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. The American people are fed up with the Senate, as evidenced by the many news articles and opinion pieces I am submitting for the record. It is time for us to act.

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.

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."

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."[1]

Senator Robert Byrd, who understood the Senate rules better than anyone, stated in 1979 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.[2] 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:

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[1] Senator John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 27 Harv. J.L. & Pub. Pol'y 181(2003).

[2] Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right To Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Committee on the Judiciary, 108th Cong. 309 (2003) (S. HRG. 108–227).

> "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.'"

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."

Renowned constitutional law scholar Ronald Rotunda stated in written testimony for the hearing:

> "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 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."[3]

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."[4]

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[3] Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181 (1997).

[4] For a more detailed discussion, see: Orrin G. Hatch, Judicial Nomination Filibuster Cause and Cure, Utah L. Rev. 803 (2005).

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. Senator Byrd, as Majority Leader in 1979, also discussed the addition of this language in the rules. He stated that, "this rule was written in 1959 by the 86th Congress. The 96th Congress is not bound by the dead hand of the 86th Congress." Senators Hatch and Byrd were correct – the Constitution does not allow the Senate of one Congress to tie the hands of its successors.

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 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."

Finally, in a recent law review article[5], Professor Aaron-Andrew P. Bruhl states:

> "During debates over the Senate rules, legislators and commentators frequently invoke the notion that the Senate is a continuing body, most notably in connection with arguments over attempts to change the filibuster rule. In this Article, I have argued that the continuing-body idea cannot withstand serious scrutiny, for the following reasons:
>
> - The continuing-body idea is insufficient to justify the Senate's current regime of rules. Even if the Senate is continuous over time, which tends to deflate the argument that the Senate is improperly binding its successors, we need a principle of commitment that explains why a continuous Senate can bind itself. No such principle is currently in evidence, and such a principle seems highly problematic.
>
> - It is not clear what makes the Senate a continuing body in a way that other legislative bodies are not. Various claims about why overlapping Senate terms matter are either false or fail to distinguish the Senate from the House.
>
> - If the Senate were a continuing body, it should act that way in areas besides the rulemaking context. But it does not. In fact, the Senate embraces propositions that contradict the continuing-body theory. But that is probably for the best, for we would strongly object to a Senate that modeled all its behavior after its handling of its rules."

[5] Aaron-Andrew P. Bruhl, Burying the "Continuing Body" Theory of the Senate, 95 Iowa L. Rev. 1401 (2010).

The Constitutional Option to Fix the Problem

When we look at the history of the cloture rule, and the abuse of the filibuster, it becomes clear that there is a long history of reform that has been accomplished by using what has become known as the "constitutional option.[6]" This history demonstrates that there is a way for a simple majority of the Senate to amend its rules, as the Constitution guarantees.

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.

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[6] For an excellent analysis of the constitutional option, see Martin B. Gold & Dimple Gupta, The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster, 28 Harv. J.L. & Pub. Pol'y 205 (2004).

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 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 1957, "my motion does not prejudge the nature of the rules which the senate in its wisdom might adopt … but my motion declares, 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 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.

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 again Mr. Chairman, and I ask unanimous consent for all of the items I cited in my testimony be included in the record.

S. HRG. 108–227

JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

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S. HRG. 108–227, May 6, 2003. Pages 146 - 151

Testimony of Steven G. Calabresi

Professor of Law, Northwestern University

The people of the United States have just won a great victory in the war to bring democracy and majority rule to Iraq. Now it is time to bring democracy and majority rule to the U.S. Senate's confirmation process for federal judges. A determined and willful minority of Senators has announced a policy of filibustering, indefinitely, highly capable judicial nominees such as Miguel Estrada and Priscilla Owen. By doing this, those Senators are wrongfully trying to change two centuries of American constitutional history by establishing a requirement that judicial nominees must receive a 3/5 vote of the Senate, instead of a simple majority, to win confirmation.

I have taught Constitutional Law in one form or another at Northwestern University for 13 years and have published more than 25 articles in all of the top law reviews including the Harvard Law Review, the Yale Law Journal, the Stanford Law Review, and the University of Chicago Law Review. I served as a law clerk to Justice Antonin Scalia and as a Special Assistant to the Attorney General of the United States. I am a Co-Founder and the Chairman of the Board of Directors of the Federalist Society, a national organization of conservative and libertarian lawyers. I offer this legal opinion in my individual capacity, and not on behalf of my academic institution, the Federalist Society or any client.

The U.S. Constitution was written to establish a general presumption of majority rule for congressional decision-making. The historical reasons for this are clear. A major defect with the Constitution's precursor, the Articles of Confederation, was that it required super-majorities for the making of many important decisions. The Framers of our Constitution deliberately set out to

remedy this defect by empowering Congress to make most decisions by majority rule. The Constitution thus presumes that most decisions will be made by majority rule, except in seven express situations where a two-thirds vote is required. The seven exceptional situations where a super-majority is required include: overriding presidential vetoes, ratifying treaties, approving constitutional amendments, and expelling a member.

There is substantial reason to think that these seven express exceptions to the general principle of majority rule are the only exceptions that the document contemplates. Under the canon of construction *expressio unius, exclusion alterius*, the enumeration of things in a series is generally supposed to be exclusive. Under this ancient and venerable canon, no other super-majority requirements beyond the seven enumerated in the constitutional text may in fact be permitted. This canon has been relied on by the U.S. Supreme Court in construing that court's original jurisdiction in *Marbury v. Madison*, as well as in many other cases.

Each House of Congress does, however, have the power to establish by majority vote "the Rules of its Proceedings", and it is quite clear that as an original matter this empowered each House to adopt parliamentary rules to foster deliberation and debate and to set up Committees to conduct business, as the British Parliament had done. It is not at all clear that the Rules of Proceedings Clause was originally meant to authorize filibusters of the kind we have become accustomed to in the Senate. From 1789 to 1806, the Senate's Rules allowed for cutting off debate by moving the previous question – a motion which required only a simple majority to pass. Critically, then, the first several Senates to sit under the Constitution did **not** have a Rule that allowed for filibustering.

The filibuster of legislation dates back to 1841 when Senator John C. Calhoun, a

notorious defender of slavery and an extreme proponent of minority rights, originated the filibuster as part of his effort to defend the hideous institution of slavery. Calhoun's creation of the filibuster was opposed by the great Senator Henry Clay and the very name filibuster itself was originally a synonym for pro-Slavery mercenary pirates who would attack Latin American governments to try to spread the Slave system. Since its inception in 1841, the filibuster of legislation has been used to block legislation protecting black voters in the South, in 1870 and 1890-91; to block anti-lynching legislation in 1922, 1935, and 1938; to block anti-poll tax legislation in 1942, 1944, and 1946; and to block anti-race discrimination statutes on 11 occasions between 1946 and 1975. The most famous filibuster of all time was the pro-segregation filibuster of the Civil Rights Act of 1964, which went on for 74 days. In recent years, the number of filibusters has escalated dramatically due to the emergence of the so-called stealth filibuster or two track system of considering legislation. We have gone from 16 filibusters in the 19th Century to 66 in the first half of the 20th Century to 195 filibusters between 1970 and 1994. Filibusters of legislation may be constitutionally dubious as an original and textual matter, but they have been permitted now in the Senate for a century and one-half and indeed seem to be mushrooming.

Now for the first time in 214 years of American history an angry minority of Senators is seeking to extend the tradition of filibustering from legislation to judicial nominees who enjoy the support of a majority of the Senate. This unprecedented extension of the filibuster to judicial nominees threatens to raise the vote required for senatorial confirmation of judges from 51 to 60 votes. This is a direct violation of the Advice and Consent Clause, which clearly contemplates only a majority vote to confirm a judge. Raising the vote required to confirm a judge will

weaken the power of the President in this area in direct violation of the Constitution while augmenting the power of a minority of the Senate. Giving a minority of Senators a veto over judicial nominees will also threaten the independence of the federal judiciary in direct violation of the separation of powers.

The Appointments Clause imposes a mandatory duty on the President to nominate and appoint judges. The Clause directs that the President "shall" i.e. "must" nominate individuals to judicial vacancies and it implicitly suggests that the full Senate must give its advice and/or consent with respect to each nominee. By giving the Senate a role in judicial confirmations, the Constitution allows the Senate to share in the inherently executive power of appointment. This senatorial exercise of executive power is to be narrowly construed, as it is an exceptional involvement of the Senate in an inherently executive task. Myers v. United States.

The question that faces this body is: should the non-textual, non-originalist tradition of allowing filibusters of legislation be allowed to spread to the new area of senatorial confirmation of federal judges? There are several reasons why allowing filibusters of judicial nominations is a bad idea. First, such filibusters weaken the power of the President who is one of only two officers of government who is elected to represent all of the American people. The President was supposed to play a leading role in the selection of judges and that role is defeated by giving a minority of senators a veto over presidential nominees.

Second, giving a minority of Senators a veto over judicial nominees will violate the separation of powers by giving a Senate minority the power to impose a crude litmus test on judicial nominees, thus undermining judicial independence. It is already hard enough for talented and capable individuals to be appointed to the federal bench. Making this process even

more difficult is bad for the federal judiciary and bad for the country. We are likely to get only bland and weak individuals being willing to serve as federal judges if we continue to make the process of becoming a federal judge ever more onerous. This would weaken the federal courts and the exercise of judicial review immeasurably.

Third, the filibuster of legislation can at least be defended on the ground that federal legislation ought to be rare because of the sweeping and national effects it has on the rights of all citizens. In contrast, the confirmation of a judge who is sworn only to apply the law made by others ought to have no such sweeping and national effects. If a mistake is made with a judicial confirmation and somehow a judicial activist is allowed to slip through, impeachment is always available to rectify the error. There is no similarly easy remedy if Congress passes a bad law.

