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Cloture in the 110TH Congress: An Obstructionist Minority or a Heavy-Handed Majority?

Executive Summary

- Democrats have accused Republicans of engaging in a record 71 filibusters during this Congress.¹ Democrats arrive at this figure by counting the number of times Democrats filed cloture and a cloture vote occurred.
- According to the Congressional Research Service (CRS), the method used by Democrats overstates the actual number of filibusters this Congress.
- CRS has said determining the number of filibusters begins by counting the “items of business” subjected to a cloture vote. By this measure, CRS has counted 46 items of business which have been subjected to cloture this Congress.
- According to CRS, cloture does not always occur due to minority obstruction. It can occur when the majority fills the amendment tree to block amendments (which has occurred a record 11 times this Congress) or tries to prematurely end debate.
- In this Congress, 46 items of business have faced a cloture vote. Thirty of those items eventually passed the Senate, of which 13 have been signed into law.
- Another 9 items of business were opposed by Democrats and Republicans alike, including: immigration reform, the DREAM Act, a “no confidence” resolution in Alberto Gonzales, and several measures to withdraw from Iraq.
- That leaves only 5 items of business for which cloture failed based solely on Republican opposition.

¹ Senator Harry Reid, *Congressional Record*, May 14, 2008, S4134.

INTRODUCTION

This year, Democrats have regularly accused Republicans of “obstructionism” by engaging in “a record number of filibusters.” At the time of publication, Republicans were accused of engaging in 71 separate filibusters. According to the non-partisan Congressional Research Service (CRS), the method Democrats are using to count filibusters is not an accurate method to count filibusters. The Democrats’ numbers include every cloture vote that has occurred as a result of a Democrat-filed cloture petition. CRS has clearly concluded that a cloture vote does not equate to a filibuster.

Additionally, the real reason for the record number of cloture votes in the 110th Congress is due in no small part to the tactics employed by the majority. Those tactics include: bypassing the committee process; blocking Republican amendments on the floor which can include filling the amendment tree (this has happened 11 times this Congress); and stifling debate by filing cloture early in the debate, sometimes on the same day legislative text is made available to the minority (this occurred 9 times in 2007).

CLOTURE BY THE NUMBERS (AS OF MAY 13, 2008)

- 105** – Number of cloture petitions filed this Congress (a record).²
- 83** – Number of cloture votes this Congress.
- 46** – Number of “items of business” subjected to a cloture vote.
- 11** – Number of times the majority has blocked minority amendments by filling the amendment tree (a record).³
- 9** – Number of times the majority filed cloture the day bill text (or a substitute amendment) was made available to the minority in 2007 (a record).
- 14** – Percentage of Roll Call Votes in 2007 which were cloture votes (a 38-year high for the first session of a Congress).

DIFFERENTIATING BETWEEN FILIBUSTERS & CLOTURE VOTES

The majority has regularly claimed that Republicans have engaged in a “record number of filibusters” this Congress. Most recently, on May 14, 2008, Senator Harry

² Greg Vadala, “Divided Senate is Well Past Previous Record Number of Cloture Motions,” *CQ Today*, April 25, 2008.

³ Kathleen Hunter, “Senate Leaders of All Stripes Use this Maneuver, Reid Just Does it More Often,” *CQ Today*, May 7, 2008.

Reid stated that Republicans had engaged in a record 71 filibusters this Congress.⁴ In order to arrive at this figure, Democrats have counted every single instance in which a Democrat filed a cloture petition and a cloture vote occurred as a “Republican filibuster.” Based on the Democrats’ method, a “Republican filibuster” has even occurred when cloture is unanimously agreed to (which has occurred 6 times this Congress) and when cloture has been unanimously rejected (which has occurred once this Congress).

The non-partisan Congressional Research Service (CRS) has concluded that Democrats are using an invalid method to count the number of filibusters which have occurred this Congress. CRS has said that filibusters cannot be determined by counting cloture votes because a cloture vote does not necessarily prove that a filibuster has occurred. In addition, CRS stated:

“Filibusters... are conducted against specific items of business, which means that the occurrence of multiple cloture attempts on the same matter does not mean that more than one filibuster is occurring.”⁵

In other words, counting multiple cloture votes against the same “item of business,” as the majority is doing, is not a valid means to count filibusters. CRS has concluded that a bill subjected to multiple cloture votes is, at most, being filibustered just once. For example, Democrats have counted each of the 6 cloture votes on the energy bill (H.R. 6)⁶ and the 2 cloture votes on the farm bill (H.R. 2419)⁷ as 8 separate filibusters, where only 2 items of business were involved.

