental changes in the role of standing committees and party offices, the nature of amending activity and debate on the Senate floor, the appropriations process, the reconciliation process and conferences, what has not been fundamentally changed by this new turmoil, this new syndrome of obstruction and restriction? The Senate has been thoroughly changed by these changes in practice. It is time to consider the reforms that have been suggested by Senator Harkin.

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

Chairman SCHUMER. Well, these have been three really excellent witness. This has been a very good and thoughtful day. Let me ask a question first to Mr. Dove, but others can comment. It is sort of two questions. I'm just trying to think this through.

In the golden days of the sixties, and I think you are right, Mr. Parliamentarian Emeritus, for lack of a better term, that because the Civil Rights Act passed with such a large amount of support, it was the law of the land, and it was more effective than if had it passed by 51/49. The difference we face today is that was a bipartisan coalition and partisanship seems to have enveloped our politics over the last 30 years. One of the reasons is actually the great reform of primaries because primaries, puts the Democratic Party to the left and the Republican Party to the right only because there are too few participants.

Senator BENNETT. Tell me about it.

[Laughter.]

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

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

And then the second question, I will let each of you speak on this, is there a way then we would not need Senator Udall's legislation to solve the complaints of the minority about filling the tree and not allowing amendments, and the complaints of the majority about obstruction on every little thing that goes way beyond. I think you know, I do not think you wonder if the tree is filled when we do not allow the District judge from the Southern District of

New York—let's leave out the New York District judge—and instead we do not allow the District judge from the Southern District of Florida to be put on the Senate floor.

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

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

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

That led to an unfortunate situation for me as I ceased to be parliamentarian. But that, I believe, has been followed. That to me is a process that needs reform. My reaction——

Chairman SCHUMER. And not slowing down the Senate to a crawl on every issue. Are the two resolvable together?

Mr. DOVE. Well, my reaction, as long as the majority party sees that they are using reconciliation, they can pass things by a bare majority, even no majority at all. If you have a tie vote and you have the vice presidency, you win with reconciliation. The filibuster amendments have to be germane.

To me, that is the process that has distorted the Senate more than anything else. Yes, I know the enormous power that the majority leader has with the right of recognition to offer amendment after amendment until no more can be offered and I have seen majority leaders use their powers. To me the most powerful majority leader I ever witnessed was Robert Byrd in the period of '77 to '81, when he set precedent after precedent using his powers as majority leader.

And there was pushback when the Republicans took the Senate in the 1980 election because of the power of that particular majority leader. And I have used this phrase before in testimony, that I do not think, as Shakespeare said, that the fault is in our stars but in ourselves. To me there are senators who can make this place work with the rules that you all have and I do not think the problem, frankly, is the rules.

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

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

Ms. MARZIANI. To start, there is no reason to believe that the intense partisanship that we see in today's Senate is going anywhere. We have seen a ratcheting up of partisan politics in at least the last 30 years and as one of my colleagues at NYU, Rick Pildes, has written about eloquently, this for better and for worse is very likely the face of national politics in the 21st Century. So with that understanding in mind, perhaps best case scenario, we would address

that intense partisanship, but without being able to figure out what to do with that situation, I think that we need to adopt new rules that work for a modern Senate.

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

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

Chairman SCHUMER. Professor Smith.

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

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

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

Chairman SCHUMER. Interesting, very interesting.

Senator BENNETT. Thank you, very much, Mr. Chairman, and one of the things that has developed, the byplay between the three of you that I want to highlight is that it may very well be that the solution to the problems that we talk about as a dysfunctional Senate lies somewhere other than amending the filibuster rule. And I have made notes—I have listened to you—of some of the things that I have observed that in my opinion have been detrimental to the functioning of the Senate and very few, if any of them, have anything to do with the filibuster rule.

Mr. Smith, you got into this a little. One of the things that I have seen in my time here is Mr. Dove, you talk about the problem lies in ourselves, breaking of a Senate precedent as opposed to a Senate rule, that conferees are always adopted by unanimous consent. Without naming any names, one minority leader broke the precedent and said we will not allow the appointment of conferees on this bill unless we can get an absolute ironclad agreement out of the majority that the conference report will say the following things, thus putting himself in the position where the minority

leader of the United States would dictate the final version of the bill over the opinion of the majority of the House of Representatives and the majority of the Senate or not allow it to go through.

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

The concept of ping-ponging a bill, the Senate was unable to produce a certain bill for a variety of reasons and so the Speaker sat down with the Majority Leader and given the power of the party in power in the House, wrote a bill in the House, rammed it through with the requisite number of votes in the House and then the majority leader had already pre-committed to the Speaker that the bill would be held at the desk, voted on in the Senate, never referred to a committee, never a subject of a hearing, and with the ability of the majority in the Senate to overcome a filibuster by virtue of numbers passed through.

Those of us who wanted to debate it, to amend it, to have anything to do with it, we never got any opportunity at all.

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

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

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

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

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

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

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

Professor Smith.

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

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

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

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

Senator Byrd complained about lobbyists walking into senators' offices and asking them to place holds on bills. This was something that was emerging in the 1970s, before most of you got here, but was already a part of the environment. When that was combined with the polarization of the parties, you can see where that would lead.

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

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

Mr. DOVE. I will talk about what happened yesterday because all the focus——

Chairman SCHUMER. You got to put your microphone on.

Mr. DOVE. I am sorry. All the focus was on the failed cloture vote. Something else happened yesterday. A bill was passed in the Senate by voice vote, jointly sponsored by Senator Patrick Leahy and Senator John Cornyn, to amend the financial regulatory law with regard to the Freedom of Information Act.

To me that is how the Senate works. That is what the Senate does. Maybe there was not a big article about it in the paper, but to me that kind of thing happens all the time. Senators from very different perspectives on most issues get together across the aisles on something that they care about and the Freedom of Information Act is something that happens to be in the purview of both Senator Leahy and Senator Cornyn, and it would be something they really do care about and they get it through.

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

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

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

Chairman SCHUMER. Thank you. Senator Udall.

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

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

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

Ms. MARZIANI. I believe quite strongly that reforming the rules would not make the Senate more like the House, but would in fact make the Senate more like the Senate is supposed to be. And specifically, I mean, as we have heard in each of these hearings, the current rules are not promoting deliberation. Instead they are incentivizing obstruction. They are being used not to achieve just,

equitable and compromised decision making, but they are many times unfortunately used for little more than game playing.

With that, if you look at the history of the structure of the Senate, the Framers surely wanted the Senate to be a stable body. There is no indication that they anticipated that the rules would somehow lead to stability or that the rules would be entrenched and that would make the body more stable. Instead, the framers gave senators longer terms that were overlapping and they thought in this way senators would have more time and have more experience as legislator, but also learn more about specific issues that they grappled with.

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

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

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

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

As far as the continuing body theory goes, as I said earlier, there is no indication that the Framers intended for the structure of the Senate to somehow give the Senate a unique rulemaking authority that would allow entrenchment. Instead, as I noted before, and as Senator Udall has noted, legislative entrenchment has long been recognized as an illegal procedure.

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

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

Chairman SCHUMER. Thank you. Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman. Senator Howard Baker told me that in 1968 he was sitting in his father-in-law's office, the Republican leader, Everett Dirksen, and the telephone rang and he heard Senator Dirksen say, no, Mr. President, I cannot

come down and have a drink with you tonight; I did that last night and Louella is very angry with me.

And about 30 minutes later, there was a rustle outside and two beagles and a president showed up and President Johnson arrived and said well, Everett if you will not drink with me, I will come drink with you. David Gergen told me that President Johnson called President Dirksen every afternoon at 5:00 to find out how he was doing. He did that for a variety of reasons, but one reason was he had to if wanted to pass the Civil Rights Bill.

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

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

Now, Mr. Dove, and to any of the witnesses, Senator Bennett made the point that it was not just a filibuster and the Senate also operates by unanimous consent. That is quite separate from the filibuster issue and there is nothing new about senators insisting on their prerogatives. I can remember Senator Metzenbaum sitting down at the front of the Senate negotiating with every single senator on every single piece of legislation that came up. And Senator Allen did the same and Senator Williams did the same in the sixties. I mean, this has been going on forever. It is a way of causing deliberation. You can call it entrenchment or obstructionism if you want to. Others call it the asserting of their right to amend or right to speak, their right to have a say.

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

Mr. DOVE. I entered the office in 1966. I was parliamentarian from 1981 to '87 and then once again from 1995 to two thousand——

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

Mr. DOVE. Oh, yes.

Senator ALEXANDER. Now, if I am not mistaken, during that time, didn't they, during that eight-year period when one was the majority leader four years, one for four years, didn't they pretty well run the Senate in a way that created an environment where the majority leader brought up a law, a bill or a motion and then they basically gave senators their right to amend and their right to debate, and in exchange for that, the senators gave back an ability for the majority leader to manage the floor, and that produced a lot of votes, some late nights, some weekends, but Senator Byrd first, Senator Baker next, basically took the position that under the

existing rules we have then and today, we can move what we need to move?

As I mentioned earlier, this Senate—and I would disagree respectfully with the chairman—this Senate has not been passing second- and third-level bills. It has passed a healthcare law and a financial regulation law a trillion dollar stimulus. But my point is, is it not possible in the current rules as shown by the way Baker and Byrd operated the Senate that the Senate can operate quite well given quite a bit of ability for senators to bring up amendments, debate them and vote on them if the leaders will just do it in that way under the rules we have today?

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

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

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

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

Chairman SCHUMER. Thank you, Senator Alexander. Senator Harkin.

Senator HARKIN. I am not on the committee.

Chairman SCHUMER. Actually, yes, I think we will go to Senator Roberts because Senator Harkin is not a member of the Committee. You are right, thank you.

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

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

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

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

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

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

[Laughter.]

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

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

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

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

All of the executive orders that are coming out, not even being promulgated in the Federal Register. And also no confirmation hearings. And I am opposed to this. So I am an obstructionist and I want to say no, that we ought to do it a different way. I have alternatives. A lot of us have alternatives.

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

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

So we got the pants put on us and then as it turned out, my dear friend, in the markup of the bill, we pretty well ended up where we would have ended up, what was it, six months prior to that. And so I think my—the way I would like to approach amendments, I do not want to have an amendment. I do not want to have it voted on. If I cannot get the minority or the majority, either way,

to agree to my amendment, put it in the manager's amendment or just agree to it and just zip, get it through by UC or just everybody understands it, then I haven't done my work if I have an amendment and I have to have a vote and then stand to lose.

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

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

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

I just have two more. The resignation of three speakers, if you really count the one that would have, impeachment, we have come through some very difficult times in the history of the Senate and it has always been partisan. We are a reflection of the balkanization of American society. I would agree with Mr. Smith on that. But I think we can do it better with peer pressure and with good people like the chairman and myself and Mr. Bennett.

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

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

For every example that one person has on one side, we got one on this side and we are back fighting those old battles again. So I would hope that we get away from that sort of tit for tat kind of thing. Secondly, on the entrenchment of the rules, let us say an anomaly happened that there was 90 senators of one party and

they changed the rules and they said, here are the rules we have now and in the future there has to be 90 senators to vote to change it. We would have to live by that forever and ever?

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

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

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

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

Senator UDALL. Vote-a-rama.

Senator HARKIN [continuing]. Vote-a-rama. You get one minute to speak and somebody else gets a minute, and you vote and there is all these ridiculous amendments that are out there. The people think they are scoring points on. Quite frankly, I do not think they score points. I do not think one of those votes has cost anybody an election yet, but I guess we go through that exercise.

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

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

Senator HARKIN. Right.

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

The common procedure for the majority in the modern Senate is to file a cloture petition, get on with other business, get a vote. If it goes down, go on to other business, and the debate on the bill subject to the cloture motion never actually starts. Even if it is a motion to proceed, there is no debate on the motion to proceed, the

majority leader is off to something else. Who can blame him? He has other activities.

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

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

Senator HARKIN. Mr. Dove.

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

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

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

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

Mr. DOVE. Okay——

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

Mr. DOVE [continuing]. I have seen it changed. I have seen it attempted to be changed. I was there when Vice President Humphrey made his ruling in 1967, which was overturned by the Senate. I was there when he made his ruling in 1969, which was overturned by the Senate, and then I was there when Vice President Rockefeller came back and had to apologize to the Senate for what he had done during the 1975 change to the rules.

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

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

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

Senator HARKIN. Think about it.

Ms. MARZIANI [continuing] With my colleagues and submit further written testimony.

Senator HARKIN. I would appreciate it.

Ms. MARZIANI. Great.

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

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

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

Senator HARKIN. Yes.

Mr. DOVE. Again, my reaction to what that represents is basically how powerful every individual senator is. I think it is one of the reasons that people like to come to the United States Senate. You really are incredibly powerful.

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

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

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

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

Thank you. We are adjourned.

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

APPENDIX MATERIAL SUBMITTED

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TESTIMONY OF SENATOR TOM HARKIN
SENATE RULES COMMITTEE
EXAMINING THE FILIBUSTER: LEGISLATIVE PROPOSALS TO CHANGE SENATE PROCEDURES
WEDNESDAY, SEPTEMBER 22, 2010

Chairman Schumer, Ranking Member Bennett, members of the Committee, thank you for the very kind invitation to speak today regarding the need for filibuster reform, and in particular the resolution I have introduced to reform the cloture procedures in the Senate.

As you know, my proposal is identical to one I first introduced in 1995, when Democrats were in the minority. My belief then, as it is now, is that elections should matter. A majority of the people's representatives, after ample deliberation, should be able to legislate and govern.

At the outset, I commend you for the thoroughness with which you have examined this issue. I will not repeat the exhaustive testimony you have already heard on the history and increasing abuse of the filibuster. I will only add that I have been a member of this body for nearly twenty-six years. I have served in the majority and minority. The current abuse of the filibuster is like nothing I have seen before. As scholars have testified, the minority, including Democrats when they were in the minority, has abused the filibuster in recent years at a level without precedent in the history of this body.

Let me state unequivocally, I agree wholeheartedly with the vital need to ensure the minority a voice in the Senate so that the voices of all Americans are heard and that this body operates in a manner that not only protects the right of debate, but fosters deliberation and the exchange of ideas.

But, I believe we can protect minority rights in the Senate without giving a minority of as few at 41 senators veto power over any nominee or legislation.

The fact is the filibuster as currently used has nothing to do with ensuring debate or deliberation and everything to do with obstruction and delay.

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Mr. Chairman, as you have heard from prior witnesses, in this Congress the filibuster has been used to block, for months, confirmation of nominees or passage of bills that were ultimately approved unanimously. The minority has used the filibuster to block motions to proceed, preventing even consideration of a bill. In other words, because of the filibuster, the Senate – the world's "greatest deliberative body" – has been prevented from even debating, let alone addressing, important national issues.

Because I do not believe the Senate can continue to function this way, I have introduced legislation to amend the Standing Rules of the Senate to permit a decreasing majority of Senators, over a period of 8 days, to invoke cloture on a given matter.

Under my proposal, a determined minority could slow down any bill for as much as 8 days. Senators would have ample time to make their arguments and attempt to persuade the public and a majority of their colleagues. This protects the rights of the minority to full and vigorous debate and deliberation, maintaining the hallmark of the United States Senate.

At the same time, this reform would restore a basic and essential principle of representative democracy: majority rule in a legislative body. At the end of ample debate, the majority should be allowed to act; there would be an up-or-down vote on legislation or a nominee. As Henry Cabot Lodge stated, "[t]o vote without debating is perilous, but to debate and never vote is imbecile."

At an earlier hearing of this Committee, our former colleague Don Nickles opposed filibuster reform. He stated his belief that the filibuster – and I quote – "forces compromise and collaboration." I strongly disagree with him. The fact is that, right now, the minority has no incentive to compromise. Not only do they know that they have the power to block legislation,

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but then they can campaign on the message that the majority party could not pass bills. In other words, the minority has a great deal of power but very little accountability.

In contrast, I believe my proposal would encourage a more robust spirit of compromise. If the minority knows that at the end of the day, a bill is subject to majority vote, they will be more willing to come to the table and negotiate seriously. Likewise, the majority will have an incentive to compromise because they will want to save time, and not have to go through numerous cloture votes over a period of 16 days, plus 30 hours of post-cloture debate.

Mr. Chairman, there is nothing radical about the proposal I have introduced. There is nothing sacrosanct about requiring 60 votes to end debate. The filibuster is not in the Constitution. And, until 1806, the Senate had a rule that permitted a simple majority to stop debate on the pending issue and bring an immediate vote.

Further, my legislation stands squarely within a tradition of updating Senate rules as appropriate to foster an effective government. Article I specifies that "[e]ach House may determine the rules of its proceedings." Using this authority, the Senate has adopted rules and laws that forbid the filibuster in numerous circumstances, for example with respect to the budget. And, since 1917, the Senate has passed four significant reforms concerning cloture.

In conclusion, I want to emphasize one fact. I have introduced my proposal, this year, as a member of the majority party. As I said, the proposal, however, is one I first introduced when I was a member of the minority party. Thus, to use a legal term, I come with clean hands. So, I want to make clear that the reforms I advocate are not about one's party gaining an undue advantage. It is about the Senate as an institution operating more fairly, effectively and democratically.

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Even though I was in the minority in 1995, I introduced this legislation then because I saw the beginnings of an arms race, where each side would simply escalate the use of the filibuster. And, sadly that is what has happened, and will continue to happen. It is time for this arms race to end.

Mr. Chairman, the Founders adopted a Constitution to enable the American people, through their elected representatives, to govern. As Chief Justice John Marshall made clear, any enduring Constitution must be able to "respond to the various crises of human affairs."

Unfortunately, I do not see how we can effectively govern a 21st Century superpower when a minority of just 41 senators can dictate action – or inaction – to a majority of the Senate and the majority of the American people. This is not a representative democracy. Certainly, it is not the kind of representative democracy envisioned and intended by the Constitution.

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Senate Rules Committee
Hearing on "Legislative Proposals to Change Senate Procedures"
Testimony of Senator Tom Udall
September 22, 2010

Summary

I believe more strongly than ever that our Senate rules are broken. And from the testimony we've heard over the last few months, and from all of the feedback I've received on my own proposal, I know that I'm not alone.

I commend my Senate colleagues who brought their own solutions before this committee. Like me, they've seen for themselves the unprecedented obstruction we've faced over the last few years. In July we heard about reform proposals by Senators Lautenberg and Bennet and today we'll discuss Senator Harkin's proposal to amend the cloture rule.

But I would like to be clear that my proposal differs from the others. Unlike those specific changes to the rules, which I think all deserve our consideration, my proposal is to make each Senate accountable for all of our rules. This is what the Constitution provides for, and it is what our Founders intended.

The Rules are not broken for one party, or for only the majority. Today the Democrats lament the abuse of the filibuster and the Republicans complain that they are not allowed to offer amendments to legislation. Five years ago, those roles were reversed. Rather than continue on this destructive path, we should adopt rules that allow a majority to act, while protecting the minority's right to be heard.

Rule XXII is the most obvious example of the need for reform, and the one my colleagues' proposals focus on. It also demonstrates what happens when the members of the current Senate have no ability to amend the rules adopted long ago – the rules get abused. I've said this before, but it bears repeating. Of the 100 members of the Senate, only two of us have had the opportunity to vote on the cloture requirement in Rule XXII – Senators Inouye and Leahy.

So if 98 of us haven't voted on the rule, what's the effect? Well, the effect is that we're not held accountable when the rule gets abused. And with a requirement of 67 votes for any rules change, that's a whole lot of power without restraint.

But we can change this. We can restore accountability to the Senate. I believe the Constitution provides a solution to this problem. Many of my colleagues, as well as constitutional scholars, agree with me that a simple majority of the Senate can end debate and adopt its rules at the beginning of a new Congress.

Critics of my position argue that the rules can only be changed in accordance with the current rules, and that Rule XXII requires two-thirds of Senators present and voting to agree to end debate on a change to the Senate rules.

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But members of both parties have rejected this argument on many occasions since the rule was first adopted in 1917. In fact, advisory rulings by Vice Presidents Nixon, Humphrey, and Rockefeller, sitting as the President of the Senate, have stated that a Senate at the beginning of a Congress is not bound by the cloture requirement imposed by a previous Senate and may end debate on a proposal to adopt or amend the Senate's Standing Rules by a majority vote.

This is what our founders intended. Article I, Section 5 of the Constitution clearly states that "each House may determine the Rules of its Proceedings." There is no requirement for a supermajority to adopt our rules, and the Constitution makes it very clear when a supermajority is required to act. Therefore, any rule that prevents a majority in future Senates from being able to change or amend rules adopted in the past is unconstitutional.

The fact that we are bound by a supermajority requirement that was established 93 years ago also violates the common law principle that one legislature cannot bind its successors. This principle dates back hundreds of years and has been upheld by the Supreme Court on numerous occasions.

So first thing, at the beginning of the next Congress, I will move for the Senate to end debate and adopt its rules by a simple majority. At a previous hearing, one of my colleagues on the Republican side questioned whether I would be willing to still do this if my party is in the minority. The answer is yes.

This is not a radical idea – it is the Constitutional Option. It's what the House does. It's what most legislatures do. And it's what the U.S. Senate should do to make sure we're accountable … both to our colleagues, and to the American people.

And it is not the nuclear option, which was a recent attempt by Republicans to have the filibuster declared unconstitutional in the middle of a Congress. The Constitutional Option has a history dating back to 1917 and has been the catalyst for bipartisan rules reform several times since then.

The Constitutional Option is our chance to fix rules that are being abused – rules that have encouraged obstruction like none ever seen before in this chamber. And amending our rules will not, as some have contended, make the Senate no different than the House. First of all, I doubt that a majority would vote to completely abolish the filibuster rule – most of us want reform, but still understand the role of the minority in the Senate. But if they did, the Senate was a uniquely deliberative chamber before the rule was adopted in 1917. Our Framers took great steps to make the Senate a distinct body from the House, but requiring a supermajority to take any action was not one of them.

So in January, on the first day of the new Congress, we should have a thorough and candid debate about our rules. We should discuss options for amending the rules, such as Senator Harkin's proposal. And after we identify solutions that will allow the body to function as our founders intended, and a majority decides that we have debated enough, we should vote on our rules.

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And even if we adopt the same rules that we have right now, we're accountable to them. We can't complain about the rules, because we voted on them. And if someone's considering abusing the rules, they'll think twice about it, because they'll be held accountable.

We need to come together on this for the good of the Senate and the good of the country. It's the job the American people sent us here to do.

Thank you.

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Senate Rules Committee
Hearing on "Legislative Proposals to Change Senate Procedures"
Testimony of Senator Tom Udall
September 22, 2010

Thank you Mr. Chairman for convening this fifth hearing. As members of this committee, over the past few months we've heard from a distinguished group of men and women who have come before us to testify about the state of our Senate's rules.

I thank them for sharing their knowledge and expertise. They've helped us further define the challenges we face. As I take my turn in this chair today, I believe more strongly than ever that our Senate rules are broken. And from the testimony we've heard over the last few months – and from all of the feedback I've received on my own proposal – I know that I'm not alone.

I commend my Senate colleagues who brought their own solutions before this committee. Like me, they've seen for themselves the unprecedented obstruction we've faced over the last few years. In July we heard about reform proposals by Senators Lautenberg and Bennet and today we'll discuss Senator Harkin's proposal to amend the cloture rule.

But I would like to be clear that my proposal differs from the others. Unlike those specific changes to the rules, which I think all deserve our consideration, my proposal is to make each Senate accountable for all of our rules. This is what the Constitution provides for, and it is what our Founders intended.

These hearings have shown us that the Rules are broken. But they are not broken for one party, or for only the majority. Today the Democrats lament the abuse of the filibuster and the Republicans complain that they are not allowed to offer amendments to legislation. Five years ago, those roles were reversed. Rather than continue on this destructive path, we should adopt rules that allow a majority to act, while protecting the minority's right to be heard.

Rule XXII – more commonly known as the filibuster or cloture rule – is the most obvious example of the need for reform, and the one my colleagues' proposals focus on. It also demonstrates what happens when the members of the current Senate have no ability to amend the rules adopted long ago – the rules get abused. I've said this before, but it bears repeating. Of the 100 members of the Senate, only two of us have had the opportunity to vote on the cloture requirement in Rule XXII – Senators Inouye and Leahy.

So if 98 of us haven't voted on the rule, what's the effect? Well, the effect is that we're not held accountable when the rule gets abused. And with a requirement for two-thirds of the Senate to end debate on any rules change, that's a whole lot of power without restraint.

I believe that the requirement in Rule XXII for two-thirds to vote to end debate on a rules change is unconstitutional, is contrary to the Framers' intent, and violates the longstanding common law principle that one legislature cannot bind its successors. I will discuss each of these issues in more detail and then explain how the Senate can take action, as it has in the past, to address the problem.

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The Constitution, the Framers, and the Original Senate Rules

Article I, Section 5 of the Constitution states, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." It couldn't be clearer that a supermajority is not needed for the Senate to determine its rules, as the very same sentence requires for the Senate to expel a member.

In the Federalist Papers, James Madison and Alexander Hamilton explained that the Constitution purposefully required only a simple majority of the Senate to take action, except in very limited, extraordinary circumstances – for significant issues such as impeachments, expelling members of Congress, overriding a presidential veto, ratifying treaties, and amending the Constitution. As Madison stated in Federalist 58, had a general supermajority requirement been in the Constitution, "an interested minority might take advantage to screen themselves from equitable sacrifices. . . . [or] to extort unreasonable indulgences" from the majority as the price of their support.

Hamilton explained in Federalist 22 that the inclusion of a supermajority voting requirement would require "the majority, in order that something may be done, [to] conform to the views of the minority; and thus . . . the smaller numbers will overrule the greater." Hamilton said, almost prophetically, that a minority of legislators could use a supermajority requirement to "embarrass the administration, ... destroy the energy of government," and that the decisions of the majority in Congress would then be subject to "the pleasure, caprice or artifices of an insignificant, turbulent, or corrupt junta . . . [for] the deliberations and decisions of a respectable majority." He further argued that "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." Madison and Hamilton's fears of minority control have become today's reality.

The original Senate Rules also demonstrate that the Framers intended for the body to operate as a majoritarian institution. Those rules, adopted under Article I, section 5 of the Constitution, included a provision allowing a senator to make a motion "for the previous question." If passed, the motion allowed a simple majority of senators to halt debate on a pending issue. This simple rule for limiting debate was inadvertently dropped in 1806 – perhaps for lack of need – and the Senate entered a period with no means to limit debate. It wasn't until the 1830s that the Senate saw the first filibusters, as members recognized that the lack of any rule to limit debate could be used to effectively block legislation opposed by even a minority of the minority.

Entrenchment of Senate Rules

After years of operating without a formal rule to cut off debate, the Senate adopted Rule XXII, which permitted cloture on "any pending measure" at the will of two-thirds of all Senators present and voting. It was the adoption of this rule that had the effect of entrenching the Senate rules against future changes. Any future attempt to change the rules would require two-thirds of Senators to vote to end debate – thus, a majority could no longer exercise its constitutional right to "determine the Rules of its Proceedings."

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Some critics of reform argue that the rules are not entrenched against change and the two-thirds requirement in Rule XXII is not unconstitutional because the final vote on any rules change is still a majority vote. They argue that the cloture requirement is only an internal Senate procedure to limit debate, not an actual vote on a rules change, so in theory a majority is always able to vote to change the rules. This is a distinction without a difference. If a majority cannot ever get to vote on a rules change because it takes a supermajority to do so, then the effect is the same – a majority is denied its constitutional right to vote on the rules.

Entrenchment of the Senate rules is not only unconstitutional, but also violates the common law principle, upheld in numerous Supreme Court opinions, that one legislature cannot bind its successors. Senators of both parties and leading constitutional law scholars have supported this conclusion on many occasions.

Senator John Cornyn wrote in a 2003 law review article that "[j]ust as one Congress cannot enact a law that a subsequent Congress could not amend by majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote."

Senator Robert Byrd, who understood the Senate rules better than anyone, stated that the original Senate adopted nineteen of its rules by a simple majority vote, and that these members "did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate." In 1975, Senator Walter Mondale stated that "[e]ven if we wanted to, we could not, under the U.S. Constitution, bind a future Congress or waive the right of a future majority." Senator Ted Kennedy said that same year that, "[t]he notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure in the Senate. It would turn rule XXII into a Catch XXII."

Senator Cornyn held a hearing in 2003 when he was Chairman of the Subcommittee on the Constitution, Civil Rights and Property Rights of the Judiciary Committee (S. HRG. 108–227). Some of the nation's leading conservative constitutional scholars testified or submitted testimony at that hearing, and all of it supports the principle that a previous Senate cannot enact a rule that prevents a majority in a future Senate from acting. I'd like to provide some quotes from their testimony and submit the full text of their testimony into the record.

Steven Calabresi, a professor of law at Northwestern University School of Law, former law clerk for Justice Antonin Scalia, and co-founder of the Federalist Society testified that:

> "The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority for rules changes, Rule XXII is unconstitutional. It is an ancient principle of Anglo–American constitutional law that one legislature cannot bind a succeeding legislature. This principle goes back to the great William Blackstone, who said in his commentary, 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not.'"

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Douglas Kmiec, then Dean of the Columbus School of Law at Catholic University, testified about the unconstitutional entrenchment of supermajority rules and stated:

> "We currently have in play a process where carryover rules, rules that have not been adopted by the present Senate, are requiring a supermajority to, in effect, approve and confirm a judicial nominee. As you know, to close debate, it requires 60 votes; in order to amend the rules, it requires 67. These are carryover provisions that have not been adopted by this body and by virtue of that, they pose the most serious of constitutional questions because, as I quote, Senator, the Supreme Court has long held the following: 'Every legislature possess the same jurisdiction and power as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less.'"

Dr. John Eastman, a professor of Constitutional Law at Chapman University School of Law, said at the hearing that "the use of supermajority requirements to bar the change in the rules inherited from a prior session of Congress would itself be unconstitutional."

Testimony submitted to the Committee for this hearing also supports this principle. Professor John C. McGinnis of Northwestern University and Professor Michael Rappaport of the University of San Diego School of Law stated in their written testimony that:

> "[T]he Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, all entrenchment of the filibuster rule, or of any other legislative rule or law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional."

Finally, renowned constitutional law scholar Ronald Rotunda stated in written testimony:

> "The present Senate rules that create the filibuster also purport not to allow the Senate to change the filibuster by a simple majority. However, these rules should not bind the present Senate any more than a statute that says it cannot be repealed until 60% or 67% of the Senate vote to repeal the Statute. … I do not see how an earlier Senate can bind a present Senate on this issue."

These opinions span the political spectrum – both liberals and conservatives agree that entrenchment of the rules is unconstitutional. In a 1997 law review article, esteemed constitutional scholar Erwin Chemerinsky wrote that:

> "[T[he conjunction of Rules V and XXII does exactly what all of the [Supreme Court] say[s] that the Constitution forbids: it allows one session of the Senate to

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> bind later sessions to its procedure for approving legislation. Rule XXII effectively extends a supermajority requirement to the passage of any measure before it, including proposed rule changes. Rule V preserves all Senate rules from one session to the next. The Senate thus violates the Court's declaration in *Newton* by depriving 'succeeding legislature . . . [of] the same jurisdiction and power . . . as its predecessors.' Rules V and XXII unconstitutionally limit the power of those sessions which came after their enactment."

Some argue that entrenchment of the Senate rules is permissible because the Senate is a "continuing body." They claim that there is never a new Senate – because two-thirds of the members are always in office, the rules must remain in effect from one Congress to the next. I disagree with this assertion. Even if the Senate is considered to be a continuing body, it is only in a structural sense in that a quorum is always able to conduct business; there is no reason that the rules must remain in effect from one Congress to the next.

Many things change with a new Congress – it is given a new number, all of the pending bills and nominations from the previous Congress are dead, and each party may choose its leadership. If the party in the majority changes, the new Senate naturally becomes drastically different than the last.

Senators of both parties have articulated similar positions. As my esteemed colleague from Utah, Senator Hatch, stated in a National Review article in 2005:

> "The Senate has been called a 'continuing body.' Yet language reflecting this observation was included in Senate rules only in 1959. The more important, and much older, sense in which the Senate is a continuing body is its ongoing constitutional authority to determine its rules. Rulings by vice presidents of both parties, sitting as the President of the Senate, confirm that each Senate may make that decision for itself, either implicitly by acquiescence or explicitly by amendment. Both conservative and liberal legal scholars, including those who see no constitutional problems with the current filibuster campaign, agree that a simple majority can change Senate rules at the beginning of a new Congress."

I agree with Senator Hatch. The language that was added to the Standing Rules in 1959 providing 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" was the result of a political compromise brokered by then Majority Leader Lyndon Johnson. There is no reason that it should bind any Senate after that – the Constitution doesn't allow it.

Professor Rotunda also addressed the continuing body theory in his 2003 testimony, stating:

> "Granted, the Senate, unlike the House, is often called a continuing body because only one-third of its members are elected every two years. But that does not give the Senators of a prior time (some of whom were defeated in the prior election) the right to prevent the present Senate from choosing, by simple majority, the rules governing its procedure. In other words, the Senate may be a continuing

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body insofar as two-thirds of its members carry over from the prior elections, but [regarding the Senate rules] the Senate starts anew every two years."

The Constitutional Option to Fix the Problem

In 1917, a group of eleven Senators filibustered President Woodrow Wilson's Armed Ship Bill, legislation that would have authorized the arming of U.S. merchant ships during the early period of U.S. involvement in World War I. President Woodrow Wilson, responding to the filibuster stated:

> *"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible. The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act."*

In response, Montana Senator Thomas Walsh – citing Article I, Section 5 of the Constitution – introduced The Constitutional Option. Walsh argued that a newly convened Senate was not bound by the rules of the previous Senate and could adopt its own rules, including a rule to limit debate. He reasoned that every new Senate had the right to adopt rules, saying that "it is preposterous to assume that [the Senate] may deny future majorities the right to change" the rules. In response to Walsh's proposal, the Senate reached a compromise and amended Rule XXII. The compromise permitted cloture on "any pending measure" at the will of two-thirds of all Senators present and voting.

Back then, the toxic partisanship we face today had not yet seeped in, but the manipulative use of the filibuster had already taken hold. It was used to block some of the most important legislation of that time. Anti-lynching bills in 1922 and '35 and '38. Anti-race discrimination bills were blocked almost a dozen times starting in 1946.

By the 1950s, a bipartisan group of Senators had had enough. On behalf of himself and 18 others, New Mexico's Clinton Anderson, my predecessor, attempted to limit debate and control the use of a filibuster by adopting the 1917 strategy of Thomas Walsh.

Just as Senator Walsh did almost four decades earlier, Senator Anderson argued that each new Congress brings with it a new Senate entitled to consider and adopt its own rules. On January 3, 1953, Anderson moved that the Senate immediately consider the adoption of rules for the Senate of the 83rd Congress.