Finally, the tradition of Senate filibusters of legislation is, as I have shown of questionable pedigree. Text and original understanding do not clearly support the filibuster of legislation and the filibuster has had a dismal history as a tool primarily used in the defense of slavery and then of segregation. While it may be too late in the day to stamp out the filibuster of legislation, surely we can keep this invention of John C. Calhoun from spreading to a new area for the first time in 214 years of American history! This is the time and place to nip the spread of the filibuster in the bud.

The Senate can always change its rules by 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 from 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. A simple majority of the Senate can and should now amend Rule XXII by majority vote to ban filibusters of judicial nominations.

Leading scholars in this area of law such as John O. McGinnis of Northwestern University, Michael Rappaport of San Diego University, and Erwin Chemerinsky of the University of Southern California all have written that the Senate Rules can be changed at any time by a simple majority of the Senate. More importantly, Vice Presidents Richard M. Nixon, Hubert H. Humphrey, and Nelson A. Rockefeller have all so ruled while presiding over the United States Senate. Some commentators have gone even further in challenging filibusters of legislation as unconstitutional, as did Lloyd Cutler, White House Counsel to Presidents Carter and Clinton. Indeed, eight years ago, 17 very distinguished law professors, led by Yale Law Professor Bruce Ackerman, opined that a new Rule in the House of Representatives purporting to create a 3/5 requirement for enacting new tax increases was unconstitutional. The Ackerman letter wisely called for limiting the proliferation of new extra-constitutional, super-majority rules – counsel that the Senate should heed here.

What will happen if the filibuster is allowed to spread to the new area of judicial confirmations? It will next spread to the resolution every new Senate must pass to organize itself, set up Committees, and apportion staff and other resources. The filibusters next expansion will be one wherein a minority of 41 Senators will claim they are entitled to equal slots and Committee resources as are enjoyed by a majority of 59 Senators. This is the logical extension of the filibusters protection of minority rule under the inexorable Calhounian logic now being played out.

S.HRG. 108-227, May 6, 2003. Pages 307 - 310

Statement of Douglas W. Kmiec
Dean & St. Thomas More Professor of Law
The Catholic University of America Law School
Before the Subcommittee on the Constitution, Civil and Property Rights
of the U.S. Senate Judiciary Committee
May 6, 2003

Mr. Chairman, thank you for this opportunity to appear before you to discuss the relationship between the Constitution, the procedural rules that affect the Senate's evaluation of judicial nominees. As you know, I was privileged to serve as constitutional legal counsel to President Reagan and the first President Bush, and I have taught constitutional law for a quarter century at several universities, including Notre Dame, Pepperdine, and Catholic Universities.

It is fair to say that the constitutionally-envisioned process for judicial nomination and confirmation is broken, and that it has been for some time. The executive and legislative branches have been at loggerheads for twenty years or more, and while the Democratic and Republican voices occasionally exchange roles, the arguments are the same. Presidents complain that nominees of high intellect, integrity and temperate demeanor are being rejected on partisan or ideological grounds. The political opposition to the President in the Senate for its part makes like complaint but in reverse, claiming the President is using a partisan litmus test to stack the judicial deck.

In one sense, these arguments are as old as the Republic. Adams sought to populate the federal bench with federalists and the anti-federalists in league with Jefferson sought to deny him this ability. What is different about the modern context is the procedurally problematic, and arguably, constitutionally questionable, manner in which both Democratic and Republican partisans have operated. On both sides of the aisle during different eras, the Senate judiciary committee has ignored presidential nominees and deprived them of hearings. Both Democrats and Republicans have used hearings as a device to short-circuit full Senate consideration, by putatively rejecting nominees on committee, rather than full Senate, votes. And presently, the warfare has escalated to the point where the Senate, otherwise highly respectful of committee deliberation, is ignoring, itself, – that is nominees reported out of committee are being blocked from floor consideration by means of constitutionally dubious filibuster.

All of this delay results in what nonpartisan judicial administrators find to be "judicial emergencies" in a significant number of jurisdictions. Since these emergencies are concentrated on the litigants seeking to have civil and economic liberties vindicated through judicial process, they go unreported by popular media. There are few good visuals that the evening news can employ of citizens being harmed by judicial delay – but the harms are real, in the federal laws that go unenforced, the businesses harmed, and the injuries that are not redressed.

The harm of executive-legislative paralysis over judicial appointment also has insidious

effect on the quality of women and men drawn to this service. It is well known that judicial salaries are a fraction of what an accomplished lawyer could earn for his or her family in private practice. Nevertheless, it is reasonable to speculate that modest salary has less of a dampening effect than delay and the coarse partisan caricature that is now used to oppose judicial nominees. The mounting of political campaigns for and against judicial nominees now begins on rumor of one's nomination, and as a result, many who might accept reduced income for public service are not willing to subject themselves and their families to scurrilous attack over an extended period that the broken confirmation process inspires.

What is to be done?

My advice is simple: follow the law of the Constitution. The original understanding gives unfettered nomination authority to the President. So too, the text allows the full Senate to reject any nominee for any reason, though commentary at the founding supposed that the reasons would have far more to do with intellectual quality or capability than partisan disagreement with the nominee's judicial perspective. Beyond that, President Bush has put the matter simply and directly: "the Senate has a constitutional responsibility to exercise its advice and consent function and hold up-or-down votes on all judicial nominees within a reasonable time after nomination."

Now if the response to this is that the Senate, by constitutional text, has sweeping authority to determine its own rules under Article I, section 5, that is, with respect, an incomplete and evasive response. As the Supreme Court unanimously held in *United States v. Ballin* (1892), "[t]he constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." In a constitutional system, power, like freedom, is not without limit, and the exercise of one provision to thwart the reasonable nominating discretion of the executive and undermine the functioning of the judiciary is subversive of the separation of powers and the constitutional system.

This is especially so when adopted senate rules disregard the principal of majority governance by imposing textually unauthorized super-majority requirements, and where those supermajority requirements are the product of rules never adopted by the current Senate.

The Constitution provides for majority rule, as an implied aspect of the consent of the governed, wherever the document by conscious choice has not specified an alternative process requiring a greater vote. In seven sections of the Constitution, a greater vote than majority is specified – for example, in Article I, section 7 providing for the override of a presidential veto by two-thirds of both Houses or the provisions in Article II providing for Senate ratification of treaty by two-thirds.

There is no comparable provision for judicial nominations, and yet, two recent nominees reported favorably by this committee to the full Senate cannot obtain an up or down vote without

surpassing the 60 vote requirement needed to close debate.

Now as a matter of form, it can be argued that this 60 vote requirement relates not to the Senate's approbation of a nominee but simply to cloture. So too, it can be argued that a supermajority has been required to close debate for a century or more, and therefore, it is too late in the day to object.

These are arguments in constitutional evasion and noncooperation, they are not worthy of what is rightly referred to as the greatest deliberative body in the world. For that reason alone, the Senate – in the interest of maintaining the integrity of its own process – should have a desire to not apply supermajority cloture requirements where doing so threatens the separation of powers.

There may also be a constitutional duty on the Senate not to continue this practice. The Senate rules related to cloture are holdover rules from a previous Senate that have never been adopted. Senate Rule V provides that Senate rules are continuing, even as the Senate, by constitutional design, is not a continuing body. It cannot be. The framers carefully provided for staggered terms, whereby one-third of the Senate would stand for election every two years. This ensures accountability and Senate responsiveness to the popular will, and failure to acknowledge this new composition by failing to give each newly constituted body an opportunity to affirm, amend, or repeal pre-existing Senate rules denies the meaning of these elections.

The likelihood of constitutional injury is all the more obvious in light of Senate Rule XXII which imposes a two-thirds requirement of those present and voting to secure cloture on any motion to change the rules. Senate Rule V which imposes these rules on the newly constituted Senate (which is denominated by its own number, selects its own officers, adjusts committee assignments, and otherwise reveals how the Senate is not a "continuing" body) violates fundamental law as old as Blackstone, who observed that "Acts of parliament derogatory from the power of subsequent parliaments bind not." Likewise, the Supreme Court has repeatedly held that "the legislature does not have the power to bind itself in the future."

Again, it is understandable why not. For the political process to remain representative and accountable, "every succeeding Legislature possesses 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." *Ohio Life Ins. and Trust Co. v. Debolt* (1853). The precept has never been doubted. Indeed, the Supreme Court would arguably apply the highest scrutiny to evaluating any legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *U. S. v. Carolone Products Co.* (1938).

Who will tell the Senate that it may be acting unconstitutionally? On one level, this is a question of justiciability. There is good reason for the judiciary to seek to avoid this issue to avoid embarrassment to a co-equal branch. And there is precedent, like *Nixon v. United States*,

dealing with the Senate's exclusive power to try impeachments, which illustrate the level of the Court's appropriate deference. But appropriate deference is not default, and factors which stayed the judicial hand in *Nixon* are not present in this context. In *Nixon,* had judges inserted themselves to superintend Senate impeachment practices, they would be undermining their own parallel authority to hear criminal issues related to impeachment, and more, weakening one of the only checks upon the judiciary, itself. These considerations for deference are not present here. Rather, a disappointment nominee or a newly elected member of the Senate with no voice in the rules that limit his electoral service could persuasively argue that the failure of the Court to intervene is fully necessary to address the injury to the body politic.

It is interesting that two former Vice-Presidents of different parties (Nixon (1957) and Humphrey (1969), sitting as the presiding officer of the Senate, have ruled that the current membership of the Senate is not bound by Senate Rule V's imposition of the rules of a different, prior body. That the Humphrey ruling was rejected by the full Senate out of the politics of the day hardly settles the constitutional issue.

The Senate has a solemn responsibility in the consideration of judicial nominations. There has been a troubling failure on the part of both parties to meet this responsibility. The Senate need not defer to the judicial nominations of the President, but it should not ignore or defeat them by means not envisioned in the Constitution, itself. Let the debate be fair and open and concluded by all members of the Senate. That practice can easily be established in newly adopted Senate Rules that allow for debate to be closed on judicial nominations by simple majority.

As I have publicly written, denying Mr. Estrada or Justice Owen their confirmation vote by the full Senate is no more legitimate than if the outgoing Democratic majority of the previous Senate had attempted by rule to prevent repeal or modification of any Democratically-sponsored enactment except by super-majority.