As of May 13, 2008, CRS had counted only 46 items of business which had been subjected to a cloture vote this Congress.⁸ As CRS has acknowledged, this does not equate to 46 filibusters. According to CRS:

“It is erroneous... to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs. For several reasons the frequency of action under the cloture rule cannot be understood simply as indicating the frequency of filibusters.”⁹

⁴ Senator Harry Reid, *Congressional Record*, S4136, May 14, 2008. This number is lower than the 72 filibusters Senator Reid previously asserted had occurred. Senator Harry Reid, *Congressional Record*, S1416, February 29, 2008. In response to media inquiries, Senate Democrats were forced to revise the number of “filibusters” downwards after their numbers were challenged. On April 15, 2008, Senator Reid stated there had been 65 filibusters. Senator Harry Reid, *Congressional Record*, S2991, April 15, 2008.

⁵ Congressional Research Service, “Frequency of Cloture Action in the Senate, 1917-2006,” prepared by Richard S. Beth, November 7, 2006.

⁶ In 2007, Roll Call Votes 208, 223, 224, 225, 416 and 425 were cloture votes on the energy bill. According to the Democrats’ definition, this single item of business was filibustered 6 times.

⁷ In the first session of this Congress, Roll Call Votes 412 and 431 were cloture votes held on the farm bill.

⁸ By comparison, CRS concludes 40 items of business were subjected to cloture in the 109th Congress. Updated data in relation to the 109th and 110th Congresses provided by Richard S. Beth via conference call.

⁹ Richard S. Beth. In addition, CRS’s methodology counts the 7 separate items of business related to withdrawal from Iraq as 7 different matters even though some would consider it a single item of business. The various measures related to Iraq policy which were subjected to a cloture vote include S. Con. Res. 2 (Roll Call Vote 43), S. 470 (Roll Call Vote 44), S. 574 (Roll Call Vote 51), S.J. Res. 9 (Roll Call Vote 74),

CRS has acknowledged that cloture is not necessarily the result of minority obstructionism. According to CRS, a cloture vote can also occur as a result “of the willingness of the leadership to press to expedite proceedings.”¹⁰ In other words, cloture can be used by the majority to prematurely end debate and to block amendments.

Accordingly, CRS disagrees with the very method used by the majority to count the number of filibusters in the 110th Congress for two reasons. First, by counting every cloture vote as a separate filibuster instead of the items of business subjected to a cloture vote, the Democrats’ methodology overstates the number of filibusters. Second, the Democrats’ methodology unfairly characterizes each cloture vote as a minority filibuster even in cases when the majority has filed cloture to prematurely cut-off amendments and end debate.

CLOTURE CAN BE THE TOOL OF AN IMPATIENT MAJORITY

In the 110th Congress, the record number of cloture votes is the result of a Democratic majority which has regularly violated the rights of the minority. It is not the result of an obstructionist minority. In this Congress, Democrats have sought cloture to prematurely end debate as soon as the debate began (this has occurred a record 9 times) and when the majority fills the amendment tree to block minority amendments (this has occurred a record 11 times). Additionally, the ratio of cloture votes to total roll call votes can be used to measure whether the majority is allowing an open amendment process or attempting to shut out amendments. Last year, the Senate set a record high for the percentage of cloture votes in the first session of a Congress, thus indicating the majority has not allowed an open amendment process.

Cloture Used to End Debate Before Debate Begins.

On many occasions in 2007, Senator Reid filed cloture on a bill as soon as debate began.¹¹ As the chart below demonstrates, Senator Reid filed cloture on a measure the day it first came to the floor more times (9) in the first session of the 110th Congress than all of the prior Senate Majority Leaders had done in the first session of the 5 previous Congresses combined (8 times).

and H.R. 4156 (Roll Call Vote 411) in the first session of this Congress and S. 2633 (Roll Call Vote 33) and S. 2634 (Roll Call Vote 34) in the second session of this Congress. This does not include cloture votes related to Iraq policy which were part of a larger package such as H.R. 1591, the 2007 emergency supplemental appropriations bill.

¹⁰ Richard S. Beth.

¹¹ Data compiled by Senate Republican Communications Center.

Cloture Filed Same Day as Legislative Text Made Available

Congress	Year	Majority Leader	Times Cloture Filed
110 th	2007	Reid	9
109 th	2005	Frist	1
108 th	2003	Frist	1
107 th	2001	Daschle	1
106 th	1999	Lott	3
105 th	1997	Lott	2

In cases where the majority files cloture before debate even begins, the majority is certainly attempting to “expedite proceedings” to prevent full debate. Accordingly, in this Congress, many cloture votes are the result of the Democratic majority seeking, at least in part, to circumvent the rights of the minority.

Cloture in Conjunction with Efforts to Block Amendments.