Anderson's motion was tabled, but he introduced it again at the beginning of the 85th Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice-President Nixon, who was presiding over the Senate. Nixon understood the inquiry to address the basic question: "Do the rules of the Senate continue from one Congress to another?"

Noting that there had never been a direct ruling on this question from the Chair, Nixon stated that, quote, "while the rules of the Senate have been continued from one Congress to another, the

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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 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."

Nixon went on to explain that under the Constitution, a new Senate had three options to deal with the rules at the beginning of a new session of Congress:

> (1) proceed under the rules of the previous Congress and "thereby indicate by acquiescence that those rules continue in effect,"
>
> (2) vote down a motion to adopt new rules and thereby "indicate approval of the previous rules," or
>
> (3) "vote affirmatively to proceed with the adoption of new rules."

Despite Nixon's opinion from the chair, Anderson's motion was tabled. In 1959 Anderson raised the Constitutional Option again at the start of the 86th Congress, with the support of some 30 other Senators.

This time he raised the ire of then-Majority Leader Johnson – who realized that a majority of senators might join Anderson's cause. To prevent Anderson's motion from receiving a vote, Johnson came forward with his own compromise – changing Rule XXII to reduce the required vote for cloture to "two-thirds of the Senators present and voting."

To appease a small group of Senators, Johnson also included new language. This language stated that the rules continued from one Congress to the next, unless they were changed under the rules. It was a move that would effectively bind all future Senates.

In 1975 – two years after Anderson left office – Senators Walter Mondale and James Pearson used the Constitutional Option to convince the Senate to adopt the rule we operate under today: it takes the vote of "three-fifths of all Senators duly chosen and sworn" to cut off debate or the threat of unlimited debate on all matters except a change to the rules, which still requires two-thirds of Senators present and voting.

Clinton Anderson relied on the Constitutional Option as the basis to ease or at least reconsider the cloture requirements laid out in Rule XXII. As he said in 1959, "my motion does not prejudge the nature of the rules which the senate in its wisdom may adopt, but it does declare, in effect, that the Senate of the 85th Congress is responsible for and must bear the responsibility for the rules under which the Senate will operate. That responsibility cannot be shifted back upon the Senate of past Congresses. "

As the junior senator from New Mexico, I have the honor of serving in Senator Clinton Anderson's former seat. And I have the desire to take up his commitment to the Senate and his

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dedication to the principle that in each new session of Congress, the Senate should exercise its constitutional power to determine its own rules.

Let me be very clear – I am not arguing for or against any specific changes to the rules, but I do think that each Senate has the right, according to the Constitution, to determine all of its rules by a simple majority vote.

As my distinguished colleague Senator Byrd, the longest serving member in the history of Congress, once said:

> "The Constitution in article I, section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past."

It is time for reform. There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedures should not be one of them. There is another way. The Senate may choose to adopt new rules or it may choose to continue with some or all of the rules of the previous Congress. The point is that it is our choice – it is our responsibility. As Clinton Anderson said, it is a "responsibility (that) cannot be shifted back upon the Senate of past Congresses."

So in January, on the first day of the new Congress, we should have a thorough and candid debate about our rules. We should discuss options for amending the rules, such as Senator Harkin's proposal. And after we identify solutions that will allow the body to function as our founders intended, and a majority decides that we have debated enough, we should vote on our rules.

And even if we adopt the same rules that we have right now, we're accountable to them. We can't complain about the rules, because we voted on them. And if someone's considering abusing the rules, they'll think twice about it, because they'll be held accountable.

We need to come together on this for the good of the Senate and the good of the country. It's the job the American people sent us here to do.

Thank you.

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Prepared Statement by Senator Pat Roberts
Washington, DC
Senate Rules Committee
"Examining the Filibuster V"
September 22, 2010

Thank you, Mr. Chairman. Today marks the fifth hearing this committee has held on the filibuster, and I am told to expect a sixth hearing.

It is counterproductive to hold multiple hearings on filibusters – which is nothing more than the right to debate legislation – without understanding the wider context in which they occur. I am talking about the practice of filling the amendment tree. Mr. Chairman, it is time for this committee to hold a hearing specifically on that practice. It is appropriate in light of the multiple hearings we've had on measures that would curtail Minority rights without addressing clear abuses by the Majority.

This committee has examined multiple approaches to curtailing filibusters. Now, there is a proposal that threatens more than just minority rights, it threatens the very nature of the Senate. I am referring to the resolution introduced by the junior senator from New Mexico – a resolution that would declare Senate Rules unconstitutional. This, my colleagues, marks a new low.

There has been an incessant attempt on the part of some in the Majority to paint the minority as obstructionists and the Senate as a "broken" institution. What's broken is not Senate Rules, but rather the attitude and approach to legislating by members of the Majority that is fundamentally at odds with atmosphere of comity and compromise that our Rules are intended to foster.

It is not the Minority that are obstructionists – it is the Majority. The Majority is obstructing the ability of the Minority, and the millions of Americans we represent, from having a voice in the legislative process. Parliamentary tactics like "Filling the Tree," Rule 14, and "Ping-Pong" have been used on a scale never before seen in the history of this body to move legislation that is overwhelmingly unpopular with the American people, and at odds with the interests of our nation.

Nobody can predict what will happen in November, but for anyone who can read the tea leaves, it appears that the current Majority will be far slimmer in 2011. Rather than accept the will of the voters who are rejecting the policies enacted by the 111th Congress, the junior senator from New Mexico wants to abolish the Senate as we've understood it for over 200 years and remake it in the House's image. Let me be clear: rather than doing the hard work of building a bipartisan consensus, this resolution is an attempt to re-write the rules to

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favor a narrower majority.

If the junior Senator from New Mexico's interpretation of the Constitution and Senate Rules is accepted, what would prevent a slim majority of either party from re-writing the Rules of the Senate whenever it suits them? Such a practice would negate the whole point of having Rules at all. It would irrevocably damage the Senate as a continuing body – which the late Senator Robert C. Byrd eloquently reaffirmed last May in this Committee when he stated, "Our Founding Fathers intended the Senate to be a continuing body that allows for open and unlimited debate and the protection of minority rights."

Those words remain true. What the junior senator from New Mexico is proposing is to make the Senate nearly identical to the House and neutralize the purpose of the Senate to act as a check on the House. Let me remind my colleagues: no majority lasts forever in American politics. The political pendulum always swings, but it is proposals like this that carry the danger of turning the pendulum into a guillotine.

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Testimony of

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Submitted to the

U.S. SENATE COMMITTEE ON RULES & ADMINISTRATION

For the hearing entitled

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.

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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 action[5] – 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

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[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).

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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 motion[11] 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

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[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.

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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.

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[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.

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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]

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[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.

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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]

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[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.

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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,

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[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).

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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]

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[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

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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

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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.

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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, compromised 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,

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[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.

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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]

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[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.*, Virgina A. Seitz & Jospeh 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 Vermule*, 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).

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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]

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[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.

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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

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[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.

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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:

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[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.

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> [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.

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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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Submission by Robert Dove

The United States Senate is a continuing body. Under the Constitution, a majority of the Senate— 51 of the 100 senators—constitutes a quorum.[1] The Constitution also establishes a rotation of Senate terms which ensures that in most normal circumstances only one-third of the Senate seats are at stake in each Congressional election.[2]

As Congressional Research Service expert Richard Beth, a respected authority on Senate rules, has written, "Even at the beginning of a new Congress, as a result, and even before newly elected Senators are sworn in for new terms of office, a quorum of the Senate remains in being, and the body remains capable of functioning and acting. By this criterion, a Senate, with membership sufficient to do business, has been in continuous existence ever since the body first achieved a quorum on April 6, 1789. That the Senate is a "continuing body" in this sense was explicitly enunciated at least as early as 1841."[3] Beth refers to this as "not a doctrine, but merely a fact."[4]

Senator Clifford Anderson was a longtime proponent of the idea that the Senate's rules could be changed by a simple majority vote at the outset of a new Congress. At the beginning of each Congress in 1953, 1957 and 1959, Anderson attempted to do so. "Though these motions were tabled, Anderson gained more support each year.[5] In 1959, then-Majority Leader Lyndon B. Johnson offered a compromise proposal to amend the filibuster rule—Rule XXII."[6]

In 1949, ten years earlier, the Senate had applied Rule XXII to the motion to proceed, thus making it possible to close off debate on the motion to proceed to a bill. But, at that time, the Senate had changed the cloture requirement to a two-thirds vote of all senators. Previously, ever since the enactment of Rule XXII in 1917, cloture had required two-thirds of those voting, an easier threshold to attain. Majority Leader Johnson's 1959 compromise returned the cloture rule to two-thirds present and voting. Cloture would be easier to invoke.

Proponents of the "constitutional option" like to characterize the 1959 compromise as a successful instance of pressure being brought to bear by the near adoption of the idea that rules can be changed by majority vote. However, the Senate in 1959, as a part of this compromise, addressed the question of the Senate as a continuing body by adopting a new rule stating that "the rules of the Senate shall

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[1] U.S. Constitution, Article I Section 5 Clause 1 states: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business…"

[2] U.S. Constitution, Article I Section 3 states: "Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year…"

[3] Beth, Richard S. "Entrenchment of Senate Procedure and the 'Nuclear Option' for Change: Possible Proceedings and Their Implications", Congressional Research Service, March 28, 2005.

[4] Ibid.

[5] In 1953, Senator Anderson's motion was tabled 70-21 and, in 1957, the Senate tabled his motion 55-38.

[6] Ibid.

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continue from one Congress to the next unless they are changed as provided in these rules."[7] This is an explicit declaration that the rules of the Senate continue from one Congress to another.

The cloture rule was further amended in 1975 when Senators Walter Mondale (D-MN) and James Pearson (R-KS) also used an attempt to amend the rules by simple majority at the beginning of a Congress to leverage a compromise rules change. Only two sitting senators—Daniel Inouye (D-HI) and Patrick Leahy (D-VT)—were in Congress then. This means that 98 Senators have never voted on the rule.

The issue of the continuity of the Senate and its rules is older than the cloture rule (adopted in 1917) itself. During the 1891 filibuster of the so-called "Force Bill" introduced by Judiciary Committee Chairman Senator George Hoar (R-MA), Senator Nelson Aldrich (R-RI) proposed a cloture rule "permitting any senator, after a matter has been considered 'for a reasonable time,' to demand that debate be closed, after which, only motions to adjourn or recess would be in order."[8]

Senator Francis Cockrell (D-MO), seeking to embarrass Senator Hoar for his support of the cloture proposal, read into the Congressional Record an article authored by Hoar published just weeks earlier in "The Youth's Companion."[9] He read:

> "The men who framed the Constitution had studied thoroughly all former attempts at republican government. History was strewn with the wrecks of unsuccessful democracies. Sometimes usurpation of the executive power, sometimes the fickleness and unbridled license of the people, had brought popular governments to destruction. To guard against these two dangers they placed their chief hope in the Senate.
>
> In the first place, they made it a perpetual body… [T]he Senate is indestructible. The Senate which was organized in 1789 at the inauguration of the Government abides and will continue to abide, one and the same body, until the Republic itself shall be overthrown or until time shall be no more… The Senate,… alone of all the departments of Government, is unchangeable and indestructible by any constitutional process."[10]

In 1917, Senator Thomas Walsh (D-MT) argued that the question of whether the rules of the Senate continued from one Congress to another had never been specifically considered by the Senate.[11] Interestingly, Vice President Thomas Marshall, who was presiding at the time, replied:

> "I do not want any misconceptions about this matter. One thing particularly is clear, and I think everyone will agree upon it. The Vice President of the United States as the

[7] Senate Rule V, Paragraph 2.
[8] Byrd, Robert C. "The Senate 1789-1989: Addresses on the History of the United States Senate", Vol. 2, 1991, pg. 104.
[9] "The Youth's Companion" was a popular religious youth magazine founded in Boston in 1827 which grew in popularity until about the turn of the 20th Century. The article appeared in the November 13, 1890 edition.
[10] Congressional Record, January 22, 1891, pg. S1680.
[11] Congressional Record, March 6, 1917, pp. S8-9.

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> Presiding Officer of this body has absolutely nothing to do with making the rules. It is not any of his business what they are. The question whether there are or are not rules... [is a question] for the Senate and it makes no difference what opinion I express, the Senate will settle it, and will settle it without any regard whatever to what my views are."[12]

Senator Walsh offered a resolution to adopt the rules of the Senate as they existed with the exception of Rule XXII governing motions and pending questions. Walsh proposed that a committee be appointed to write a cloture rule and that the debate on that rule would be conducted under "general parliamentary law," including the provision that it would be "in order to move to fix a time when the Senate shall take a vote on the pending question or to move the previous question with a view to closing debate..."[13]

In their treatise on the "constitutional option", Martin Gold and Dimple Gupta conclude that:

> "Although the Senate was not forced to act on Walsh's constitutional option, there is strong reason to believe that the proposal was the impetus for cloture reform. Looking back on the 1917 rule change, Senator Clinton P. Anderson (D-NM) concluded that Walsh's proposal carried the day: '[Walsh] made a very powerful argument [in favor of adding a cloture rule] ... When he finished, someone surrendered. Senator Walsh won without firing another shot. A cloture rule was brought forth ... and, with the exception of three, every one of [the opposing Senators]... fell into line.' Senator Paul H. Douglas (D-IL) concurred that the 1917 rules 'change would not have been made had not Senator Walsh presented his original resolution: " [W]hile there was no formal rule or decision dealing with the Walsh motion, it was not overruled, and the result he was seeking to accomplish was attained, because the objectors had hanging over their heads general parliamentary law, under which the previous question could be moved to shut off debate.""'[14]

However, it seems pretty clear that the popular uproar against the Senate fueled by President Woodrow Wilson's criticisms had left little doubt that the Senate would amend its rules and create a cloture provision. This would have happened, I believe, without Senator Walsh's maneuverings. The debate throughout and the overwhelming 76-3 vote at the end to adopt the rule support this view.

Congressional Quarterly points out that "as a political scientist in 1882, Wilson had celebrated 'the Senate's opportunities for open and unrestricted discussion.'"[15] But as CQ points out, that after the 1917 bill to arm merchant ships was blocked by filibuster in the Senate, Wilson fumed, "The Senate of the United States is the only legislative body in the world which cannot act when the majority is ready for action. A little group of willful men...have rendered the great government of the United States helpless and contemptible."[16]

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[12] Ibid, pg. S9.
[13] Ibid.
[14] Gold, Martin B. and Dimple Gupta. "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster", Harvard Journal of Law & Public Policy, Volume 28, Issue 1, 2004.
[15] CQRollCall.com Found at: http://corporate.cqrollcall.com/wmspage.cfm?parm1=227.
[16] Ibid.

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CQ concludes, "Public outrage finally forced the Senate to accept debate limitations."[17]

However, as many of the 86 senators who voted to adopt a cloture rule made clear, they supported a conservative rule which would not interfere with extended debate in the Senate, and they did not support Senator Walsh's contention that the rules could be changed by a simple majority at the start of a Congress. As the man who would succeed Woodrow Wilson as president, Senator Warren Harding (R-OH) declared on the floor:

> "I am quite content to say that I favor some modified form of cloture rule; but the point I want to make is, that where the sentiment of this body is favorable to a change of the rules, no dilatory tactics can long obtain in opposing that change of the rules… I am not ready to accept the soundness of the Senator [Walsh]'s argument, that this is not a continuing body; and I cannot accept the contention that we must first enter into a state of chaos in order to bring about the reform which the Senator seeks."[18]

The debate about continuity of the Senate is crucial. It is likely that any future effort to change the cloture rule, if controversial, will include a battle over this issue. Senate Rule V requires only a majority vote to amend the Senate rules. This is deceiving, however, because, under Rule XXII, it takes two-thirds of the Senators present and voting to end debate on the rules change. Therefore a supermajority, larger than the normal 60 vote cloture, is required to get to the vote on changing the rules. This makes it unlikely that major changes will occur unless the Senate decides that it was not a continuing body after all.

As I have noted, the Senate rules themselves state: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[19] So, without a grand compromise, it will take a very cooperative Vice President, willing to join with the Senate's majority and ignore the Senate's rules, and/or precedents to get the Senate to the point where it can or will change the rules in the absence of a two-thirds cloture vote.

A "constitutional option" was threatened by Republicans led by Majority Leader Bill Frist (R-TN) during the 2003-2005 effort to thwart Democratic filibusters of several of President Bush's judicial nominees. Senator Frist, opening the 109th Congress in the Senate issued the clear threat, "I reserve the right to propose changes to Senate Rule XXII, and do not acquiesce to carrying over all the rules from the last Congress."[20] This statement was based on the belief that he was reserving the right to use the "constitutional option" to rewrite the Senate's rules by majority vote.

Norman Ornstein, one of the most authoritative scholars on Congress, a proponent of filibuster reform wrote recently:

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[17] Ibid.
[18] Congressional Record, March 7, 1917, pg. S16.
[19] U.S. Senate Rule V, Section 2.
[20] Congressional Record, January 4, 2005, pg. S14.

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> "Reform ideas are fine-- but they are academic exercises unless 67 Senators can agree to change their rules, a near impossibility. I have no doubt that Democrats are going to be tempted to contemplate their own version of the "nuclear option" after the 2010 midterm elections, something considered briefly in 1978-79 by the Carter Administration."[21]

He explains:

> "Since its origins, the Senate has been considered a continuing body… Thus, the rules in the body remain in effect—and those rules require two-thirds to invoke cloture for a rules change. Mondale considered taking the chair as President of the Senate and making a parliamentary ruling that the Senate is not a continuing body; rather, like the House, it has to adopt rules at the beginning of each Congress, and that can be done by majority action. That might work—but like the nuclear option, it would be radioactive, with collateral damage that would reverberate for a long time, in a Senate where business is mostly conducted by unanimous consent."[22]

Of course, it's not clear that so much unanimous consent would be necessary any longer in a new majoritarian Senate. After all, the majority would be free to operate the legislative agenda as it saw fit.

I take the view, as has the Senate, itself, repeatedly, that the Senate is a continuous body. A quorum of senators (at least 51 under the Constitution) is, at all times, duly elected and seated. Since the Senate has been a continuous body from the outset, its original rules have survived in a straight line to the present. The Senate under Article I Section 5 has the power to write its own rules. The Senate has done so. And, again, the Senate in its Rule V has clearly declared, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[23]

There is nothing in Article I Section V which directly supports the contention that the Constitution empowers the Senate to change its rules in contradiction to its existing rules and the provisions for changing those rules under those rules.

The 1953 battle, led by Senate liberals frustrated by repeated filibusters conducted by Southern Democrats against civil rights legislation, sought to reduce the necessary number of votes for cloture from two-thirds of the whole body, which was the case in the wake of the 1949 compromise which

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[21] Ornstein, Norman, "Time to Reassess Filibuster to Keep Senate Functioning". Roll Call, January 20, 2010, Pg. 6.
[22] Ibid.
[23] Rule V, Paragraph 2. U.S. Senate Rules, U.S. Senate Rules Committee Website.

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allowed cloture against the motion to proceed. Their strategy was to argue that, under the Constitution, the Senate could vote at the beginning of a session with a simple majority to change its rules. The issue was not resolved and the Senate voted to table a motion by Senator Clinton Anderson (D-NM) to consider a change in the rules.[24]

Senate Historian Donald Ritchie asked rules expert Martin Gold in his Senate oral history interview about this era of attempted changes in Rule XXII:

> RITCHIE: At the beginning of every Congress from the Truman and Eisenhower administrations right on through to Nelson Rockefeller, when he was vice president, they were still hoping to do that. It's interesting that the ideologies and parties have changed, but the talk of the tactics has stayed the same. What really did change things in the past was whenever you had an election that gave one party or the other a large majority, instead of having things as evenly balanced as they are now, or at least that's the way it's seemed to me.
>
> GOLD: Well, that's right. You know, I have looked at a lot of that history and can trace some interesting people. You talk about how people have changed after they got accustomed to the Senate. When Mike Mansfield was elected to the Senate in 1952, and when he arrived in 1953, the first issue before the Senate was reform of the filibuster rule by the so-called constitutional method. There were twenty-one senators who supported that change that year, almost all of whom were Democrats. Mansfield was one of them. He was part of that intrepid group that tried to change the rules by such a means. By the time he got into the leadership and the same efforts were being made by others, he spoke out vigorously against it. Part of that was a change in role from being a freshman member pursuing a particular ideology without regard to Senate traditions to being the majority leader and being the defender of those traditions; also lots of years of experience in the Senate and an evolving sense of what the Senate was supposed to be about. But you are absolutely correct to say that in the years between 1953 and 1975, whenever these efforts were made, and they were almost made biennially, they were done by liberal Democrats, with some support on the Republican side... [25]

The late Senator Robert Byrd (D-WV), the Senate's leading expert of its rules and their history, at the Senate Rules Committee's May 19, 2010 hearing just a month before his death, declared, "Our Founding Fathers intended the Senate to be a continuing body that allows for open and unlimited debate and the protection of minority rights. Senators have understood this since the Senate first

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[24] Congressional Quarterly Almanac (1953), p. 313.

[25] Martin Gold, Counsel to the Senate Republican Leader, 1979-1982, 2003-2004, Oral History Interviews, Senate Historical Office, Washington, D.C., conducted by Donald A. Ritchie (then Associate Historian and currently Senate Historian).

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convened."[26]

For the "constitutional option" to succeed, it will rely upon Vice President Biden ignoring the Senate rules, and almost certainly the advice of the Senate Parliamentarian, and ruling that a simple majority, under the Constitution, can invoke cloture.

During the 2005 debate on the "nuclear option," which was based on much the same reasoning, then-Senator Biden rejected the argument in the strongest terms. I quote his statement at some length because it makes the case strongly and correctly, and because Joseph Biden, himself, is likely to be at the center of just such an historic decision-making moment. Then-Senator Biden declared:

> "We should make no mistake. This nuclear option is ultimately an example of the arrogance of power. It is a fundamental power grab by the majority party…to eliminate one of the procedural mechanisms designed for the express purpose of guaranteeing individual rights, and they…would undermine the protections of a minority point of view in the heat of majority excess. We have been through these periods before in American history but never, to the best of my knowledge, has any party been so bold as to fundamentally attempt to change the structure of this body.
>
> …Quite frankly, it is the ultimate act of unfairness to alter the unique responsibility of the Senate and to do so by breaking the very rules of the Senate.
>
> … Put simply, the nuclear option would transform the Senate from the so-called cooling saucer our Founding Fathers talked about to cool the passions of the day to a pure majoritarian body like a Parliament. We have heard a lot in recent weeks about the rights of the majority and obstructionism. But the Senate is not meant to be a place of pure majoritarianism.
>
> Is majority rule what you really want? Do my Republican colleagues really want majority rule in this Senate? Let me remind you, 44 of us Democrats represent 161 million people. One hundred sixty-one million Americans voted for these 44 Democrats. Do you know how many Americans voted for the 55 of you? One hundred thirty-one million. If this were about pure majorities, my party represents more people in America than the Republican Party does. But that is not what it is about. Wyoming, the home State of the Vice President, the President of this body, gets one Senator for every 246,000 citizens; California, gets one Senator for 17 million Americans. More Americans voted for Vice President Gore than they did Governor Bush. By majoritarian logic, Vice President Gore won the election.

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[26] Senator Robert Byrd, opening statement, Hearing on "Examining the Filibuster: The Filibuster Today and Its Consequences", Senate Committee on Rules and Administration, May 19, 2010.

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> … At its core, the filibuster is not about stopping a nominee or a bill, it is about compromise and moderation… It does not mean I get my way. It means you may have to compromise. You may have to see my side of the argument. That is what it is about, engendering compromise and moderation.
>
> …Moderates are important only if you need to get 60 votes to satisfy cloture. They are much less important if you need only 50 votes. I understand the frustration of our Republican colleagues…Whenever you are in the majority, it is frustrating to see the other side block a bill or a nominee you support. I have walked in your shoes, and I get it."[27]

At this point in his statement, then-Senator Biden of 2005, could be addressing himself directly to Vice President Biden of 2011:

> "…If there is one thing I have learned in my years here, once you change the rules and surrender the Senate's institutional power, you never get it back. And we are about to break the rules to change the rules.
>
> I do not want to hear about `fair play' from my friends. Under our rules, you are required to get 2/3 of the votes to change the rules. Watch what happens when the majority leader stands up and says to the Vice President--if we go forward with this--he calls the question. One of us, I expect our leader, on the Democratic side will stand up and say: Parliamentary inquiry, Mr. President. Is this parliamentarily appropriate? In every other case since I have been here, for 32 years, the Presiding Officer leans down to the Parliamentarian and says: What is the rule, Mr. Parliamentarian? The Parliamentarian turns and tells them.
>
> Hold your breath, Parliamentarian. He is not going to look to you because he knows what you would say. He would say: This is not parliamentarily appropriate. You cannot change the Senate rules by a pure majority vote.
>
> So if any of you think I am exaggerating, watch on television, watch when this happens, and watch the Vice President ignore--he is not required to look to an unelected officer, but that has been the practice for 218 years. He will not look down and say: What is the ruling? He will make the ruling, which is a lie, a lie about the rule.
>
> … The nuclear option abandons America's sense of fair play. It is the one thing this country stands for: Not tilting the playing field on the side of those who control and own the field.

[27] Congressional Record, May 23, 2005, pp. S5735-S5737.

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> I say to my friends on the Republican side: You may own the field right now, but you won't own it forever. I pray God when the Democrats take back control, we don't make the kind of naked power grab you are doing. But I am afraid you will teach my new colleagues the wrong lessons.
>
> We are the only in the Senate as temporary custodians of the Senate. The Senate will go on. Mark my words; history will judge this Republican majority harshly, if it makes this catastrophic move."[28]

I could give Vice President Biden and the current Democratic majority in the Senate no more eloquent warning than to modify then-Senator Biden's words. History will judge this Democratic majority harshly, if it makes this catastrophic move.

There are two instances which some proponents of eliminating the filibuster claim as precedent. The first occurred in 1969 when Sen. Frank Church (D-ID) offered a cloture motion on his proposal to change Rule XXII which at the time required a 2/3 vote to a proposed 3/5 requirement. He asserted that under the Constitution cloture on his proposal would only require a simple majority.

Vice President Humphrey ruled that at the beginning of a Congress a simple majority could invoke cloture and if the Senate did vote to invoke cloture with less than a 2/3 votes but more than a majority, he would rule that cloture was invoked. The Senate voted 51-47 to invoke cloture. The Vice President's ruling was appealed, and the Senate voted not to sustain the opinion. This does not create a precedent since the Vice President's judgment was not sustained by the Senate and cloture was not invoked.

The second occasion was in 1975. Senators James Pearson (R-KS) and Walter Mondale (D-MN) attempted to use the Constitutional option. Pearson offered a motion providing for majority cloture on a change in the rules to reduce the supermajority required for cloture to 3/5 vote. The motion included the proposition that cloture on his proposal could be invoked by a simple majority. Majority Leader Mike Mansfield (D-MT) raised a point of order against the motion. Vice President Rockefeller ruled that if the Senate were to reject the Mansfield appeal, it would be the judgment of the Senate that the Pearson motion was constitutional and he would enforce cloture by a simple majority under the Constitutional option. The Senate tabled the point of order, but Senator James Allen (D-AL) was able to divide the question because the Pearson motion had two parts. Rockefeller allowed the division and ruled that the first part was debatable, nullifying the Pearson-Mondale victory in effect. Mondale offered another motion for an immediate simple majority cloture vote and again Mansfield raised a point of order which was tabled by the Senate.

Senator Robert Byrd (D-WV), backed by Senator Mansfield and the Republican leadership, offered a compromise 3/5 cloture (duly elected and sworn, rather than present and voting as in the Mondale proposal and retaining 2/3 for rules changes). The compromise was adopted and the Senate reconsidered and adopted the Mansfield point of order.

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[28] Ibid.

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Some view this action as reversing the precedent. Some believe that it did not reverse the initial point of order and that the precedent stands. In my view, the Senate, as it always has in its more than 200 year history, through this point of order, backed away from the consequences of majority cloture on rules changes, and did what the Senate does well, arrived at a viable and stable compromise.

Senator Byrd, in his excellent history of the Senate, points out that "By this action, as the Rules Committee's published history stated, the Senate 'erased the precedent of majority cloture established two weeks before, and reaffirmed the continuous nature of the Senate rules.'"

The argument over a precedent may be a side bar because, in reality, the Vice President or presiding officer can do whatever a majority will permit as long as he and the Senate's majority are willing to ignore the Senate rules. (Rule XXII requires a 2/3 majority in order to end debate on a rules change and Rule V states, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.")

In 1967, Senator Sam Ervin (D-NC), who had served as a Justice on the North Carolina Supreme Court and who later became famous for his Chairmanship of the Senate Watergate Committee, pointed out:

> "If a majority can act as proposed... at the beginning of the session, it can so act on any day of the session...[The only rule the Senate could have under this theory would be that the majority of Senators present on any given occasion could do anything they wish to do at any time regardless of what the rules of the Senate might be. If the Constitution does not permit the Senate to adopt rules which can bind a majority of the Senate at the beginning of the session, it does not permit the Senate to adopt rules which can bind a majority at any time in the session. This conclusion is inescapable because the provisions of the Constitution applicable to the Senate are exactly the same on every day of the session, however long it may last."[29]

The question of majorities binding future majorities, and legislatures binding future legislatures is central to the "constitutional option" argument. This is particularly true because the Senate acted in 1959 to adopt Senate Rule V which states, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." The question arises whether that rule binds future Senates.

There are many circumstances in which the Congress "binds" future Congresses in much the same way. These provisions like Rule V, however, do not truly bind the future bodies because the Congress is able, under the rules, to change or reverse the actions.

[29] Congressional Record, January 18, 1967, pp. S925-S926.

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Examples include laws which Congress has passed which impose expedited procedures on the Congress like the War Powers Act of 1973, the Trade Act of 1974, the Defense Base Closure and Realignment Act of 1990, and the Congressional Accountability Act of 1995.

These expedited procedures affect activities of both houses of Congress, their committees, and the role of Senators in shaping public policy through debate and amendments.

In addition, the Budget Act of 1974 creates the reconciliation process, and the budget process has been amended to create such past laws as Gramm-Rudman, and more recently PAYGO. In addition, the Senate has imposed the Byrd Rule on itself to limit amendments under reconciliation. These have binding characteristics on the Congress which can only be waived by supermajority votes. Actually, Rule XXII is less binding since it applies only to debate and the rules themselves can be amended by a simple majority vote.

Also, I would argue that in the Constitution, the Founders bound all future Congresses, Constitutional Conventions, and potentially huge majorities of the American people, when they wrote in Article V "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Finally, James Madison in a letter to Thomas Jefferson written on February 4, 1790, refers to three categories: (1) constitutions; (2) ***laws irrevocable at the will of the legislature***; and (3) laws involving no such irrevocable quality. Clearly, he saw the second as a legitimate category of laws.[30]

Madison writes:

> "On what principle does the voice of the majority bind the minority? It does not result I conceive from the law of nature, but from compact founded on conveniency. A greater proportion might be required by the fundamental constitution of a Society, if it were judged eligible. Prior then to the establishment of this principle, *unanimity* was necessary; and strict Theory at all times presupposes the assent of every member to the establishment of the rule itself. If this assent can not be given tacitly, or be not implied where no positive evidence forbids, persons born in Society would not on attaining ripe age be bound by acts of the Majority; and either a *unanimous* repetition of every law would be necessary on the accession of new members, or an express assent must be obtained from these to the rule by which the voice of the Majority is made the voice of the whole."[31]

The Senate, exercised its right, under the Constitution, to establish a rule (Rule V) which sets out the procedures for future Senates to amend their rules. This is far less binding than "laws irrevocable at the will of the legislature" since Senate rules are revocable.

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[30] *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826*, ed. by James Morton Smith, W. W. Norton (1995). Found at http://www.constitution.org/jm/17900204_tj.htm.

[31] Ibid.

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Senator Mansfield, during the 1967 debate, even though he strongly supported changing Rule XXII from the two-thirds requirement to the three-fifths rule warned:

> "...[T]he urgency or even wisdom of adopting the three-fifths resolution does not justify a path of destruction of the Senate as an institution and its vital importance to our scheme of government. And this, in my opinion, is what the present motion[32] would do. The proponents would disregard the rules which have governed the Senate over the years simply by stating the rules do not exist...
>
> This biennial dispute for a change in the rules has brought to issue the question of the Senate as a continuing body. The concept is really symbolic of the notion of the Senate in our scheme of government... What should be considered is whether the motion at hand- the motion for simple majority cloture- would destroy the character of the Senate as a parliamentary body... If a simple majority votes to sustain the availability...this motion at this time, it necessarily means that henceforth on any issue, at any time, and during any future session of any Congress a simple majority, with a cooperative presiding officer, can accomplish any end they desire without regard to the existing rules of process and without consideration or regard to the viewpoint of any minority position...
>
> The issue of limiting debate in this body is one of such monumental importance that it reaches, in my opinion, to the very essence of the Senate as an institution."[33]

[32] A motion by Senator McGovern which would have invoked cloture by a majority vote.
[33] Congressional Record, January 18,1967, pp. S921-S922.

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Testimony of

Steven S. Smith

Director, the Murrary Weidenbaum Center on the
Economy, Government, and Public Policy,
Kate M. Gregg Distinguished Professor of Social Sciences, and
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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.

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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.

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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 it 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.

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* See appendix.

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Appendix

1. Approaches to Elaborating on Senator Harken'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

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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

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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.

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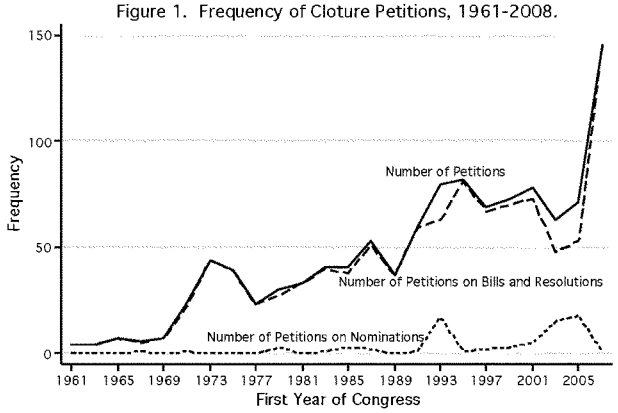
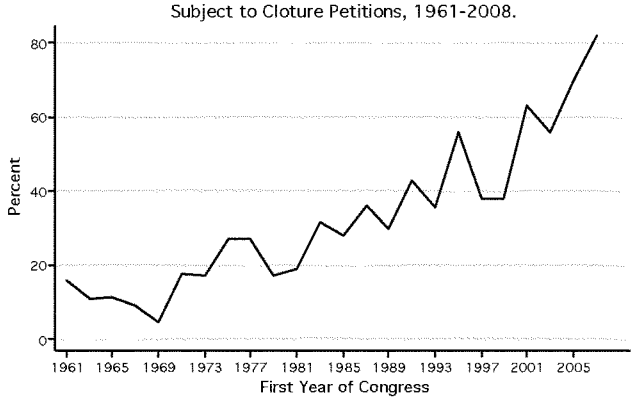
Figure 1. Frequency of Cloture Petitions, 1961-2008.