It is not just the present nominees who are being injured; it is the right of Senate members not to have their representation diluted or nullified, and in that, it is the right of all of us who voted for those members that is being wrongly – if not unconstitutionally – filibustered.

S.HRG. 108-227, May 6, 2003. Pages 321 - 324

May 12, 2003

The Honorable John Cornyn
Chairman of the Senate Subcommittee on the
Constitution, Civil Rights & Property Rights
Washington, DC

Dear Chairman Cornyn:

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 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

The Constitution allows each legislative house broad discretion in selecting its legislative rules, including rules relating to the support needed to take a vote and to pass a measure. Under the Rules of Proceedings Clause of Article I, section 5, clause 2, the Senate has clear authority to enact the filibuster rule as well as other supermajority rules. The main limitation on the Senate's authority to enact a legislative rule is that the rule cannot violate another constitutional provision.

The Senate rule that would prevent a majority of the Senate from the opportunity to vote on whether to repeal or modify the filibuster rule would violate an important and traditional constitutional principle embedded in the vesting of legislative power to the Congress in Article I, section I: that no house may entrench a legislative rule or law against modification by a future majority of that house. Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching that rule.

This understanding of the legislative power has strong support in both constitutional structure and history. As a matter of structure, the Constitution established an extremely strict constitutional amendment process that requires two-thirds of Congress to propose an amendment and then three-quarters of the states to ratify one. Legislative entrenchment, however, would allow the Senate to pass a rule that could not be repealed by a subsequent Senate and therefore would operate as a type of quasi-constitutional law. For example, instead of enacting a constitutional amendment to prohibit Congress from passing unbalanced budgets, the Senate could pass a rule that would prevent itself from taking this action and then entrench that rule against change by prohibiting its future modification or by requiring a 90 percent vote for such modification. It is extremely unlikely that the Framers would have allowed each house to pass a measure that so resembles a constitutional amendment through a lenient procedure such as majority passage through a single house, when they established such a strict procedure for

constitutional amendments.

History also provides powerful support for the notion that a house may not entrench its rules against amendment by a majority. When the Constitution was written, Anglo-American legislatures did not generally, if ever, entrench. As Blackstone stated in his Commentaries, each legislature "is always of equal . . . authority" and therefore "Acts of parliament derogatory from the power of subsequent parliaments bind not." Americans inherited this understanding that the legislative power did not include the authority to entrench when they established an independent nation. Thus, one of the most famous statutes in American history – the 1786 Virginia Statute for Religious Freedom, which was written by Thomas Jefferson and introduced by James Madison – states in the statute itself that even the justly celebrated principle of religious freedom, which was regarded as a natural right, could not be entrenched against future repeal. The statute provides: "And though we know this assembly elected by the people for ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

This understanding of the legislative power was also applied to the United States Constitution. James Madison, the father of the Constitution, told the House of Representatives in 1790 that the Congress did not have the authority to entrench legislation: "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"

Under our Constitution, then, the Senate can enact and enforce a rule like the filibuster rule that requires a supermajority of the legislature to take votes or certain actions. Similarly other rules, such as the committee system, which may also deprive a majority of the Senate from taking action, are also constitutional. These rules can be a valuable part of our constitutional democracy, serving a variety of significant purposes. Yet, there is an important distinction between legislative supermajority rules and entrenched rules. Although supermajority rules prohibit a majority from taking action, they allow a majority to eliminate the rule. Entrenched rules, by contrast, prevent a future majority from repealing or amending the rule.

This analysis of the Senate's constitutional powers is also consistent with the distinctive role of the Senate in our constitutional system. One important distinction between the Senate and the House of Representatives is that the Senate is a continuing body with enduring rules, whereas the House of Representative's rules terminate at the end of every Congress and must be enacted anew every two years. The continuing nature of the Senate rules, however, does not justify nor require the entrenchment of these rules. So long as a majority of the Senate can amend the rules, there is no constitutional difficulty with the continuing nature of the rules. Put differently, the continuing nature of the rules does not require that these rules be entrenched against change.

Another distinction between the two houses is that the Senate has attempted to emphasize collegiality and deliberativeness. The filibuster rule is often thought to contribute to these norms by allowing a Senate minority to continue debating a matter, even though a majority would vote to end debate. But the Constitution does not forbid the operation of the filibuster. The Constitution only forbids a minority from blocking a change in the filibuster rule and therefore permits the Senate to continue its emphasis on deliberateness by continuing to enforce the filibuster in most instances.

It should be underscored that the filibuster rule is still likely to be effectual even though a majority can amend it. There is every reason to believe that the filibuster will continue to operate and to prevent a vote, even though a majority of the Senate would want to end debate and could, theoretically, vote to exempt that filibuster from the filibuster rule. Even if a majority of the Senate supports ending a particular filibuster, that does not mean that majority would be willing to amend the filibuster rule generally or to create an exception for that particular filibuster. Senators might be reluctant to amend the filibuster rule out of a desire to operate the Senate in accordance with traditional practices that have been thought to contribute to orderly decisionmaking in a variety (but not all) circumstances. Indeed, at present, Senate minorities often refrain from filibustering bills even though these minorities oppose the bills, because a filibuster is regarded as an extraordinary action – and that occurs under a regime where the filibuster is part of the rules. The Senate is likely to be even more reluctant to amend the rules.

In testimony, Professor Michael Gerhardt relies upon a recent essay by Professors Eric Posner and Adrian Vermeule arguing that the Constitution permits entrenchment, but that reliance is misplaced for at least two reasons. First, Posner and Vermeule's article acknowledges that the "Supreme Court sees [the prohibition on entrenchment] as a constitutional axiom" and that "the academic literature takes the rule as given, universally assuming that legislative entrenchment is constitutionally or normatively objectionable." Thus, whatever the scholarly merits of Posner and Vermeule's article, it cannot be understood as stating the law. Second, the two of us have just published an essay, including a critique of Posner and Vermeule's theory, which in our view refutes their constitutional claims. *See Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385 (2003).

Professor Gerhardt also quotes an earlier article, where we did not take a position on the constitutionality of the Senate rules allowing a filibustering of a change in the filibuster rule. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L. J. 483 (1995). In that article, we were defending the constitutionality of the House three-fifths rule, which required a three-fifths supermajority in order to raise income tax rates. That article did not take a position on the entrenchment of the filibuster. Instead, we discussed two theories that were consistent with the constitutionality of the three-fifths rule, one which would hold the entrenchment of the filibuster unconstitutional, the other which regarded it as permissible. Since that time we have undertaken additional work, largely in response to Posner and Vermeule's argument, and have developed the analysis we present here.

Finally, that the proposed change in the filibuster rule relates to judicial appointments does not affect this analysis. While it is theoretically possible that entrenchment would be permissible in a specific area, such as the Senate's power to advise and consent, even though it was not allowed generally, one would require strong evidence based on text, history, structure, and purpose to reach that conclusion. We are not aware of any such evidence.

Sincerely,

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Northwestern Law School

Michael B. Rappaport
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S.HRG. 108-227, May 6, 2003. Pages 349 - 352

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13 May 2003

James C. Ho, Esq.
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn

RE: *Changing the Rules Governing Senate Filibuster of Nominations*

Dear Mr. Ho:

I would like to render my legal opinion regarding the ability of the Senate to change its rules regarding filibusters of nominations.

First, a little background. The filibuster has a long history, but its pedigree is not one that should make us proud. It prevented civil rights legislation from being adopted for nearly a century.[1]

The modern filibuster has evolved into an invisible filibuster that is much more powerful than its historical predecessor. The current filibuster is covert and nearly invisible to the observer, because the Senate rules do not require any senator to actually hold the floor to filibuster: instead, the senators simply tell the Senate leadership that they intend to filibuster. Other Senate business goes on, but a vote on a particular issue — a nomination or a vote on legislation — cannot be brought to a vote.

The present Senate rules that create the filibuster also purport not to allow the Senate to change the filibuster by simple majority. However, these rules should not bind the present Senate any more than a statute that says that it cannot be repealed until 60% or 67% of the Senate vote to repeal the statute. As I explain more fully below, I do not see how an earlier Senate can bind a present Senate on this issue.

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[1] This point is neither original nor hardly in dispute. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199 (1997): "Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters played a major role in blocking measures to prohibit lynching, poll taxes, and race discrimination in employment, housing, public accommodations, and voting." (footnotes omitted citing authorities).

I understand that my opinion is being given in the context of a dispute between the Republicans and Democrats regarding the appropriateness of using the filibuster to prevent the Senate from voting on nominations that the relevant committee has approved. Of course, if the full Senate is allowed to vote on the nomination then, under the Constitution, a simple majority will be sufficient to confirm. Thus, this legal question has political overtones, but the resolution of the present dispute is not based on political preference: instead, it is based on law and logic.

Hence, Democratic commentators agree that the Senate can vote (if a simple majority want to vote) notwithstanding a preexisting rule to the contrary. For example, Lloyd Cutler, the former White House Counsel to Presidents Carter and Clinton wrote in 1993 that the Senate Rule requiring a super-majority vote to cut off debate is "plainly unconstitutional."[2] Prominent Democratic academics agree that the modern day filibuster "raises serious constitutional questions." *See*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).[3] Moreover, these authors reach the same conclusion that I reach: "the Senate rule that prohibits a majority of a newly elected Senate from abolishing the filibuster is unconstitutional because it impermissibly entrenches the decisions of past Congresses."[4]

Granted, the Senate, unlike the House, is often called a continuing body because only one-

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[2] "Rule XXII's built-in requirement that it and other Senate rules cannot be amended by majority vote, but only when two-thirds of the senators present vote 'aye.' The Constitution specifies no exception to the vice president's constitutional right to cast a tie-breaking vote, which necessarily includes votes on motions to amend the Senate's own rules. Since Rule XXII denies this power to the vice president by requiring that any amendment requires an affirmative vote of two-thirds, it is *plainly unconstitutional*." Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23. See also his testimony before the JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 104th Cong. (1995) (statement of Lloyd Cutler, White House Counsel).

