"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

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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.

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).