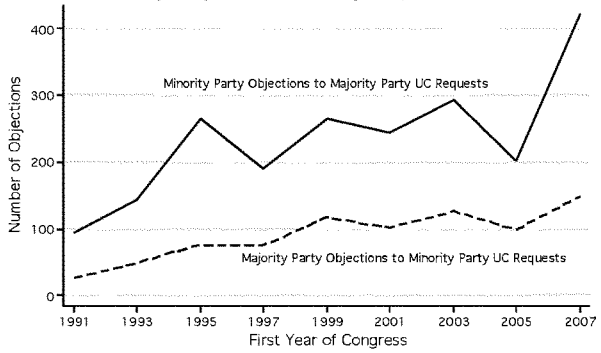
Source: U.S. Senate, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm

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.

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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.

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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.	

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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.

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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	60 in majority	60 in majority	60 in majority	60 in majority
with 98 or 97 Elected Senators	59 in majority	59 in majority	59 in majority	59 in majority	59 in majority
with 96 Elected Senators	58 in majority	58 in majority	58 in majority	58 in majority	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**	**60 in majority**	**60 in majority**	**60 in majority**	**60 in majority**
step 2	**57 in majority**	**57 in majority**	**57 in majority**	**57 in majority**	**57 in majority**
step 3	**54 in majority**	**54 in majority**	**54 in majority**	**54 in majority**	**54 in majority**
step 4	**51 in majority**	**51 in majority**	**51 in majority**	**51 in majority**	**51 in majority**
Senator Bennet—Minority Thresholds to Continue Debate					
with 100, 99, or 98 Elected Senators	*41 in minority*	*41 in minority*	*41 in minority*	*41 in minority*	*41 in minority*
with 97 or 96 Elected Senators	*40 in minority*	*40 in minority*	*40 in minority*	*40 in minority*	*40 in minority*
Ornstein—Minority Thresholds to Continue Debate					
with 100, 99, or 98 Elected Senators	*40 in minority*	*40 in minority*	*40 in minority*	*40 in minority*	*40 in minority*
with 97, 96, or 95 Elected Senators	*39 in minority*	*39 in minority*	*39 in minority*	*39 in minority*	*39 in minority*
Senator Harkin with Minority Thresholds					
step 1	*41 in minority*	*41 in minority*	*41 in minority*	*41 in minority*	*41 in minority*
step 2	*44 in minority*	*44 in minority*	*44 in minority*	*44 in minority*	*44 in minority*
step 3	*47 in minority*	*47 in minority*	*47 in minority*	*47 in minority*	*47 in minority*
step 4	*50 in minority*	*50 in minority*	*50 in minority*	*50 in minority*	*50 in minority*

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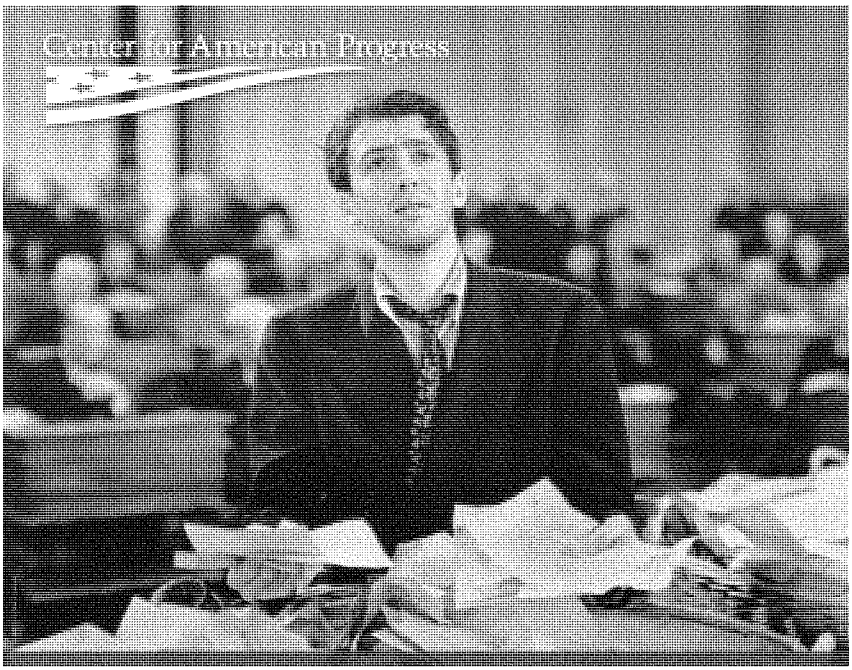

From Deliberation to Dysfunction

It Is Time for Procedural Reform in the U.S. Senate

Scott Lilly March 2010

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Center for American Progress

From Deliberation to Dysfunction

It Is Time for Procedural Reform in the U.S. Senate

Scott Lilly March 2010

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Introduction and summary

The U.S. Senate has a proud tradition of ensuring that important decisions are carefully weighed before they become law. This has served the nation well at times. But under current practices the latitude granted to individual senators to obstruct does not always contribute to more measured consideration of national policy. In recent years, the Senate has been less and less able to follow the regular order in the consideration of pending legislation, the confirmation of senior executive branch officials, and other work.

Increasingly, the Senate has been forced to rely on legislative shortcuts that severely undermine the philosophy of full and careful consideration of all matters before the body. Even so, the chamber fails to complete much of the work for which it is responsible and falls so far behind schedule in completing the work it does do as to seriously undermine the capacity of the entire federal government to respond in an effective and efficient way to the problems facing our country.

The root cause of these problems is the institution's inability to adopt rules that balance the responsibilities of Congress against the rights of individual senators. Rules that allow the Senate to limit debate and maintain a functional schedule have not been strengthened in more than four decades, but during that period the workload has increased significantly, and the willingness of senators to use all of the powers offered by the rules to obstruct legislative progress has increased exponentially.

While many Americans continue to think of the filibuster as it was portrayed in the 1939 film, "Mr. Smith Goes to Washington," it has evolved into a very different practice over the course of the past 71 years. It has been decades since a senator actually took to the floor and attempted to block legislation through extended speechmaking. Now a senator merely needs to serve notice that he or she will not concur in a procedural motion by the leadership that the prospects for making progress on the legislation proposed for consideration are so diminished that it is often pulled from the legislative schedule. This practice applies to not only new laws altering national policy in some significant way, but also to the annual spending bills that keep the government operating and even the appointment judges, senior, and even not-so-senior executive branch officials and military officers.

While it is unlikely the Senate will abandon the filibuster, it is clear that the rules governing the use of the filibuster must change if the body is to be prevented from becoming a

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more serious impediment to competent governance. The chaotic, hit-or-miss process in which rather mundane matters are debated at great length while more important issues are slipped past the full Senate without significant debate or opportunity for amendment turns the concept of deliberation on its head.

The long delay in adopting spending measures diminishes the capacity of program managers in executive branch agencies to effectively manage public funds. And the hundreds of unfilled administrative positions across the executive branch created by Senate inaction on executive branch nominees further reduce the prospects that taxpayer dollars will be spent in a thoughtful and effective manner.

At a minimum, the Senate needs to adopt modest procedural changes to its rules curbing some of the filibuster's worst abuses and making the Senate not only more responsible in performing its work but at the same time more deliberative.

Origins of the filibuster

The word filibuster is taken from Spanish and translates roughly to the English word "pirate," as in stealing the legislative process. The framers of the Constitution did not envisage that individual senators would hold this powerful tool. The original Senate Rules provided for the termination of debate at any time by majority vote. A motion to ask for a vote on the business pending before the Senate, or in legislative-speak to move "the previous question," was allowed until the rules were rewritten in the 9th Congress in 1806, but even then, prolonged debate for the purpose of obstruction was not practiced until 1841 as comity deteriorated in the decades leading up to the Civil War.

In the two decades preceding the Civil War, the filibuster became strongly established in Senate tradition. During that period, there was no legislative recourse to a decision by a small number of senators to kill legislation—even if they were the only ones in the entire country who opposed it. As a result, Congress ceased to be a forum for resolving the major issues of the day unless senators themselves recognized the need to limit their power to obstruct.

From the decade following the Civil War until the U.S. entry into World War I, there were repeated attempts to change Senate rules and allow limitations on debate—all of which failed. But when antiwar isolationists used the filibuster to block the arming of U.S. merchant ships against German submarines in 1917, President Woodrow Wilson recognized the opportunity to force change. Calling a special session of Congress to complete the work that filibusters had blocked in the previous Congress, Wilson demanded reform:

> *"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."*

Days later, the Senate adopted Rule XXII, which allowed limits to be placed on debate if two-thirds of the senators present and voting concurred. Then (as is the case today) the rule still provided several days of debate and parliamentary maneuvering before the matter being subjected to filibuster could be resolved. In essence, the Senate moved somewhat in the direction advocated by President Wilson, but established a threshold for terminating debate that made reform more apparent than real.

Following the Watergate scandal a second wave of reform swept the Senate in 1975. Included in the changes adopted by the post-Watergate Senate was the requirement that committee meetings be open to the press and public and that the two-thirds requirement for ending a filibuster be lowered to three-fifths, or 60 percent of the membership.

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The disappearance of authorizing legislation

The federal government is run through a two-track process. In one, Congress enacts legislation "authorizing" the parameters of a particular program, for instance the National Park Service, while in a separate process it decides annually the amount of money that will be spent on the programs that are authorized. Over the course of the past several decades, the authorizing process—in which many of the most contentious issues affecting programs should be resolved—has been in decline.

The Congressional Budget Office reports that in the current fiscal year, FY 2010, about half of the money provided for the nondefense activities of the government ($290 billion out of $584 billion) had to be appropriated without legal authority. That is because a total of 250 laws authorizing various pieces of the federal bureaucracy had expired, and Congress had failed to take the necessary steps through the authorizing process to enact replacement legislation.

There are a variety of reasons why these "authorizations" were not renewed, but chief among them is that the chairmen of the committees of jurisdiction in the Senate cannot get the legislation scheduled for consideration by the full Senate. The reason? The legislative calendar is so consumed by extended debate and deliberation—often on minor issues—there is no time left for most major authorizations to come to the Senate floor.

This problem then cascades into the appropriations process as the Senate leaders must decide whether to fund programs for which there is no legal authority or terminate important government services and activities. Appropriation bills must then address programmatic problems that should have been dealt with by the committees with authorizing jurisdiction.

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The appropriations logjam

Despite numerous efforts over the years to ensure that Congress pass all of the 12 annual appropriation measures before the beginning of a new fiscal year, Congress has not enacted all appropriation bills on time in 15 years. Frequently, federal agencies do not know how much they have to spend in a given fiscal year until nearly half of that year has expired. In most instances this is problem is tied to the Senate schedule.

During the past year, the House of Representatives passed 4 of the 12 bills in June and the remainder in July. The Senate passed three in July, one in August, two in September, one in October, and two in November. The remaining three bills, including the largest domestic spending bill, never went to the Senate floor at all. Those three bills nonetheless conferenced went to conference with the House of Representatives as if they had been considered by the Senate when in fact they had only been considered in a committee comprising only 30 of the Senate's 100 members.

That may sound like a terrible abuse of process and a lousy work record, but in fact it is better than normal. In only two of the last 10 years has the Senate considered all of the appropriation bills that were sent to the president for signature. Since FY 2001, the Senate has conferenced 51 annual appropriation measures as though they had been considered by the Senate and brought back conference reports for nothing more than an up-or-down vote on every one of them. The average number of bills failing to get full Senate consideration has been five per year over the course of the past decade.

By the same token, Congress did not enact the last of the appropriation bills for FY 2010 until December 19, 80 days or nearly a quarter of the way into the new fiscal year. But that was better than normal by the standard of the past decade. The FY 2003 bills did not become law until late February. In FY 2004 it was late January, in FY 2006 it was the end of December, and in FY 2007 was mid-February (See table 1).

TABLE 1

Failing on the job

Record on the passage of appropriations bills without full consideration on the floor of the Senate, 2001-10

Fiscal year	Appropriation bills not considered
2001	5
2002	0
2003	10
2004	1
2005	7
2006	0
2007	9
2008	5
2009	11
2010	3
Total	**51**
Average 2001–2010	**5.1**

Source: Thomas, "Status of Appropriation Legislation, Fiscal Years 2001 -2010," Congressional Research Service, available at http://thomas.loc.gov/home/approp/app10.html.

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The hollowing out of government leadership

Another major responsibility of the Senate is to confirm or reject presidential appointments to key positions within the federal government. One practice that has evolved with the Senate's handling of this responsibility is a special form of the filibuster known as a "hold" on appointments.

During an earlier period, holds were used to simply give an individual senator an opportunity to have a week or two to examine an appointee before a decision was made on confirming or rejecting an appointment. The hold means that the senator who has placed it is signaling that he will object to a unanimous consent request allowing for consideration of the appointment. That means that a cloture motion will be required to proceed to consider the confirmation. Since that will take the better part of a week—and the Senate must under current law confirm hundreds of executive and judicial branch positions—it is practical to bring up only those nominations that can get unanimous consent.

Over the years, senators have realized that presidents not only need these nominations to proceed but are willing to pay a price in certain instances to get them. A White House desperate to put their team in place may be willing to make valuable concessions to a senator willing to release a hold—but you can't be a player if you don't have a hold to begin with. Increasingly, holds are attached to nominees for reasons having nothing to do with the nominee or his or her ability to serve.

Evidence of how much this practice has grown surfaced recently when it was revealed that Sen. Richard Shelby (R-AL) placed a hold on every single one of the 80 administration appointees who had been cleared for approval by Senate committees. Sen. Shelby explained that he thought the Obama administration had a bias against his home state in awarding grants and contracts. In particular, he was concerned that the U.S. Air Force might decide that the bid by European Aeronautic Defense and Space Corporation to build a new generation of tanker aircraft was not the best value to U.S. taxpayers. EADS had indicated that although the components of the plane would be largely produced in Europe they would be shipped to the United States and assembled in Shelby's home state of Alabama. The senator felt holding up all nominees would place maximum pressure on the administration to ignore other contract bids.

After a barrage of negative press reports, Sen. Shelby released the hold on most of the appointees but continued until recently to block confirmation of nominees to manage the

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Department of Defense's acquisition and technology operations and Air Force installations and logistics (both of whom had now been awaiting confirmation for nearly seven months). Sen. Shelby also continued to block the confirmation of the administration's nominee to be undersecretary of the Air Force.

As of March 1, there were 228 presidential nominees pending confirmation before the U.S. Senate. There are six who were nominated more than 10 months ago. A total of 34 nominees have been on hold more than six months, and 34 more have been on hold between four and six months. Among the positions left vacant during that period are the head of the office of legal counsel at the Department of Justice, the undersecretary of treasury for international affairs, and the undersecretary of commerce for international trade.

What's more, many nominees who eventually were confirmed were prevented from joining the Obama administration for most if not all of its first year in office. One emblematic case in point: The administration sent the Senate a nominee to run the Office of Resources and Technology at the Department of Health and Human Services on June 1 of last year. She was confirmed more than eight months later on a voice vote, but only after the president's budget for the department had been submitted for the coming fiscal year, which ends in September 2011.

Or consider the undersecretary for science and technology at the Department of Homeland Security. She also was approved on a voice vote, but only six months after her nomination had been submitted to the Senate while a critical office in planning our defenses against possible terrorist attacks remained vacant.

Having run on a platform of reforming government contracting and procurement policies, a top priority for the Obama White House was filling the top position at the General Services Administration. In the end, their nominee got all of the 96 votes cast on her approval, but it was nearly 10 months after her name had been sent to the Senate for confirmation.

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Systemic government failure

Unfortunately the failure of the Senate to pass new authorizations, send spending measures to the White House in a timely manner, or confirm nominees for key positions in the executive and judicial branches of government are not simply measures of how well the Senate is performing in a given year. They have immense implications that extend far beyond the Senate chamber.

The failure to pass new authorizations means that most of the resources available to the Senate to oversee the functioning of the federal government are disengaged. Executive branch managers are not challenged on program performance. Standing authorities for program management are left in place for years after they should have expired and new authorities that are needed are not granted. Further, failure to resolve issues through the work of the 18 Senate committees that are charged with reviewing, repealing, or updating authorizations means that contentious issues that should be resolved through that process are dumped onto annual appropriation bills, making expeditious consideration of those bills more difficult.

The failure to adopt spending legislation in a timely manner has a more profound and immediate impact on government programs and how efficiently tax dollars are spent. Each agency has finite resources to manage the workload it is assigned under federal law. If project managers, contract officers, or grant administrators get their budget at the beginning of a fiscal year in October, they have a full 12 months to publish solicitations for grant and contract proposals, appoint reviewers to select proposals that give the taxpayer the greatest value, draft contracts that protect the government's interests in the timely and effective performance of work, and consummate those contracts.

If appropriation measures are not agreed to until February, however, then funds may not be allocated to agencies until March. That means there simply isn't enough time to make the process work, and there is certainly not enough time to make it work well. As a result, the delay in adopting annual appropriation measures that has become a routine consequence of the Senate's methods of making decisions is a prescription for waste, fraud, and abuse. Contracting procedures are necessarily short circuited. Noncompetitive contracting becomes routine and the reviews to determine best value become pro-forma.

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The consequences of leaving key executive branch positions unfilled for extended periods is more obvious, but the costs in terms of quality government are underestimated.

Government programs must be funded without formal standing legal authority because there is no time on the Senate schedule to bring such authorizations to the Senate floor. Funding for much of the government is not agreed to until months after the fiscal year has already started, leaving program managers and contract officers with only six or eight months to do a full year's work. A major portion of the agencies and programs across the government are left leaderless not simply for months, but in some instances for years because the Senate finds it impossible under its rules of procedure to move forward with nominations.

An additional price paid by taxpayers for the manner in which nominations are now managed is the increasing unwillingness of qualified people to place their lives on hold for the extended periods of time that is frequently required for Senate confirmation. By shrinking the pool of qualified people willing to become candidates for managing government programs the Senate is without question increasing the cost of those programs and lowering the quality of services provided.

More aggressive use of obstruction

Filibusters used to be viewed as an option to slow consideration on measures of great import on which there were deep philosophical divisions. Remarkable restraint was exercised in the use of this powerful and undemocratic tool during most of the 20th century. During the 44 years between 1917 and 1970, motions to limit debate were filed on 56 occasions or little more on average than about once a year.

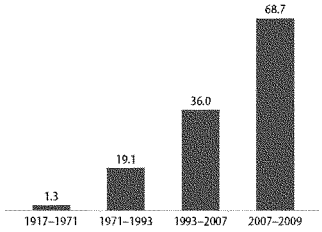
Significant change in the use of the filibuster began to occur beginning in the 1970s. During the 22 years between 1971 and 1993, 420 cloture motions were filed, or an average of nearly 20 filibusters per year. The pace picked up again in 1993. Between 1993 and 2006, there were 504 cloture motions or 36 per year.

But since the 2006 elections the use of the filibuster has again doubled. To borrow a term from "Star Wars," filibustering has gone from overdrive to "hyperspace." Filibusters are now commonly used to block not only legislation the minority opposes, but to block legislation the minority does not necessarily have strong feelings on but will use to place a stick in the spokes of the legislative wheel anytime an opportunity presents itself.

During the two sessions of the 110th Congress, 139 cloture motions were required. And in the first session of the current Congress, 67 such

FIGURE 1
Flooding the zone

Average cloture motions to end filibusters per year in the Senate, 1917–2009



Source: U.S. Senate, Senate Action on Cloture Motions, available at http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm.

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motions were required. This represents an average of about 69 filibusters per year over the past three years. Since the cloture rule was created almost 93 years ago, more than two-thirds of the motions for cloture have occurred in the last two decades, and more than a quarter of those have occurred in just the last three years (see figure 1).

Further, the number of cloture motions is only a partial picture of the total range of obstruction taking place in the modern U.S. Senate. Cloture is filed against only those threatened filibusters that the Senate leadership has the floor time and possible votes to overcome. Much legislation and many presidential appointments are killed before they can be reported by committee either because 60 votes cannot be obtained or the cost in time to the Senate schedule is too great to warrant the effort required to defeat a threatened filibuster.

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Factors behind the out-of-control filibuster practice

What has changed? What fostered a culture of broad restraint in the use of obstructionism for more than four decades but seems to have steadily dissipated in the subsequent 30 years and has now disappeared altogether? One explanation has less to do with the Senate as an institution than the change that has taken place in our national political culture over that period. As politics has become more confrontational and less gentile in the country, it has gradually been reflected in the types of people elected to the Senate and their approach to the legislative process.

Beyond that, however, are other factors. Some observers believe the Senate has gradually become an institution that is more focused on protecting the prerogatives of its individual members than in protecting the integrity of the institution to act as a rational and functioning legislative body. The capacity of a single senator to unilaterally block the confirmation proceedings of senior administration appointees or to stall the consideration of essential legislation may weaken both the Senate and the nation, but it ensures that any administration or any Senate leader who ignores the demands of any senator regardless of seniority, party, or standing among his or her colleagues places a great deal at risk.

The current staff director of the Senate Finance Committee, Bill Dauster, said it well in a 1996 article in *Roll Call*: "These powers to debate and amend make every single United States Senator a force to be reckoned with." The absence of hierarchy and discipline within the body may create a dysfunctional institution, but it insures a certain minimal power threshold for all of its members.

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Modest changes to make the Senate a more responsible institution

This is a sensitive subject. It is unlikely the Senate will adopt reforms that go as far as many feel appropriate. Whether the Senate should be able to resolve major transformative issues such as the current proposals for changing the nation's health care system by a majority vote is fair question for debate and there are good arguments on both sides.

But that is a different question from the procedural issues raised in this paper. Approving administration nominees in a timely manner or passing the annual appropriation bills before the beginning of a new fiscal year is not about deliberation—it is about whether the country wishes to grant individual senators so much power that the institution can devolve into the kind of anarchy, chaos, and gridlock we are now witnessing.

A huge amount of Senate floor time has been consumed each year in the consideration of the annual appropriation bills. Last summer after two days of seemingly endless debate on the Energy and Water Appropriation bill a cloture motion was filed by Senate Majority Leader Harry Reid (D-NV). The following day, Sen. Byron Dorgan (D-ND), the chairman of the Appropriation Subcommittee that had produced the bill, explained:

> *"The cloture motion was filed last evening, and I understand why ... We bring an appropriations bill to the floor that has very widespread support and then it largely comes to a standstill. It would not make much sense for us to be here in this position all week."*

When the opposition to the bill realized debate would be shut off, they allowed it to come to passage and moved their effort to clog the legislative calendar to other targets, allowing the bill in question to be acted on. The opposition then moved their efforts to a different target, allowing the appropriation measure to pass the Senate and go on to conference with the House on an 85-9 roll call vote.

There was a far less satisfactory outcome, however, for a majority of the 12 annual appropriation measures. Eight had to be delayed for consideration until September, when there was little prospect that they could be enacted before the beginning of the new fiscal year. Of those eight, three were not even brought before the Senate until the fiscal year they were intended to fund had already begun, and three others including the largest domestic bill never came before the Senate at all. Those three bills were wrapped into a must–pass, year-end legislative measure that was not subject to amendment.

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The full Senate's failure to consider a significant portion of the annual appropriation bills is not simply a monumental failure of process. It also ironically defeats the very objective that the filibuster was intended to protect: the right of individual senators to fully debate and if necessary amend the decisions delegated to Congress under the Constitution. When the extended consideration of appropriation bills consumes so much floor time that authorization bills can never get to the floor, it means that authorizing committees are blocked from real participation in the legislative process and that the appropriation process is the only real means of affecting government policy.

But when legislation produced by the Appropriations Committee goes directly to conference with the House without debate in the full Senate, it means that only the 30 members of that committee have a real say in the only part of the legislative process that is left. More than two-thirds of the body is excluded from the exercise of the most fundamental power of the legislative branch.

In 1974, the Senate agreed to an important exception to the rule of unlimited debate. The Congressional Budget Act provided that if a budget resolution passed by both houses of Congress directed Congress to enact legislation altering the size of the budget deficit (or surplus), then that legislation would be considered in the Senate with only limited opportunity for amendment and with no more than 20 hours of debate.

It is time for the Senate to adopt a second exception to ensure the deliberate and timely consideration of all appropriation measures. All debate on each measure could be limited to no more than 16 hours—except that each senator who chose to offer an amendment could do so even if the 16-hour time limit had been exceeded. Debate on a single amendment could be limited to one hour.

If this kind of reform were enacted, then most senators would have more say in appropriation matters than they do presently. The Senate would be able to pass funding bills and get their bills to conference committee with the House in time to send final legislation to the president before the beginning of the fiscal year. And a more orderly and structured approach to appropriations would free the Senate to spend more time on other important legislation.

The logjam created by extended debate on appropriation bills in the Senate often makes it nearly impossible for chairmen of authorizing committees to get important legislation on the Senate calendar. Authorizing legislation dealing with philosophical issues that have proven historically to be more difficult to resolve would still be subject to current rules of debate, but authorizing committees would have greater opportunity to take their legislation to the Senate floor by virtue of the restraints placed on the consideration of appropriation bills. More frequent authorizations would in turn help reduce the number of contentious issues in appropriation measures.

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Similar steps need to be taken with respect to the confirmation process. There is no question that Congress needs to hold the executive branch more accountable, but this is not the way to do it. No senator should be allowed to hold up the confirmation of a nominee for more than a matter of weeks. Committees should be discharged of further consideration of a nominee after a period of two months unless the committee formally votes for further delay based on the fact that it has received insufficient information to reach a conclusion. After 30 days, consideration of confirmation should be in order without unanimous consent, and debate on the confirmation should be limited to a reasonable period—for example, four hours.

Many will see even these modest proposals as an infringement on the great traditions of a great deliberative body. But all institutions change over time. Some change in gradual and incremental ways to deal with the changes in the world around them. Others postpone change until the problems they face become grave and the remedies extreme. The Senate seems to be in the later category, but unlike many institutions it places more than itself at risk.

Most rank-and-file senators will not willingly give up the extraordinary powers that the current system grants them. And their leaders would probably cease to be leaders if they demanded such reforms. Change will probably only come when the public is made more aware of the costs of the current system and demands specific change.

About the author

Scott Lilly is a Senior Fellow at American Progress who writes and researches in a wide range of areas including governance, federal budgeting, national security, and the economy. He joined the Center in March 2004 after 31 years of service with the U.S. Congress. He served as clerk and staff director of the House Appropriations Committee, minority staff director of that committee, executive director of the House Democratic Study Group, executive director of the Joint Economic Committee, and chief of staff in the Office of Congressman David Obey (D-WI).

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Minority Rules

Ten Ways to Bring the Senate to Its Knees

Ian Millhiser September 29, 2010

When you consider its big ticket achievements, the current 111th Congress is one of the most successful in American history. Two Supreme Court justices, long-overdue financial reform, a stimulus package that pulled the economy from the brink of disaster, and a landmark law bringing affordable health care to all Americans are nothing to sneeze at.

Yet beneath these most visible achievements is a far different story. The Senate can confirm two highly-visible Supreme Court justices, but it can't confirm more than a handful of President Obama's lower court nominees. The Senate can overcome virulent objections to its most high profile bills, but it has yet to even take a vote on 372 bills that already passed the House—many of them unanimously.

There's a simple reason for this disparity. It may only take 60 votes to get something accomplished in the Senate, but it takes 100 votes to do so quickly. Senators who want to block progress can force hours of irrelevant debate. Or they can gum up the works with extraneous amendments. Or they can force lengthy amendments to be read aloud. Or they can demand time-consuming roll call votes on frivolous procedural objections. And with each minute wasted, the clock ticks closer and closer to the end of the 111th Congress in January.

Let's be clear—the level of obstruction in today's Senate is unprecedented. But obstruction and delay is cooked deep into the Senate's meat. Indeed, there are so many ways to shut down business in the Senate—many of which can be implemented by one lone senator—that the real surprise is that the Senate has ever accomplished anything. There are many more ways to block progress in the Senate than this brief paper can detail, but here is a short list of ten ways to bring the Senate to its knees.

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Obstruction tactic No. 1—endless debate

The word "debate" does not mean much in the United States Senate. Rather than being a free exchange of ideas intended to convince other senators of one position or another, most Senate debate time is occupied by senators giving closely-vetted speeches to an almost-entirely empty chamber. Nevertheless, the Senate rules make it very difficult to stop the serial speeches and actually hold a vote. Unless at least 60 senators agree to hold a vote, the speeches go on forever. A "filibuster" is nothing more than a senator's decision to prevent the Senate from holding a vote on a particular issue until 60 of their colleagues finally tell them "no."

Obstruction tactic No. 2—endless debate over whether to debate

Not only can senators use the filibuster to force endless debate, they can also use it to prevent debate from starting in the first place. Before the Senate can begin debate on most legislation, the senators must either unanimously agree to consider it or the majority leader must offer a "motion to proceed" to consideration of that bill. This motion can be filibustered. Thus, for almost all bills, dissenting senators have at least two opportunities to filibuster, once to prevent debate from starting and another time to prevent it from ending.[1]

Obstruction tactic No. 3—endless debate over whether to negotiate

If the House and Senate pass similar but not identical bills, the differences between the two bills generally are hashed out through a process known as a "conference committee" comprised of relevant members of the Senate and House of Representatives. Before these negotiations can begin, however, the Senate must pass three motions: a motion formally disagreeing with the House bill; a motion expressing the Senate's desire to conference; and a motion enabling a small group of senators to be designated as negotiators. Each of these three motions can be filibustered.[2]

Obstruction tactic No. 4—forced debate on matters that have already been decided

Even when a filibuster is broken, the delay doesn't end. Once 60 senators break a filibuster—a process known as "cloture"—the dissenters can still force up to 30 hours of post-cloture debate per broken filibuster.[3] Thus, to pass a single bill, the

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Senate may need to waste 30 hours after breaking the filibuster on the motion to proceed, another 30 hours after breaking the filibuster on the motion to end debate, and another 90 hours after breaking the three filibusters before the bill goes to conference committee. This adds up to nearly an entire week every time the Senate passes a single bill.

The picture for nominations is slightly less grim. Nominations are considered "executive business," in the language of the Senate, and thus can be debated without giving the minority an opportunity to filibuster the motion to proceed.[4] Likewise, because the Senate alone confirms nominees, there are no conference committees on nominations and thus no opportunities to filibuster negotiations with the House. Nevertheless, dissenting senators can still force up to 30 hours of time to be wasted before the Senate can confirm a nominee.

The ability to force post-cloture debate on a nomination is particularly unnecessary because these 30 hours ostensibly exist to allow additional amendments to be considered once the Senate agrees to end debate. Because nominations cannot be amended, it is unclear why post-cloture debate on nominations should even exist.

Moreover, 30 hours may not sound like a lot of time, but a president must fill approximately one thousand Senate confirmed jobs over the course of a presidential term. When you multiply 30 hours times all one thousand nominees, it adds up to more Senate work days than actually exists in two entire presidential terms.[5]

Obstruction tactic No. 5—secret holds

Because unanimous consent is required to avoid a filibuster and post-cloture debate, just one senator can place a "hold" on any senate business by indicating their willingness to withhold such consent. Worse, Senate customs have evolved to allow "secret holds," where a senator tells his party leader to place the hold and the leader blocks progress on a matter without ever revealing which senator is responsible for this obstruction.[6]

Senators have long used holds to "take hostages."[7] Sen. Richard Shelby (R-AL), for example, recently placed a hold on over 70 nominees from the Obama administration in an attempt to force the federal government to award a $35 billion defense contract to Northrop Grumman.[8] Recently, however, senators have also begun to use these holds simply to prevent business from moving quickly on the Senate floor.

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Obstruction tactic No. 6—forcing a roll call vote on everything

The Senate frequently uses relatively quick voice votes to conduct routine procedural business and move uncontroversial bills and nominations. The Constitution, however, permits just one fifth of the senators present for a vote to demand a much more time consuming roll call vote.[9] By drawing out the time required for each vote, a small minority of the senators can gradually run down the Senate's clock.

Obstruction tactic No. 7—frivolous points of order

The tactic of forcing time-consuming roll call votes works best when used in conjunction with another tactic to maximize the number of votes taken. One easy way a senator can force a large number of votes is by constantly raising "points of order" alleging that the majority's actions violate the Senate rules.[10] Although such points of order can eventually be "tabled" by a simple majority vote,[11] an obstructionist minority can still create significant delay by repeatedly forcing such votes and demanding that a roll call vote be taken, even if they are fully aware that their points of order lack merit.

Obstruction tactic No. 8—frivolous amendments

In most cases, any senator can offer any amendment to any bill under consideration, regardless of whether or not that amendment is germane to the underlying legislation.[12] Accordingly, senators can try to delay or block legislation by overwhelming the amendments process or by filing "poison pill" amendments, which are likely to pass but which also are likely to cause senators who would otherwise vote for the underlying bill to turn against it.

Admittedly, the majority leader is less defenseless against this tactic than they are against many other obstructionist ploys. Using a tactic known as "filling the amendment tree," for example, the majority leader can effectively insist that majority-supported amendments are voted on first. Additionally, the leader can place a 30-hour time limit on obstructionism if 60 senators support cloture.

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Obstruction tactic No. 9—reading amendments aloud

Even the majority leader's own amendments, however, can become fodder for obstructionism. Unless every single senator agrees to dispense with this requirement, each amendment must be read aloud after a senator offers it.[13] In some cases, these amendments can be hundreds of pages long and require many hours to finish reading.

Obstruction tactic No. 10—committee shenanigans

In addition to the minority's immense power to delay progress on the Senate floor, each committee has its own set of rules which can be abused to prevent business from moving forward. Many committees, for example, require that a certain number of senators be present before a bill or nomination can be reported out of the committee. The Judiciary Committee's rules even provide that "Eight Members of the Committee, including at least two Members of the minority, shall constitute a quorum for the purpose of transacting business." Thus, it is possible for the minority to stall all business in that committee simply by refusing to show up for work.

The minority leader also has the power to completely shut down committees for most of every day that the Senate is in session. Under the Senate's rules, "when the Senate is in session, no committee of the Senate or any subcommittee thereof may meet, without special leave, after the conclusion of the first two hours after the meeting of the Senate commenced and in no case after two o'clock postmeridian unless consent therefore has been obtained from the majority leader and the minority leader."

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Conclusion

Presently, a minority of senators are engaged in unprecedented obstructionism to block legislation and bring judicial confirmations to a crawl. They are able to do only because the Senate rules provide numerous opportunities for abuse. Dissenting senators can force days of pointless debate before a single vote can be cast. They can demand pointless rituals such as reading all amendments aloud. And they can bog down the Senate with time-consuming votes on frivolous objections. Indeed, with so many opportunities for abuse, the miracle of the United States Senate is that it has ever functioned at all.

Ian Millhiser is a Policy Analyst with American Progress.