[3] Indeed, in 1995, Professor Bruce Ackerman of Yale, along with 16 other law professors opined that a proposed House of Representatives rule that created a 60% majority requirement for enacting new tax increases was unconstitutional, even though the House could have repealed that rule by simile majority vote. *See* reference in, Congressional Testimony by Federal Document Clearing House Immigration and Naturalization Bills, Cong. Testimony, 2003 WL 11717788 (May 6, 2003).

[4] The introductory comments to the article offer a brief summary of the author's full analysis, which is over 70 pages in length. This summary and the parts in quotations are taken from these comments from the authors' article. This article explains that what the authors call a "stealth filibuster" is historically "unprecedented" and raises "serious" constitutional questions. The authors conclude, first: "The Constitution requires that the judiciary declare Rule XXII's requirement that there be a two-thirds vote for a change in the Senate's rules unconstitutional." 49 STAN. L. REV. at 253. And second, "Senate Rule XXII is unconstitutional in requiring a two-thirds vote in order to change the Senate's rules." *Id.*

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 body insofar as two-thirds of its members carry over from the prior elections, but — for purposes relevant to this letter — the Senate starts anew every two years.

It is easy to make this point by looking at simple logic and a few examples.

If the prior Senate can bind a later Senate, that would mean that the prior Senate could, by mere rule, impose what amounts to an important amendment to the Constitution regarding the number of votes needed to confirm a nominee. The Senate cannot change the number of votes needed to confirm a nominee any more than it can properly change the number of votes necessary for consenting to the ratification of a treaty from two-thirds to 75% or 25% or 51%. Nor could a majority of the Senators amend the rules to provide that a treaty may be ratified only if two-thirds of the Republican Senators present and voting give their consent.[5]

Recall that Senator James Jeffords changed parties and became an independent after the 2000 election. That shifted control of the Senate from Republicans to Democrats. The new Senate then reorganized itself, changed committee staff, and so on. However, if the prior Senate can really bind the present Senate, the Republicans could have filibustered the effort to reorganize the Senate. One might respond: but that would mean that the Senate could not vote on anything while there was a filibuster going on! Ah, but as I mentioned above, the Senate no longer require a senator to actually hold the floor to filibuster; senators "filibuster" simply by notifying the Senate leadership that they plan to filibuster. If the present Senate cannot change its filibuster rule until 67 senators vote against this modern-day "invisible" filibuster, then the Republicans could have prevented the turn-over of the Senate after the Republicans no longer controlled 50 or 51 votes. Yet, we all know that attempt would be invalid.

Or, think of it this way: what if the prior Senate (before the most recent election that shifted control to the Republicans) used its rule-making power to provide that judicial appointments require 75% or even unanimous consent, and that the Senate could not change that rule except by unanimous consent? Surely, no one would argue that the prior Senate can prevent the present Senate from changing that rule. Filibusters cannot be used to prevent changes in the rules that govern filibusters.

The present Senate rules are no more sacrosanct than a statute. If the House and Senate enact a law and the President signs it, it remains in effect until the House and Senate repeal it and the President signs the repealing legislation. The prior law cannot provide that it remains law unless 60% or 67% of the Senators approve the repeal. Similarly, a Senate rule remains in effect until the

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[5] *See also, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 253 (1997): "it is unconstitutional for Congress to bind future sessions of Congress. It is a clearly established principle of constitutional law, supported by fundamental democratic principles, that one Congress cannot tie the hands of future Congresses"

Senate changes that rule. The prior rule cannot provide that it remains law unless 60% or 67% of the Senators approve the repeal.

In short, the Senate can change its filibuster rule by simple majority vote. The rule regarding the filibuster cannot apply to votes to change the Senate rules, including the Senate rule regarding filibusters.

Sincerely,

Ronald D. Rotunda

National Review Online
January 12, 2005
Crisis Mode
A fair and constitutional option to beat the filibuster game.

By Senator Orrin G. Hatch

Judicial nominations will be one of the most important issues facing the Senate in the 109th Congress and the question is whether we will return to the tradition of giving nominations reaching the Senate floor an up or down vote. The filibusters used to block such votes have mired the judicial-confirmation process in a political and constitutional crisis that undermines democracy, the judiciary, the Senate, and the Constitution. The Senate has in the past changed its procedures to rebalance the minority's right to debate and the majority's right to decide and it must do so again.

Newspaper editorials condemning the filibusters outnumber supporting ones by more than six-to-one. Last November, South Dakotans retired former Senate Minority Leader Tom Daschle, in no small part, because he led the filibuster forces. Yet within hours of his election to succeed Senator Daschle as Minority Leader, Senator Harry Reid took to the Senate floor to defend them. Hope is fading that the shrinking Democratic minority will abandon its destructive course of using filibusters to defeat majority supported judicial nominations. Their failure to do so will require a deliberate solution.

DIAGNOSING THE CRISIS

If these filibusters were part of the Senate's historical practice or, as a recent NRO editorial put it, merely made confirming nominees more difficult, a deliberate solution might not be warranted. But this is a crisis, not a problem of inconvenience.

Senate rules reflect an emphasis on deliberation and debate. Either by unanimous agreement or at least 60 votes on a motion to invoke cloture under Rule 22, the Senate must end debate before it can vote on anything. From the Spanish *filibustero*, a filibuster was a mercenary who tries to destabilize a government. A filibuster occurs most plainly on the Senate floor when efforts to end debate fail, either by objection to unanimous consent or defeat of a cloture motion. During the 108th Congress, Senate Democrats defeated ten majority-supported nominations to the U.S. Court of Appeals by objecting to every unanimous consent request and defeating every cloture motion. This tactic made good on then-Democratic Leader Tom Daschle's February 2001 vow to use "whatever means necessary" to defeat judicial nominations. These filibusters are unprecedented, unfair, dangerous, partisan, and unconstitutional.

A POLITICAL CRISIS

These are the first filibusters in American history to defeat majority supported judicial nominations. Before the 108th Congress, 13 of the 14 judicial nominations on which the Senate took a cloture vote were confirmed. President Johnson withdrew the 1968 nomination of Abe Fortas to be Supreme Court chief justice the day after a failed cloture vote showed the nomination did not have clear majority support. In contrast, Democrats have now crossed the confirmation Rubicon by using the filibuster to defeat judicial nominations which enjoy clear

majority support.

Focusing on President Clinton's judicial nominations in 1999, I described what has been the Senate's historical standard for judicial nominations: "Let's make our case if we have disagreement, and then vote." Democrats' new filibusters abandons this tradition and is unfair to senators who must provide the "advice and consent" the Constitution requires of them through a final up or down vote. It is also unfair to nominees who have agreed, often at personal and financial sacrifice, to judicial service only to face scurrilous attacks, trumped up charges, character assassination, and smear campaigns. They should not also be held in permanent filibuster limbo. Senators can vote for or against any judicial nominee for any reason, but senators should vote.

These unprecedented and unfair filibusters are distorting the way the Senate does business. Before the 108th Congress, cloture votes were used overwhelmingly for legislation rather than nominations. The percentage of cloture votes used for judicial nominations jumped a whopping 900 percent during President Bush's first term from the previous 25 years since adoption of the current cloture rule. And before the 108th Congress, the few cloture votes on judicial nominations were sometimes used to ensure up or down votes. Even on controversial nominees such as Richard Paez and Marsha Berzon, we invoked cloture to ensure that we would vote on confirmation. We did, and both are today sitting federal judges. In contrast, these new Democratic filibusters are designed to prevent, rather than secure, an up or down vote and to ensure that targeted judicial nominations are defeated rather than debated.

These filibusters are also completely partisan. The average tally on cloture votes during the 108th Congress was 53-43, enough to confirm but not enough to invoke cloture and end debate. Democrats provided every single vote against permitting an up or down vote. In fact, Democrats have cast more than 92 percent of all votes against cloture on judicial nominations in American history.

A CONSTITUTIONAL CRISIS

Unprecedented, unfair, and partisan filibusters that distort Senate procedures constitute a political crisis. By trying to use Rule 22's cloture requirement to change the Constitution's confirmation requirement, these Democratic filibusters also constitute a constitutional crisis.

The Constitution gives the Senate authority to determine its procedural rules. More than a century ago, however, the Supreme Court unanimously recognized the obvious maxim that those rules may not "ignore constitutional restraints." The Constitution explicitly requires a supermajority vote for such things as trying impeachments or overriding a presidential veto; it does not do so for confirming nominations. Article II, Section 2, even mentions ratifying treaties and confirming nominees in the very same sentence, requiring a supermajority for the first but not for the second. Twisting Senate rules to create a confirmation supermajority undermines the Constitution. As Senator Joseph Lieberman once argued, it amounts to "an amendment of the Constitution by rule of the U.S. Senate."

But don't take my word for it. The same senators leading the current filibuster campaign once argued that all filibusters are unconstitutional. Senator Lieberman argued in 1995 that a supermajority requirement for cloture has "no constitutional basis." Senator Tom Harkin insisted

that "the filibuster rules are unconstitutional" because "the Constitution sets out...when you need majority or supermajority votes in the Senate." And former Senator Daschle said that because the Constitution "is straightforward about the few instances in which more than a majority of the Congress must vote....Democracy means majority rule, not minority gridlock." He later applied this to judicial nomination filibusters: "I find it simply baffling that a Senator would vote against even voting on a judicial nomination." That each of these senators voted for every judicial-nomination filibuster during the 108th Congress is baffling indeed.

These senators argued that legislative as well as nomination filibusters are unconstitutional. Filibusters of legislation, however, are different and solving the current crisis does not require throwing the entire filibuster baby out with the judicial nomination bathwater. The Senate's authority to determine its own rules is greatest regarding what is most completely within its jurisdiction, namely, legislation. And legislative filibusters have a long history. Rule 22 itself did not even potentially apply to nominations until decades after its adoption. Neither America's founders, nor the Senate that adopted Rule 22 to address legislative gridlock, ever imagined that filibusters would be used to highjack the judicial appointment process.