This Congress, Senator Reid has engaged in parliamentary maneuvers to block Republican amendments by partially or fully “filling the amendment tree” a total of 11 times in just the first 16 months of this Congress.¹² By comparison, this tactic was used only 9 times in two full years of the 109th Congress, 3 times in the 108th Congress, and only 1 time in the 107th Congress.

The process of filling the amendment tree is a tactic in which a Senator, usually the majority leader using his right of priority recognition, files both a first and second degree amendment and then objects to any unanimous consent request to set those amendments aside. This prevents any amendments from being considered, except with the approval of that Senator.

When this tactic is employed by the majority at the same time a cloture petition has been filed, it becomes clear that the majority is seeking to prevent the minority from offering amendments and to cut off debate. Most recently, after Senator Reid offered a substitute amendment to the Federal Aviation Administration reauthorization bill, filled the amendment tree, and filed cloture, Democratic Senator Max Baucus had this to say with respect to the tactics of his own leadership:

“I hope we can get away from the situation the minority leader described, which is filling up the tree, which tends to get us stuck. The goal here is not to get us stuck...”¹³

As Senator Baucus noted, blocking amendments tends to impede, rather than encourage, legislative progress. Despite this fact, Senator Reid has continued to use this tactic in the 110th Congress. In fact, Senator Reid has used this tactic more this Congress than any other majority leader has in recent years.

¹² Information provided courtesy of Senate Budget Committee, minority staff.

¹³ Senator Max Baucus, *Congressional Record*, S3583, April 30, 2008.

Cloture Votes Instead of Votes on Amendments.

Another fact that demonstrates that the current majority is attempting to block the minority's amendments is the ratio of cloture votes to roll call votes. Expressed as a percentage (14 percent), this Congress has set a record for the number of votes devoted to cloture in the first session of a Congress. This demonstrates that the majority has focused far more effort on invoking cloture than it has on processing amendments. Ironically, in the United States Senate, the more open the amendment process the more efficient the Senate operates. Conversely, a closed amendment process often results in greater, and sometimes unnecessary, delay.

Percentage of Roll Call Votes Which Were Cloture Votes

Congress	Year	Majority Leader	Cloture Votes	Total Roll Call Votes	Percentage of Votes Which Were Cloture Votes
110 th	2007	Reid	62	442	14.0% (Record High)
109 th	2005	Frist	21	366	5.7%
108 th	2003	Frist	23	459	5.0%
107 th	2001	Daschle/Lott	22	380	5.8%
106 th	1999	Lott	36	374	9.6%
105 th	1997	Lott	24	298	8.1%
104 th	1995	Dole/Lott	21	613	3.4%
103 rd	1993	Mitchell	20	395	5.1%
102 nd	1991	Mitchell	20	280	7.1%
101 st	1989	Mitchell	9	312	2.9%
100 th	1987	Byrd	23	420	5.5%
99 th	1985	Dole	9	381	2.7%
98 th	1983	Baker	7	381	1.8%
97 th	1981	Baker	7	497	1.4%
96 th	1979	Byrd	4	509	0.8%
95 th	1977	Byrd	5	636	0.8%
94 th	1975	Mansfield	23	611	3.8%
93 rd	1973	Mansfield	10	594	1.7%
92 nd	1971	Mansfield	10	423	2.4%
Average (356 cloture votes out of 8,371 roll call votes):					4.3%

In 2007, this 14 percent of all roll call votes which were cloture votes represents a record high and is more than 3 times the first session average over the last 38 years. The fact that such a high percentage of votes were cloture votes means that the Senate voted on relatively few amendments.

A good example of an amendment that was denied a vote was the constitutional line-item-veto amendment offered to the ethics bill by Senator Judd Gregg.¹⁴ Rather than permit a vote on this amendment, Senator Reid filed cloture on the bill. The treatment of this amendment demonstrates how the majority has used cloture to block Republican amendments. Instead of moving the bill forward, progress on the legislation stalled until Democrats agreed to allow Senator Gregg to offer the amendment to subsequent legislation. Shortly after the Democratic majority agreed to stop blocking the Republican amendment, the ethics bill passed the Senate and later became law.¹⁵ This example demonstrates that the tactics of the majority to block amendments can impede, rather than promote, passage of legislation.

THE OUTCOME OF CLOTURE

Many Bills Subjected to Cloture Have Passed the Senate this Congress.