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5 Ian Millhiser, "The Tyranny of the Timepiece" (Washington: Center For American Progress, 2010), p. 3.

6 Walter J. Oleszek, "Proposals to Reform "Holds" in the Senate" (Washington: Congressional Research Service, 2007) p.1.

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10 Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101Cong., 2 sess., S. Doc. 101-28 (Government Printing Office, 1992), p. 1273.

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Center for American Progress

The Tyranny of the Timepiece

Senate Rules Obstruct Voting to a Degree that Wounds Our Government

Ian Millhiser September 28, 2010

Introduction

The most valuable commodity in the U.S. Senate is not votes, it is time.

Judgeships, ambassadorships, and other key federal jobs go unfilled—not because the nominees lack the 60 votes necessary to move nominations forward—but because the Senate simply doesn't have enough time to vote on confirmation. Meanwhile, entire cabinet departments function without congressional authority and agencies operate for months at a time without knowing how much money is in their budget.

Yet the Senate simply cannot find the time to solve these problems.

This logjam is not the result of laziness—the Senate in the current 111th Congress has worked more days than any other Senate in recent memory. Nor is it entirely the result of ideological sparring, although the Senate would not be the mess it is today if a minority of its members were not engaged in unprecedented obstructionism. Rather, it is a monster born from the Senate's increasingly tight schedule alongside each senator's sweeping power to run out the clock before anything gets accomplished.

Here's a look at different aspects of this tyranny of the timepiece.

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Blocking progress 30 hours at a time

Limitless "debate" is the hallmark of the United States Senate. Typically, before senators can vote on a bill or nomination, at least 60 members of the Senate must agree to cease debating the matter and allow a vote to proceed. Thus, a filibuster is nothing more than a refusal to provide the sixtieth vote and allow the endless cycle of debate to be broken.

But the Senate's concept of "debate" bears little resemblance to the notion of an exchange of competing viewpoints intended to convince senators of the rightness of one side or another. Rather, the iconic image of a modern senate debate is a single senator speaking to an almost entirely empty chamber. As Sen.Tom Udall (D-NM) recently told the *New Yorker*'s George Packer, "a senator typically gives 'a prepared speech that's already been vetted through the staff. Then another guy gets up and gives a speech on a completely different subject.'"[1]

Nor does debate end after 60 senators agree to break a filibuster—a process known as "cloture" in the arcane language of the Senate. Unless the senators unanimously consent to holding a vote immediately, dissenting senators may demand up to 30 hours of post-cloture debate before a vote can actually take place, and they can prevent the Senate from considering any other business during these hours of delay.

Thirty hours may not seem like a lot, but when you consider the sheer number of confirmations, bills, and appropriations that the Senate must consider just to keep the country running, the ability to waste 30 hours before any one of these tasks can be accomplished empowers the dissenters to prevent more than a fraction of the Senate's business from ever being completed.

Consider the confirmations process. Excluding judges, ambassadors, prosecutors, and federal marshals, the *Washington Post* reports that President Obama must fill 526 senate-confirmed positions for the government to operate at full capacity.[2] Thus, at 30 hours per confirmation, the Senate would need to spend over 650 days—nearly two years—to confirm each of these nominees, and that's assuming that the senators work around the clock, on weekdays and weekends, without taking any recesses or holidays and without considering any other business whatsoever. (See box)

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Adding up the hours

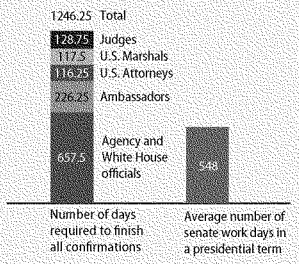
The *Washington Post*'s count of 526 agency and White House appointees excludes ambassadors, U.S. Attorneys, U.S. Marshals, and federal judges. When you add these Senate confirmed positions into the mix, the time required to confirm all the president's nominees grows even more:

- There are 181 senate-confirmed "Chiefs of Missions" leading an equal number of embassies abroad. Confirming each of these ambassadors would require just over 226 days.
- The 93 U.S. Attorneys would require over 116 days to confirm.
- Confirming 94 U.S. Marshals would require nearly 118 days.
- Presently, 103 federal judgeships are vacant. They would require almost 129 days to confirm.

In total, this adds up to over 1,200 days and nights required to confirm all of a president's nominees over minority objection—more Senate work days than there are in two entire presidential terms.

The Senate's time mismatch

Comparing the days available to accomplish the work of the Senate against the days needed to accomplish that work



Source: The number of chiefs of missions is taken from the 2008 "Plum Book." The number of U.S. Attorneys was provided by the Justice Department. The number of Marshals was provided by the U.S. Marshals Service, and the number of judicial vacancies was provided by the Administrative Office of the U.S. Courts.

For the 100th through 110th Congress, the Senate met an average of just under 137 calendar days every year.[3] Thus, in a typical presidential term, the Senate is actually in session for less than 550 total days. In other words, even if the Senate were to work 24 hours a day on each of those days (which it emphatically does not), and even if the Senate were to consider no other business, there is literally not enough time in a president's term of office to confirm all of his nominees against blanket obstructionism.

Secret holds

Just like Senate "debate" bears little resemblance to actual debate, modern Senate filibusters also bear little resemblance to the dramatic climax of the classic movie *Mr. Smith Goes to Washington*. Indeed, in many cases, one senator's mere threat of a filibuster—an action known as a "hold" in Senate lingo—can prevent a bill or nomination from moving forward because that threat carries with it the power to waste as much as 30 hours of floor time.

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Worse, the Senate's customs also allow "secret holds." Just one senator can hold up a bill or nomination, and they do not even need to reveal who they are. Thus, their constituents have no way to know who to blame—and who to hold accountable—when Senate business completely shuts down.

An empty bench

To be fair, no Senate minority has ever exercised its full power to obstruct every single presidential nominee under the Senate's 30 hour rule, but a minority of the current senators have come closer than any of their predecessors.

So far, the federal judiciary has borne the brunt of this unprecedented obstructionism. Even many of Obama's most uncontroversial nominees have suffered needless delays. Conservatives filibustered Judge Barbara Milano Keenan for four months. She was then confirmed 99-0. Judge Denny Chin was also blocked for months, only to be confirmed 98-0. Judge Jane Stranch, who was recently confirmed 71-21, waited over 400 days for confirmation. And these judges are the lucky ones. Many of Obama's judicial nominees were unanimously endorsed by the Senate Judiciary Committee, but are still being blocked by minority obstructionism.

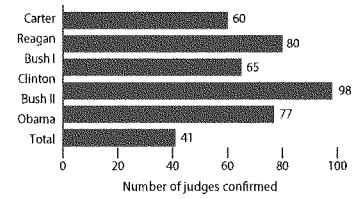
Indeed, the Senate has confirmed President Obama's district and circuit nominees at only about half the rate of his two predecessors. By this point in his presidency, the Senate had confirmed 98 of President Clinton's lower court judges, while 77 of President George W. Bush's nominees wore black robes. President Obama, by contrast, has only been able to get 41 judges past the Senate's roadblocks. Indeed, as figure 2 demonstrates, the Senate has been slower to confirm Obama's judges than those of any other recent president. (See chart.)

Admittedly, President Obama has been relatively slow to name nominees. But the rate of nominations does not explain the collapse in the percentage of nominees confirmed by the Senate. By this point in President Bush's presidency, 61 percent of his nominees were confirmed, as compared to only 48 percent of Obama's nominees.[4]

The disparity between the Senate's performance in the Bush and Obama eras is striking when you consider the unusual

Successful judicial nominations since 1976

Number of confirmed judges under presidents Obama, Bush II, Clinton, Bush I, Reagan, and Carter at this point in their presidencies



Source: Federal Judicial Center

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events of Bush's early presidency. Indeed, in many ways, the stars aligned against President George W. Bush's ability to confirm federal judges.

Because the Supreme Court's decision in *Bush v. Gore* was not handed down until mid-December of 2000, Bush had a truncated transition period that left him little time to vet nominees. Additionally, the Senate switched from Republican to Democratic control during the first year of Bush's presidency, unavoidably delaying all Senate business as the Senate completed the administrative steps compelled by such a reorganization. Finally, the terrorist attacks on September 11, 2001 understandably made confirming new judges a low priority for the grieving nation.

Obama presides over a different kind of national tragedy—the economic collapse that he inherited from his predecessor—but Obama decisively won the 2008 presidential election and his party controls the Senate. In other words, absent unprecedented obstructionism, one would expect Obama's confirmation rate to be unusually high—not the lowest in recent memory.

Where progress goes to die

Lest there be any doubt, nominations are hardly the only item of Senate business quietly dying because the Senate simply does not have enough time to consider them. Rather, by the last day of August 2010, fully 372 bills had passed the House during the 111th Congress, but have yet to even receive a vote in the Senate.[5]

Very few of these bills received significant opposition in the House. Indeed, a study by the congressional transparency project Open Congress found that only 16 passed the House with less than 60 percent of its Members voting in favor.[6] Fully 44 of the languishing bills passed the House without a single dissenting vote from either side of the aisle.[7]

The challenges facing these bills in the Senate even exceed the obstacles facing the president's nominees. Before the Senate can begin debate on most legislation, the senators must either unanimously agree to consider it or the majority leader must offer a "motion to proceed" to consideration of that bill. This motion, however, can be filibustered—and thus dissenting senators can require up to 30 hours of post-cloture debate after the Senate agrees to break this filibuster.[8]

These 30 hours, which occur after the Senate agrees to begin debate, are in

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addition to the up to 30 hours a minority can require after the Senate agrees to end debate and conduct a final vote on the bill. Thus, in most cases, dissenting senators can force up to 60 hours of delay before a bill may receive a final vote, and they cannot spent these 60 hours advancing any other pending business. The upshot: Passing each of the 372 waiting bills over minority objection could require as much as 930 entire days and nights—more time than there is in an entire congressional term.

The death of meaningful oversight

Historically, federal programs were governed by two separate pieces of legislation. House and Senate committees with subject-matter expertise on that program draft "authorization" bills that define the parameters of such programs; while the less specialized appropriations committees actually decide how much money each program has to spend.

Yet, as the Center for American Progress's Scott Lilly recently explained, the chairs of authorizing committees often cannot get authorizing legislation scheduled for a full Senate vote because "[t]he legislative calendar is so consumed by extended debate and deliberation—often on minor issues."[9] As a result, nearly half of the $584 billion appropriated for nondefense discretionary spending in fiscal year 2010 "had to be appropriated without legal authority."[10]

The implications of this failure to authorize federal programs are twofold. First, although the House and Senate Appropriations Committees sometimes compensate for the absence of authorizing legislation by inserting programmatic instructions into appropriations bills, these committees are ill-equipped to make these kinds of judgments. Authorizing committees have specialized knowledge in the handful of agencies that they each oversee, but the Appropriations Committee must oversee the entire federal government. As a result, appropriators are stretched very thin, and are all too often called upon to make decisions that are better addressed by lawmakers and congressional staff with particular expertise.

Additionally, depriving authorizing committees of their power to enact and amend authorizing legislation undermines effective congressional oversight. This is because an agency's willingness to cooperate with a congressional committee is directly related to that committee's ability to punish the agency for noncompliance. Without authorizing legislation, only appropriators have significant power to

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apply pressure to federal agencies, but overburdened appropriations committees are unlikely to have the time to monitor every single federal program without help from authorizing committees.

Promoting wasteful government

Although the Senate has yet to fall into such dysfunction that it is unable to enact the annual appropriations bills required to keep the federal agencies operating, the Senate's tight schedule all too often delays final determination of an agency's annual budget until months after a fiscal year has begun. As CAP's Lilly explains, "Congress has not enacted all appropriations bills on time in 15 years. Frequently, federal agencies do not know how much they have to spend in a given fiscal year until nearly half of that year has expired."[11]

Such delay does far more than simply postpone when agencies spend much of their annual appropriations. It also wastes countless taxpayer dollars every year. As Lilly notes:

> *If project managers, contract officers, or grant administrators get their budget at the beginning of a fiscal year in October, then they have a full 12 months to publish solicitations for grant and contract proposals, appoint reviewers to select proposals that give the taxpayer the greatest value, draft contracts that protect the government's interests in the timely and effective performance of work, and consummate those contracts.*[12]

Conversely, agencies that are deprived a full year to complete these time-consuming processes are forced to find shortcuts such as no-bid contracts and less-rigorous reviews. Government contractors can make out like bandits from a delayed appropriations process, but the taxpayers are left holding the bag.

Conclusion

Senate obstructionism is worse now than it has ever been. The result: Our country is grinding to a halt. Many of the right wing's present tactics—such as widespread

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filibusters of uncontroversial nominees—are entirely unprecedented, yet the Senate's inability to complete routine business is nothing new. For years, Congress has failed to provide the most basic guidance to federal agencies. And the problem is likely to continue if long-overdue steps are not taken to encourage swift action by the United States Senate.

In fact, the real surprise is not that the Senate is currently paralyzed by a time crunch. The real surprise is that this crisis did not emerge sooner. So long as unanimous consent—all 100 senators—is required to move Senate business forward in a timely manner, it will remain far too easy to abuse the Senate rules and bring progress to a standstill.

Ian Millhiser is a Policy Analyst with American Progress.

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12 Ibid, p. 7.

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"Examining the Filibuster: Legislative Proposals to Change Senate Procedures"
Hearing Before the Senate Committee on Rules and Administration
September 22, 2010

Statement of Professor Aaron-Andrew P. Bruhl[1]

I am a law professor who studies parliamentary procedure. As the Committee's hearings this year have shown, the debate over filibuster reform, and procedural reform more generally, raises a number of difficult issues. Most of these issues are not strictly legal in nature but are instead political decisions in the highest and best sense of the word – that is, not politics as mere partisan calculation but instead politics as the art of governing. I have no special professional expertise in those political matters. But some portions of the debate over procedural reform do concern law, and I hope that I can be of service to the Committee as it considers that aspect of the problem.

In these brief comments I will address the legal status of the Senate's standing rules and how their legal status bears on the proposals discussed during the September 22 hearing. As the Committee knows, the Senate does not customarily adopt new rules at the beginning of each Congress. Rather, the existing rules remain in force until changed. Indeed, Rule V expressly states that the rules carry over from Congress to Congress unless changed in the manner the rules provide. Because the rules provide that a motion to amend the rules is subject to filibuster, the current rules (including the cloture rule itself) are very hard to change.

Senator Harkin and Senator Udall have introduced resolutions that take different approaches to procedural reform. The Harkin resolution would amend Rule XXII so as to make it easier to invoke cloture. As I understand it, the resolution works within the framework of the current rules (including Rule XXII), which means that the Harkin resolution, if filibustered, could not come to a vote unless two-thirds of the senators voted in favor of cloture. The Udall resolution, in contrast, is premised on the claim that the Senate can adopt new rules by majority vote, without being blocked by

[1] Assistant Professor of Law, University of Houston Law Center. I am submitting this document purely in my personal capacity. I do not speak on behalf of, and my views should not be construed to reflect the position of, my employer.

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filibusters, when the Senate convenes at the start of the new Congress in January 2011. This would be similar to the practice followed in the House of Representatives.

Because the two approaches reflect differing views on the continuing validity of the Senate's current rules, one naturally wonders about the justification for the practice of permitting the Senate's rules to carry over from Congress to Congress indefinitely. The traditional justification for this practice depends, in large part, on the notion that the Senate is a "continuing body." The Senate is considered a continuing body primarily because only a third of its members stand for election every two-year cycle.

Although it is often invoked in debates over procedural reform, the continuing-body idea has long puzzled me, and so several years ago I decided to investigate it. My findings are reported in a recently published law review article.[2] I will not go into detail here – I respectfully refer you to the article for that – but I will summarize some of my conclusions.

The short of it is that the continuing-body idea, in my view, is a highly problematic concept that obscures much more than it reveals. There are several problems with it. *First*, it is not clear why the Senate's structure of overlapping terms should matter for purposes of the status of the Senate's rules. My article considers various claims about the relevance of the Senate's structure and finds that they are either mistaken or that they fail to distinguish the Senate from the House, a body that lacks the special type of continuity the Senate supposedly possesses. *Second*, if the Senate were a continuing body for purposes of the rules, then one would expect that structural feature of the Senate to affect other aspects of Senate practice as well. But in fact there is no consistent practice of continuity across other domains that would support the type of continuity the Senate's rules display. *Third*, even if the Senate were a continuing body, that would not suffice to justify rules of debate that are not merely continuous but also entrenched against repeal. Put differently, even if today's Senate should be considered the same entity that convened over two hundred years ago, shouldn't it be permitted to change its mind?

I recognize that my conclusions about the continuing-body idea will not be universally shared. Although my views are based on what I believe is the correct

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[2] Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010). The article is available for free on the *Iowa Law Review*'s website and at www.ssrn.com.

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understanding of the Constitution and are consistent with the views of some authorities, they differ from the views of some other distinguished commentators and legislators, perhaps including some members of this Committee. I do not suggest that these issues are easy. I would note, however, one particular objection to my argument that does not, in my view, hold up. The objection begins by observing that the Framers intended the Senate to provide stability in the government, as against the potentially more temperamental and mutable House of Representatives. There is certainly some truth in that. Yet it is irrelevant to the matters involved in the continuing-body debate: a concern for stability in governmental policy does not necessarily militate in favor of parliamentary rules that are themselves hard to change. So far as I am aware there is no reason to think that the Framers intended that the Senate's rules be resistant to change.[3] Further, it seems highly doubtful whether rigidity in parliamentary rules promotes long-term stability.

As I said, any discussion of reforming the Senate's rules raises hard questions that call for the exercise of sound judgment and practical wisdom. The continuing-body idea is just one part of the picture. There might be good reasons to maintain the filibuster quite apart from questionable claims about the Senate's continuous character. It is my simple and respectful plea that, in deliberating on whether and how to change the Senate's rules, you not rely on the highly problematic idea that the Senate is a continuing body, as that is a mere label that tends only to obscure the real issues.

[3] Apart, that is, from the handful of procedural rules that the Constitution itself fixed equally for both the House and the Senate. *E.g.*, U.S. CONST. art. I, § 5, cl. 1 (majority makes a quorum); *id.* at cl. 2 (two-thirds needed to expel a member).

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Response 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

QUESTION FOR THE RECORD FROM SENATOR TOM UDALL

Question: *At the hearing, one of my colleagues on the Republican side stated that my resolution "would declare Senate rules unconstitutional." As you know, I have never stated that all of the rules are unconstitutional, nor have I questioned the constitutionality of the three-fifths cloture requirement in Rule XXII. My position is that the two-thirds cloture requirement in Rule XXII is unconstitutional because it prevents a majority of the Senate from being able to adopt or amend its rules. Do you believe that my position is legally and constitutionally sound? Has this position been advocated by other members of the Senate or constitutional experts?*

Answer: There is no doubt that your position is legally and constitutionally sound. Article I, Section 5, Clause 2 of the Constitution authorizes each chamber of Congress to "determine the Rules of its Proceedings." 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. In short, unless a majority can, in fact, effect rules change at the start of a new session, the current Rules are unconstitutional.

If the Senate Rules could not effectively be changed by a majority vote of future Senates, they would also violate another fundamental constitutional principle – that one legislature cannot bind future legislatures by insulating statutes or procedural rules from subsequent appeal. This long-established anti-entrenchment principle has been repeatedly upheld by the Supreme Court.[1] Indeed, as the Court recognized in *Ohio*

[1] *See, e.g.*, *United States v. Winstar*, 518 U.S. 839, 872 (1996) (noting that Court's cases have noted that the Court's cases "have uniformly endorsed this principle"); *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.*

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Life Insurance v. Debolt, this rule is vital to our democratic structure.[2] Each legislature, made up of representatives elected by the people, must be equally able to serve the public good. If yesterday's senators are allowed to use the Senate Rules to reach into the future, today's senators can no longer effectively serve their constituents' current desires.

Moreover, there has long been robust support for these constitutional arguments. In fact, when Senator Henry Clay confronted the Senate's first filibuster in 1841, he threatened to stop debate by "resort[ing] to the Constitution and act[ing] on the rights insured in it to the majority."[3] Since then, 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, at the start of the 94th Congress in 1975, the Senate voted to allow a simple majority to end debate on new rules – thereby formally endorsing this postition as precedent. [4]

In the written testimony I submitted to you and to the Committee in advance of the September 22nd hearing, I discuss all of these points in greater detail. If you would like to learn more, I encourage you to review my earlier submission.[5] In addition, please do not hesitate to contact me with additional questions or for further information.

Respectfully submitted,

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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).

[2] 57 U.S. at 431.

[3] GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 73 (2006).

[4] While the Senate later took a vote purporting to reverse this incident, the Senate had already set an important precedent defining the scope of its constitutional authority.

[5] My written testimony is also available electronically at http://brennan.3cdn.net/67632ee3eae60b3ca7_igm6b5y33.pdf.

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EXAMINING THE FILIBUSTER: IDEAS TO REDUCE DELAY AND ENCOURAGE DEBATE IN THE SENATE

WEDNESDAY, SEPTEMBER 29, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, chairman of the Committee, presiding.

Present: Senators Schumer, Dodd, Durbin, Udall, Goodwin, Bennett, Alexander, and Roberts.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Carole Blessington, Executive Assistant to the Staff Director; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The hearing will come to order. And I want to thank everybody, including my friend Bob Bennett, for participating in this hearing. It is the sixth and final in our series of hearings to examine the filibuster.

Over the course of these hearings we have looked at a number of issues:The development of the filibuster since the earliest days of the Senate; the growing challenges that the use—and abuse—of the filibuster presents to the Senate; and the impact of the filibuster on nominations and other matters.

Our hearing in July examined filibuster-related legislation introduced by Senators Frank Lautenberg of New Jersey and Michael Bennet of Colorado. Last week we had a hearing of the proposals sponsored by Senator Harkin and our Committee member Senator Tom Udall.

These hearings will hopefully inform some of the discussions at the beginning of the next Congress. While the membership of the Senate will change, problems posed by the abuse of the filibuster are not going away.

This week, I would like to turn to some every interesting ideas that have been proposed over the last few decades but have not yet been a focus of our hearings. We have had focus on some of the ideas, but not all.

These ideas have been promoted by members of both parties. We have already heard testimony in previous hearings on ideas to limit debate on nominations, whether they be judicial or executive.

Now, first, motion to proceed.

And I want to welcome Senator Dodd here.

The first idea concerns limiting debate on the motion to proceed. The motion is intended to be a procedural step that allows the Senate to begin consideration and debate on a measure, a substantive piece of legislation. However, far too often in today's Senate is the decision to begin debate itself is filibustered. This does not encourage serious debate and deliberation—it blocks it.

The motion to proceed was not covered by Rule 22, the cloture rule, when it was first adopted in 1917, because cloture then was applied only to legislation, not to procedural motions. In 1949, however, Rule 22 was expanded to include most procedural motions, and the motion to proceed for the first time became subject to cloture except on rules changes. In 1959, Rule 22 was again expanded to apply cloture also to ending debate on motions to proceed on changes to the Standing Rules.

In the decade since, leading Senators of both parties have tried to further limit debate on the motion to proceed, so the Senate could move on to the real business at hand. Most noteworthy, in the 1980s, Senators Robert Byrd and Ted Stevens, obviously a bipartisan effort, both Leaders and members of this Committee, introduced resolutions to prevent filibusters on the motion to proceed by limiting the amount of time the Senate could spend debating it.Senator Byrd already had tried that once before in 1979 as a Majority Leader, and of course as an expert on Senate procedures.

In 1984, the Temporary Select Committee to study the Senate Committee system recommended a two-hour limit on debate for a motion to proceed. It is rationale was to: "ensure that unlimited debate is permitted only on substantive issues." That is something we are still talking about today.

As use of the filibuster has escalated, it is being used increasingly on the motion to proceed by both parties when they have been in the Minority. This chart shows it all. [Chairman points to chart.] And as you can see, in 2007 to 2008—that is the last full session of Congress—the number of cloture votes on the motion to proceed skyrocketed. Let us see here. It more than doubled any previous year.

The way we operate today, the Senate rules basically provide Senators with two bites at the filibuster apple before a Bill can even get to a vote on the floor. It is fair to ask whether this is overkill. Even the most obstructionist-minded Senator only needs one filibuster to block a Bill they oppose.

The frustration with filibusters on the Motion to Proceed can prompt a Majority Leader to file cloture sooner and more frequently and with less time given foramendments.The effect of being able to filibuster the same Bill twice can be to launch a procedural arms race that thwarts efforts to debate, improve and pass legislation.

The second issue we will look at is post-cloture time requirements. And I am going to take a little more time today with the indulgence of my colleagues, because we have so many issues before us, and I want to lay them out. And I will give Senator Bennett equally more time if he wishes.

The second type of proposal we will examine today are those that offer greater flexibility during post-cloture time. Currently, after

cloture is reached, there are 30 hours of time allocated for debate prior to voting on final passage. Each Member has up to one hour, though clearly not all one hundred Senators can take a full hour before the 30-hour period expires. Too often, we do not have substantive discussion, or consider amendments on the Senate floor during these 30 hours—we are just "burning the time." We have all seen the empty floor as we wait until the clock expires.

Changes that would make better use of post-cloture time, or reduce it if there is not much real debate, have been proposed over and over, for many years. As one of his many recommendations to change the Standing Rules, Senator Byrd introduced resolutions several times during the 1980s, as did Senator Stevens, to reduce the total hours of post-cloture time or to move more quickly to a vote on final passage if Senators have finished real debate.

The next issue we will look at is filibusters on going to Conference. In an ideal world, Conference Committees allow the House and Senate to work out differences in a negotiated, bicameral manner that results in the best possible legislation. I remember from the days I was in the House, the "joy" of being on a Conference Committee on major pieces of legislation, even as a newer member in the House, and having a real back-and-forth, and not knowing how the legislation would turn out. The coalitions develop as the amendments are introduced. It almost always was bipartisan, at least on the Committees that I was on, and even here in the early years of the Senate.

But this "joy" is sort of not available to newer Senators. Why? Because Conference Committees are actually on the verge of extinction. And abuse of the filibuster may be to blame.

Here is this chart. [Chairman points to chart.] It shows that while reasons can be hard to pinpoint exactly, there has been a real decrease in using Conference Committees to reconcile differences in recent years. This is the number of times that—I am going to hold it up.

This is the number of times that the Conference was used. As you can see, it is at a real all-time low in the last full Congress, 2007–2008. This is the percentage of laws where Conference Committees were used, two percent.

One reason. many believe, is that threats of filibusters have made it a lot harder to agree to a Conference and appoint conferees.

In the history of the Senate these three actions—one, ask that the Senate insists on its amendments or disagree to the House amendments to the Senate Bill; two, request a Conference with the House; and three, request that the Chair be authorized to appoint conferees—are usually agreed to, or have usually been agreed to, by unanimous consent.

However, debate—and thus a filibuster—is permitted on each of these three actions. If the Senate has spent two to three weeks on a controversial Bill, a reasonable Leader might seek to avoid Conference filibusters because they take a long time. That is when we see the so-called ping-ponging of Bills between the House and Senate. Or other strategies designed to pass a Bill without going to Conference.

And on this one I think, at least my view from my 30 years experience on both the House and Senate sides, is that Minority Senators whether in the House or Senate have a much greater ability to shape legislation when there are Conference Committees.

The need to streamline the process of going to Conference is also not new, but I believe it has become more urgent. We will hear from our witnesses today about several ideas to eliminate or limit the filibuster that have severely restricted the use of Conference Committees.

Another issue we will address is "filling the amendment tree". I know this is an issue that has vexed many members on the Minority side, or many members when they are in the Minority, whatever party they are a member of. And I know Senator Gregg will talk a lot about that today, and we welcome him here for that.

Under Senate procedure the presiding officer of the Senate acknowledges the Senate who first seeks recognition. By precedent the first Senator recognized is the Majority Leader. So under Senate procedures, a Senator may offer amendments to a pending Bill in the order in which he or she is recognized. This allows the Majority Leader to offer a certain number of first-degree and second-degree amendments to the measure up to the maximum possible. This creates what is called the "amendment tree".

Once the maximum number of amendments has been offered by the Majority Leader, no more are allowed, and the "tree" is considered "filled". Depending on the floor situation, the tree may be filled with as few as three or as many as eleven amendments. The effect of filling the tree is that no member can propose any further amendments to that measure without consent. Which in most all cases means—no new amendments.

How is this procedure tied to the discussion about the filibuster? Well, when a Majority Leader fills the tree, other members are prevented from submitting their own amendments. Filling the tree also gets around "filibuster by amendment," where the Minority Party uses the amendment process to keep offering amendments in the first and second degree with the intent of killing the Bill.

Members of the Minority Party—of course, that only happens if the tree is—that only occurs when the tree is filled later, not when it is filled immediately. And members of the Minority often argue that filling the tree eliminates an opportunity for substantive change or improvement to the legislation. The Majority, by contrast, often argues that filling a tree is actually a way to get a vote on a Bill or prevent obstructionism by amendment.

But it certainly gets in the way. I mean, when I first got here, people said, the power of the Majority is to set the agenda, the power of the Minority is to offer amendments that would put the Majority on the spot or question their agenda. When we fill the tree, of course, that does not happen.

So today we are looking at hearing, as I mentioned, from our colleague Senator Gregg. He will be leaving the Senate at the end of the year, and I think I can speak for every member of this panel and say, "to all of our regret," and probably not to his.

Senator Gregg, last week, during last week's hearing, I mentioned the colloquy you had with some of our Republican colleagues on the Committee on the Senate floor following the failed cloture

vote on the Defense Authorization Act. During that colloquy, you described the frustration on your side of the aisle. And I think it is fair to say you are not alone. There is a frustration on both sides of the aisle, and I hope these hearings and testimony such as yours will move us toward meaningful reform. So we thank you for testifying before this Committee about your thoughts about Senate rules and procedures related to the filibuster, filling the tree, and sharing with us your experience and insights.

Senator Bennett.

OPENING STATEMENT OF THE HONORABLE ROBERT F. BENNETT, A U.S. SENATOR FROM UTAH

Senator BENNETT. Well, thank you Mr. Chairman. I think you have laid out the past history very well. And rather than prolong the hearing, I will simply stipulate that your charts are accurate. And look forward to hearing from our witnesses.

Now I will reserve perhaps a little more time later on when we get into the give and take of the question period. But I understand Senator Dodd wants to speak, and has to go to another assignment. So I will defer now, and be available a little later on if things require a steady hand to straighten out some misconceptions that might arise.

Chairman SCHUMER. Your hand is always steady in these matters Senator Bennett and we appreciate it. Senator Dodd has to leave.

I know has given a lot of thought to these issues, because we have discussed them. So would it be okay with the Committee's consent, I would like to recognize Senator Dodd.

Senator DODD. Well, I thank you Mr. Chairman. I will be brief.

Chairman SCHUMER. Only Senator Durbin objects.

Senator DURBIN. I withdraw.

Chairman SCHUMER. He has withdrawn his objection.

OPENING STATEMENT OF THE HONORABLE CHRISTOPHER J. DODD, A U.S. SENATOR FROM CONNECTICUT

Senator DODD. Well, I will try and be brief with my colleagues. Thank you Mr. Chairman. It is Bob Bennett and I and Judge Gregg all days away from departing the Senate. I have enjoyed my tenure on this Committee over the years. The work of the Committee, we have had some raucous meetings in this room over the years on various matters that have come before the Rules Committee. And I chaired the Committee for a while, including when we passed the Help America Vote Act, that Mitch McConnell and I wrote back a number of years ago.

And I apologize for not having been here for a good many of the hearings you have had on this subject matter, since my Banking Committee responsibilities kept me from attending. And I commend you Mr. Chairman for exploring this issue as much as you have.

I recall back in the snowstorms of this past winter there was a reporter for the Washington Post who wrote and talked how Washington had been immobilized by snow, and then went on to say this is highly unusual, normally Washington is immobilized by Sen-

ators, at the time. And that probably reflects the views of an awful lot of people in the country.

Chairman SCHUMER. Senators do not melt.

Senator DODD. No, you do not melt, that is true. Well there has been a lot of truth in this. And there is a serious conversation going on about how we address these procedural issues in the Senate, and the problem of endless delays of legislation. A conversation among those both outside the body and within it who have been observers of the Senate during their careers, including Norm Ornstein who you will hear from later this morning, and others who have been talking about this.

And I regret that my other Committee assignment's obviously made it hard for me to participate in this debate along the way. Because I do have some strong views on it after 30 years in this body. And having been an observer of it for longer than that, as both I and Bob Bennett and our parents served in this institution. I served as a page back in 1960, and so I have almost 50 years of being around this building over the years, and watching the Senate operate. It had great days and less than great days in its performance of its duties.

And obviously we have been hearing some wonderful people. I mentioned Norm Ornstein obviously who we know and appreciate immensely. Thomas Mann. Experts from the Brennan Center. Obviously Senator Byrd. People like Senator Gregg, Don Nickles and others who have come before us and shared your views on this subject matter.

But as Senator Byrd so eloquently reminded the Committee when he testified, prior to his death in June, the Founders intended the Senate as a continuing body that allows for open and unlimited debate, and the protection of Minority rights. Minority rights. And he noted that our system established a necessary fence, to use Madison's words, as the principle author of the Constitution, against the dangers of fickleness, to quote Madison, and of the temporary passions of our public life.

He observed that that fence is the United States Senate. Now I recognize the source of my colleagues' frustrations. I have heard it in our meetings, caucus meetings, cloakrooms, on the floor of the Senate, and in private conversations. I have heard it more importantly for years among the people of our country, who are sometimes angry and frustrated that the Senate often appears to be tied up in procedural knots when we should be focused on moving the country forward. A time like this certainly is evidence of that.

It is true that during this Congress, the Minority has threatened to filibuster almost every major proposal for Senate consideration, including the two largest and most substantial measures that we have considered over the last two years. That is of course the Healthcare Reform Bill and the Financial Reform Bill.

And I note that it was only after Majority Leader Reid explicitly threatened to keep us in around the clock that eventually we were able to proceed and act on the Wall Street Reform legislation.

On items large and small, the Minority has either threatened or acted to block legislation that we put forward. And I have been a frequent critic of such unnecessary delays and such abuses of the rules. But Mr. Chairman, I do not believe the answer to this prob-

lem necessarily lies in lowering the 60-vote threshold to break the filibuster. I know there are a lot of other issues which you are going to discuss, but the fundamental question, whether or not we ought to lower that number, is something I have strong reservations about and would strongly oppose.

Even after a series of sequential votes, which lowers the threshold each time, or an otherwise fundamental altering of the structure of the filibuster rule itself. I'm not sure what the right answer is. It may lie in forcing actual filibusters rather than allowing the hint of a filibuster to rule of the day. It may lie in eliminating debate on the motion to proceed altogether, or in scaling back the time required for debate on cloture or on the motion to proceed.

It may and I think certainly does lie in exercising greater discipline in the way each United States Senator, those of us who have been privileged, a small number out of more than two centuries of Americans, who have had the privilege to come here and serve here, in how we apply and use the rules that we have been given, often to our own advantage.