TRYING TO CHANGE THE SUBJECT

Liberal interest groups, and many in the mainstream media, eagerly repeat Democratic talking points trying to change, rather than address, the subject. For example, they claim that, without the filibuster, the Senate would be nothing more than a "rubberstamp" for the president's judicial nominations. Losing a fair fight, however, does not rubberstamp the winner; giving up without a fight does. Active opposition to a judicial nomination, especially expressed through a negative vote, is the best remedy against being a rubberstamp.

They also try to change the definition of a filibuster. On March 11, 2003, for example, Senator Patrick Leahy, ranking Judiciary Committee Democrat, used a chart titled "Republican Filibusters of Nominees." Many individuals on the list, however, are today sitting federal judges, some confirmed after invoking cloture and others without taking a cloture vote at all. Invoking cloture and confirming nominations is no precedent for not invoking cloture and refusing to confirm nominations.

Many senators once opposed the very judicial nomination filibusters they now embrace. Senator Leahy, for example, said in 1998: "I have stated over and over again...that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported." Since then, he has voted against cloture on judicial nominations 21 out of 26 times. Senator Ted Kennedy, a former chairman of the Judiciary Committee, said in 1995 that "Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate." Since then, he has voted to let a minority of the Senate deny judicial nominees a vote 18 out of 23 times.

Let me put my own record on the table. I have never voted against cloture on a judicial nomination. I opposed filibusters of Carter and Clinton judicial nominees, Reagan and Bush judicial nominees, all judicial nominees. Along with then-Majority Leader Trent Lott, I repeatedly warned that filibustering Clinton judicial nominees would be a "travesty" and helped make sure that every Clinton judicial nomination reaching the full Senate received a final

confirmation decision. That should be the permanent standard, no matter which party controls the Senate or occupies the White House.

SOLVING THE CRISIS

The Senate has periodically faced the situation where the minority's right to debate has improperly overwhelmed the majority's right to decide. And we have changed our procedures in a way that preserves the minority's right to debate, and even to filibuster legislation, while solving the crisis at hand.

The Senate's first legislative rules, adopted in 1789, directly reflected majority rule. Rule 8 allowed a simple majority to "move the previous question" and proceed to vote on a pending matter. Invoked only three times in 17 years, however, Rule 8 was dropped in the Senate rules revision of 1806, meaning unanimous consent was then necessary to end debate. Dozens of reform efforts during the 19th century tried to rein in the minority's abuse of the right to debate. In 1917, President Woodrow Wilson described what had become of majority rule: "The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action.... The only remedy is that the rules of the Senate shall be altered." Leadership turned gridlock into reform, and that year the Senate adopted Rule 22, by which 2/3 of Senators present and voting could invoke cloture, or end debate, on a pending measure.

Just as the minority abused the unanimous consent threshold in the 19th century, the minority abused the 2/3 threshold in the 20th century. A resolution to reinstate the previous question rule was introduced, and only narrowly defeated, within a year of Rule 22's adoption. A steady stream of reform attempts followed, and a series of modifications made until the current 60-vote threshold was adopted in 1975. The point is that the Senate has periodically rebalanced the minority's right to debate and the majority's right to decide. Today's crisis, with constitutional as well as political dimensions and affecting all three branches of government, presents an even more compelling case to do so.

These filibusters are an unprecedented shift in the kind, not just the degree, of the minority's tactics. After a full, fair, and vigorous debate on judicial nominations, a simple majority must at some point be able to proceed to a vote. A simple majority can achieve this goal either by actually amending Rule 22 or by sustaining an appropriate parliamentary ruling.

A SIMPLE MAJORITY CAN CHANGE THE RULES

The Senate exercises its constitutional authority to determine its procedural rules either implicitly or explicitly. Once a new Congress begins, operating under existing rules implicitly adopts them "by acquiescence." The Senate explicitly determines its rules by formally amending them, and 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.

Some object to this conclusion by observing that, because only a portion of its membership changes with each election, 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.

A SIMPLE MAJORITY CAN UPHOLD A PARLIAMENTARY RULING

An alternative strategy involves a parliamentary ruling in the context of considering an individual nomination. This approach can be pursued at any time, and would not actually amend Rule 22. The precedent it would set depends on the specific ruling it produces and the facts of the situation in which it arises.

Speculation, often inaccurate, abounds about how this strategy would work. One newspaper, for example, offered a common description that this approach would seek "a ruling from the Senate parliamentarian that the filibuster of executive nominations is unconstitutional." Under long-standing Senate parliamentary precedent, however, the presiding officer does not decide such constitutional questions but submits them to the full Senate, where they are debatable and subject to Rule 22's 60-vote requirement. A filibuster would then prevent solving this filibuster crisis. Should the chair rule in favor of a properly framed non-debatable point of order, Democrats would certainly appeal, but the majority could still sustain the ruling by voting for a non-debatable motion to table the appeal.

Democrats have threatened that, if the majority pursues a deliberate solution to this political and constitutional crisis, they will bring the entire Senate to a screeching halt. Perhaps they see this as way to further escalate the confirmation crisis, as the Senate cannot confirm judicial nominations if it can do nothing at all. No one, however, seriously believes that, if the partisan roles were reversed, Democrats - the ones who once proposed abolishing even legislative filibusters - would hesitate for a moment before changing Senate procedures to facilitate consideration of judicial nominations they favored.

A FAMILIAR FORK IN THE ROAD

The United States Senate is a unique institution. Our rules allowing for extended debate protect the minority's role in the legislative process. We must preserve that role. The current filibuster campaign against judicial nominations, however, is the real attack on Senate tradition and an unprecedented example of placing short-term advantage above longstanding fundamental principles. It is not simply annoying or frustrating, but a new and dangerous kind of obstruction which threatens democracy, the Senate, the judiciary, and even the Constitution itself. As such, it requires a more serious and deliberate solution.

While judicial appointments can be politically contentious and ideologically divisive, the confirmation process must still be handled through a fair process that honors the Constitution and Senate tradition. If the fight is fair and constitutional, let the chips fall where they may. As it has before, the Senate must change its procedures to properly balance majority rule and extended debate. That way, we can vigorously debate judicial nominations and still conduct the people's business.

— The Honorable Orrin G. Hatch is a Republican senator to the United States Senate from Utah. Senator Hatch is former chairman of the Senate Judiciary Committee.

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ARTICLE: Our Broken Judicial Confirmation Process and the Need for Filibuster Reform
By SENATOR JOHN CORNYN (R-TX)

Excerpt from page 204:

An even stronger constitutional argument could be made that a majority of Senators retains the constitutional right at least to adopt rules abolishing or regulating the use of the filibuster. n77 Under this [*204] argument, the filibuster is permissible but only because the majority always retains the prerogative to dispense with it at its discretion. Senate rule proposals cannot be defeated by a minority of Senators willing to filibuster even a rules proposal. Just 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. Such power, after all, would violate the general common law principle that one parliament cannot bind another. As William Blackstone once explained:

> Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind the present parliament. n78

In addition, such power would arguably offend the U.S. Constitution because it would be tantamount to amending the Constitution by majority vote of Congress. Indeed, as the Father of the Constitution, James Madison, explained to the House of Representatives in 1790, just one year after the Constitution took effect: "Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made." n79 Thomas Jefferson took the same view, famously declaring in a letter to Madison that "the earth belongs always to the living generation." n80 Jefferson and Madison also worked together on the Virginia Statute for Religious Freedom, which specifically acknowledges that "this assembly elected by the people for ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in [*205] law." n81

The Supreme Court appears to have spoken on this issue as well. As it explained in its unanimous decision in *Ballin,* "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 . . . ." n82 These arguments have also been made by numerous Senators throughout our history, and even became a part of Senate precedent during the 1975 struggle to amend Senate Rule XXII. n83

SENATE MANUAL,

CONTAINING THE

STANDING RULES AND ORDERS

OF

THE UNITED STATES SENATE,

THE CONSTITUTION OF THE UNITED STATES, DECLARATION OF INDEPENDENCE, ARTICLES OF CONFEDERATION, THE ORDINANCE OF 1787, JEFFERSON'S MANUAL, ETC.

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[Jefferson's Manual, Sec. XXXV.

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4. No amendment, the object of which is to provide for a private claim, shall be received to any general appropriation bill, unless it be to carry out the provisions of an existing law or a treaty stipulation, which shall be cited on the face of the amendment. [Jefferson's Manual, Sec. XXXV.

RULE XVII.

AMENDMENT MAY BE LAID ON THE TABLE WITHOUT PREJUDICE TO THE BILL.

When an amendment proposed to any pending measure is laid on the table, it shall not carry with it, or prejudice, such measure.

RULE XVIII.

AMENDMENTS—DIVISION OF A QUESTION.

If the question in debate contains several propositions, any Senator may have the same divided, except a motion to strike out and insert, which shall not be divided; but the rejection of a motion to strike out and insert one proposition shall not prevent a motion to strike out and insert a different proposition; nor shall it prevent a motion simply to strike out; nor shall the rejection of a motion to strike out prevent a motion to strike out and insert. But pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for the purpose of amendment as a question; and motions to amend the part to be stricken out shall have precedence. [Jefferson's Manual, Secs. XXXV, XXXVI.

RULE XIX.

DEBATE.

1. When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is 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, and to obtain such consent he shall first address the Presiding Officer; and no Senator shall speak more than twice upon any one question in debate on the same day without leave of the Senate, which shall be determined without debate. [Jefferson's Manual, Secs. XVII, XXXIX.

2. If any Senator, in speaking or otherwise, transgress the rules of the Senate, the Presiding Officer shall, or any Senator may, call him to order; and when a Senator shall be called to order he shall sit down, and not proceed without leave of the Senate, which, if granted, shall be upon motion that he be allowed to proceed in order, which motion shall be determined without debate. [Jefferson's Manual, Sec. XVII.