As discussed previously, 46 different items of business were subjected to one or more cloture votes this Congress.¹⁶ Many of these items (28) passed the Senate following adequate debate and a fair amendment process. Many of these bills (13) have become law (and Judge Leslie Southwick was confirmed to the Fifth Circuit). The bills which have become law include:

- Revised Continuing Appropriations Resolution, 2007 (H.J. Res. 20, P.L. 110-5)
- Minimum Wage Act (H.R. 2, became law as H.R. 2206, P.L. 110-28)
- Energy Independence and Security Act of 2007 (H.R. 6, P.L. 110-140)
- Water Resources Development Act of 2007 (H.R. 1495, P.L. 110-114)
- U.S. Troop Readiness/Katrina Appropriations Act (H.R. 2206, P.L. 110-28)
- Defense Authorization Act (H.R. 1585, became law as H.R. 4986, P.L. 110-181)
- Consolidated Omnibus Appropriations Act, 2008 (H.R. 2764, P.L. 110-161)
- AMT Tax Increase Prevention Act of 2007 (H.R. 3996, P.L. 110-166)
- Economic Stimulus Act of 2008 (H.R. 5140, P.L. 110-185)
- Ethics Reform bill (S.1, P.L. 110-81)
- 9/11 Modernization Act (S. 4, P.L. 110-53)
- Court Security Improvement Act (S. 378, P.L. 110-177)
- Consolidated Natural Resources Act (S. 2739, P.L. 110-229)

¹⁴ On January 12, 2007, Senator Reid filed cloture on S. 1, the Senate Ethics bill, after Senator Gregg filed SA 17, regarding a “second look at waste,” to the substitute amendment, SA 3.

¹⁵ S. 1 passed the Senate by a vote of 96 to 2 on January 18, 2007 and was signed into law by the President on September 14, 2007.

¹⁶ Of the 46 measures subjected to cloture: 14 were signed into law or the nominee was confirmed; 14 passed the Senate but are not law; and 14 matters have not passed the Senate. Cloture was granted on 3 other matters but Democrats ended consideration. Cloture failed on a Republican-filed cloture petition.

In addition, 14 other items of business which faced cloture have passed the Senate but are not yet law (often because the House has failed to act). They include:

- Children's Health Insurance Program (H.R. 976, vetoed)
- Highway Technical Corrections Act (H.R. 1195, sent to White House)
- U.S. Troop Readiness/Katrina Appropriations Act (H.R. 1591, vetoed)
- Intelligence Authorization Act for Fiscal Year 2008 (H.R. 2082, vetoed)
- Farm Bill (H.R. 2419, conference report agreed to by both Houses)
- Foreclosure Prevention Act of 2008 (H.R. 3221, House returned to Senate)
- Children's Health Insurance Program (H.R. 3963, vetoed)
- Passenger Rail (Amtrak) Reauthorization Act (S. 294, awaiting House action)
- Food & Drug Administration Revitalization Act (S. 1082, awaiting House action)
- Indian Health Care Improvement Act (S. 1200, awaiting House action)
- Veterans' Benefits Enhancement Act of 2007 (S. 1315, awaiting House action)
- FISA Amendments Act of 2008 (S. 2248, Senate vitiated previous passage)
- Flood Insurance Reform & Modernization Act (S. 2284, awaiting House action)
- Consumer Product Safety Reform Act (S. 2663, House appointed conferees)

Just A Few Bills Subjected to Cloture Have Not Passed the Senate.

Just a handful of measures, 14 in all, have been subjected to a cloture vote and have failed to pass the Senate. On 9 occasions, at least one Democrat reached across the aisle to join Republicans in opposing cloture. While the Democratic leadership may argue that this constitutes a "Republican filibuster," such a characterization is simply not accurate as the opposition to cloture was bipartisan in nature. Examples of items of business where cloture was not invoked due to bipartisan opposition include:

- A "no confidence" resolution in Alberto Gonzales (S.J. Res. 14)
- An act to provide the District of Columbia with House representation (S. 1257)
- Comprehensive Immigration Reform (S. 1639 and S. 1348)
- The "DREAM" Act (S. 2205)

That leaves just 5 bills which have failed to pass the Senate due only to Republican opposition to cloture.¹⁷ Therefore, Senate Republicans have not engaged in "71 Republican filibusters." Rather, Republicans have only prevented the passage of 5 items of business following a cloture vote.

¹⁷ In three cases, Senator Reid was the lone Democrat to vote against cloture in order to permit him to move to reconsider the cloture vote. For purposes of this paper, even though Senator Reid voted against cloture, his vote is not counted as a vote in opposition to cloture.

CONCLUSION

The 110th Congress has seen a record number of cloture votes. Contrary to the political talking points, each cloture vote does not constitute a separate filibuster. Many cloture votes occur, not due to minority obstruction, but rather as a result of the majority's attempts to block amendments and prematurely end debate.

As has occurred regularly in this Congress, legislation has frequently passed the Senate following a failed cloture vote. The eventual passage of legislation regularly follows a fair amendment process and adequate debate. To date, only 5 measures have failed to pass the Senate following a cloture vote in which only Republicans voted against cloture. This demonstrates that Republicans are willing to work with the majority, provided they are given a fair chance to amend and debate the legislation.