On the last point, there is clearly considerable room for change. I find abuses, the way I have seen in recent years, on holds placed on confirmation process, and holds placed on uncontroversial items, to be used as leverage elsewhere on opposing virtual requirement that anything we try to do of any significance requires 60 votes. These tactics, run contrary to every Senator's duty to act in good faith as members of this body.

There are many ideas put forth by my colleagues about what we should do to address these problems and abuses. But I stand with our late colleague, Senator Robert Byrd of West Virginia, when it comes to measures designed to eliminate or substantially limit the basic structure of current filibuster rules. I think would be unwise to change the current filibuster rule threshold and limit the rights of the Minority to leverage important changes to legislation brought forth by the Majority. That is a right crucial to this institution. And we should exercise great, great care, when we consider any changes to it.

During the course of my 30 years, three decades, in the Senate, I have served both in the Majority and the Minority. I have served in every imaginable configuration with Chief Executives. And I caution my colleagues on my side that it was not long ago that we exercised the filibuster or holds—more discriminatingly, I believe, more carefully than it is true today—on matters we thought of such import, of such great historic moment, where we made the judgment that we needed to use those tools to protect our rights within the Minority.

For example, it was just ten years ago that we exercised the filibuster to combat the Estate Tax, an extension of the Tax Relief Act of 2006; on an extreme version of the US Patriot Act reauthorization; and a similarly extreme version of the FISA legislation that threatened America's fundamental civil liberties. The Federal Marriage Amendment, to amend the Constitution to define marriage within its text. An extreme and unwise version of the Patients First Act of 2003, part of the Medical Malpractice Reform Bill. And the ill-advised Energy Policy Act of 2003. All major measures that

we were able to stop, slow, or in some cases, force changes to using the filibuster.

So Mr. Chairman, let me again thank you for doing these, having these hearings. I think they have been very enlightening and worthwhile as we go forward.

For over two centuries, the Senate has been the bulwark within our democratic political process of Minority rights and the freedom of speech. It has been the only institution in many ways that provides that unique opportunity.

And I would hope that my colleagues, and those who will come after us here, as guardians of this institution and its rules and procedures, which have made such a unique contribution to our Constitutional process, would operate with great caution, no matter what their frustrations, and I know they are deep, and we all feel them. But we bear a higher responsibility to this institution and the future of it, by guarding the very principles that allow for that Minority voice to be heard, to be having the time to express itself. And I worry deeply that we may change that in such a way that the Senate would lose the essence of its existence.

So with that, Mr. Chairman, I think you very much for allowing me to share these few thoughts.

Chairman SCHUMER. Senator Dodd, as usual, your statement is thoughtful, and intelligent. And you speak your mind, and I just want to think you for your many years of service to this Committee, as Chair, as ranking member, and as member.

Senator DODD. Thanks.

Chairman SCHUMER. And without objection, what I would like to do now is call on Senator Gregg, let him make his statement. As you can see, even though we just had two Democrats speak, we had different views.

I said to Senator Bennett, Senator Dodd might have well represented the Minority, whatever party it might be, on his view on this issue.

Senator DODD. I see Marty Paone as well here, and I apologize. Marty, I knew you were going to be a witness, I did not see you sitting there. Thank you for your service here as well over the years.

Chairman SCHUMER. Thanks Chris. So what I would like to do with the Committee members' indulgence is call on Senator Gregg. There will not be, as usual, there will not be questions of Senator Gregg. But when we go to the Second Panel, if people want to make a few minutes of opening statements, it will not detract from their time. Is that okay with everybody?

Okay. Good. Then we will move on to Senator Gregg. Your entire statement will be read into the record. And welcome here.

OPENING STATEMENT OF THE HONORABLE JUDD GREGG, A U.S. SENATOR FROM NEW HAMPSHIRE

Senator GREGG. Thank you Mr. Chairman, thank you for your kind comments. And let me associate myself with Senator Dodd, as I often do, because I agree one hundred percent with his opening statement, and think it was an eloquent recitation of the importance of the filibuster and the rules of the Senate in protecting the Minority.

I was asked to speak today a little bit about a number of issues dealing with this and my perception of them. I appreciate it and am honored at the chance to talk about it. But everybody at this dais knows as much as I know about this issue. And you have certainly been studying it.

So let me just reflect both in historical terms and on a personal experience level why I think this is so critical. You know, this Committee's taking up a rules issue, but what you are really taking up is the Constitutional structure of the greatest government ever created in history. We are the freest, the most prosperous, the most extraordinary nation in the history of the world. And we are that was because we have a constitutional government that has given us the freedoms and the prosperity that we benefit from.

And I happen to believe that at the center of that constitutional government is the Senate. Some would argue of course it is the House, because they have the ability to initiate appropriations and tax policy. But I do not believe it. I believe that it is the Senate because the Senate is where the rights of the people of this nation are protected. Especially Minority rights.

It was created for that purpose when Madison and Randolph were thinking of how do you where going to structure this government I am sure they had in mind the parliamentary systems that they had seen in Europe. The fact that they move too quickly and that they trample the rights of the minorities. And so they setup this structure of checks and balances which is throughout our system, but the ultimate check was and is the Senate of the United States.

It is been expressed in a lot of different ways but let me just read a few because I think it is important to go back to the folks who have made a difference in this body, and who understood the body with more depth than I do. And I would say this. I am leaving the Senate as is Senator Dodd and Senator Bennett. I do not leave in a disgruntled way, just the opposite. I am a tremendous admirer of the Senate as an institution, and the people who serve it.

I just think I have had the chance over my 18 years to come in contact with some of the best most committed people that I have ever come across in my walk of life. They are just, there are a lot of special people here. Both Senators and Staff who are committed to doing what is right. Well we have philosophical differences, quite a few. But as a very practical matter, this is the place where good people come to try to make this nation better.

So let me read a couple of quotes that I think really capture the essence of the purposes of the Senate. And we will begin with Webster, who of course was from New Hampshire, although he represented Massachusetts in the Senate. "This is a Senate of equals, of men of individual honor and personal character, of absolute independence. We know no masters, we acknowledge no dictators. This is a hall for mutual consultation and discussion."

And then the other member of the triad, Clay. "The Majority ought never to trample on the feelings or violate the just rights of the Minority. They ought never to triumph over the fallen, nor make any but temperate and equitable use of their power."

And then the third member of the triumvirate of great Senators, Calhoun. "The government of the absolute Majority instead of the

government of the people is but the government of the strongest interests. And when not efficiently checked, it is the most tyrannical and oppressive that can be devised."

And then another Senator who should be in the triumvirate. "It is the Senate where the Founding Fathers established a repository of checks and balances. It is not like the House of Representatives where the Majority Leader or the speaker can snap his fingers and get what he wants. But the reason we do not always work by the Majority rule is very simple. On important issues, the Founding Fathers wanted, and they were correct in my judgment, that the slimmest Majority should not always govern when it comes to the vital issues that is what they want." That was Senator Schumer.

You can go on and read Byrd, or read Howard Baker, or read Lyndon Johnson, or Harry Reid. They all came to the same conclusion, the Senate is about protecting the rights of Minority. And at the essence of protecting the rights of the Minority is the filibuster rule.

Now, I was asked to speak a little bit about the filling of the tree. The tree, as was explained very accurately by the Chairman, the filling of the tree basically cuts off the Minority rights in a most intemperate and inappropriate way, because it makes it impossible for the Minority to come forward with amendments.

When I arrived here, the whole purpose of the Senate was to bring Bills to the floor. And anybody who wanted to come to the floor and amend the Bill in any way they wanted to pretty much got to do that. I can remember when we brought appropriations Bills out of the Appropriations Committee, I had the good fortune to chair two different Appropriations Committees that Bills went across the floor every year, I would plan when I had the Commerce, State, Justice Committee, to get amendments on everything, everything under the sun.

There would be gun amendments. There would be marriage amendments. There would be Mexico City amendments. You name it, it was going to come on the Bill. I expected that as the Leader on the floor responsible for this piece of legislation. And it was good. It was a good discussion. And we always reached a conclusion, took a little longer usually depending on who was around. But it took a little longer to get to a conclusion, but we always did it.

When you fill the tree, you cut off the Minority's ability to make those types of amendments and it really is detrimental to the institution itself because if you do not allow the Minority to amend, in fact if you do not allow every member of the Senate to have an opportunity to amend, then you are basically undermining the whole purpose of the Senate.

Now regrettably, filling the tree has become an unfortunate practice here. In fact, in this Senate the tree has been filled more than it has been filled under the last six Majority Leaders. That is not healthy.

And the Chairman talked a little bit about filibustering the motion to proceed. Why is the motion to proceed a critical motion? And why should filibuster still be applicable to the motion to proceed? It is because at that point that the Minority Leader has leverage to negotiate, to the extent that negotiation occurs, how the Bill will be managed when it hits the floor, and what the amend-

ment process will be. If you shut off that point of pressure, then you once again close down the capacity of the Minority to make its case and get the Bill to the floor in the form where amendments can be allowed.

So I believe very strongly, as the Chairman has outlined in his opening statement relative to filling the tree, and as Senator Dodd has outlined relative to the filibuster, that at the essence of the Senate is the ability of the Minority to amend. That is simply what it is all about. And if you foreshorten the ability of the Minority to amend, you undermine the purposes of the Senate and you undermine the constitutional form of government we have.

And I thank the Chairman for his time.

[The prepared statement of Senator Gregg included in the record]

Chairman SCHUMER. I thank Senator Gregg for his excellent statement. And maybe since it was brief, does anyone have a question they would want to ask Senator Gregg?

Well, I have one. We do have—from your statement maybe you do not believe the Senate in the last couple of years has sort of become more dysfunctional. And neither side gets what they want. The Majority does not get to move forward on legislation. The Minority does not get to offer amendments, either germane or not.

And does the Senator think there might be some grounds for compromise, where say, for instance—and I understand his point on the motion to proceed—where you would not be allowed to filibuster the motion to proceed but at the same time, and someone proposed this at our last hearing, there might be a guaranteed right for the Minority to offer at least a number of amendments not to be dilatory but have that opportunity as sort of a tradeoff.

Some of our witnesses last week said that they thought the Senate had departed from its function of being the great society where the great debate occurred, the issues were debated, etcetera, given the gridlock we have here, without pointing fingers of blame.

Tell me what you think of that kind of tradeoff.

Senator GREGG. I think it is dangerous. I think because you can never anticipate what the Minority needs. I cannot anticipate that. The Republicans may be in the Majority in the next Senate or the following Senate; you do not know what the Minority position is going to be on a piece of legislation because you cannot anticipate the legislation.

So the Minority has to be able to retain as many rights as possible to the floor, and to the ability to amend on the floor.

I agree that there is a problem in the Senate right now. But I think it is the fact that we do not take Bills up on regular order. The fact that we basically have a reticence within the Senate to make the tough votes on the floor. I mean, we have done some fairly complex legislation around here. We have a lot of floor activity.

The Financial Reform Bill, for example, was a very complex piece of legislation which was on the floor for a long time, and which was debated and amended. The managers kept the amendments on target, and strong managers can do that.

We did it with the Immigration Bill. That Bill was on the floor for a long time. Aggressively amended.

And the Healthcare Bill started off that way. Of course it got foreshortened at the end, which was really I thought unfortunate.

But it is just a question of getting a calendar where the Majority understands that if it is going to take big pieces of complex public policy to the floor, it is going to have to spend two or three weeks to do it. And I do believe that that is very doable. And I think we have shown we can do it as a Senate.

And I think the body functions well if it is given the opportunity to amend. People run out of energy, we all know that. These amendments stop coming after a while. And people have to make tough votes. That is what it comes down to. People willing to make the tough votes.

Chairman SCHUMER. My proposal was not curtailing the right to require tough votes. It would be dealing with something like unlimited amendments, or the ability of—now obviously one person cannot do this, one person can slow it down but cannot stop it—but the ability to even prevent an issue from coming to the floor, unless you have 60 votes.

And forestalling the kinds of debates that you talked about was not used for Immigration, was not used for, as you say it was for healthcare later, but the other issue you mentioned, I cannot recall it.

Senator GREGG. You know, theoretically, I think you probably can make an argument for that decision. But I cannot predict, nor can anybody in this room predict the practical needs of the Minority as it goes forward. And I think you have to reserve as much authority to the Minority to be able to influence its ability to make its case on the floors as possible. Presently that means being able to filibuster the motion to proceed until you get to a point where the Minority feels its rights to amend are protected.

Chairman SCHUMER. All right. Anyone else? Senator Alexander.

Senator ALEXANDER. Senator Gregg, Senator Byrd indicated in his testimony earlier this year that he thought that while there were abuses of the current rules, that the Senate could work under the current rules if the Leaders would just use them. And he used examples of, in terms of the filibuster, just confronting those who wished to filibuster and keep the Senate in session, just one day after another, and other such steps.

And I am wondering whether you, as you look back over at your years here, think that we could get to a situation where a Minority could insist of the Majority, whichever party, that there had to be amendments and debate, and where the Majority could by holding the Senate in session, keep filibusters under control?

In other words, can this be done without changing the rules?

Senator GREGG. Well, my experience is that the 24 hour attempts to try to break a filibuster do not work, because basically it is the Majority that has to produce the people. And that is really, the Majority's never going to be able to break a Minority by keeping you here all the time, because the Minority really does not have to be here. All they have to do is keep somebody on the floor to object.

So I just do not, I have never seen that as the best way to address how you—visually and politically it might have an effect. The population may say, well, they are there all night, look at that, this is an important issue. But I do not think it subsequently affects the capacity to deal with a filibuster.

I suppose you could change the rules so that if you go into a filibuster status, those seeking the filibuster would have to attend in order to pursue the filibuster. That is a possibility. And maybe a Minority that wants to filibuster should have that responsibility.

Chairman SCHUMER. Senator Durbin.

Senator DURBIN. I would like to follow up on that, because we had a classic example where a member from your side forced a vote on a Saturday on a filibuster. And then when 60 or 70 of us changed our schedules to not go home to our families, the Senator who forced the vote did not show up for it. Was at a wedding in his home state.

It strikes me that this really is offensive, that someone says, I have got to protect my rights, but in absentia, I have got things to do back home, so why do not you all stay on the floor here and come up with 60 votes.

Senator GREGG. I think that is a legitimate point, Senator.

Senator DURBIN. Well, I also want to ask this question. Do you not believe though—I like Jimmy Stewart, do not get me wrong—but he has created an impression of the Senate which I do not think reflects the reality of the Senate.

Senator GREGG. I have always thought of you as a Jimmy Stewart liking figure.

Senator DURBIN. Yes, that is me. And, Spirit of Saint Louis.

But the point I want to get to is, do not you believe that there should come an obligation with those who initiate the filibuster to at least be present? Or those who support their position to be present on the floor, if we are going to "burn 30 hours"? What a terrific waste of time.

At the heart of this is something that goes unspoken in most of these hearings, why do we want to avoid controversial amendments? Because we want to avoid controversial ads running against us in the next campaign. Once you have been around for a few years and you have cast thousands of votes, you figure there is plenty for them to work with and I do not have to worry about tomorrow's vote.

And secondly, the reason why we cannot burn off the hours, for example the Food Safety Bill, which you and I had worked on for over a year, and want to bring to the floor, the one Senator who is holding it up says, well if you want to bring it, we'll just go ahead and file cloture. Knowing full well we do not have the time for it, because members cannot stay in town as much, because they are out raising money for their campaigns.

So I mean, does not this reflect the new reality that maybe Senator Byrd did not have to live within his political experience, that now is the reality of the Senate?

Senator GREGG. Well, I think that was the point that Senator Alexander was also raising, which I think is legitimate to look at. Whether if you are asserting the filibuster right you should have to be available to defend that right on the floor.

I would simply point out the Food Safety, like you I would like to see it passed, but to get it passed it should have been on the calendar earlier. You know as well as I do that if you push up against an adjournment event, the power of a single Senator grows exponentially as we head towards adjournment around here.

But yes, I think it is worth considering whether or not those asserting their rights under the filibuster should have to be present to defend that right, and presently they do not have that.

Chairman SCHUMER. And we had a hearing on that, Senator Lautenberg actually proposed that as a rule change.

Senator Roberts for a question.

Senator ROBERTS. Well first of all, I want to say to Jimmy Stewart that I like your role in the Glenn Miller Story. I thought you played an excellent role.

Chairman SCHUMER. I thought he played an excellent clarinet.

Senator ROBERTS. I think it was a trombone.

Senator GREGG. It was a clarinet.

Senator ROBERTS. Was it Glenn Miller?

Senator GREGG. Oh was that Benny Goodman, I am sorry.

Senator ROBERTS. That is right.

Senator ALEXANDER. Here is another example of gridlock in the United States.

Senator ROBERTS. I offer an amendment to clarify the record.

Senator GREGG. Please, I withdraw my comment.

Senator ROBERTS. All right. Bob Byrd came here in one of his last appearances before Committee, it was a very poignant time. And said that a Minority can be right, and Minority views can certainly improve legislation. The bottom line of my statement which I will insert for the record and save time when we get to that, is that Mr. Chairman the way forward is not through rules changes, it is understanding the purpose of our rules to foster consensus, bipartisanship, and moderation.

Let us try to return to our Senate tradition before embarking on a radical rule change that sounds almost like kindergarten stuff, really, given the challenges that we face, or a hope that cannot come true.

But let me ask Judd, as you have been here as long as I have, and we came to the House together. What do you see down the road? Because partly what impacts this is not so much—well, it does impact it in terms of filling the tree and finding cloture and all of these things. But rightly or wrongly, the Congress reflects the Balkanization of the American public. And it seems to me that we are terribly Balkanized, and it seems to me that if we reinforce that with the information that we receive, everybody gets their netherworld of information now from the Internet and the Web and Facebook and tweets, and all the things that I do not understand. And that my staff does not let me see.

But at any rate, it is a far different world. Somebody said something about going to Conference, and it helps matters at the last Conference that I attended was the 2008 Farm Bill, we had 41 members. Half of them had never seen a farm. They could spell farm, but not agriculture. I think Charlie Rangel was the head of the Conference, and announced that he did not know why he was there, but that the Speaker had asked him to be there, so he was there, and then left.

Usually during a Farm Bill Conference we had 15 or 16 people including the Senator from Illinois—who was for corn, I was for wheat, by the way, but that is how that would work. But we worked it out. And I am just wondering if there are not elements

that are at play here with our society that makes this much more difficult. The Senator from Illinois said everybody has gone to raise money, actually you are here to raise money.

Well, some people go to places where there are water holes where I guess you can drink more freely from in terms of money for campaigns. But there is a Tuesday-Thursday mentality here as opposed to earlier times when people socialized together. People knew one another. People at least spent some degree of time in the other person's shoes. And I think it is that, that we have lost. Or that we have really seen dwindle away.

Where are we going to be five years from now if this keeps up in terms of the Balkanization we see in all of this talk about, we have lost comity and everything else? Part of that I do not think is right, because you and I have served here during the Vietnam days, during the impeachment, during Nixon resignation, during you can name any number of issues here that were great great challenges that produced an awful lot of rhetoric and a lot of challenges. But at any rate, where are we headed here? Where are we going to be in five years, Judd?

Senator GREGG. Well, my biggest concern would be that we end up like the House of Representatives. That we end up basically as an institution which this not have the openness that traditionally and historically this institution requires, relative to debate and amendment and discussion.

As to collegiality, there is much more pressure on every Senator now to be off somewhere, to be doing something. I think Dick Lugar described it most effectively when he said the Senate is a one hundred carrier task force going down the hallway. It is an unfortunate fact. But that is the nature of our times. Times change, and we obviously are representing an extremely sophisticated society that requires a great deal of its government. And especially those who represent it.

So I do not think you are going to put the genie back in the bottle and suddenly have what used to happen in the 50s and 60s where people hung out in the afternoon and had drinks and spent the weekends with each other. But you can keep the place collegial just by keeping it open, so that people do not feel that their rights are being shut off, and so that people do feel that they are a single individual who can make a different within the Senate, which is what the Senate is all about.

Chairman SCHUMER. Well, on that note we thank you, Senator.

Senator GREGG. Thank you.

Chairman SCHUMER. Thank you for your thoughtfulness and participation here today.

Let me now call on our next panel of witnesses. There are two. A warm welcome to them. They both are regulars here, and we thank them for that.

First is Marty Paone. And by the way, I was just informed that you like it Paone not Paone, so I apologize for all the years of calling you Paone. In any case, it is good to see you back. And we know you hold the Senate in great esteem, as does your colleague Senator Ornstein.

Marty Paone is a veteran of the United States Senate, he began working on the Senate floor for the Democratic Leadership in 1979.

From 1995 to 2008 he served as an officer of the Senate in the position of Democratic Secretary, and he is currently Executive Vice President of the Prime Policy Group.

Mr. Norman J. Ornstein is a resident scholar at AEI, the American Enterprise Institute, where he also serves as the co-director of the Election Reform Project. He is author of many books about Congress, including the Broken Branch. He writes a weekly column for Roll Call, is an election analyst for CBS News and a Senior Counsel to the Continuity of Government Commission.

Gentlemen, both your statements will be read into the record in their entirety, and you may proceed as you wish. We will begin with Mr. Paone.

STATEMENT OF MARTY PAONE, EXECUTIVE VICE PRESIDENT, PRIME POLICY GROUP, WASHINGTON, DC

Mr. PAONE. Thank you Mr. Chairman and members of the Committee. I am honored to be here discussing the procedures of the Senate, a subject that I learned to cherish while working for Leaders Byrd, Mitchell, Daschle and Reid.

I served on the Senate floor for almost 29 years. During that time, I was Secretary for the Majority twice and Secretary for the Minority twice. I had two sets of cards, depending on the election.

Following the election, if there was a change in the Majority I would joke with my Republican counterpart that in addition to handing over the presiding work, we would also trade speech folders. One accused the other of being an obstructionist, while the second complained of the trampling of the Minority's rights.

Today it is my understanding you will be focusing on four aspects of filibuster reform. Motion to proceed. Eliminating a debate on a motion to proceed would save time and put the legislative calendar on an equal footing with the executive calendar. A middle ground would be to institute a time limit on the motion to proceed. Any modification of this motion would streamline the operation of the Senate but for just that reason could be expected to be met with Minority opposition.

Post-cloture term. During the 30 hours post-cloture, each Senator is entitled to speak for up to one hour. One member could still cause considerable delay, because quorum calls, while counting against the 30 hours, do not count against the member's hour.

While you can force the opponent to remain on the floor or else the Chair will put the question, and I think you all skipped over that earlier, you cannot force them to debate and consume their hour. One possible change would be to charge the quorum time towards the Senator's hour.

An alternative idea would be to count any time consumed in a quorum call at an accelerated rate. Say a multiple of ten. So that every minute spent in a quorum call would count as ten minutes. If this were the rule, then during post-cloture time I would eliminate also the ability to object to the dispensing of a quorum so that the Majority could not abuse this accelerated clock.

Over the years a process has evolved so that once cloture is invoked the amendment tree remains filled and even germane amendments are blocked out. One suggestion would be to automatically tear down the tree post-cloture, and to provide for a guaran-

teed number of amendments from each side. The amendments would start to qualify under Rule 22, be timely filed, properly drafted, and germane.

Other possible changes include a reduction in time on nominations, since they are unamendable. Adding a three-fifths vote to reduce the time. Or reducing the threshold to invoke cloture to a three-fifths vote of those voting and present.

There have been complaints about the waste of time spent on nominations that are eventually confirmed by nearly unanimous votes. One change for nominations with lifetime appointments would be a reverse cloture motion. It would work like this. The Majority Leader would ask consent to confirm a nomination or to get a time limit on it.

If there is an objection, then the next day by 4pm the opponents would have to file a motion of opposition which would state that they intend to vote against the nomination. Sixteen signatures, the same as for cloture would be required on that motion. And if it is not filed by the appointed time, the Senate would then proceed to the nomination, and it would be considered a time limit of two hours equally divided. If the 16 signatures in opposition are secured, then the Majority Leader could file cloture motion on the nomination, which would ripen the next day.

Substitute amendments. It is virtually impossible for a Committee substitute or a floor substitute to meet the strict germaneness test of cloture. This necessitates the filing of cloture motions on the substitute and on the Bill itself. The latter is a true waste of time, since once the substitute amendment has been adopted, the Bill is no longer amendable. The substitute amendment should be automatically considered germane.

The appointment of conferees. It takes three separate debatable motions to send a Bill to Conference. Many times in the past, these were adopted by consent. But over the years, both parties have objected to the appointment of conferees, and not it is the exception rather than the rule to see a Bill sent to Conference.

Combining the three motions into one would still allow the opposition to filibuster this stage of the process. This might also reduce the use of the message between Houses method, or what has come to be known as the ping-pong process. If this process is to be used more sparingly, then not only should the motions be combined, but there should also be a prompt cloture vote and a reduction in post-cloture time. If the Minority truly wants to participate in Conferences, then they should allow the appointment of conferees.

Filling in of the tree. Everyone agrees that the Majority Leader has priority recognition. It follows then that the Majority is entitled to the first vote on a given issue. Majority Leaders from both parties have filled the amendment tree to get a first vote on an issue. And sometimes on more than one issue. However at some point in order to move the process along, the Majority Leader has to pare back the tree and allow other amendments. If amendments are not allowed, then the Minority's natural response is to vote against cloture as a protest for being shut out of the amendment process.

Majority Leaders from both parties have been asked by their members to protect them from certain votes. In my opinion that is an unfair request, and it puts the Leader in an untenable position

of having to fill the amendment tree and possibly fail to enact the legislation in question.

The solution to this is simple. Do not ask the Majority Leader for such protection. Senators should be prepared to vote at least on a cloture vote or a budget waiver vote with respect to any and all amendments and move on.

Again, I thank the Committee for this opportunity this morning, and I welcome any questions.

[The prepared statement of Mr. Paone in the record]

Chairman SCHUMER. Thank you Mr. Paone.

Mr. Ornstein.

STATEMENT OF NORMAN ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, WASHINGTON, DC

Mr. ORNSTEIN. Thanks Mr. Chairman. It is always an honor and a privilege to be in front of this Committee.

I want to start by saying to Senator Bennett, I was at Brigham Young University two weeks ago for Constitution Day, and spent a sizeable amount of time there and in Provo. And I can testify to the enormous amount of goodwill and warmth that still exists in the state for you, and regret that the voters did not have a chance to express that again in November.

This is my favorite Committee in the Senate. I have testified in front of it many times over the years. And it is my favorite Committee because the members who are on this Committee understand and appreciate the role of the institution. It includes some of my favorite Senators on both sides of the aisle. And I am delighted that we are getting some junior members like Tom Udall who are so deeply committed to the institution and throw themselves into that role.

I want to comment for a minute or two on some of the discussion you had with Senator Gregg. I do think the problem is more of the culture than it is the rules, that the rules operated better in a previous era. But frankly the reality is the culture is going to get worse before it gets better. Because I see the newcomers who are going to be arriving in this institution in January, and there are many of them who do not fit the mold of the people who are serving on this Committee. If we had only people on this Committee cloned to make a hundred, I do not think we would have as much of a problem, we would not have to spend so much time here.

But we are going to get a number of people coming in who are like the one Senator now who has decided that he is the word and the truth and is going to hold up everything, who do not see the value of compromise, of respecting and looking towards the views of others. And that means that while we cannot solve the problems of the culture, I do believe that it requires some significant focus on the rules to remove some of the unnecessary and extraneous obstacles that arise that affect both sides of the aisle, but also that use up the most precious commodity the Senate has, which is time, often just for the purpose of using up that time.

One other comment relating to something that Senator Durbin said. If I could wave my magic wand and do one thing, it would not be some of the things we are talking about here. It would be

to move the Senate to a schedule which was five days a week, three weeks on and one week off, with no fund-raising during those 15 days a month. You can have 15 days a month to fundraise, I think that would be adequate even under the current system.

But if you were here nine to five, Monday through Friday, it not only would provide a better family life, and more opportunities to interact socially, but it might create a very different kind of atmosphere in way of operation. But that may be harder than changing any of the rules that we are talking about.

On the rules themselves, I want to associate myself with what Marty said, with most of his changes. And I start with the belief that we need to look at the idea of a one bite at the apple principle. That there is, despite what Senator Gregg said, there are ample opportunities before you ever get to the motion to proceed for the Minority Leader to negotiate with the Majority Leader.

I do not see that the leverage of another filibuster, which is still going to require 60 votes when you get to the Bill itself, is a necessary commodity. And that having two, three, or more bites at the apple only serves to provide opportunities for delay and obstruction. I do not believe, and I agree with Senator Dodd, that we ought to make the Senate like the House. I do not believe that we should move the threshold down, although I do think that moving to three-fifths of those present and voting would deal with one of the issues and problems that Senator Gregg mentioned, which is changing the incentive, so that it is the Minority that has to be on the floor if you do have extended debate.

And I have also, as perhaps you have seen, and part of this flowing from conversations that I had with Senator Udall and his staff, think it is worth considering and maybe even just for nominations, not just the 16 votes required to file a petition, but make it two-fifths of the Senate required to extend debate rather than three-fifths of the Senate required to end debate. Shift the focus to the Minority if they feel intensely enough about an issue with great national import, then they ought to be the ones who have to provide the votes.

The idea that Senator Byrd, the late, great Senator Byrd, when he was extraordinarily ill, had to be forced to come to the floor to provide a 60th vote, or that the Senate was frozen in the period after his death and before Senator Goodwin came in, just does not make a whole lot of sense to me as a way to operate.

With all of that, I do also believe, and I have a number of suggestions which are a little bit different perhaps in form from Marty's, most of which are now incorporated or will be soon in a resolution that Senator Mark Udall is introducing, which I would endorse as well, but believe that we need to focus on the filling of the amendment tree as well.

And I do think that, you know, it is a chicken-and-egg problem. But we need to deal with both the chicken and the egg at this point. And finding a way to guarantee the Minority an opportunity to have its voice and to offer an amendment is a necessary component to any of the other changes in the rules that we implement.

And I hope with some of these, which I think are common sense things, do not detract from the Minority's ability. When it feels intensely about an issue of great national moment, to extend debate

or to raise the bar, are things that ought to be able to get enough votes, that perhaps we would not even have to turn to the constitutional option.

Thank you very much.

[The prepared statement of Mr. Ornstein in the record]

Chairman SCHUMER. Well, thank you. And thank you both. Excellent testimony.

I have specific questions on specific proposals. But I think, I would like to ask two questions of each of you in a broader sense.

As you can see here, you heard Senator Dodd's testimony, we all remember Senator Byrd's. Here is the broad philosophical division, I guess, or disagreement among Senators. And some say, the world is moving much more quickly. We are in a globally competitive world. We cannot just have delay, as our country has urgent needs, over and over and over again. This would reflect not only on delay, but 60 votes, because the Minority seems to wield those together now.

The other argument is, this has worked for 220 years, and urgencies have appeared at various times in the past. And you do not mess with something that has worked, for all the momentary—I guess the others, those who would argue this, would say—frustrations. Do we need, does the new world demand, some kind of fundamental change, not to block the Minority from offering amendments, but to allow the Senate to move more quickly? Because it has come to a standstill, and as one of you mentioned, next year could come to a greater standstill.

And a Minority Leader could take on seven or ten resolute Senators who say, "we are going to stop every nickel of spending". But a Minority Leader generally will not do that, because a Minority Leader will have a constituency of 43, and if there are seven adamant people, he just does not want to alienate them.

Okay, that is the first question, the sort of large question. And then the second question relates to what Professor Norm Ornstein said. The ideal way to do this, if we were going to make some changes, would not be invoking the Constitution, but to get two-thirds of the Senators to agree that some changes are needed, which by definition says you have to deal with both the Minority's concern, which is—and I believe the Majority and Minority will stay the way they are but they could change for all we know in the election—you have to deal with the Minority's ability to offer amendments so that they do not slow down the process as a way to get amendments. Slow it down to a point of absurdity.

So I would like both of you to comment, and that is my only question, on both those questions. The large picture question, do we need change? Does the new world demand change? Or should we just stick with what has worked with the most successful nation in the world in the past? And then second, what are the chances, if we do need change, of getting it to be done in a two-thirds Majority way?

Mr. ORNSTEIN. I will start Senator. First, on the first question. We have operated for 220 years. We have also changed the Senate's procedures numerous times over those 220 years when conditions demanded it. We changed the rule in 1917. Of course, we elimi-

nated the motion to proceed very early on, which helped to create some of the issue that we have with regard to filibusters today.

We changed things again in 1975. We have to be very careful about the changes. I think one of those changes inadvertently helped to exacerbate the problems, which is when we moved to an absolute number of three-fifths of the Senate. If you have present and voting, then Minority does have a reason to stick around to meet quorum calls, so you could actually do something with extended debate.

But I think conditions warrant change. We have passed a lot of legislation, it is true. It is not the best way to legislate when you can have one, two, or three Senators who are needed to make up the 60 votes who exercise an enormous amount of leverage and do not necessarily make for better legislation. I would rather have a more open amendment process to make it work that way.

But what also happens is, when you take out, stretch out the time, and let us face it, when you have filibusters on nominations that pass unanimously, when you have filibusters on Bills that ultimately pass unanimously or near unanimously, this is not a Minority that is trying to express an intense point of view. When that happens, then the queue gets longer, and important Bills, like the Food Safety Bill or others, get delayed.

Now, that may—perhaps it could have come out earlier—but the fact is we have got a lot of legislation that takes a long time to incubate and work through the issues and to get compromise. If you have used up all the time, there is no time left. And so I would really think that some of these changes—I should know, I mentioned a couple of others like the idea that you have to read amendments word for word if they have been posted online for 24 hours, I think there are ways of clearing the decks a little bit there.

But I just think that change is necessary. And ideally, change happens with a bipartisan consensus. And I would hope—I mean, there are no Senators I respect more than Senator Roberts, Senator Alexander, Senator Bennett—that both sides could work together to find some common ground here, and try to avoid having either a confrontation over the rules or an inability to.

Chairman SCHUMER. What do you think the likelihood of that happening is?

Mr. ORNSTEIN. I suppose I could invoke George W. Bush, slim to none, and slim just left the building. But I actually think—I have been impressed with these hearings. These hearings have not been confrontational. There are different points of view obviously expressed by Majority and Minority, and by those who have been in the Minority before and understand they may be again. But I think this has been a search for common ground rather than just position taking.

So I hope from some of the ideas that we and others have discussed, you could find some areas where you could strike the right balance, preserve Minority rights but also enable some more efficiency. Because we are going to move from productivity to something that much more resembles gridlock given the changes that are going to take place in our politics.

Certainly in November and heading to January. And it is a dangerous, dangerous time for the country with the issues that we

face. And I think we have got to grapple with making sure that there is an ability to act in a reasonable and balanced fashion.

Chairman SCHUMER. Mr. Paone.