3. If a Senator be called to order for words spoken in debate, upon the demand of the Senator or of any other Senator the exceptionable words shall be taken down in writing, and read at the table for the information of the Senate.

[Jefferson's Manual, Sec. XVII.

RULE XX.

QUESTIONS OF ORDER.

1. A question of order may be raised at any stage of the proceedings, except when the Senate is dividing, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate. When an appeal is taken, any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer without debate; and every appeal therefrom shall be decided at once, and without debate; and any appeal may be laid on the table without prejudice to the pending propo-

sition, and thereupon shall be held as affirming the decision of the Presiding Officer. [Jefferson's Manual, Sec. XXXIII.

2. The Presiding Officer may submit any question of order for the decision of the Senate. [Jefferson's Manual, Sec. XXXIII.

RULE XXI.

MOTIONS.

1. All motions shall be reduced to writing, if desired by the Presiding Officer or by any Senator, and shall be read before the same shall be debated. [Jefferson's Manual, Sec. XX.

2. Any motion or resolution may be withdrawn or modified by the mover at any time before a decision, amendment, or ordering of the yeas and nays, except a motion to reconsider, which shall not be withdrawn without leave. [Jefferson's Manual, Sec. XX.

RULE XXII.

PRECEDENCE OF MOTIONS.

When a question is pending, no motion shall be received but—

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a

recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

[Jefferson's Manual, Sec. XXXIII.

RULE XXIII.

PREAMBLES.

When a bill or resolution is accompanied by a preamble, the question shall first be put on the bill or resolution and then on the preamble, which may be withdrawn by a mover before an amendment of the same, or ordering of the yeas and nays; or it may be laid on the table without prejudice to the bill or resolution, and shall be a final disposition of such preamble.

[Jefferson's Manual, Sec. XXVI.

RULE XXIV.

APPOINTMENT OF COMMITTEES.

1. In the appointment of the standing committees, the Senate, unless otherwise ordered, shall proceed by ballot to appoint severally the chairman of each committee, and then, by one ballot, the other members necessary to complete the same. A majority of the whole number of votes given shall be necessary to the choice of a chairman of a standing committee, but a plurality of votes shall elect the other members thereof. All other committees shall be appointed by ballot, unless otherwise ordered, and a plurality of votes shall appoint. [Jefferson's Manual, Sec. XI.

2. When a chairman of a committee shall resign or cease to serve on a committee, and the Presiding Officer be authorized by the Senate to fill the vacancy in such committee, unless specially otherwise ordered, it shall be only to fill up the number on the committee.

Mr. MANSFIELD. I announce that the Senator from West Virginia [Mr. NEELY] is absent because of illness.

Mr. DIRKSEN. I announce that the Senator from Wisconsin [Mr. WILEY] is absent on official business.

The VICE PRESIDENT. A quorum is present.

LEGAL HOLIDAY ON INAUGURATION DAY

Mr. JOHNSON of Texas. Mr. President, I ask unanimous consent that the Senator from Kansas [Mr. CARLSON] may be recognized for a few moments, without the time being charged to either side, for the purpose of calling up a resolution concerning Inauguration Day.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. CARLSON. Mr. President, this year Inauguration Day occurs on Sunday, January 20. In order that there may be a legal holiday in the District of Columbia on Monday, January 21, it is necessary that a resolution be passed providing that January 21 be a holiday.

I introduce at this time a joint resolution to that effect, and ask for its immediate consideration.

The VICE PRESIDENT. The joint resolution will be stated by the clerk.

The joint resolution (S. J. Res. 1) was read the first time by title, and the second time at length, as follows:

Resolved, etc., That the 20th day of January 1957 and the 20th day of January in every fourth year thereafter, known as Inauguration Day, is hereby made a legal holiday in the metropolitan area of the District of Columbia for the purpose of all statutes relating to the compensation and leave of employees of the United States, including the legislative and judicial branches, and of the District of Columbia employed in such area: *Provided, however*, That whenever the 20th day of January in any such year shall fall on a Sunday, the next succeeding day selected for the public observance of the inauguration of the President of the United States shall be considered a legal holiday as provided by this joint resolution.

SEC. 2. For the purposes of this joint resolution, the term "metropolitan area of the District of Columbia" shall include, in addition to the District of Columbia, Montgomery and Prince Georges Counties, Md.; Arlington and Fairfax Counties, Va.; and the cities of Alexandria and Falls Church, Va.

The Senate proceeded to consider the joint resolution.

The VICE PRESIDENT. The question is on the engrossment and third reading of the joint resolution.

Mr. KNOWLAND. Mr. President, will the Senator yield for a question?

Mr. CARLSON. I yield.

Mr. KNOWLAND. This is the same type of resolution as was submitted 4 years ago, and it has been customary to make Inauguration Day a legal holiday in the District of Columbia and the immediate vicinity. Is that correct?

Mr. CARLSON. That has been the past history. In the past Congress has set aside Inauguration Day as a legal holiday. The pending resolution does that. In addition, it provides that hereafter Inauguration Day shall be a legal holiday when that day occurs on a date other than January 20.

Mr. KNOWLAND. I have no objection, and I think the joint resolution should be passed.

The VICE PRESIDENT. The question is on the engrossment and third reading of the joint resolution.

The joint resolution was ordered to be engrossed for a third reading, read the third time, and passed.

RULES OF THE SENATE

Mr. JOHNSON of Texas. Mr. President, a parliamentary inquiry.

The VICE PRESIDENT. The Senator will state it.

Mr. JOHNSON of Texas. As I understand the unanimous-consent agreement, from now until 6 o'clock the time will be evenly divided between the distinguished Senator from New Mexico [Mr. ANDERSON] and the majority leader. Is that correct?

The VICE PRESIDENT. The Senator is correct. The Senate is now operating under that agreement.

Mr. ANDERSON. Mr. President, I yield myself 10 minutes.

We are again facing the question of whether or not the Senate of the United States, round by round, shall determine its own rules, or whether it shall be bound by rules adopted a century ago.

Jointly, with some 30 other Senators, and in accordance with article I, section 5 of the Constitution of the United States, which declares that each House may determine the rules of its proceedings, we have moved that the Senate take up for immediate consideration the adoption of rules for the Senate of the 85th Congress.

This motion, if agreed to, would not prejudge the nature of the rules which the Senate of the 85th Congress in its wisdom might adopt. It has been suggested to me that this is nothing but a majority cloture proposal. It is nothing of the kind. If a majority of the Senate should wish to adopt the old rules as the rules of the Senate of the 85th Congress, the majority could do so.

My motion supports, but does not deny, the right of the Senate to determine the rules of its proceedings, but my motion declares, 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. No Congress, and no House of the Congress, can tie the hands of future Congresses or future Houses of the Congress. That principle is basic to our Constitution and to our democratic form of government. I hope that not only those who believe, with me, that the Senate should not continue rule 22 in its present form as a part of the rules of the Senate, but many of those of a contrary mind, will support this motion, so that, in accordance with the letter and spirit of the Constitution, this body may determine the rules of the proceedings. Let us assume and not shirk or evade that responsibility.

That constitutional responsibility is very clear. Article I, section 5 of the Constitution declares that each House may determine the rules of its proceedings. The language of the Constitution is very clear in its application to each House of the Congress.

It is not disputed that the House of Representatives of each new Congress has the power to adopt, and for many years has adopted, the rules of its proceedings at the opening of each Congress. For a period of time, from 1860 to 1890, the House operated much as the Senate has operated, under a system of acquiescence in past rules stemming from a resolution of the House that the 1860 rules should be the rules of the present and subsequent Houses unless otherwise provided. But in 1890 Speaker Reed ruled that at the beginning of each new Congress the House operates under general parliamentary law until new rules are adopted. Thereupon the House adopted new rules designed to permit efficient majority exercise of legislative functions, and to prevent minority obstructions. Since 1890 the House rules have been adopted anew by each incoming House.

I have heard recently—and I assume new Members of the Senate have been hearing recently—that if we fail to adopt rules we shall tie up the Senate for weeks to come. I only hope that each Member of the Senate will take time to refer to the CONGRESSIONAL RECORD of yesterday and see what happened in the House of Representatives when it was ready to adopt rules. The chairman of the Rules Committee rose and moved that the rules be the same as those of the 84th Congress. There was not a word said on either side. The Speaker put the question on the motion, and within scarcely 30 seconds from the time the chairman of the Rules Committee had been recognized the House of Representatives had adopted its rules; and there is nothing in any record that would indicate that, after a preliminary skirmish, the Senate of the United States would not do the same thing.

Mr. JOHNSTON of South Carolina. Mr. President, will the Senator yield?

Mr. ANDERSON. I yield.

Mr. JOHNSTON of South Carolina. As I understand, the Senator is discussing the House of Representatives, and not the Senate, all the way through.

Mr. ANDERSON. Not all the way through. I am discussing at the moment what the House of Representatives did yesterday.

For a long period of years the House of Representatives was tied in the same fashion, and by the same strings with which the Senate is now tied. The House was working on the assumption that the old rules applied all the way through unless some change was made.

In 1890 the Speaker of the House of Representatives banged down his gavel and stated that the Constitution of the United States provides that each House shall determine the rules of its proceedings, and that the House of Representatives would proceed immediately to adopt its rules.

If that had not been done, we would have the most unwieldy organization imaginable. I was formerly a Member of the House, as many other Senators

have been. No one can imagine the chaos which would result, with the complication of modern issues, if the 435 Members of the House were governed by the old rules. It was necessary to make it possible for the House of Representatives to act. That was what was done in 1890.

Mr. JOHNSTON of South Carolina. Mr. President, will the Senator yield?

Mr. ANDERSON. I yield.

Mr. JOHNSTON of South Carolina. Is it not also true that since 1890 the House of Representatives has been acting under those rules?

Mr. ANDERSON. Yes; it has been acting under those rules, with some exceptions. At one time, upon motion by a Representative from the State of Mississippi, there was added to the rules of the House the provision that the Committee on Un-American Activities should be a permanent committee. As a Member of the House I participated in long debates on the question of the Committee on Un-American Activities. When I entered the House of Representatives in 1941, the Dies Committee was about the hottest subject in the Congress. However, when the proposed rule came before the House, Representative Rankin was able to have it placed in the rules in a matter of seconds.