Mr. PAONE. Yes, I think it would be good to have some change. But in the era—you do have a new era, obviously of instant news, the Internet, etcetera, the Senate has changed also. Let's face it, it is a light lift here, these days, working only from Tuesday to Thursday afternoon. I mean, working a five day week would be a change, but you showed from Thanksgiving to Christmas Eve that it can be done. You can use the clock, and if you use the clock, especially at the beginning of a Congress, more efficiently, then you do not need a rules change for that.

If someone says they object to a motion to proceed, say fine, then you are going to be on that floor not just when we invoke cloture, you are going to be on that floor now, Monday, until we have that cloture vote on Wednesday. I do not have to bring in all my members, I am just going to bring in a Presider and a Leader, 24–7. And if you go to the bathroom, I am putting the question.

Now, granted, at the outset, that person will get some help, because everyone will want to help him in a three-to-five am range, sure, I will come running over to help you. You do that three or four times though and it is going to get of old, and I do not think it is going to be as easy to find help in that early morning range. Also it will highlight, and it will answer your critics who ask: "why do not they make them filibuster?"

Well Jimmy Stewart's "Mr. Smith Goes to Washington" was a movie, and this will show them what they get with a filibuster. You get a quorum call, the senator sitting there reading his mail. But you can at least make his life miserable. You do not have to have a roll call vote and bring everybody else in to make their lives miserable. In any case , that is something you can do without a rules change.

And it is not inconceivable that you can change the rules. Yes, you will need bipartisan ship to change the rules. I mean, in 1986 when you went on tv there were a number of rules changes that were instituted in that resolution. In 2007, the Ethics Bill, a number of rules changes were included in that Bill. It is not inconceivable that you could have a moment in history where there is such a momentum for a piece of legislation that you can come to a bipartisan agreement that yes, in this we are going to include a couple of modifications on how we operate. But obviously it is going to have to be done in a bipartisan way.

As I said, using the clock in a more efficient way not just on a filibuster but working Monday through Friday, working more hours, keeping people in town, all of this would go a long way towards improving your efficiency. In the old days, the people used to say air-conditioning is what killed this place. Air-conditioning and the airlines, because it allowed members to go home on weekends. And then eventually no longer brought their families with them to Washington.

In the old days, you would have a new member come in, he would be in the cloak room asking Muskie and Jackson, where do I get a realtor? What school should I send my children to? Do I live in Potomac or do I live in McLean? And they would end up com-

muting together. Stevens would commute in with Muskie. One day he had a horrible day because he told Muskie not to pass a bill before he could do his amendment, and Muskie went to third reading and ignored Steven' demand to offer an amendment. Mansfield then had to come over and undo a vote so that Stevens could offer his amendment.

But you guys used to commute. You used to live in the same neighborhoods. And as a result, you went to the PTA meetings together. You got to know each other as people. Not as enemies, not as opponents. And so, if you make people stay here five days a week, no matter where they live, what part of the country they have to go to, for an extended period, I think that would contribute to some of that.

Chairman SCHUMER. And again, question I asked, Mr. Ornstein. There is a constitutional option obviously that Senator Udall has explored.

Mr. PAONE. Yes.

Chairman SCHUMER. So you may not need the two-thirds. But obviously I think everyone would agree, that would be preferable if rules changes were to be made. What are the chances that we could get that two-thirds on some kind of balanced package in these times right now?

Mr. PAONE. Right now I do not think you would get the two-thirds. Especially as you are heading into an election which may result in many new members. You are even at 15 new people, even if everybody gets reelected.

Chairman SCHUMER. Right.

Mr. PAONE. So you are going to have new people, and these new folks will not have a legislative institutional knowledge of how this place operates. And I do not think you would get two-thirds. But by the same token, I don't think it is out of the question that down the road, you might be able to get a Bill passed that incorporates some rules changes.

The constitutional option would bring, in my opinion, irreparable harm to this body if you were to utilize it.

Chairman SCHUMER. Thank you. Senator Bennett.

Senator BENNETT. Thank you very much Mr. Chairman. I have enjoyed this morning. I have enjoyed the historic review. Marty, I remember the days when Senators spent time with each other. And I was here as a staffer when Everett Dirksen determined the wording and direction of the Civil Rights Bill.

Everybody talks about Lyndon Johnson's legislative genius creating the Civil Rights Act of 1964. It was Everett Dirksen that made that possible.

And I remember when Bobby Kennedy was the Attorney General, and the writing of that Act. Kennedy's staff would come to the Hill, and they would not go to Mike Mansfield's office. They would go to Everett Dirksen's office. Because the Southern Democrats were threatening the filibuster. Dirksen with his Republicans held the balance of power to break the filibuster. And the Administration had to make sure that Dirksen felt okay about it.

And you may remember that Barry Goldwater, the Republican standard bearer in that election voted against the Civil Rights Act, which created a problem for my father because my father voted for

it, and thus guaranteed himself a primary opponent the next time he came up.

So I am familiar with all of the give and take and the historical circumstance you described. Let me add just a little historical perspective from my own experience.

I think the Majority Leader has the authority to crack the whip now if he wants to, and clean up a lot of the things that you are talking about. And Marty, your comments I think sort of fit in to this. Let me give you one historic example.

Back in 2006, John F. Kerry was in Europe, and Sam Alito was up for nomination to the Supreme Court. And basically Kerry phoned in the filibuster. He made a phone call to Harry Reid, and said, no, I will not allow a vote, and so on. And Harry responded to that. And Kerry was out of the country.

By contrast, I remember managing a Bill on the floor, and a Senator who will remain nameless because none of this got into the press as the Kerry thing did, said, I will object if Senator X offers this amendment, and my objection will go to such lengths that we will have a filibuster.

I said okay, I am going to notify Senator X of that fact, and he is going to come to the floor and offer the amendment. And you are going to have to be here on the floor or I will accept it, as the manager of the Bill.

And Senator X showed up, offered his amendment. The Senator who said, I am opposed to this, I want to put a hold on this, was not on the floor. And as the manager of the Bill, I said I have no objection to this, and there was no objection.

The Senator's staff was livid. But I said, if the Senator really, really wants to object to this, the Senator has to be on the floor. Now, I sound braver than I was. Because I cleared it with the Majority Leader, who said sure, go ahead.

So here are two examples of a Majority Leader saying, the Senator has to show up or his hold will not matter, or the Majority Leader saying to a Senator who called him from Europe, okay I will honor that, you do not have to show up, you can continue your trip abroad and a de facto filibuster will be on it.

I would like you both to comment on that. And the pressures, maybe Marty you have a better insight into this than any of us, the pressure is on the Majority Leader when something of this comes up, because if a Majority Leader says, and I have had Majority Leaders tell me, Trent Lott you know, if he does not show up, never mind.

Now it was somebody with whom Trent had a particular problem. But would that kind of action on the part of the Majority Leader produce the kind of efficiency that we are talking about without any changing in the rules? And what are the pressures on the Majority Leader to say, oh no, you do not dare do that.

Give me some reaction to that.

Mr. PAONE. Well obviously everything is on a case-by-case basis. We had one situation where Mitchell was trying to get an agreement on a Bill and a senator called in who was watching on CSPAN, and they called in from their living room and said they wanted to object. And I told Senator Mitchell about that Senator

and where he was and he said, tell him he needs to come to the floor if he wants to object.

And that is why when we as the floor staff would help with new staff when they would come over at the beginning of a Congress, we would explain to them that letters you write, do not consider them hold letters. We call them consults. Because your hold letter is only as good as your ability to get a Senator to the floor to object, and to debate the motion to proceed. We would warn people that just because you say you have an objection does not mean that the item is not going to come up. You have to be able to produce the senator to fillibuster.

And like I say, it is on a case by case basis. That one instance, on Alito, yes, there was a situation where a member was out of the country and he wanted to be involved with the vote or the debate, but quite frankly, he was not the only one, if my recollection is correct, that was opposed to Alito. So that is not what completely stopped that in its tracks.

Yes, the Majority Leader does have that ability to ignore a "hold" request. But at some point he is also the Leader of his party, and he is responsible for looking out for the interest of his members. And he will tell them yes I will look out for your interests, but you have to at some point come over and do it yourself. You cannot expect me to be the one debating that issue. You are the one who has the opposition. I will buy you some time, I will honor your objection for a period of time, but eventually you are going to have to be the one to come here and oppose this issue.

Mr. ORNSTEIN. Senator I do think that one real problem with the Senate now is that there is way too much deference to individuals even though it is a body made up of individuals. My favorite story about the Senate is when Senator Mitchell left this body at a very young age, and he went out and interviewed to be Commissioner of Baseball, and met with the owners. And when he came out, one of his friends said, why would you even consider a job like that? You would be the handmaiden to 28 of the most out of control egos in the world. And Mitchell said, well that would be a 72 percent reduction from my current job.

And of course what happens is people put holds on, and Leaders protect them. And when you do not protect them—I thought Trent Lott was a terrific Leader, but when he ran into trouble he did not have a safety net deep enough, because I think some of his colleagues resented the fact that he did work to make the trains move on time.

Now, Leaders can do a lot more. We are going to get an interesting test to this perhaps now with Senator DeMint. My inclination would be to say, go to the floor, go 24 hours, and make him stay there. If he wants to object and deny unanimous consent, then that is what he is going to have to do.

And I would like to see whether his colleagues, the overwhelming Majority of whom think that this is, even though there is a reason to want to have some time to look at things, not the best way to go, will protect him. But I doubt very much that that will happen.

Now if we could have the change in the way Leaders operated with their members, and the members said I will give up some of my individual prerogatives to protect the good of the institution, I

would be delighted with that and it might obviate the need for many of these rules changes.

But going back to where we started, I am afraid we are going to get a bunch of people coming into this body, probably more than 20, a Majority of whom would never even consider something like that as being within their universe.

Chairman SCHUMER. Thank you. Senator Durbin.

Senator DURBIN. Thanks, both of you for your testimony. And I can recall that when I was first elected to the Senate in 1996, and sworn in in 1997, I ran across Howard Metzenbaum at an event, who had recently left the Senate. And he kind of pulled me to his side, put his arm on my shoulder and said, you got to know the Senate rules. And you got to realize, that if you do not care if they hate—I am going to clean this up a little bit—If you do not care if they hate you, you can get an awful lot done in the Senate.

And I did not see this in my own experience, but I am told that there were times when there were three Chairs on the floor. The lead sponsor of the Bill, manager of the Bill, the ranking Republican, and Senator Metzenbaum. And the amendments to finance Bills cleared all three desks so they did not move.

And he waited, and dragged things out until in desperation Senator Mitchell or others would come to him on a Friday and say, what will it take? And he would hand them a list, and say, this is what I am waiting for. And at the end of the day, a lot of people were upset with him, but as he said, he achieved some certain things.

I will say one thing in defense of Senator Metzenbaum, he was on the floor, from told, and involved in it. Now we get emails from Senators, from their staff, serving notice on all of us, that they have created something called a steering Committee, on your side. I did not realize that there was such a thing, but apparently there is.

And this Senator said, our steering Committee will decided what we consider on the floor of the Senate this week. This is a staffer saying to other staffers, so please refer anything your interested in moving on the floor to us, or it is not going to move. This doing things by mail or remote, to me defies logic and should not be protected by this institution.

Now let me go to a particular point that you raised, Mr. Paone. You talked about moving nominations. But now we are not dealing with a controversial nomination. We are dealing with a large number of non-controversial nominations, that are being subjected to filibuster. Nominations as we have noted came out with overwhelming votes, if not unanimous votes, out of Committee, and will probably have the same experience or close to it on the floor, that are being filibustered.

Even if you took your approach, Marty, in terms of where you wanted to go, and you had to deal with a hundred nominations, it is impossible. Would you find any way of bringing them together, say all right, we are going to move these ten nominations unless 40 members will sign, saying that they are opposed to it? Tell me how we deal with the volume that we are being faced with, and the number of filibusters that bear no relevance to protecting the rights of the Minority which is destined to vote for them.

Mr. PAONE. It is, I agree, it is a difficult problem. Trying to bundle nominations together, however I can feel Senator Byrd rolling in his grave right now, because we would sometimes talk to him about, well can you maybe bundle some together in one cloture motion or something like that. And he would point out that you could have individuals in that bundle that someone may want and others may not.

So it is difficult to bundle nominations because each one is unique. But again, you have to, maybe you cannot get them all done, make better use of the clock. Quite frankly, you may end up in a situation—I am not in favor of it, I worked for the Democrat side, but if the House flips in the upcoming election then next year you may not have too much in the way of legislation going back and forth between Houses then you may have a lot of time to spend on nominations.

So they will need to be done in a drawn out basis. Some of these nominations, yes the Administration was a little slow in sending them up. And yes, due to some obstruction, you do have a large backlog. You are just going to have to use the clock just like you did for Healthcare from Thanksgiving to Christmas.

Senator DURBIN. I understand what you are saying, but when you look at even taking a day or two for each nomination, if—And I think there will be some who will be hell bent on exercising the filibuster on everything, controversial or non-controversial—It is just physically impossible. It makes the Senate not an institution to be respected for its principles, but a dysfunctional institution which apparently is not even committed to principle.

If ultimately the Minority is going to vote for the nominee, then we are not protecting the rights of the Minority with the rules that enshrine the right of some person to make it too days instead of two hours to vote on that nomination.

That to me—I do not think we bring respect on the institution nor give ourselves a functioning role in this important process. Thank you all very much for your testimony.

Mr. ORNSTEIN. If I could add Senator Durbin?

Senator DURBIN. Of course.

Mr. ORNSTEIN. I am sorry, Senator Alexander left. But I plead with you next year to really work on changing the broken nomination and confirmation process. It is damaging to the fabric of governance. We have large numbers of positions that are unfilled. Now two years into an Administration. A good part of the problem is an Administration that had moved them too slowly, but much of it is in the Senate. And there are a lot of things that need to be cleaned up.

But if we are going to make some changes to streamline things, I would turn first to the nomination process. And as I suggested a little bit earlier, I would be happy if you could move it to a two-fifths bar for nominations alone. I think those are different. And the way in which people get held hostage by individuals and the way in which the process now gets used to use up precious time for no appropriate purpose is just not good for the Senate or for the country.

Senator DURBIN. Thank you.

Chairman SCHUMER. Senator Udall.

Senator UDALL. Thank you Chairman Schumer, and thank you very much to this panel. I think this has been a great panel, I think it has been very enlightening. And you have explored a lot of issues.

And I would like to take off, Mr. Ornstein, from where you did, talking about governance. Because that is the thing that worries me the most. I worry about the Senate as an institution, but then I worry, if the Senate is not working as an institution, then we are not doing the things the American people sent us here to do.

And we really right now have a broken institution. You talked about nominations. Apparently, the judicial Conferences said 44 of these judicial nominations are emergencies, and we cannot get them done, we do not have the time.

On the Executive side, I am used to an era when my Dad went into the Cabinet, that you had your team in the first couple of weeks. Apparently a year after this Administration was in office, they only had 55 percent of their Executive team in place. I do not know how you run a government under those kinds of situations.

It has been pointed out on the appropriations process, and Mr. Paone, you know this well, in the Senate we get to offer amendments on appropriations. So that is an important role. It is something that, you are almost like you are an appropriator. You do not have quite the detail.

This year, the remarkable thing has happened, no appropriations. So the major thing that we do in government, to keep the government running, to make the government efficient, to do that oversight, to hold those hearings and then to bring that Bill to the floor, we have not done any appropriations Bills and we're going to kick it over until December. So a sixth of the year will be gone. And that hurts the ability of government to do the things that I think the American people want it to do.

Authorizations, once again, major departments need to have that oversight. We used to do—my memory is on authorizations—we used to do at least Defense and Intelligence. This year we have not done those. And we had a vote on that.

And then, the House has passed, I think it is now the numbers counting and adding up every day almost 400 Bills that we have not dealt with. And all of this, and then the other issues that Norm, you, and Marty and others mentioned, I mean, Food Safety, Education, Jobs Bills, I mean, the list goes on and on and on. And many of those are contained in the House Bill.

So I see us as a broken institution that is not performing for the voters. And we need to break through that, and I think your panel has proposed some ideas. But, none of these ideas are going to be, and I think you have asked the question, going to be able to be put in place unless we take the constitutional option. I do not see us having 67 votes.

And believe me, I want to protect the right of the Minority to be heard, but I do not, as Senator Byrd said, want them to govern. The Minority should not be put in a governing situation.

And Mr. Chairman I would ask unanimous consent to put my opening statement in the record, because there was a part of that when it came, this opening statement when it came to the motion to proceed, Senator Byrd was for that. He was for that. He came

before our Committee and said he was for sensible change. And he would like to limit debate on that.

And actually in 1979 when he was the Majority Leader, took the Senate floor and said that unlimited debate on the motion to proceed, and I quote, quote here, "makes the Majority Leader and the Majority party the subject of the Minority, subject to the control and will of the Minority."

Senator Byrd was very powerful on that point. And despite the moderate change that Senator Byrd proposed, limiting debate on a motion to proceed to 30 minutes, it did not have the necessary 67 votes to overcome a filibuster.

So we are really(

Chairman SCHUMER. Without objection, your statement will be put into the record.

Senator UDALL. Thank you, Mr. Chairman. Senator Byrd, and he argued, you know the 67 votes at the time, Senator Byrd argued that a new Senate should not be bound by that rule, stating, "the Constitution in Article 1, Section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of a Congress, the Congress is not obligated to be bound by the dead hand of the past." That is what we have done. We have bound ourselves by rules that were passed in a previous Congress.

And so I have used all my time here, but I do want to try to ask a question. And I hope you will give me, Mr. Chairman a little bit of leeway. To me, there is something that brings accountability. And I know Marty, I wrote down your words here, those are, irreparable harm to the body. It is like a dagger in my heart.

But anyway, I am not trying to bring irreparable harm. There is to me a certain accountability to adopt rules every two years when you have a Congress. And I am not saying throw out all the rules. I am saying, let us be accountable. We hide behind, now, we hide behind the rules and say, oh we cannot change them.

We are all now talking reform. And I hope we have, I really want Republicans to join us. The preferable thing to me would be to get the 67 votes and to move forward. But if we do not have that, we have the responsibility to govern.

Don't you see a certain accountability in adopting rules every two years, under the Constitution, on the first day of a session? As far as I know, all legislatures do that. Parliaments do that, people do this around the world, they do it here in the United States. And I think that as long as we have respect for the institution and for the Minority to be heard, that this will bring accountability to the process.

And that is what—I do not view this as something that is sweeping aside. It makes us accountable, and then everybody knows, well hey if we abuse the rules, if you abuse the rules, then they can be changed two years from now.

Please go ahead. And sorry for running on so long there.

Chairman SCHUMER. Please take your time.

Senator UDALL. All of these speakers got me all geared up here.

Chairman SCHUMER. And you have—Senator Udall you have done a great job. You have increased awareness of this issue, you are the one who suggested these hearings to begin with. Take as much time as you want.

Senator UDALL. Mr. Chairman, you have done an excellent job too in putting these together.

Mr. PAONE. First of all, I would like to at least step back a moment. Everyone is talking about the broken system. This Congress will go down in history as probably one of the more productive Congresses in generations. You all have done extraordinary work, even with a broken system. Lilly Ledbetter. TARP. Stimulus. Healthcare. Financial Services. Two Supreme Court Justices.

These things take time. And they sucked time away from the authorizations and appropriations. Of course, one of the other reasons you do not have an appropriations Bill done is you did not do a budget. You cannot have one without the other. Let us face it, without the budget, the appropriations process flows a lot more slowly.

Now, as far as—and I did not use irreparable harm lightly. I did not mean, that you take it as a dagger. My only point is I look at things through the prism of, if I was still here in the Minority, what would be my reaction?

Now, I fast forward to January. I am in the Minority. You are still in the Majority, a smaller Majority than you have now probably. You use the constitutional option by Majority vote to change the rules in violation of your own rules. Rule 5 says they continue, and you cannot change them except in accordance with the rules. You have changed the rules using that option, and you even just said yourself, every two years we should adopt our own rules.

Well, that is fine, if that is the body you want to be. That is what the House does. So fast forward another two years, I am the Secretary for now the Majority. We have taken the place back. I am going to use your template to yes change those rules. Only I am not going to be nice and say, all we are taking away is the motion to proceed. I am going to say that whatever Bill comes up shall be, and whatever nomination, whatever comes to the floor for debate, shall be debated under the strictures as dictated by the Rules Committee. And the Rules Committee ratio shall be two-thirds majority, one-third minority.

And so you as an individual member will have just lost all your power to affect change. Because you will not be able to object to things coming up. You will not be able to put holds on things or be able to filibuster something. You as an individual member will then be another House member only in a smaller body.

And that is why I am afraid that if you go this route, it will be used down the road. And if every two years the Majority changes. If that is what happens, if that is what the end result of the Senate is going to be in the future, so be it. It is your call and ultimately you will have to answer to the folks, the voters. But that is my concern, it is similar to what Senator Dodd voiced, and I think Senator Byrd voiced in his last meeting here.

Chairman SCHUMER. Senator Ornstein—I mean, you are almost a Senator.

Mr. ORNSTEIN. That is quite all right, thanks.

Chairman SCHUMER. Mr. Ornstein.

Mr. ORNSTEIN. Just a couple of quick comments. One is of course, when this was tried in 1975, it brought enough of a jolt to the system that it actually forced bipartisan compromise. And in an ideal

world for me, we achieve a bipartisan compromise before we ever get to that point. If it happened in a way that forced a bipartisan compromise, I would prefer that to no change at all.

I would note that I am not sure that disaster occurred. If we could wave a magic wand and go back to having Majority required to change the rules, there is actually some restraint that is placed on both sides. If you know that it is going to be very easy to implement your own changes, if the Majority changes. So I do not think that it brings Armageddon.

But in the culture that we have now, I think Marty has got a point. Doing this would cause enormous inflammation out there. And it would be so much better if we could find a way to preserve the rights of the Minority and streamline the process to keep rogue individuals or even attempts at obstruction for obstruction's sake from occurring, and find two-thirds who would be willing to do it.

And I would hope that most of our efforts would be devoted to that purpose, and we would not have to turn to what—I think there is some sound constitutional reason to believe that a body cannot bind itself permanently into the future, but it is not a desirable course if we can avoid it.

Chairman SCHUMER. Senator Bennett has a final comment.

Senator BENNETT. Yes. Norm, that is why they called it the Nuclear Option. I was there when it was being discussed, and it came up with the phrase, the Constitutional Option to put a soft glow around it. But I think it was Trent in a moment of candor, for which Trent is known, and for which he paid, said, you do that and it is like setting off a nuclear bomb. That is the nuclear option.

And Marty, I think you are exactly right that you go in that direction. Yes, I think the Constitution can be described in a way that says you have the right to do it, but just because you have the right to do it does not mean it is the right thing to do.

And I had not thought it through in the way you have, in that, okay we will escalate here and here and here. But I think you are exactly right, that is what we will do. And if I may, Mr. Chairman?

Chairman SCHUMER. Please.

Senator BENNETT. I remember in our Conference a judge, and I do not remember who it was, we had the Majority but President Clinton was the President, and the judge was put forward, and our Majority was such that we were not going to be able to prevent this particular judge from going forward.

And a group of people within the Conference, very upset, well we have got 41 votes against him, we do not have enough to defeat him. But we have enough people in the Republican Conference to say, we have got 41 votes against him, let us filibuster him.

And the person who said, absolutely not, was Trent Lott. Because, he said, we do not filibuster judges. And if we were to do that, we would change the culture of this place. We just do not filibuster judges. That is not what you do.

And the Chairman of the Judiciary Committee, my senior and colleague, Senator Hatch, said, absolutely we do not do that, because we are going to win the Presidency in 2000, and if we filibustered this judge, that means they could filibuster some of our judges.

And so the younger members who had the bit in their teeth about, let us start filibustering judges, kind of stood down, and that judge went through. I have no idea who it was, I have no memory.

And when the decision was made to filibuster Miguel Estrada, that change took place. And we have all heard on the Senate floor when President Obama was sending up some nominees, and my friends on the Democrat side were saying now, quoting Mitch McConnell, you do not filibuster judges, because filibustering judges is the wrong idea. And Mitch said, you are right, I said it, I believed it, but you changed things and I am now playing by your rules.

And that is the best example I can think of, of what would happen if you used the constitutional option or the nuclear option to start turning around, fooling around with the rules. A future Minority Leader who became a Majority Leader or vice versa, would say, I may have said that in the past, but this is where I stand now, and you have changed the rules.

Mr. PAONE. Can I respond?

Chairman SCHUMER. Please.

Mr. PAONE. Far be it from me to get into a judicial nomination discussion here, but in that era, when you are in the Majority, President Clinton was in the White House, you did not have to filibuster judicial nominees, you just did not report them out of Committee.

And historically, it is not the first time a judge was fillibustered. Abe Fortas was denied his Chief Justiceship on the Supreme Court as a result of a filibuster. By the way, it was on a motion to proceed. In those days you could still filibuster a nomination on a motion to proceed. He failed to get cloture on a motion to proceed, he then withdrew his nomination because there was a filibuster against that Supreme Court nomination.

And there were two judges. Ninth Circuit judges, Paez and Berzon, that Senator Lott, good to his word, I have to hand it to him, committed to call those up as a result of other negotiations. And he called them up and we did get them confirmed. But we did have to invoke cloture on both of those circuit nominations because there were filibusters on each of those two judges. We did get cloture and those two are on the Ninth Circuit. But I just wanted to clarify some of that.

Chairman SCHUMER. I would just make one other point here. And this is for another hearing, and we are going to have to break. We got to vote at noon I think.

But one of the differences that might have happened, even in the last ten or fifteen years—I am not sure if this is true—the Leader whether it is a Minority Leader or Majority Leader has less desire, less ability, call it what you will, to tell a small group of recalcitrant Senators, to stop.

And what we find on this aisle is many of our Republican—on this side of the aisle—many of our Republican colleagues tell us they do not like what somebody will do on the other side in terms of blocking, but there are always 41 votes there to protect their right to do it. And I bet 15 or 20 years ago there might not have been.

So that is another element of this, that we got to think about.

Bob?

Senator BENNETT. I will just for the record disagree with your interpretation of what happened to Abe Fortas. I was here when it happened and I do not think he was killed by a filibuster.

Mr. PAONE. There was a cloture vote.

Senator BENNETT. They went through a procedure but that is not why he did not get on the court.

Chairman SCHUMER. We will not have another hearing on the Abe Fortas nomination.

I thank our witnesses. Very informative. I thank both Senators Udall and Bennett. And the others who participated.

Hearing is adjourned.

[Whereupon, at 11:54 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

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Senate Rules Committee
Hearing on "Ideas to Reduce Delay and Encourage Debate in the Senate"
Statement of Senator Tom Udall
September 29, 2010

Mr. Chairman,

Thank you for holding this hearing.

Today's hearing on "Ideas to Reduce Delay and Encourage Debate in the Senate" highlights once again why our Rules are in desperate need of reform. I have been speaking for months about reforming the Senate Rules – not just the filibuster – and I am happy that we have the opportunity to discuss some of the other issues today.

Today we are discussing several ways to make the Senate a more functional body, while also ensuring that it retains its unique deliberative qualities. But until we agree that on the first day of the next Congress, a majority of the Senate has the constitutional right to change its rules, I am afraid that any proposed changes will never get a vote.

One idea we are discussing today illustrates my point. Making the motion to proceed non-debatable, or limiting debate on such a motion, has had bipartisan support for decades. This recommendation is often mentioned as a way to weaken the power, and abuse, of holds. Yet we are discussing it again today because the rules are unconstitutionally entrenched against change.

I was privileged to be here for Senator Byrd's final Rules Committee hearing, where he stated, "I have proposed a variety of improvements to Senate Rules to achieve a more sensible balance allowing the majority to function while still protecting minority rights. For example, I have supported eliminating debate on the motion to proceed to a matter … or limiting debate to a reasonable time on such motions."

In January 1979, Senator Byrd – then Majority Leader – took to the Senate Floor and said that unlimited debate on a motion to proceed, "makes the majority leader and the majority party the subject of the minority, subject to the control and the will of the minority."

Despite the moderate change that Senator Byrd proposed – limiting debate on a motion to proceed to thirty minutes – it did not have the necessary 67 votes to overcome a filibuster. At the time, Senator Byrd argued that a new Senate should not be bound by that rule, stating:

> "The Constitution in article I, section 5, says that each House shall determine the rules of its proceedings. Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past."

Efforts to reform the motion to proceed have continued since. In 1984, a bi-partisan "Study Group on Senate Practices and Procedures" recommended placing a two-hour limit on debate of a motion to proceed. That recommendation was ignored.

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In 1993, Congress convened the Joint Committee on the Organization of Congress. The Committee was a bipartisan, bicameral attempt to look at Congress and determine how it can be a better institution. Senator Pete Domenici, my immediate predecessor, was the co-vice chairman of the committee. Senator Domenici stated at a hearing before the Joint Committee, "If we abolish [the debatable motion to proceed], we have gone a long way to diffusing the validity of holds."

But here we are again today – more than thirty years after Senator Byrd tried to make a reform that members of both parties have agreed is necessary. And there is one major obstacle to achieving rules reform – the Senate Rules themselves.

The current rules – specifically Rule V and XXII – effectively deny a majority of the Senate the opportunity to ever change its rules. This is something the drafters of the Constitution never intended.

I believe the Constitution provides a solution to this problem. Colleagues, as well as constitutional scholars, agree with me that a simple majority of the Senate can adopt or amend its rules at the beginning of a new Congress because it is not bound by the rules of the previous Congress.

I again thank the Chairman for holding these important hearings. But talking about change, and reform, does not solve the problem alone. We must act. We can hold hearings, convene bi-partisan committees, and study the problem to death, but until we agree that the Constitution provides the right for each Senate to adopt its rules of proceedings by a simple majority vote, there will be no real reform.

It's our chance to fix the rules that are being abused, like the filibuster, secret holds, and the amendment process. This is our chance to bring accountability back to the Senate and to return power to the American people.

The predecessor of my Senate seat, Clinton Anderson, was one of the first proponents of adopting rules at the beginning of a Congress. In 1957 he said on the Senate floor that, "It is our duty to take responsibility for the rules which will govern our procedures, and not to cast that responsibility upon the dead hands of past Congresses." I agree with him, and I hope that my colleagues will join me in fulfilling our duty next January.

In the meantime I am looking forward to the testimony of our distinguished panel today and am confident this will be as illuminating and interesting as the previous five hearings on this topic have been.

Thank you, Mr. Chairman, and I ask unanimous consent for all of the items I cited in my testimony be included in the record.

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for the introduction of bills, resolutions, and statements at the desk be in order until 5 p.m. today.

The PRESIDING OFFICER (Mr. CRANSTON). Without objection, it is so ordered.

ORDER FOR THE REFERRAL OF TREATIES AND NOMINATIONS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that for the duration of the 96th Congress it be in order to refer treaties and nominations on the days when they are received from the President, even when the Senate has no executive session that day.

The VICE PRESIDENT. Without objection, it is so ordered.

AUTHORIZATION FOR COMMITTEE ON ETHICS TO MEET DURING SENATE SESSIONS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that for the duration of the 96th Congress, the Ethics Committee be authorized to meet at any time during the session of the Senate. This would put the Ethics Committee in the same category as the Appropriations Committee and the Budget Committee now enjoy.

The VICE PRESIDENT. Without objection, it is so ordered.

AUTHORIZATION FOR RECEIPT OF BILLS, JOINT RESOLUTIONS, CONCURRENT RESOLUTIONS AND SIMPLE RESOLUTIONS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that during the 96th Congress Senators may be allowed to bring to the desk bills, joint resolutions, concurrent resolutions and simple resolutions.

The VICE PRESIDENT. Without objection, it is so ordered.

ORDER FOR TIME LIMITATION ON ROLLCALL VOTES

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that for the duration of the 96th Congress there be a limitation of 15 minutes each on any rollcall vote with warning signal to be sounded at the midway point, beginning at the last 7½ minutes, and when rollcall votes are of 10-minutes duration the warning signal be sounded at the beginning of the last 7½ minutes.

The VICE PRESIDENT. Without objection, it is so ordered.

STANDING ORDER TO RECEIVE REPORTS AT THE DESK DURING 96TH CONGRESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that during the 96th Congress it be in order for the proper members of the staff to receive reports at the desk when presented by a Senator at any time during the day of the session of the Senate.

The VICE PRESIDENT. Without objection, it is so ordered.

SENATE RESOLUTION 9—PROPOSED AMENDMENT OF STANDING RULES OF THE SENATE

Mr. ROBERT C. BYRD. Mr. President, I would hope to have the attention of the Members at this point. They may relax. I do not intend to pull any fast ones at the moment.

[Laughter.]

I am about to send to the resk a resolution which would change certain rules of the Senate. I will be speaking for a few minutes and Members may take it easy. But I would like to have their attention.

I believe the time has come for the Senate to modify Senate rule XXII. At the present time, there is no Senate rule XXII, for all intents and purposes. Cloture may be invoked on a matter and, after having been invoked by 60 Senators—a constitutional three-fifths—that matter may be drawn out interminably by a single Senator, by two or three Senators, or by a larger group of Senators.

They may offer dilatory motions and amendments in spite of the rule. They may call up 100 amendments, 200 amendments, 500 amendments, 1,000 amendments, any number of amendments. There is no rule providing for a second cloture motion to stop the kind of so-called debate.

Thus, one Senator, two Senators, three Senators, or a minority of Senators of any number may thwart the will not only of a majority but of a three-fifths majority of the Senate, which, having voted for cloture, signifies its will that the debate shall come to a close and that the pending matter shall be acted upon one way or another.

I do not believe that this is in the national interest, and I do not believe it is fair play. The majority of the Senate is entitled to fair play. Three-fifths of the Senators who vote in a given instance to invoke cloture are entitled to fair play. They are entitled to see a matter come to a final decision at some point after a reasonable amount of debate. All Senators are entitled to offer motions and amendments, but not to abuse the rules of the Senate and to impose upon the courtesy of their colleagues and make the Senate a spectacle before the Nation.

And so, Mr. President, I have come to the conclusion, after a lot of wrestling with my own conscience, that the time has come to do something about this situation.

We live in the 20th century, and we live near the end of the 20th century. We are about to begin the 8th decade of the 20th century. I say to you that certain rules that were necessary in the 19th century, and in the early decades of this century must be changed to reflect changed circumstances.

It is becoming more and more necessary, as we face this mad rush of life and today's new issues, international and domestic, that the Senate have rules that will allow it to deal with these issues effectively, in a timely and orderly fashion.

It is now possible for the Senate to engage in at least two filibusters on any given issue. If the majority leader moves to take up a bill on the calendar, he can only do so by unanimous consent, or by motion, which is debatable—except within a tiny time frame within the first 2 hours of a new legislative day, and under certain circumstances only. Otherwise, on that motion to proceed to debate, the debate is unlimited. It makes the majority leader and the majority party the subject of the minority, subject to the control and the will of the minority. I am not speaking of a minority necessarily as a party, but it makes the majority leader subject to the will of a minority of Senators: as few as one Senator on either side of the aisle. If I move to proceed—or if any future majority leader moves to proceed to take up a matter, and unless he works it into that infinitesimally small time frame within the first 2 hours of a new legislative day—then one Senator can hold up the Senate for as long as he can stand on his feet.

Time and time again I seek to bring up bills on the calendar. Time and time again I am confronted with situations in which it is said, "Such-and-such a Senator is not here; he has a hold on that bill."

"Well, let us go to another bill."

"Well such-and-such a Senator has a hold on that bill, and he is not here, either."

"Well, let us go to this other bill."

"Well, such-and-such a Senator will object to that. He is here, but he will object."

So what kind of predicament is the majority leader in? He can move, but he is put in the position of making a debatable motion, so that any single Senator or any group of Senators, however small, can talk until such time as cloture is invoked.

So this rule needs to be changed to allow the leader of the majority party to move to take up a matter and, after a reasonable period for debate, proceed to vote on the motion to proceed. A majority of the Senate can vote to proceed to take up the matter, or can vote to reject the leader's motion. In any event, it gives the majority party and the majority leader an opportunity to work to get the business of the Senate transacted in timely and orderly fashion.

The present rule of the Senate allows two filibusters on any matter: A filibuster on the motion to proceed, and a filibuster on the particular matter once it is before the Senate. I say before all the world that Senators have a right to filibuster a matter, but the filibuster should be on the merits. There should not be a filibuster on the mere motion to proceed to take up the matter. If the opposition has 41 votes, they can kill any bill by filibustering the bill or resolution itself. They should not put the Senate through the misery of a double filibuster: A filibuster on the motion to proceed; and then, if the matter is taken up, a filibuster on the bill itself. They should allow the Senate to proceed to the consideration of the matter, and then conduct their filibuster. Otherwise, the Senate is put to the test of cloture after

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cloture after cloture, on the motion to proceed and, if cloture is invoked, then cloture to shut off debate on the matter itself.

One filibuster is enough. If a minority of the Senate has enough votes, 41, to kill a bill, it should allow the bill to at least be brought up for debate on the merits.

This matter of the filibuster has gotten to the point that the Senate is continually being faced with the filibuster threat. The mere threat of a filibuster, these days, is nearly as bad as the filibuster itself. We have seen, in the last 9 years since 1970, more filibusters conducted in the Senate than occurred in the previous 30 years. I cannot make that statement with assurance of absolute accuracy, but I will not miss it by much. I will say it again: The Senate, beginning in 1970, inclusive of 1970, has seen more filibusters than were conducted in the 30 years prior to 1970. Let me just discuss that for a moment.

In 1935 there were three filibusters, and in 1 subsequent year between 1935 and 1970 there were three filibusters. So in each of 2 years out of the period 1935 through 1970, there were three filibusters. There were at least 10 years during that period in which no filibuster occurred at all in any one of the 10 years—not a 10-year period, but 10 separate years. There were another 10 or 11 or 12 years during that period of time in which one filibuster occurred—only one in each of such year. And there were a few years in which two filibusters occurred in each year.

But we have reached the point now where every year we can expect 4, 5, 6, and as many as 10. I believe that in one recent year there were as many as 10 or more filibusters. Yes; in 1975 there were 12 filibusters, according to the information I hold in my hand.

Now we are becoming more and more the victim of this ingenious procedure that allows, first, a filibuster threat; second, the filibuster on the motion to proceed; third, the filibuster on the matter itself; and fourth and finally, the cost cataclysmic and divisive filibuster of all, the postcloture filibuster.

Now, Senators know what happened the year before last on the filibuster on the natural gas pricing bill. A small number of Senators utilized the rules and created a situation in which the bill would have been killed had the majority leader not used extraordinary procedural tactics to save that bill. If I had to do it all over again tomorrow, I would do it over again tomorrow. But Senators know what happened. It created bad feelings. It was a very divisive thing.

I can understand that some Senators were outraged at the procedures that I used to save that bill. But if I had not used those procedures, the conference report on that bill would not have reached the floor at the end of the last session, and we would not have passed that bill. I did what I thought I had to do. In exactly the same circumstances, I would do it all over again, and I would understand the outrage that would meet that effort.

Now, ladies and gentlemen, my colleagues, this postcloture filibuster is the kind of thing that creates ill feelings and deep divisions in the Senate. It is fractious; it fragments the Senate, it fragments the party on either side of the aisle, and it makes the Senate a spectacle before the Nation. It is not in the national interest.

So these are among the rules that I propose to modify, or to change.

There is not change which I have proposed which is not a reasonable change and which I cannot, as majority leader, stand up here and justify.

Now, I am going to yield to the minority leader in a few minutes, but I am not quite ready to yield to anyone at this moment.

I have been majority leader 2 years. I was majority whip 6 years, and I was secretary of the Democratic conference for 4 years.

In those 12 years out of my 20 years in the Senate, I dare to say that it cannot be challenged that I have stayed on this floor more than any other Senator since the first Senate met in 1789. I have stayed on this floor more than any other Senator in all of the history of the Senate for an equal given period of time—12 years.

I know pretty well what the Senate rules and precedents are. No man ever becomes a master of them. But I know something about them. Having been in the leadership for 12 years, I know what the difficulties are of having to lead the Senate.

The minority leader has a different responsibility to some degree. He, too, must share the responsibility of leading the Senate. He has cooperated, and we have worked together well. I can say the same for the distinguished minority whip, and I do not have a better friend in the Senate than TED STEVENS. He is my ranking minority member on my Appropriations Subcommittee on the Department of the Interior.

These are men I love, and I value their friendship. I appreciate the cooperation and the courtesies that they have extended to me.

The minority leader does have some of the responsibilities of keeping the legislative process moving, and he has worked with me in that regard. But he has a responsibility, also, of protecting the members of his party. He carries out his responsibilities exceedingly well. He is to be commended. I understand the function and the role of the minority party. It has an adversary role in many instances. There are instances in which, thank heavens, we have worked together. In most instances we do, and that is in the best interest of the Nation. There are times when the minority feels it is in the best interests of the Nation that they take an adversary role, and I respect them for that.

But I say to Senators that the majority has the responsibility of leading. The majority has the responsibility of keeping the legislative process moving. I can tell Senators that after 12 years in the leadership, I am only proposing changes that make it reasonably possible for the majority party, the majority leader, and, in certain instances, the majority of the Senate—forgetting party for a moment—the majority of the Senate on both sides to work its will on matters, especially after cloture has been revoked. It is for this combination of reasons that I am offering this resolution today.

I base this resolution on article I, section 5 of the Constitution. There is no higher law, insofar as our Government is concerned, than the Constitution. The Senate rules are subordinate to the Constitution of the United States. The Constitution in article I, section 5, says that each House shall determine the rules of its proceedings.

Now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past.

Take rule XXXII, for example, the second paragraph thereof which says that the rules of this Senate shall continue from Congress to Congress until changed in accordance with these rules.

That rule was written in 1959 by the 86th Congress. The 96th Congress is not bound by the dead hand of the 86th Congress.

The first Senate, which met in 1789, approved 19 rules by a majority vote. Those rules have been changed from time to time, and that portion of Senate rule XXXII that I just quoted was instituted in 1959. So the Members of the Senate who met in 1789 and approved that first body of rules did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate. The Senate of the 86th Congress could not pretend to believe that all future Senates would be bound by the rules that it had written. It would be just as reasonable to say that one Congress can pass a law providing that all future laws have to be passed by two-thirds vote. Any Member of this body knows that the next Congress would not heed that law and would proceed to change it and would vote repeal of it by majority vote.

I am not going to argue the case any further today, except to say that it is my belief—which has been supported by rulings of Vice Presidents of both parties and by votes of the Senate—in essence upholding the power and right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress.

I have not always taken that position, but I take it today in the light of recent bitter experience. The experience of the last few years has made me come to a conclusion contrary to the one I reached some years ago.

Now, Mr. President, I am going to offer a resolution, and I am going to make a motion, and I am not going to press the Senate into any vote today. I do not want to proceed in such a fashion. I want the Senate to take a week or 10 days to debate this resolution, and let any Senator any amendment that he wishes to offer. Let the Senate vote on amendments, and then vote up or down on the resolution. Vote it down if it is the majority of the Senate's wish. If the majority of the Senate wants to amend it, so be it.

If the majority of the Senate does not

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like a single provision I have put in that resolution that is quite the Senate's prerogative, and I will bow to the will of the Senate. I do not want to be pushed into a situation where a majority of the Senate at the beginning of a new Congress will change the rules. But I make this prediction:

The majority of the Senate may not back me up today. This is the opening day, and we will recess so that we will still be in the opening legislative day when we come back on Thursday. I make a prediction that if the majority of the Senate does not back me up in this effort, if we, cannot get a time agreement; if we cannot work out something—but I feel that we can, that is why I am not going to press it to a vote today; I feel that we can work out a resolution; I believe that there are members of the minority who want to see something done about this postcloture situation; I want to be a reasonable man; I do not want to be put in the corner of having a proceed by majority vote.

But I will say this to Senators: I might have to do just that, and I am going to leave the way open to do that, and if I do that and fail, I will not be ashamed of having tried. If a majority of the Senate does not want to change the rules, I will have done what I think is best. But the time will come when every Member of the Senate will rue the day that we did not change that rule XXII in such a way that these very devisive postcloture situations can be eliminated and the Senate can get on to work its will and serve the national interests.

I predict further that if these postcloture filibusters continue, the day will come when the majority of this Senate will rise up and will strike down that rule and will change it; and there may then be greater and more far-reaching changes proposed than I have proposed today.

I may not be around here when that happens, but a majority of the Senate is not going to be patient much longer and the Nation is not going to stand for government by postcloture filibuster on the part of one, two, three or a small minority of the Senate, flaunting the will and defying the will and thwarting the will of the majority of Senators who have voted to invoke cloture on a given matter.

So, I say to Senators again that the time has come to change the rules. I want to change them in an orderly fashion. I want a time agreement. But, barring that, if I have to be forced into a corner to try for a majority vote, I will do it because I am going to do my duty as I see my duty, whether I win or lose.

If 51 Senators do not back me up in that, I will have done my duty. They will have done theirs as they see fit. I believe that they will come to see that, if we can only change an abominable rule by a majority vote, that it is in the interests of the Senate and in the interests of the Nation that the majority must work its will. And it will work its will.

Having said that, I say no more today. I will certainly yield to the distinguished minority leader. I want to retain my right to hold the floor. I want to protect myself in this matter. I do not relish the idea of hogging the floor, but I do want to protect my position in this situation.

It is not my intention to put the Senate to the test today. I intend only to call up the resolution and make a motion to proceed to its consideration. Then it will be my intention to move to recess over until Thursday, thus giving the minority leader and myself and other Senators an opportunity to discuss it.

So, Mr. President, I do not intend to yield the floor today, and I do not say that dictatorially or dogmatically, I just say it out of necessity; I am going to protect the rights of the minority leader—I send to the desk a privileged resolution to amend the standing rules of the Senate, and I move that pursuant to article I, section 5 of the Constitution, the Senate proceed to its immediate consideration without debate of the motion.

The VICE PRESIDENT. The resolution will be stated.

The legislative clerk read as follows:

S. RES. 9

Resolved, That paragraph 1 of rule III of the Standing Rules of the Senate is amended by striking out all after the words "unless by unanimous consent" and inserting in lieu thereof the following: "or on motion decided without debate. Motions to correct the Journal shall be privileged, shall be confined to an accurate description of the proceedings of the preceding day, and shall be determined without debate."

SEC. 2. That rule VIII of the Standing Rules of the Senate be amended by inserting a new sentence at the end of section 2, as follows: "Debate on such motions made at any other time shall be limited to thirty minutes, to be equally divided and controlled by the Majority and Minority leaders."

SEC. 3. That rule XV of the Standing Rules of the Senate is amended by adding at the end thereof the following new paragraph: "The demand for the reading of an amendment when presented to the Senate for consideration, including House amendments, may be waived on motion decided without debate when the proposed amendment has been identified by the clerk and is available to all Members in printed form."

SEC. 4. That rule XVIII of the Standing Rules of the Senate is amended—

(1) by inserting after "QUESTION" in the caption a semicolon and the following: "GERMANENESS";

(2) by inserting "1." before "If"; and

(3) by adding at the end thereof the following new paragraph:

"2. (a) At any time during the consideration of a bill or resolution, it shall twice be in order during a calendar day to move that no amendment other than the reported committee amendments which is not germane or relevant to the subject matter of the bill or resolution, or to the subject matter of an amendment proposed by the committee which reported the bill or resolution, shall thereafter be in order. Such a motion shall be privileged and shall be decided without debate.

"(b) If a motion made under subparagraph (a) is agreed to by an affirmative vote of three-fifths of the Senators present and voting, then any floor amendment not already agreed to (except amendments proposed by the committee which reported such bill or resolution) which is not germane or relevant to the subject matter of such bill or resolution, or to the subject matter of an amendment proposed by the committee which reported such bill or resolution, shall not be in order.

"(c) When a motion made under subparagraph (a) has been agreed to as provided in subparagraph (b) with respect to a bill or resolution, points of order with respect to questions of germaneness or relevancy of amendments shall be decided without debate, except that the Presiding Officer may, prior to ruling on any such point of order entertain such debate as he considers necessary in order to determine how he shall rule on such point of order. Appeals from the decision of the Presiding Officer on such points of order shall be decided without debate.

"(d) The provisions of this paragraph shall not apply to amendments subject to the rules of germaneness and relevancy contained in paragraph 4 of rule XVI and paragraph 2 of rule XXII."

SEC. 5. A. That (a) line 5 of the first paragraph of paragraph 2 of rule XXII of the Standing Rules of the Senate is amended by striking out "or the unfinished business," and in the line above inserting "or" before the words "other matter pending before the Senate," and lines 6 and 7 of the second paragraph of paragraph 2 is amended by striking out ", or the unfinished business.".

(b) The second paragraph of paragraph 2 of rule XXII of the Standing Rules of the Senate is amended by inserting at the end thereof a new paragraph as follows: "After one hundred hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The amount of time specified in the preceding sentence may be increased, or decreased (but to not less than ten hours), by the adoption of a motion, decided without debate, by a threefifths affirmative vote of the Senators duly chosen and sworn. At any time after ten hours of consideration, any remaining time may be reduced, but to not less than ten (10) hours, by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to reduce time and only one motion to extend time, specified above, may be made in any one calendar day.".

(c) The last paragraph of paragraph 2 of rule XXII of the Standing Rules of the Senate is amended by striking out the first sentence and inserting in lieu thereof the following: "After cloture has been invoked, no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks.".

B. That Rule XXII of the Standing Rules of the Senate be amended by inserting a new paragraph at the end of section 2 as follows:

"After September 1 of each calendar year until the end of the session, the application of the provisions of section 2 of rule XXII shall be modified to provide that if a proper motion to invoke cloture has been filed pursuant to section 2, it shall be in order to proceed immediately to the consideration thereof, and after three hours of debate, equally divided and controlled by the Majority and Minority Leaders, the Senate shall proceed to vote on the adoption of that motion, and if that question shall be decided

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in the affirmative by a three-fifths vote of the Senators duly chosen and sworn, then said measure, motion, or other matter pending before the Senate shall be the unfinished business to the exclusion of all other business until disposed of. All other provisions of section 2 of rule XXII shall be applicable to any question on which cloture is invoked pursuant to this paragraph."

SEC. 6. That rule XXVII of the Standing Rules of the Senate is amended by adding at the end thereof the following: "The demand for the reading of a conference report when presented may be waived on motion decided without debate when the report is available to all Members in printed form.".

SEC. 7. That section 133(f) of the Legislative Reorganization Act of 1946, as amended, be amended to strike the words: "at least three calendar days (excluding Saturdays, Sundays and legal holidays)" and insert in lieu thereof the words: "at least two calendar days (excluding Saturdays, Sundays, and legal holidays, except when the Senate is in actual session on such days)".

SEC. 8. That (a) the Committee on Rules and Administration is authorized and directed to provide for installation of an electronic voting system in the Senate Chamber.

(b) The expenses incurred in carrying out the provisions of subsection (a) shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the Committee of Rules and Administration.

Mr. ROBERT C. BYRD. Mr. President, there is one area that I modify. I modify on page 3 the words "to recommit." Strike those words.

Mr. President, before I yield to the distinguished minority leader, and I beg his indulgence—if I may have the attention of all Senators—I said that I would attempt to get a unanimous-consent agreement.

I ask unanimous consent that the Senate proceed immediately to the consideration of the resolution, that during the consideration of the resolution, debate on any amendment be limited to 2 hours, to be equally divided between and controlled by the mover of such and the Senator from West Virginia (Mr. BYRD); that debate on any debatable motion, appeal, or point of order which is submitted or on which the Chair entertains debate shall be limited to 1 hour, to be equally divided between and controlled by the mover of such and the Senator from West Virginia (Mr. BYRD); *Provided*, In the event the Senator from West Virginia (Mr. BYRD) is in favor of any such amendment or motion, the time in opposition thereto shall be controlled by the minority leader or his designee; *Provided further*, That no amendment that is not germane to the provisions of the said resolution shall be received; *Provided further*, That the Senate proceed to vote on the question of agreeing to the resolution no later than 3 p.m. on Tuesday, January 23, 1979, without further amendment, motion, point of order, or appeal, unless pending, with the exception of one request to ascertain the presence of a quorum; *Provided, further*, That on each day between now and the time for final action on the resolution when the Senate meets, there be 6 hours allotted for debate on the resolution, to be equally divided between and controlled, respectively, by the majority leader and the minority leader; that the said Senators, or either of them, may, from the time under their control on the question of agreeing to the resolution, allot additional time to any Senator during consideration of any amendment, debatable motion, appeal, or point of order.

That completes my request.

Mr. President, I do not lose the floor by virtue of Senators reserving the right to object. Am I correct?

The VICE PRESIDENT. The Senator is correct.

Mr. ROBERT C. BYRD. I do not yield for any purpose other than reservations for rights to object or for an objection.

I yield now to the distinguished minority leader.

Mr. BAKER. Mr. President, reserving the right to object, I begin, if I may, by commending the majority leader for——

Mr. ROBERT C. BYRD. Mr. President, before the Senator begins, I yield to the distinguished minority leader not for the purpose of his reserving the right to object, but for the purpose of his making a statement. That is, if he wishes to reserve the right to object, he may object. I do not want to put him under that condition. I do not yield for any purpose other than a statement or a reservation or an objection.

Mr. BAKER. That will save torturing some verbs in the course of this presentation.

Mr. President, I begin by commending the majority leader for his judgment and discretion in approaching this matter in this manner.

I will say in a few moments a few things about the unanimous consent request and the restrictions that I believe it lays on us. But I am genuinely pleased and happy that the majority leader has chosen to proceed in what I think is a more deliberate and profound way than might otherwise have been the case.

As is his custom, the majority leader advised me in advance of his intention to proceed on the first day with proposals for rules changes. On last Friday, he delivered to me a copy of the resolution which he has now offered, together with a section-by-section analysis.

It seems to me that his options were clear: that he could proceed, as he described, under the precedent and rules of the Senate, as he interprets them and as previous Presiding Officers have interpreted them.

I am speaking particularly of the situation in 1975, when the then occupant of the chair, Vice President Rockefeller, indicated that the question of the adoption of a rules change by majority vote presented a constitutional question which must be presented to the Senate. The effect of that ruling and subsequent motions, in the view of this Senator, was to provide the unhappy circumstance whereby the rules of the Senate might not only be changed by majority vote on the first day, but also, it is possible to do so without debate.

I reiterate: I am pleased that the majority leader has not chosen to do that. We are approaching a matter of some delicacy and difficulty with a degree of care which is also characteristic of the majority leader.

Mr. President, I do not know what we can agree to on this side, and I will elaborate that point in just a moment. But before I do that, I point out, as I am sure most of our colleagues are aware and will recall, that in the case of the most recent post-cloture filibuster, it was the majority leader and the minority leader, with the distinguished occupant of the chair, the Vice President, in the chair at the time, who managed to establish a line and series of precedents that created the possibility to at least accelerate the disposition of the controversy and conflict.

The point of the matter is that this is not, nor has it been, a matter that is purely partisan in its character. I rather suspect that there may be as many Members on his side of the aisle as there are on my side of the aisle who have a concern for that precedent and how it may affect us in the future. But that is, at best, only tangential and collateral to the matter that is before us now.

The matter at hand, in my view, is this: How can we avoid reiterating an unfortunate precedent, meet the procedural challenge of these times, and promote the best interchange of ideas between us to create a new rules situation with which we all can live, whether we are in the majority or the minority, now or in the future?

Mr. President, I can only speculate how the Members of the Senate on this side of the aisle will react to this resolution in detail; therefore, I will not do that. Rather, I will advise the minority leader and my colleagues that today, in anticipation of this dilemma, I have appointed an ad hoc committee, to be chaired by the Senator from Alaska (Mr. STEVENS), consisting as well of the Senator from New York (Mr. JAVITS), the Senator from Idaho (Mr. MCCLURE), the Senator from Rhode Island (Mr. CHAFEE), and the Senator from North Carolina (Mr. HELMS), to serve in an ad hoc capacity, to examine this proposal and propose to our conference our reaction, in an appropriate way, at the proper time.

Mr. President, I am not sure, frankly, that that can be undertaken with the deliberation that I believe it requires in order to bring this matter to a conclusion on January 23.

I hope would that there might be some flexibility in that timing. I would hope, for instance, that we might proceed on some basis that would give us a discretion to determine a final date, or, rather, even to leave the request without a final disposition date and to limit instead the consideration of amendments which may be proposed.

This is, of course, a matter which addresses itself to the majority leader and in no way suggests that I disapprove of what he has done because I recognize his responsibility. But I am sure he recognizes mine as well, because the protection of minority rights happens to be my special province in this Congress at this time.

I would hope that he would consider eliminating that provision of the unanimous-consent request for a final determination, as I understood his request, on January 23.

Mr. President, I have a number of amendments I prepared in anticipation

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of this resolution. I do not propose to offer them now. I think I could not do so under the rules except to offer them for printing, under the restrictions which would occur by reason of the yielding by the majority leader to me for a special purpose. But I think it is likely there will be a series of other amendments.

Mr. ROBERT C. BYRD. Mr. President, the distinguished Senator, of course, may send those amendments to the desk for their printing.

Mr. BAKER. I thank the Senator.

Mr. ROBERT C. BYRD. I continue to hold the floor but I yield for the stated purpose to the distinguished minority leader.

Mr. BAKER. Mr. President, I believe that is all I have to say at this time except to say that I share with the majority leader the belief that the post-cloture filibuster, a creature of fairly young age and recent development, is one that the Senate has not focused on adequately. I am prepared to do that and I want to do that. I believe we can do that. I am less sanguine about the possibility of dealing with the rules of the Senate which deal with matters before the invocation of cloture. I indicate this present frame of mind only by way of information to the majority leader.

Mr. JAVITS. Will the Senator yield?

Mr. BAKER. I see the distinguished Senator from New York on his feet. I wonder if the majority leader will consider yielding to him to speak on this matter.

Mr. ROBERT C. BYRD. I yield to the distinguished Senator from New York, reserving my right to the floor. I know that the distinguished Senator from New York wants to make only a similar statement. I yield only for that purpose.

The VICE PRESIDENT. The Senator from New York.

Mr. JAVITS. Mr. President, I might first state what I think ought to be done, and then to discuss the question. I think the precedent which was laid down when we began to fight the battles to amend rule XXII goes back 22 years, the length of my service here in the Senate. I believe the majority leader and the minority leader will find it highly artificial to proceed as he has to proceed today, by keeping his right to the floor and yielding only for very limited purposes, et cetera. This was preserved by Mike Mansfield by a unanimous-consent agreement. I hope it will be again. There was freedom of give and take. There was one unanimous-consent agreement which would be the rights of the majority leader to be fully preserved including the right for a summary vote on a motion to take up as well as the right to decide by a majority what should be the rule.

Second, I believe that the Senate can change what it did before. I am having our staff of this side run it down, but I believe in 1959 when we wrote into rule XXXII that the Senate Rules cannot be changed except according to rule XXII, I said at the time that it was pure rhetoric and that the Senate, of course, could change its rules because that was, in my judgment, and has been for 20 years, the dictate of the Constitution. Of course, I would have to maintain that position, and I believe it is the proper position under the Constitution.

That being said, I also would like to suggest to both Senators, because they have both shown a very equitable frame of mind as indeed they should, if possible, that it is going to be quite difficult to draft what we should do on the floor. The one thing upon which we should agree is a time limit because otherwise it might never be done. We should reserve the right of the Senate to vote on the constitutional issue because we would have to vote again to undo what it did before in the vote in 1975.

Within that framework, I deeply believe that it is going to take collaboration between the two sides with the best brains we have and the best outside brains we can consult to develop what we ought to do. I will say why.

While I consider what took place horrendous in terms of frustrating the will of the Senate and endangering the Nation perilously through the fact that we might not have passed any energy bill at all, though Lord knows as on Senator I think we have done infinitely too little and if I were President I would ration gasoline in this country tomorrow, but be that as it may I believe that equally horrendous without its being witting and without impugning remotely the patrotic motivation of the majority leader, was the sweeping aside of every right of the minority or of any Senator and not considering amendments, motions, requests for quorums, all of which went down the drain in one torrent.

This Government is built not only upon solarity but upon justice. Justice requires opposing briefs. That was a way of obliterating opposing briefs. I deeply belive, with all respect, we have to be as solicitous, if not more solicitous, about that right, about that freedom which we have to amend or to move even if it is a pain and an anguish as we do to facilitate our business.

(Mr. CRANSTON assumed the chair.)

Mr. JAVITS. I believe it can be done. I say to Senator BYRD. The human mind can contrive ways to meet this problem. Mr. BAKER has ideas, I am sure I have, and our committee will have.

Therefore, I conclude as I began, that this is an extremely critical effort. I see quite a few new Members in the Chamber. I hope they will realize how important this is to them. They will be here a lot longer when many of us are gone. They will have to live under these rules which will be prepared, manacles put upon our wrists, in their original pristine form even as we hear their form today.

I would suggest, therefore, that the majority leader and the minority leader contrive the unanimous-consent request which will give us the auspices for conducting this debate freely and easily and being able to work our will without constraints which at the moment are upon us. That has been done before and it can be done again.

Second, that we agree on a date by which this matter is to be determined. I believe that, again, that can be contrived. My belief would be that it is a matter, as I believe Senator BAKER indicated, of a month or a month and a half, something like that. Committees will have to be organized and begin to function.

Third, that we having appointed a small committee I would most respectfully suggest that it might be a good idea for the majority as well so that the two committees might meet together, might exchange ideas, might negotiate, might get all the expertise they humanly can. Then the Senate would vote on the constitutional question at a given time and then proceed to vote on amendments and motions up or down, again under unanimous consent, which would assure us we are not going to have a post-filibuster filibuster notwithstanding our unanimous-consent agreement.

Mr. President, I am deeply oppressed by the lawless state into which the Congress has fallen. There are reasons for it and the reasons are very impressive, of incompetence, of banality, of crime, and of the general dereliction in what the public perceives to be our services. I am a lawyer so that ancient adage applies to us: It is not what the facts are, we may be very virtuous, but it is what the jury thinks they are, and that is what the jury thinks they are.

I deeply believe, Senator BYRD, may I say to both of you, that we are starting in a very auspicious way if we deal with this question, and I hope that decency, the cooperation, the considerateness with which we deal with it will begin to restore us in the eyes of our fellow countrymen.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request?

Mr. BAKER. Mr. President, reserving the right to object——

Mr. ROBERT C. BYRD. Mr. President, if the Chair will withhold putting that question at the moment, I am very impressed by what both the distinguished minority leader and the distinguished Senator from New York have said. I am particularly impressed by the suggestion by the Senator from New York that there be a time limit—that there be a final vote. I have said Tuesday, January 23. I am not wedded to that date. It can be Tuesday or a month from then so far as I am concerned. I certainly would want to remove the constraints that obtain at the moment on all Senators.

I am willing to try to work out an agreement that will assure a vote without a filibuster, but a vote. If it is 6 weeks from today, that is all right with me, but I want a vote on this resolution. I want the Senate to have its opportunity to work its will on it, to make whatever changes the majority of the Senate feel necessary. That is all I am asking. I am asking for the majority of the Senate on both sides of the aisle to have its day, and then let us vote.

Now, I believe that, if I understand the distinguished Senater from New York correctly, that if there is going to be an objection to a final vote on the 23d, perhaps we had better just recess now and go out for a couple of days, and work out a time agreement that does provide a date for a final vote, and then proceed in accordance with that kind of agreement. If that is the consensus, I will not press

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any further with this request at this time. It is a request that gives us something to work with. I will leave it pending, and as soon as Senators have had their say on this matter, I will then move to recess for 2 days. In the meantime, perhaps, we can work out a time frame that will be suitable to all Senators. I am very agreeable to that.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. ROBERT C. BYRD. I yield.

Mr. JAVITS. I think the Senator ought to withdraw the request because it means an overhanging problem for everybody to be on the qui vive.

The Senator's rights are fully preserved. He still will have the floor, and he will when we recess. The Senator can have it when we come back by unanimous consent, and I would not leave that pending.

Other than that I agree with the Senator.

Mr. ROBERT C. BYRD. I shall withdraw the request. The reason I am going to withdraw this request is that I believe that reasonable minds are going to prevail, and I think there are 100 reasonable minds in this Senate.

Based on what the distinguished Senator from New York has said, I think this is a reasonable way to approach the matter. I hope that we can work out an agreement that would allow us a final vote on this resolution.

I am not wedded to the 23d. I just want a final vote on the resolution. I want Senators to have the opportunity to debate it. I want them to have an opportunity to amend it. I want them to have an opportunity to vote on it up or down as amended, if amended and, therefore, for the time being, with the understanding that I still hold the floor, I withdraw the unanimous-consent request.

The PRESIDING OFFICER. The request is withdrawn.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, without losing my right to the floor—and I do not lose the floor by asking unanimous consent—that a section-by-section analysis of the resolution to amend certain rules of the Senate be inserted in the RECORD. Of course, this analysis does not include the last provision in the resolution that dealt with electronic voting, but that speaks for itself.

There being no objection, the analysis was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS OF THE ENCLOSED RESOLUTION TO AMEND CERTAIN RULES OF THE SENATE

1. Section 1 of the resolution proposes to amend Rule III of the Senate to make motions to suspend the reading of the Journal in order without debate. Under the existing rules this can only be done by unanimous consent. Motions to correct the Journal would also be in order and not debatable under the proposed change.

2. Section 2 of the resolution would amend Rule VIII to provide that debate on motions to proceed to the consideration of any matter made at any time outside of the morning hour would be limited to not to exceed 30 minutes, to be equally divided and controlled by the majority and minority leaders, whereas under the existing procedure there is no limitation of debate on such motions.

3. Section 3 would amend Rule XV to provide that where an amendment is available to all members in printed form when presented, the demand for its reading may be waived by a majority without debate.

4. Section 4 of the resolution would amend Rule XVIII of the Senate by providing that during the consideration of a bill or resolution it would be in order to move without debate by a 3/5th vote that all subsequent floor amendments be required to be germane except for amendments recommended by the committee reporting the bill. Since there is a germaneness requirement on general appropriations bills under Rule XVI, paragraph 4 and under Rule XXII once cloture has been invoked on a matter, the provisions of this section would not apply in those two situations.

5. Section 5 of the resolution would amend paragraph 2 of Rule XXII to provide for a fixed time limitation on a measure or matter upon which cloture has been invoked. The fixed time of 100 hours of consideration would apply to all action including votes, quorum calls, etc., and at the end of that time no amendments, motions, etc., not then pending would be in order. However, one live quorum call to establish the presence of a quorum would be in order. The one hundred hour limitation could be increased or decreased on motion without debate by an affirmative vote of 60 Senators. However, a motion to reduce could not be made until after at least 10 hours of consideration of the measure on motter, and if then reduced it may not be to less than 10 hours, which time would be divided between the majority and minority leaders.

Rule XXII would also be amended by striking out in three places the expression "or the unfinished business". This is to conform the rule to the existing precedent that the measure or matter, including the unfinished business, must be before the Senate when a cloture motion is filed on it.

Rule XXII is proposed to be further amended to provide that after September of each calendar year, if a cloture motion is filed the Senate may proceed to its immediate consideration instead of having to wait 2 days, and after 5 hours of debate, the Senate would proceed to vote on such motion.

6. Section 6 would amend Rule XXVII to provide that when a conference report is available to all members in printed form, the demand for its reading when presented may be waived on motion without debate.

7. Section 7 would amend 133(f) of the Legislative Reorganization Act of 1946 by providing that the "3-day rule" on committee reports be changed to "2 days", excluding Saturdays, Sundays and legal holidays except when the Senate is in session on such days. Under the current rule, Saturday, Sundays and legal holidays are exempt from the computation of the 3 days in any event.

Mr. DOLE said subsequently: Mr. President, on January 15, we discussed proposed changes in the rules. I think the distinguished minority leader and the majority leader worked out some accommodation of discussing proposed changes. Perhaps we can work out some agreement on proposed changes.

Mr. President, the resolution proposed by the distinguished majority leader puts several distressing constraints on the minority. When I say minority, however, I do not necessarily mean myself and my colleagues on this side of the aisle. The legislation before us now can threaten a minority of 1 or a minority of 49. It can tread on the rights of the minority, whether that minority is the minority party or a minority of Senators. And it is the function and the duty of the U.S. Senate to protect the minority, to assure that each Senator is guaranteed the right to express his views, no matter how solitary or unpopular they may be. The result of this carefully devised system, I admit, is to slow down the process of legislation, which may prove frustrating to those who would prefer to see our business whisked through with a minimum of time and a maximum of results visible to the constituency.

But, Mr. President, the Senate is a body committed to the principle of free and unlimited debate. The trend of proposed rules changes in the past, particularly of rule 22, has been to gradually limit and narrow the extended debate rule and the few remaining devices available to the minority in the Senate today. This legislation means to further limit those devices and reduce the rights of the minority. On the surface, these changes seem harmless enough. They smooth out the flow, they quicken the pace, they iron out what the majority regards as the "wrinkles" in our legislative process. The Senator from Kansas feels, however, that these seemingly minor changes will serve, in the end, to rob the minority of its few remaining recourses and bestow an unfair advantage on the majority that is inequitable and unjust to the American people.

Mr. President, part of the genius of our political system is that the minority is in a better position to help shape public policy in our country than are parliamentary bodies of most other nations. The U.S. Senate is unique in that way. And I do not think that the American people are willing to forgo that distinctive mark of our democratic society. I think we owe it to our constituencies to uphold the rights of the minority and the equity of our political system.

The legislation proposed by the distinguished Senator from West Virginia seeks once again to curtail those privileges enjoyed by the minority. The resolution also fails to uphold the rights of individual Senators. It would grant the minority leader and majority leader an opportunity to control debate on a motion to proceed. Frequently, however, the side of an issue which needs airing and which could benefit from extended discussion might not include the leader of either the minority or majority. In that event, the opposition would not be protected.