The rules have not remained the same. They have been changed as occasion required; and the changes have been made in accordance with the Constitution, and in accordance with proper legislative practice.

Mr. JOHNSTON of South Carolina. So far as filibusters are concerned, the rules have remained the same, have they not?

Mr. ANDERSON. I think that is a correct statement.

Mr. JOHNSTON of South Carolina. I believe the Senator from New Mexico will agree that in the case of a body consisting of 435 Members, the rules must be different from the rules governing a body of 96 Members.

Mr. ANDERSON. I do not think I can quite concede that. I will say to the Senator from South Carolina that I think the rules of the Senate might very well be different from the rules of the House. I have never said otherwise. That is why I said in the beginning that this is not merely a question of majority cloture. I do not favor majority cloture, but I emphasize the fact that the Constitution of the United States provides that the Senate of the United States may determine its own rules, and I refuse to be bound by the action of someone who is not now in the Senate, who has long since gone to his reward, but who ties my hands, and says to me, through his action, that I cannot participate in the deliberations of this body as fully as I should like because 2 generations or 4 generations ago he wrote a rule which I am required to follow.

Mr. JOHNSTON of South Carolina. Mr. President, will the Senator yield?

Mr. ANDERSON. I yield.

Mr. JOHNSTON of South Carolina. Members of the House of Representatives are elected every 2 years, are they not?

Mr. ANDERSON. That is correct.

Mr. JOHNSTON of South Carolina. In the Senate two-thirds of the membership carries over.

Mr. ANDERSON. That is correct.

Mr. President, there will be further discussion of this question throughout the entire day, and I shall perhaps participate in that discussion. When we went into this question 4 years ago, I made a motion that the Senate proceed in the fashion now proposed, and I was surprised to hear it said that this was a Walter Reuther proposal. I grant that Walter Reuther has advocated a similar course to that which I am now advocating. However, Mr. Reuther also advocates allegiance to the country and respect for the flag. If Mr. Reuther happens to say that we should respect the flag of the United States, I do not intend to be disrespectful to it because respect for the flag is a Reuther proposal. I did not get my proposal from Walter Reuther.

Senator James, of Kentucky, spoke on this subject in 1915. I will say to the able Senator from Kentucky [Mr. COOPER] that the State of Kentucky has taken on increased interest since the last election. The President of the United States, when he was appearing on a television program after his overwhelming election last fall, said he was speaking about modern Republicanism. I realize that the Senator from Kentucky was one who participated, with many of us, in liberal and progressive fights. Therefore, I was glad to find that when this question was raised many years ago it was raised by Senator James, of Kentucky. On February 15, 1915, he felt impelled to say something about the shipping bill filibuster, which, as he saw it, was threatening the welfare of the country.

He questioned the continuity of the Senate as a body. He said:

> These rules have not been adopted by the Senate. They are merely the inheritance of hundreds of years behind us, with the gathered cobwebs and dust that have come down through the centuries.

I find that in the statement filed by the able minority leader yesterday afternoon, and I pick it up and commend it as good language for us to remember.

That statement was challenged by Senator Root of New York. He asked if anyone disputed that the Senate was a continuing body. Senator Thomas of Colorado got up and said, "I challenge it, and I intend to test it."

Senator Thomas proceeded to get ready to test it at the opening session of the next Congress. When he tried to test it, Walter Reuther was a boy of 9 years. Somehow I find it difficult to believe that Mr. Reuther had reached his 9-year-old hand all the way out to Colorado to influence Senator Thomas. Nor do I believe that he influenced me. I was in the Senate of the United States in 1949 when the present rule was adopted. I had lived through the long dreary hours, waiting for the filibuster then in progress to come to an end. I recognized that there were Senators who decided that it would be desirable to terminate that filibuster. They circulated a round robin throughout the corridors of the Senate and through the adjoining rooms, where gin rummy games were going on, and they said, "Let us have a chance to go home. Let us sign the round robin and get this over."

They said, "Our friends will consent to a wholly new version which will give us a wholly new rule. Let us sign up quickly and adopt it."

Let me say, Mr. President, that I did not accept that version, and I am glad today that I did not accept it. I say that because, while there was great assurance that the rule would effectively prevent filibusters, I questioned whether anyone really believed it would.

Mr. President, a great many Senators who were interested in this proposal were not influenced in the slightest by subsequent events, but determined that night, so long as they remained in the Senate, they would try to wipe out a cloture rule which seemed to run contrary to the Constitution of the United States and its sacred provisions.

Mr. President, the whole question of constitutionality must some day be raised. The Constitution provides that each House may determine the rules of its procedure.

When we look at rule 22, we find paragraph 3, which denies that the Senate may adopt its own rules. That provision reads:

> The provisions of the last paragraph of rule VIII * * * and of subsection 2 of this rule shall not apply to any motion to proceed to the consideration of any motion, resolution, or proposal to change any of the standing rules of the Senate.

Mr. President, we cannot move in the field of changing the standing rules of the Senate because this prohibition exists. We are told now that we cannot take it out of the rules by majority vote, because a previous Congress wrote that provision into the rules.

Mr. President, suppose that a previous Congress had said, instead, that the rule relating to cloture may never be changed except by unanimous consent.

On the night, in 1949, when this rule was adopted, there was so much sentiment in favor of ending the filibuster then going on that I am sure the Senators who signed that round robin would just as soon have signed one which provided that a filibuster could not be stopped except by unanimous consent.

They were ready, apparently, to sign anything that was presented to them, and they agreed that this rule should go into the Senate's rules. Let us suppose that a provision had been adopted in 1949 that the rule could not be changed except by unanimous consent. In that case, Mr. President, how many Senators today would be willing to accept such a restriction, if it had been put upon them in 1949? Therefore I say we should not accept this provision of the rules. The only chance we will ever have of ridding ourselves of this improper provision, as I see it, is by acting upon it in the early days of the session of Congress. Therefore, I say that this is a step that we must take.

I hope every Member of the Senate will write down in his copybook or in some other document these words:

To say that the Senate in 1949 could pass an irrepealable rule on cloture is to say that it can alter the very Constitution from which it derives its power to meet and conduct its business.

Cooley's Constitutional Limitations as cited in the document filed by the able minority leader [Mr. KNOWLAND] uses almost this language and points out that this is true because insofar as one Senate could bind a subsequent one by its enactments, it could—and I am now quoting from the first column of page 33 of yesterday's RECORD—"in the same degree reduce the legislative power of its successors; and the process might be repeated until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two Houses would be to a greater or less degree rendered ineffectual."

Mr. President, my quarrel has been largely with section 3. I do not like everything in the provisions regarding cloture, but I am outraged by section 3, which provides that I may do nothing about it. Unless the Senate moves in the particular way now proposed, at this particular time, Senators will never have a chance to change that provision.

Mr. HUMPHREY. Mr. President, will the Senator yield?

Mr. ANDERSON. I yield.

Mr. HUMPHREY. I should like to say, first, that I believe the Senator has put his finger upon the vital point in this entire discussion. I have listened with keen interest to the Senator's dissertation on the rules of the Senate. I know his position is very clear. He is not arguing about any new form of cloture; he is arguing for the constitutional right of the Senate to adopt its own rules. Is that correct?

Mr. ANDERSON. Yes. I say to the Senator from Minnesota that when I received the letter written by the Senator from Illinois [Mr. DOUGLAS] and the Senator from Minnesota [Mr. HUMPHREY], I replied that I was willing to go along with them on the question of the Senate having a right to adopt its own rules, but as to what the rules should be, I said, I may be diametrically opposed to them; but, nevertheless, I believe I have a right, as does the Senator from Minnesota, who entered the Senate on the same day on which I entered it, as did the Senator from Illinois, to have a part in the determination of the rules under which the Senate may operate.

Mr. HUMPHREY. However, the Senator does say that, although the Senate may adopt clause 3 of rule 22 for one Congress, as was done in 1949, this rule does continue applicable, without the acquiescence or overt consent of the Senate, to the 82d Congress, 83d Congress, 84th Congress, or 85th Congress. Is that correct?

Mr. ANDERSON. The Senator has stated it exactly correctly. I was a Member of the Congress which adopted the rule to which I object. During that time I raised no question about it, because the majority had overridden men. I do not believe we shall be overriden in the 85th Congress. The Constitution provides that each House may determine the rules of its procedure. It is not provided that a previous House may determine that the rules may never be changed except by unanimous consent, and that they may be shoved down the throat of every new Member coming into the Congress. Some day the objectionable parts of rule 22 will be taken out of the book. It may take time, but it will be eliminated. The proposal received 21 votes 4 years ago. There are 31 sponsors at this time, and that should tell the Members of the Senate what is going on; namely, that the hands of the Senate of the United States cannot forever be tied by rules adopted in 1949.

Mr. HUMPHREY. Mr. President, will the Senator from New Mexico yield?

Mr. ANDERSON. I yield.

Mr. HUMPHREY. The point has been made on other occasions that the fact that the Senate has not changed its rules since 1949 is conclusive evidence that the rules continue, and that, therefore, they are not subject to change through the process in which we are now engaged; namely, at the beginning of the session to file a motion providing for the adoption of the rules. The argument is that because we have not changed the rules, they are, therefore, not subject to change through the procedure in which we are now engaged.

However, merely because the Senate may not have exercised—and I use the words "may not have exercised" its right, that is no reason to say that the right does not exist.

I call to the Senator's attention the language of article I, section 5, of the Constitution. The Founding Fathers debated this language for a considerable period of time. The language is that "each House may determine the rules of its procedure." The word "may" is very important. They may, if they so desire, or they may not. It is not a mandate, but it is permissive.

The point which the Senator from New Mexico is now making is that he desires at this time to have the Senate act.