RULE XXII

The resolution also presents a very serious alteration of rule 22. It would not only limit the amount of available time to each Senator, but would also create a situation in which some Senators could be cut completely out of their right to offer amendments. Because of the provision that quorum calls be charged against the maximum time limit, there is no guarantee that each senator will have time to speak.

This piece of legislation also shortens the waiting period after the filing of a cloture petition—it changes the period—from 2 days to "proceed immediately to

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the consideration thereof, and after 3 hours of debate, equally divided and controlled by the majority and minority leaders, the Senate shall proceed to vote." A cut of the time for consideration from 2 days to 3 hours is a substantial reduction. I doubt if meaningful debate on an issue can always be accomplished in 3 hours.

SUSPENSION OF READING OF JOURNAL

Senator BYRD's legislation also provides that the reading of the Journal and of amendments and conference reports be dispensed with by a nondebatable motion, as well as by unanimous consent. The absence of any debating time in these instances only sets the stage for parliamentary abuse on the part of the majority. It seems to me that the Senate cannot very well decide such an issue without some discussion, even if it be limited to only 10 minutes. It is evident that these proposed changes could prove very restricting to the minority and form part of a pattern for maneuvering on the part of the majority.

The right to free expression belongs to all the Senators in this Chamber and is seriously threatened by this resolution. If we allow this right to be stifled we drastically reduce the effectiveness of the Senate and its usefulness to society. I strongly recommend to my colleagues on both sides of the aisle that we reject this legislation and to allow the Standing Rules of the Senate to remain as written until they can be thoroughly reviewed by the Rules and Administration Committee and by the full Senate.

Mr. President, one thing the Senator from Kansas might suggest is that we ought to work out something to avoid what many consider an unnecessary number of rollcall votes in this body. I hope that my new colleagues who join us in the Senate might ponder the necessity of repeated votes—vote after vote after vote—when there is no real reason for the same.

As I understand it, there was a time in this body when that determination was made by the distinguished leaders, the minority leader and the majority leader would decide many times whether or not a rollcall vote was necessary.

If that is not totally satisfactory, perhaps the ranking majority member and the ranking minority member on committees might join in a request for rollcall votes.

But I do believe when we talk about an effective and orderly flow of business in the Senate of the United States, we can all think of interruptions we have had during very important Senate hearings. We have had to rush back and forth to the floor. I would certainly cooperate as one Member of this body if we could work some accommodation, as far as the rollcall votes are concerned. Perhaps the leaders do not want that great responsibility, but maybe those of us who share responsibilities as ranking minority members or majority members on the committees might work with the leaders in the Senate to see if we cannot in some way hold down the number of rollcalls we have almost on a daily basis.

When I first came to the Senate, I think it was around 200 and some. I do not know the exact number last year, but I guess it was well up to 400 or 500 rollcalls.

Mr. BAKER. Will the Senator yield?

Mr. DOLE. I yield to my colleague, the distinguished minority leader.

Mr. BAKER. Mr. President, I could not agree with the Senator from Kansas more. I think that not only are many rollcalls unnecessary, but I think, frankly, a lot of them are impositions on the Senate and its membership.

I would be more than happy to work out some sort of de facto arrangement, de facto rule or arrangement, to provide, as he suggests, that the majority leader and the minority leader might consult with the ranking members of the jurisdictional committees, or effective committees, and decide whether the rollcalls were, in fact, desirable, or not.

I suppose we could never totally enforce it, but we could establish a good precedent, if our colleagues would back us up.

I applaud the Senator from Kansas for his suggestion. I represent to him that I would be more than pleased to do that. I will certainly explore that at the first opportunity on our side and will communicate it, as well, to the majority leader and his side and hope we can carry the Senator from Kansas' suggestion into effect.

Mr. DOLE. I thank the distinguished minority leader.

It is a matter we discussed, as he recalls, briefly, a few weeks ago.

Mr. President, I might also correct the record, there were 520 rollcall votes in 1978.

I think we might have survived with 200 or 250. Maybe the 520 were necessary, but I doubt it. I doubt that many of my colleagues, as they look back on it, feel the votes they may have asked for were totally necessary.

ROUTINE MORNING BUSINESS

PROPOSED AMENDMENT TO THE TARIFF ACT—MESSAGE FROM THE PRESIDENT—PM 5

The VICE PRESIDENT laid before the Senate the following message from the President of the United States, which was referred to the Committee on Finance:

To the Congress of the United States:

I am today transmitting to the Congress a proposal for legislation to extend until September 30, 1979, the authority of the Secretary of the Treasury under Section 303(d) of the Tariff Act of 1930 to waive the application of countervailing duties. The Secretary's authority to waive the imposition of countervailing duties expired on January 2, 1979. Extension of this authority is essential to provide the Congress with time to consider the results of the Tokyo Round of Multilateral Trade Negotiations (MTN). Failure to extend this authority is likely to prevent the reaching of a conclusion to these negotiations and could set back our national economic interests. Accordingly, I urge that the Congress enact the necessary legislation at the earliest possible date.

As stipulated by the Congress in the Trade Act of 1974, negotiation of a satisfactory code on subsidies and countervailing duties has been a primary U.S. objective in the Tokyo Round. We have sought an agreement to improve discipline on the use of subsidies which adversely affect trade. I am pleased to report that in recent weeks our negotiators have substantially concluded negotiations for a satisfactory subsidy/countervailing duty code which includes: (1) new rules on the use of internal and export subsidies which substantially increase protection of United States agricultural and industrial trading interests, and (2) more effective provisions on notification, consultation and dispute settlement that will provide for timely resolution of disputes involving trade subsidies in international trade.

My Special Representative for Trade Negotiations has informed me that negotiations on almost all MTN topics have been substantially concluded, and that those agreements meet basic U.S. objectives. However, final agreement is unlikely unless the waiver authority is extended for the period during which such agreements and their implementing legislation are being considered by the Congress under the procedures of the Trade Act of 1974.

Under current authority, the imposition of countervailing duties may be waived in a specific case only if, inter alia, "adequate steps have been taken to eliminate or substantially reduce the adverse effect" of the subsidy in question. This provision and the other limitations on the use of the waiver authority which are currently in the law would continue in effect if the waiver authority is extended. Thus, U.S. producers and workers will continue to be protected from the adverse effects of subsidized competition.

A successful conclusion to the MTN is essential to our national interest, as well as to the continued growth of world trade. If the waiver authority is not extended, such a successful conclusion will be placed in serious jeopardy. Accordingly, I urge the Congress to act positively upon this legislative proposal at the earliest possible date.

JIMMY CARTER.

THE WHITE HOUSE, *January 15, 1979.*

COMMUNICATIONS

The VICE PRESIDENT laid before the Senate the following communications, together with accompanying reports, documents, and papers, which were referred as indicated:

EC-1. A communication from the Secretary of Agriculture, transmitting, pursuant to law, a summary of the Weather-Water Allocation Study; to the Committee on Agriculture, Nutrition, and Forestry.

EC-2. A communication from the Acting Secretary of Agriculture, reporting, pursuant to law, as to the aggregate value of all agreements entered into under Title I of the Agricultural Trade Development and Assistance Act (Public Law 480) during fiscal year

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A DISCUSSION OF THE PEARSON-RIBICOFF STUDY GROUP REPORT, APRIL 1983

Roger H. Davidson
Walter J. Oleszek

Congressional Research Service
April 28, 1983

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DEBATE ON MOTION TO CONSIDER.

Recommendation. The Study Group recommends that "some restrictions be placed on the length of debate of a motion to proceed to the consideration of a proposed piece of legislation. If the Senate, in its wisdom, should decide to place a restriction on the debate of a motion to consider, it could place a limit of two hours, to be equally divided and controlled by the two Leaders or persons acting in their behalf."

Discussion. From its beginning the Senate has had relatively few rules limiting debate. Almost any motion, as a result, can be the subject of prolonged debate. Filibustering, however, was not a major source of delay during the early years of the Senate. Wrote one student of the early Senate: "Although these first Senators did not establish filibustering as a characteristic feature of the Senate, they did not, on the other hand, adopt as a precedent any rule framed for the specific purpose of closing off all debate." 1/

Today, each measure faces at least two potential filibusters: the first on the motion to take up the legislation and the second during consideration of the measure itself. The Pearson-Ribicoff blueprint limits debate on the motion to consider in order to expedite consideration of legislation. If the Senate chooses not to adopt the motion to consider, then the measure would likely be returned to the calendar. A 1979 version (S. Res. 9) of the Pearson-Ribicoff proposal would have more severely restricted debate on the motion to consider: thirty minutes equally divided.

1/ U.S. Congress. Senate. The United States Senate, 1787-1801; A Dissertation on the First Fourteen Years of the Upper Legislative Body. Senate Document No. 87-64, 87th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1962. p. 213.

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In short, the Study Group's proposal only marginally affects the Senate's hallowed tradition of extended debate by limiting it on the procedural motion to consider. There is no interference with the right of extended debate on substantive issues. Thus, any Senator could still prevent hasty Senate action on legislation by discussing its merits at length. Yet the proposal, in concert with Study Group suggestions for setting priorities and forbidding repeated debates on the same question, could be a step toward reducing what many Senators see as multiple paralyses afflicting Senate proceedings.

On the other hand, there are major issues that arouse great public and senatorial concern. When these circumstances arise, Senators may want to employ every conceivable parliamentary device--including extended debate on the motion to proceed--to educate their colleagues and the citizenry about the import of these issues. For this purpose Senators need adequate time, some of which can be provided by debating procedural motions.

Another Study Group proposal--regular observance of the morning hour--might accomplish the same result as this recommendation. Motions to take up legislation during the second hour of the morning period, as noted previously, are nondebatable. Today, the Senate "seldom has a morning hour because it seldom adjourns," observed Senator Orrin Hatch, R-Utah. "(B)ut that could easily be remedied by the majority leader unilaterally if he chose to." 2/ Senator Hatch also questioned whether there were many filibusters on the motion to consider.

2/ Hatch, Orrin. Remarks in the Senate. Congressional Record, Daily Edition, v. 125, Jan., 25, 1979. p. S620.

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[COMMITTEE PRINT]

S. PRT. 98-242

REPORT

OF THE

STUDY GROUP ON SENATE PRACTICES AND PROCEDURES

TO THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

U.S. GOVERNMENT PRINTING OFFICE

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STUDY GROUP ON SENATE PRACTICES AND PROCEDURES

Established pursuant to Senate Resolution 392 (97th Cong., 2d Sess.), agreed to May 11, 1982.

JAMES B. PEARSON, *Former Senator from Kansas*
ABRAHAM A. RIBICOFF, *Former Senator from Connecticut*

FLOYD M. RIDDICK, *Parliamentarian Emeritus, Consultant*
ANTHONY L. HARVEY, *Executive Director*

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7. Debate on motion to consider

It is evident that the Senate is very sensitive to any restrictions placed on debate, particularly when a controversial proposed piece of legislation is at stake. On the other hand, if debate is to be germane to the pending business, it would appear that the debate of the motion to consider a piece of business would be restrictive in nature on how much worthwhile debate could be given to that motion. Besides, once the Senate has agreed to proceed with the consideration of a piece of business, that proposed legislation is wide open for debate in every detail, unless cloture should be invoked or a unanimous consent could be reached providing for the contrary. Therefore, the Study Group recommends that some restrictions be placed on the length of debate of a motion to proceed to the consideration of a proposed piece of legislation. If the Senate, in its wisdom, should decide to place a restriction on the debate of a motion to consider, it could place a limit of two hours, to be equally divided and controlled by the two Leaders or persons acting in their behalf.

8. Cloture rule

The cloture rule has been amended to place a 100 hour cap on the time for the consideration of a bill once cloture has been invoked, and while the 100 hours places a definite time to conclude the consideration of any business on which cloture has been invoked, it does not assure that that time will be used wisely. Likewise, while the amendments must be germane once cloture is invoked, there is no assurance that these amendments will have been drafted for the purpose of giving constructive legislation to the country. Too often amendments have been submitted solely for the purpose of delaying final action on the pending business on which cloture has been invoked. The procedure for invoking cloture might be satisfactory and sufficient for the needs of the Senate, but possible delay in post cloture is evident and needs some changes in order to overcome that weakness. There is no limit to the number of amendments that each Senator may call up, and while each Senator, with a few exceptions, is limited to one hour of debate, a single Senator may contrive to use much or most of the 100 hours with little or no accomplishment by calling up amendments and getting roll call votes on which it was evident to begin with that they would not be agreed to; this is possible as long as one-fifth of the Senators present, a quorum being present, are willing to order a roll call vote. There is no limit on how long an amendment may be. Any Member may draft a 1,000-page amendment, submit it, and have it considered, as long as it is germane. A demand for the reading of such long amendments would take a great deal of the Senate's time.

To overcome some of the post cloture filibuster, certain restrictions should be placed in the rule which would certainly aid in shortening, if not eliminating, much of the post cloture filibuster. For example, it is recommended that no Senator, except the Leaders and the managers of the bill, be allowed to offer more than two amendments to be considered after cloture is invoked. It could be required that all amendments to be considered be read between the

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98th Congress
2d Session | COMMITTEE PRINT | S. PRT.
98-254

REPORT TOGETHER WITH PROPOSED RESOLUTIONS

TEMPORARY SELECT COMMITTEE TO STUDY THE SENATE COMMITTEE SYSTEM

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

DECEMBER 14, 1984

U.S. GOVERNMENT PRINTING OFFICE
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ny on the two-year budget and is well aware that close cooperation will be needed between House and Senate to enact such legislation. However, the Committee believes that the two-year budget process can best be achieved through the normal legislative process rather than by establishing some special new mechanism.

The Select Committee notes that the need for a two-year process was recognized when the Budget Act was enacted. The Act called for the submission of advance authorizations. That provision has, however, not been followed by any administration. It appears that advance authorizations are not sufficient to accomplish the extension of the timetable that is required with the institution of a budget process. Therefore, the broader approach of the biennial budget would be a possible solution. The Select Committee is convinced that, with the expertise already residing in the Budget, Governmental Affairs, and Rules Committees, the new select committee will be able to produce recommendations within the 90-day time period.

IV. OTHER RECOMMENDATIONS

NONGERMANE AMENDMENTS

The Problem

Under current rules, amendments must be germane in the following cases: after cloture is invoked, on general appropriations bills, and under certain statutory procedures, most importantly on budget resolutions and reconciliation bills. Germaneness is also regularly required under unanimous consent agreements.

The opportunity to offer non-germane amendments lies at the heart of Senate procedure. It is an essential component of the principle of the protection of the minority. With this opportunity, the majority cannot foreclose debate and votes on issues that a minority wants brought to national attention. In addition, the opportunity to offer such amendments enables Senators to bring to the floor issues on which the committee of jurisdiction has not acted.

Recommendation

While non-germane amendments have a legitimate place in Senate procedure, they can also be used to divert the Senate from important policy debates and to impede action on essential legislation. One way to preserve the protection that non-germane amendments give, while protecting the ability of the Senate to conduct its business, is to provide for a special germaneness rule, invoked by 60% of those present and voting. To ensure that the rule can be effectively enforced, it would also be necessary to require a similar majority to overturn rulings of the chair holding an amendment non-germane. This proposal has a distinguished history, having been suggested by the present minority leader and the assistant majority leader. For a history of proposals limiting non-germane amendments, see Appendix D, p. 41.

FILIBUSTER AND CLOTURE

The Problem

The tradition of unlimited debate prevailed in the Senate until 1917. A procedure to cut off debate was adopted only as a result of

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the blockage by a small group of Senators of the Wilson Administration's measure to authorize the arming of merchant ships immediately prior to World War I. The history of limitations on debate in the Senate is set forth in the Minority Leader's scholarly insertions in the *Congressional Record* of March 10, 1981, and no attempt to review that history will be made here. That history shows that this is another area in which the Senate has balanced the rights of the minority with the ultimate duty of the Senate to act on the important issues of the day.

It is also abundantly clear from that history that neither unlimited debate—nor the authority to cut it off—were intended to be used lightly. The principle of unlimited debate was designed to protect the minority exercising its right to delay, or even prevent, action on issues of fundamental principle. The authority to cut off debate enabled a strong majority to act after the minority had exercised its rights. Filibuster and cloture were meant for great issues but they have become trivialized as recent history all too clearly demonstrates. In the last 6 weeks of the 98th Congress, more cloture votes took place than during the first 10 years of the existence of Rule 22. The Senate voted 7 times on cloture petitions; three of those votes were on the motion to proceed. Eight other cloture petitions were filed and later vitiated.

By comparison, from 1963 to 1965, when the Senate considered such controversial issues as amending Rule 22, the Civil Rights Act of 1964, legislative apportionment and the Voting Rights Act of 1965, only 4 cloture votes took place.

Cloture is not only invoked too often, it is invoked too soon and it is invoked on procedural as well as substantive issues. Each of the cloture petitions at the end of the 98th Congress was filed on the same day that the matter came before the Senate as compared to the cloture petitions on the Treaty of Versailles and the Civil Rights Act of 1964 which were filed after these matters had been pending in the Senate for 51 and 57 days respectively.

Recommendations

To restore the historic balance between unlimited debate and the invocation of cloture, it is necessary to ensure that unlimited debate is permitted only on substantive issues by providing for a two hour time limit on the motion to proceed and to make cloture not only more difficult to invoke but more effective once invoked.

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House Report 103–413, Vol. 2 | 103D CONGRESS, FIRST SESSION | Senate Report 103–215, Vol. 2

ORGANIZATION OF THE CONGRESS

FINAL REPORT

OF THE

JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

PURSUANT TO

H. CON. RES. 192

(102D CONGRESS)

U.S. GOVERNMENT PRINTING OFFICE

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JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

[Authorized by H. Con. Res. 192, 102d Congress]

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and members using agency facilities; reports on these studies are to be considered as part of the reauthorization process for the support units.

In line with the above proposal to require greater disclosure through a cost accounting system, this recommendation could be the natural next step to guarantee greater disclosure and discipline within the Congress as a whole.

23. *Use of Detailees from Congressional Instrumentalities and Executive Agencies*

Recommendation: The Congress should require that any committee, Senator or House Member using the services on detail of an individual regularly employed by the General Accounting Office, the Congressional Budget Office, the Congressional Research Service, the Government Printing Office, the Office of Technology Assessment, or any executive branch agency, should fully reimburse such instrumentality or agency for the cost of that service.

This recommendation requires that detailees from congressional and executive agencies can only be provided to committees and Members on a reimbursable basis. The proposal builds on existing provisions in Senate Rule XXVII, cl. 4, providing that no staff employee of any department or agency of the Government should be detailed or assigned to a committee of the Senate without the written permission of the Senate Rules and Administration Committee. The new proposal goes further and requires that committees and Members reimburse the Executive or support agency for such staff.

The services of detailees from the legislative support agencies and the Executive Branch are not truly free. Having staff detailed full-time limits the ability of the agency staffer to work for other congressional clients and to perform other responsibilities. Unreimbursed details reduce agency capabilities when they are already under pressure from downsizing. As Congress cuts back on its own operations, the availability of unreimbursed detailees would put great pressure on Senate and House offices and committees to use such detailees as replacement staff; detailees should not be an avenue for circumventing staff cutbacks.

If an office truly needs the fulltime services of an executive or support agency employee, then the office should pay for that service. Offices which cannot afford the reimbursement could continue to obtain assistance from agency staff so long as these staff remained available to perform other duties as well.

This proposal would not affect the ability of Members and committees to employ fellows, interns, and other staff provided through bona fide educational and professional development programs.

SENATE FLOOR PROCEDURE

24. *The Motion to Proceed*

Recommendation: Debate on the motion to proceed should be limited to 2 hours when made by the Majority Leader or his designee.

Currently, the motion to proceed to a measure is fully debatable in the Senate, except when the motion is offered during the Morning Hour. But, Senate custom reserves the use of the non-debatable form of the motion only for the most extreme circumstances. Typically, the motion to proceed is offered at times when it is fully debatable.

The chief limit on debatable motions to proceed has been the so-called "two-speech rule," limiting Senators to no more than two speeches on the same subject on the same legislative day. But, since 1986, the Senate has weakened the enforcement of the two-speech rule, thus making it a less effective control on debate time. Essentially, if a motion to proceed is contested, it may be necessary for the Majority Leader to seek to invoke cloture (a three-fifths vote) although only a majority vote is needed to ultimately take up a measure. Protracted debate on the motion to take up, coupled with unlimited debate on the measure itself, and the possibility of unlimited debate at even later stages of the legislative process provides too great a protection for opposition Senators and gives too little authority to the floor leaders in setting the Senate's agenda.

This proposal would impose a 2-hour limit, equally divided, on motions to proceed when offered by the Majority Leader or his designee. Motions to proceed offered by any other Senator would be debatable without limit—an event, however, which rarely occurs given the custom of reserving such authority to the Leadership. In addition, motions to proceed to the consideration of a rules change would remain fully debatable, whether offered by the Majority Leader or not.

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ROLL CALL

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Stevenson: In Senate, 'Motion To Proceed' Should Be Non-Debatable

April 19, 2010
By Charles A. Stevenson
Special to Roll Call

There's a simple step the Senate could take that would prevent a lot of the current delay and obstruction, while still permitting lawmakers to debate some controversial matters at length.

The "motion to proceed" should be made non-debatable and subject to an immediate majority-rule vote.

This may seem like an arcane parliamentary matter, but in practice the chance to kill a bill or nomination before it is open to debate and amendment is a key weapon in the hands of obstructionists. They don't even have to oppose the measure; they just argue that "now is not the time" to take it up. In fact, in the past 20 years, more than one-fourth of the cloture petitions to end debate have been on motions to proceed.

Maybe the Senate, under pressure from voters and stymied by the recent surge in filibusters, will change or repeal the current rule that requires a 60-vote supermajority to cut off debate. But that isn't likely, since it takes 67 votes to change the rules and since all Senators can envision circumstances when they might want to fight even though outnumbered.

Even if lawmakers eliminated the 60-vote rule, obstructionists would retain numerous tools to block or delay action.

A compromise might be found on the motion to proceed, which would have substantial additional benefits while still preserving the right of extended debate on substantive matters.

Right now, the motion to take up legislation is non-debatable only in very special circumstances: if the Senate has adjourned rather than recessing at the end of the previous day, if it has a period of morning business the next day and if it is in the second hour of the session. Even then, the bill goes back to the calendar if debate continues at the end of morning business.

The biggest problem in the Senate's current rules isn't that the majority can't work its will, but that a handful of Senators can clog the legislative stream, preventing action even on broadly supported measures.

Cutting off debate requires a day's wait after the first cloture petition is filed, and then 30 more hours of debate even if cloture is invoked. This means that the leadership needs at least four days just to end debate on the motion to proceed, plus many more on controversial amendments.

Four days on one measure is four days that can't be devoted to other matters — and the Senate has averaged only 167 days in session each year this decade.

Making the motion to proceed non-debatable would not only reduce the opportunities for filibusters but would also end the practice of individual "holds" on bills and nominations.

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Those holds aren't in the rules, but they are the result of rules that require, for example, the Senate to take up bills and nominations in the order they were added to the calendar — that is, oldest first, with more urgent matters or more recent versions delayed until all previous matters have been disposed of.

A non-debatable motion to proceed could still be rejected by majority vote, and a matter being debated could still be filibustered, but the opponents would have to muster their troops, whereas now a single Member can hold the whole Senate hostage.

There are other rules changes that the Senate might adopt to have a more orderly and businesslike legislative process.

It could change the rule (XIX) that requires that "all debate shall be germane and confined to the specific question then pending before the Senate" for only the first three hours and it could enforce more rigorously the section of that rule that "no Senator shall speak more than twice upon any one question in debate on the same legislative day."

Senators could also drop the provision saying that the rules continue from one Congress to another unless changed by a two-thirds vote. That was added in 1959 under pressure from Senators fighting civil rights bills in order to overturn a ruling that would have allowed each new Congress to adopt rules by majority vote – as the House of Representatives does every two years.

But if Senators are unwilling to change the basic rule on filibusters, they should at least make the motion to proceed non-debatable so that the Senate can get to work without petty delays.

Charles A. Stevenson was a Senate staffer for 22 years; he now teaches at the Nitze School of Advanced International Studies at Johns Hopkins University.

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Testimony of

Martin Paone

Executive Vice President Prime Policy Group

Senate Democratic Secretary 1995-2008

Submitted to the

U.S. Senate Committee on Rules and Administration

For the hearing entitled

Examining the Filibuster: Ideas to Reduce Delay and Encourage Debate in the Senate

September 29, 2010

Mr. Chairman and members of the Committee:

I'm honored to be here discussing the procedures of the Senate, a subject that I learned to cherish while working for Leaders Byrd, Mitchell, Daschle and Reid. I served on the Senate floor for almost 29 years. During that time I was Secretary for the Majority twice and Secretary for the Minority twice. --I had two sets of cards depending on the election.

Following an election, if there was a change in the Majority, I would joke with my Republican counterpart that, in addition to handing over the presiding book, we would also trade speech folders:

One accused the other of being an obstructionist;

While the second complained of the trampling of the Minority's rights.

Today it is my understanding that you will be focusing on four aspects of filibuster reform.

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Motion to Proceed:

Eliminating debate on the motion to proceed would save time and put the legislative calendar on an equal footing with the Executive Calendar.

A middle ground would be to institute a time limit on the motion to proceed. Any modification of this motion would streamline the operation of the Senate but for just that reason could be expected to be met with minority opposition.

Post Cloture Time:

During the 30 hours post cloture each Senator is entitled to speak for up to one hour. One member can still cause considerable delay because quorum calls, while counting against the 30 hours, do not count against the member's hour. While you can force the opponent to remain on the floor or else the chair will put the question, you cannot force them to debate and consume their hour. One possible change would be to charge the quorum time towards the senator's hour.

An alternative idea would be to count any time consumed in a quorum call at an accelerated rate, say a multiple of 10, so that every minute spent in a quorum call would count as 10 minutes. If this were the rule then during post cloture time I would also eliminate the ability to object to the dispensing of a quorum so that the Majority could not abuse this accelerated clock.

Over the years the process has evolved so that once cloture is invoked the amendment tree remains filled and even germane amendments are blocked out. One suggestion would be to automatically tear down the tree post cloture and to provide for a guaranteed number of amendments from each side. The amendments would still have to qualify under rule 22, -- be timely filed, properly drafted and germane.

Other possible changes include the reduction of time on nominations, since they are unamendable; adding a 3/5's vote to reduce the time; or reducing the threshold to invoke cloture to 3/5's of those voting.

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There have been complaints about the waste of time spent on nominations that are eventually confirmed by nearly unanimous votes. One change, for nominations with lifetime appointments, would be a reverse cloture motion.

It would work like this: the Majority Leader would ask consent to confirm a nomination or to get a time limit on it. If there is an objection than the next day by 4 pm the opponents would have to file a "motion of opposition" which would state that they intend to vote against the nomination. Sixteen signatures, the same as for cloture, would be required on that motion and if it is not filed by the appointed time the Senate would then proceed to the nomination and it would be considered under a time limit of two hours, equally divided. If the 16 signatures in opposition are secured then the Majority Leader could file a cloture motion on the nomination which would ripen the next day.

Substitute amendments: It is virtually impossible for a committee substitute or a floor substitute to meet the strict germaneness test of cloture. This necessitates the filing of cloture motions on the substitute and on the bill itself. The later is a true waste of time since once the substitute amendment has been adopted the bill is no longer amendable. The substitute amendment should be automatically considered germane.

The appointment of conferees:

It takes three separate debatable motions to send a bill to conference. Many times in the past these were adopted by consent. But over the years both parties have objected to the appointment of conferees and now it is the exception rather than the rule to see a bill sent to conference. Combining the 3 motions into one would still allow the opposition to filibuster this stage of the process.

This might also reduce the use of the message between houses method or what has come to be known as the "ping pong" process. If this process is to be used more sparingly then not only should the motions be combined but there should

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also be a prompt cloture vote and a reduction in post cloture time. If the Minority truly wants to participate in conferences then they should allow the appointment of conferees.

Filling the amendment tree:

Everyone agrees that the Majority Leader has priority recognition. It follows then that the Majority is entitled to the first vote on a given issue. Majority Leaders from both parties have filled the amendment tree to get a first vote on an issue, and sometimes on more than one issue. However, at some point in order to move the process along, the Majority Leader has to pare back the tree and allow other amendments. If amendments are not allowed then the Minority's natural response is to vote against cloture as a protest for being shut out of the amendment process.

Majority Leaders from both parties have been asked by their members to protect them from certain votes. In my opinion that is an unfair request and it puts the Leader in an untenable position of having to fill the amendment tree and possibly fail to enact the legislation in question. The solution to this is simple—don't ask the Majority Leader for such protection. Senators should be prepared to vote, at least on a cloture vote or a budget waiver vote, with respect to any and all amendments and move on.

Again I thank the Committee for this opportunity this morning and I welcome your questions.

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Testimony of Norman J. Ornstein
Resident Scholar, American Enterprise Institute

Before the
Committee on Rules
U.S. Senate
September 29, 2010

Chairman Schumer, Ranking Member Bennett, members of the committee. I am pleased and honored to be invited to testify again on issues related to the filibuster and other Senate rules and their implications for the Senate, other institutions, and the fabric of governance in America.

First, let me reiterate a point I made in my testimony in May, and have made in other venues, including my column in Roll Call and in magazine and newspaper articles. I do not favor eliminating Rule XXII, reducing the bar to fifty, or making the Senate as "efficient" as the House of Representatives. I believe that a Senate where a minority of members, feeling intensely about an issue of great national moment, can find ways to raise the bar, to retard action, and to force extended debate. But the filibuster should be reserved for a smaller number of issues of great national concern, and should require the active participation of a substantial group of senators making up that minority—and not allow an individual or a small group merely to raise a little finger either to raise the bar from a majority of those voting to sixty senators, and to abuse or stretch the rules simply for the purposes of delay and obstruction.

There are many ways to preserve that Senate tradition of protecting minorities where they feel intensely about important issues, while also eliminating barriers that are now used overwhelmingly for delay or obstruction. One simple way is to *eliminate the filibuster on the motion to proceed.* There is no good reason to allow more than one bite of the apple when a minority of senators signal a filibuster—if the bar is raised to sixty or whatever super-majority number, it should apply once. I know that there are ways to avoid filibusters on motions to proceed, but majority leaders have found that using the morning hour to do so involves significant costs. Motions to proceed, in my view, should be non-debatable, or with at most an hour of debate. At the same time, I see no reason why filibusters should be allowed on both a bill and a substitute for it that gets adopted. *If a substitute is adopted after overcoming a filibuster, the underlying bill should be voted on without another filibuster being in order.*

In a related area, I recommend *eliminating the third bite at the apple via a filibuster on going to conference*—I would make all motions relevant to initiating conferences subject to strict limits on debate, perhaps four hours evenly divided. And by that, I do not mean four hours on each of several motions related to a conference, but four hours in toto.

Another way is to *streamline the process for cloture motions and to make post-cloture time work more efficiently*. On the former point, I see no good reason why the Senate needs two full days for a cloture motion to ripen; one day should suffice. On the latter, I would offer a few ideas. One is to take the thirty hours of post-cloture debate and divide it evenly between the

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majority and the minority. A second is to require that senators actually debate during that period—and that quorum calls count against a senator's hour of debate.

There are other areas within Senate rules that can also be altered to reduce unnecessary delay and obstruction for obstruction's sake. One is the process of requiring amendments to be read in toto by the clerk—if an amendment has been available to senators for 24 hours or more, reading it aloud serves no purpose other than obstruction. *The Senate should allow a non-debatable motion to end the reading of an amendment if it has been available on-line for 24hours.*

There is also no reason anymore to require committees to ask permission to meet outside of morning hours—making them suspend their business when the Senate is in session is disruptive and annoying, and truly unnecessary.

Now let me turn briefly to the other side of the coin—the justifiable frustration many members of the minority feel about the propensity of majority leaders to act preemptively and fill the amendment tree to shut out amendments. In previous hearings, including the one in which I testified, this committee has had fruitful and interesting discussions of this problem, and the chicken-and-egg question that arises about the sharp increase in cloture motions and whether they are due to minority obstruction or majority high-handedness. There is no simple answer here, but I do want to note that while some of the filibusters in recent months have clearly been in response to the premature use of the amendment tree by the majority leader, there are way too many instances of delay tactics used on measures or nominees that achieved unanimous or near-unanimous support, with the multiple filibusters and full exercise of the thirty hours post-cloture that had nothing to do with real minority grievances and everything to do with using up more of the Senate's precious time.

But that is no excuse for avoiding the real issue about overuse and misuse of the amendment tree. I would make the following suggestion here, one I have discussed, as with many other of the recommendations above, with your colleague Mark Udall, who has been among many senators, including members of this committee like Tom Udall, who have worked very hard to find reasonable and balanced ways to make the Senate function better while retaining its core values. Let me note that this issue is complicated enough that I would want a lot of consideration of how to frame a rules change here, including weighing possible unintended consequences, before acting. The idea, of course, is to strike a different balance, giving the minority the opportunity to offer a different approach and to debate it, while also giving the majority a chance, after a debate, to table that idea, and to limit the use of the amendment process to flood the zone with extraneous amendments. One approach is to have a new, non-debatable motion to set aside a filled amendment tree and allow, by a simple majority vote, a single amendment from the minority to be called up and debated. The majority could of course still offer a motion to table; ideally, the rules would allow some debate on the amendment before the motion to table.

I am of course happy to discuss these ideas and others, including thresholds for filibusters and cloture.

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Senate Committee on Rules and Administration
Hearing on "Ideas to Reduce Delay and Encourage Debate in the Senate."
September 29, 2010
Questions for the Record from Senator Tom Udall

For Marty Paone:

Q. How would making the motion to proceed non-debatable impact the power of holds?

A. If, as in a vacuum, the situation arose that the motion to proceed to items on the Legislative Calendar was a non-debatable motion then it would have no more of an impact on "holds" as the current situation with the Executive Calendar demonstrates. Members will focus their efforts on the legislation itself rather than utilizing the delay afforded by the motion to proceed to attempt to influence the debate on the substance or to negotiate the terms for its consideration.

However, if that non-debatable status was attained by a rules change enacted, despite opposition, by a majority vote at the beginning of a congress then that would set the stage for a regular revisiting of the Senate's Rules at the beginning of each congress. If this became the norm then I believe the natural progression would result in a Senate ruled by majority vote to the point where the ability to filibuster would be drastically curtailed and eventually eliminated.

At that stage the "holds" process would have also evaporated since an individual's ability, even if he/she were a member of the party in power, to object to a matter or nomination's disposition would no longer exist. If, on any given day, a majority could decide that a bill should advance or a nomination should be confirmed then the senator who wanted to oppose it would only be left with the ability to give his/her statement, assuming the majority would allow he or she the time to speak, and then cast his/her vote in opposition.

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