Mr. ANDERSON. That is exactly correct. The Senate may do it. I believe the Senate should do it. Before we get through we shall be hearing that there is plenty of time to determine the question in an orderly fashion; that such action as is now proposed will get into the way of proposals relating to the freedom for Hungary, or some such thing as that. We always hear the story that there will be plenty of time for the question to be brought up in an orderly fashion. But there is no possibility of that happening. The Committee on Rules and Administration tried to incorporate in the rules a cloture provision in previous Congresses. The last proposal was passed over five consecutive times, even though we were trying all the time to get some action on it. Why was it said that it had to be passed over? Because some project dear to some Member of the Senate might be held up. Because we never have time late in the session to take up the calendar item that covers the change in the cloture rule. We get to the last days and the majority leader whether he is a Democrat or Republican, and no matter how conscientious he may be, comes sadly to the Members and says, "Oh, if we have this cloture change before the Senate, our southern friends will filibuster for 3 weeks. That means that the appropriation bills will not pass. That means that the great national proposals like the creation of Horse Shoe Bend National Military Park in Alabama or the Pea Ridge National Military Park in Arkansas would never get through the Senate and that we will not have a chance to have a vote on Hells Canyon Dam or the San Luis Dam in California.

We accumulate on the calendar enough of a backlog so that every Senator has a gift dangling on the Christmas tree and we are then told that the good fairies will take away the Christmas tree and that Santa Claus will not come down the chimney if we are bad boys and insist that a change in the cloture rule be brought before the Congress. There is one day, and only one day, that this matter can be considered in this Congress, and that is today. Any Senator who votes to table the motion, votes to end all possibility that the cloture rule of the Senate, unconstitutional though it may be, will be revised in the 85th Congress. I make that flat prediction without any fear that subsequent events may prove it to be untrue.

Then we hear the panic line that a rules proposal would get in the way of measures affecting the Suez situation and Hungary, and in the way of the fighters for freedom all over the world. We have been told not to get in the way of any of those things.

The House acted upon its rules promptly. It is ready to conduct business. The Middle East proposal which the President will announce before the Congress tomorrow can be taken up and considered by the House of Representatives. It is going to take some time, I believe, in the Foreign Relations Committee of the Senate. Anyone who is so naive as to believe that the proposal will be taken by that great body and rubberstamped and reported in an hour or two is misguessing the situation. It is said that there is no committee to which it can be referred if we do not adopt these rules. All this propaganda advanced on the floor of the Senate today is only panic propaganda, because the proposal can be referred and will be referred, no matter what we do with the rules.

Mr. HUMPHREY. Mr. President, will the Senator from New Mexico yield further?

Mr. ANDERSON. I yield.

Mr. HUMPHREY. Mr. President, I wish to thank the Senator from New Mexico for bringing to our attention again some of the cries of anguish, fear, and trepidation that have been raised regarding what will happen if we revise the rules. It has been stated that there would be no appropriate committee to

which any message of the President or any statement of the President could be referred, like the statement which will come to us tomorrow on the crucial problems in the Middle East.

I have in my hand Public Law 601 of the 79th Congress, known as the Legislative Reorganization Act of 1946. That act supersedes the provisions which are found in the Senate Manual relating to Senate committees. The Senate committees are established now, not by rules of the Senate, but by statutory law. The Senator from New Mexico has pointed out that in the instance of Senate committees, they do not exist by mere sufferance of the rules of the Senate, but they exist by reason of the Reorganization Act.

I suggest, if it be agreeable to the Senator, that the portion of the Reorganization Act relating to Senate committees be included at this point in the RECORD.

Mr. ANDERSON. Mr. President, I ask unanimous consent that that may be done.

There being no objection, the portion of the Reorganization Act relating to Senate committees was ordered to be printed in the RECORD, as follows:

PART 1—STANDING RULES OF THE SENATE

STANDING COMMITTEES OF THE SENATE

SEC. 102. Rule 25 of the Standing Rules of the Senate is amended to read as follows:

"RULE 25

"*Standing committees*

"(1) The following standing committees shall be appointed at the commencement of each Congress, with leave to report by bill or otherwise:

"(a) Committee on Agriculture and Forestry, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Agriculture generally.

"2. Inspection of livestock and meat products.

"3. Animal industry and diseases of animals.

"4. Adulteration of seeds, insect pests, and protection of birds and animals in forest reserves.

"5. Agricultural colleges and experiment stations.

"6. Forestry in general, and forest reserves other than those created from the public domain.

"7. Agricultural economics and research.

"8. Agricultural and industrial chemistry.

"9. Dairy industry.

"10. Entomology and plant quarantine.

"11. Human nutrition and home economics.

"12. Plant industry, soils, and agricultural engineering.

"13. Agricultural educational extension services.

"14. Extension of farm credit and farm security.

"15. Rural electrification.

"16. Agricultural production and marketing and stabilization of prices of agricultural products.

"17. Crop insurance and soil conservation.

"(b) Committee on Appropriations, to consist of 21 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Appropriation of the revenue for the support of the Government.

"(c) Committee on Armed Services, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Common defense generally.

"2. The War Department and the Military Establishment generally.

"3. The Navy Department and the Naval Establishment generally.

"4. Soldiers' and sailors' homes.

"5. Pay, promotion, retirement, and other benefits and privileges of members of the Armed Forces.

"6. Selective Service.

"7. Size and composition of the Army and Navy.

"8. Forts, arsenals, military reservations, and navy yards.

"9. Ammunition depots.

"10. Maintenance and operation of the Panama Canal, including the administration, sanitation, and government of the Canal Zone.

"11. Conservation, development, and use of naval petroleum and oil-shale reserves.

"12. Strategic and critical materials necessary for the common defense.

"(d) Committee on Banking and Currency, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Banking and currency generally.

"2. Financial aid to commerce and industry, other than matters relating to such aid which are specifically assigned to other committees under this rule.

"3. Deposit insurance.

"4. Public and private housing.

"5. Federal Reserve System.

"6. Gold and silver, including the coinage thereof.

"7. Issuance of notes and redemption thereof.

"8. Valuation and revaluation of the dollar.

"9. Control of prices of commodities, rents, or services.

"(e) Committee on Civil Service, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. The Federal civil service generally.

"2. The status of officers and employees of the United States, including their compensation, classification, and retirement.

"3. The postal service generally, including the railway mail service, and measures relating to ocean mail and pneumatic-tube service; but excluding post roads.

"4. Postal-savings banks.

"5. Census and the collection of statistics generally.

"6. The National Archives.

"(f) Committee on the District of Columbia, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. All measures relating to the municipal affairs of the District of Columbia in general, other than appropriations therefor, including—

"2. Public health and safety, sanitation, and quarantine regulations.

"3. Regulation of sale of intoxicating liquors.

"4. Adulteration of food and drugs.

"5. Taxes and tax sales.

"6. Insurance, executors, administrators, wills, and divorce.

"7. Municipal and juvenile courts.

"8. Incorporation and organization of societies.

"9. Municipal code and amendments to the criminal and corporation laws.

"(g) (1) Committee on Expenditures in the Executive Departments, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"(A) Budget and accounting measures, other than appropriations.

"(B) Reorganizations in the executive branch of the Government.

"(2) Such committee shall have the duty of—

"(A) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

"(B) studying the operation of Government activities at all levels with a view to determining its economy and efficiency;

"(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government;

"(D) studying intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.

"(h) Committee on Finance, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Revenue measures generally.

"2. The bonded debt of the United States.

"3. The deposit of public moneys.

"4. Customs, collection districts, and ports of entry and delivery.

"5. Reciprocal trade agreements.

"6. Transportation of dutiable goods.

"7. Revenue measures relating to the insular possessions.

"8. Tariffs and import quotas, and matters related thereto.

"9. National social security.

"10. Veterans' measures generally.

"11. Pensions of all the wars of the United States, general and special.

"12. Life insurance issued by the Government on account of service in the Armed Forces.

"13. Compensation of veterans.

"(i) Committee on Foreign Relations, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Relations of the United States with foreign nations generally.

"2. Treaties.

"3. Establishment of boundary lines between the United States and foreign nations.

"4. Protection of American citizens abroad and expatriation.

"5. Neutrality.

"6. International conferences and congresses.

"7. The American National Red Cross.

"8. Intervention abroad and declarations of war.

"9. Measures relating to the diplomatic service.

"10. Acquisition of land and buildings for embassies and legations in foreign countries.

"11. Measures to foster commercial intercourse with foreign nations and to safeguard American business interests abroad.

"12. United Nations Organization and international financial and monetary organizations.

"13. Foreign loans.

"(j) Committee on Interstate and Foreign Commerce, to consist of 13 Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

"1. Interstate and foreign commerce generally.

"2. Regulation of interstate railroads, buses, trucks, and pipelines.

"3. Communication by telephone, telegraph, radio, and television.

Furthermore, I believe it to be in the national interest that we have a change in this rule.

Senators remember that in 1949 there was a proposal to amend rule 22. That was the year when I first became a Member of the Senate. The objection was raised that the rule as it was then effective did not apply to a motion to bring up a measure, and that the motion to change the rules was therefore subject to unlimited debate. The late, beloved Vice President Barkley held that the then prevailing rule, which provided for cloture by a vote of two-thirds of the Senators present and voting, did apply to such a motion. I voted to sustain Mr. Barkley's ruling, but the Senate overruled him.

When the Senate overruled Vice President Barkley, it meant there was no limitation at all on a motion to bring up a measure, and I then voted for the 1949 amendment, believing it to be preferable to the situation in which we found ourselves. In so voting, however, I certainly did not intend to bind forever the hands of future Senators. I think every Senator has a right to have his say about the rules under which he operates.

After carefully studying the history and precedents, I decided to join with the Senator from New Mexico [Mr. ANDERSON] and our other colleagues in moving the adoption of new rules, providing a change in rule 22. My study has led me to believe that this is the proper time to make such a motion, and that each new Senate should, under the Constitution and precedents, have the right to decide the rules under which it operates.

Any legislative body should, in the final analysis, be able to bring a measure to a conclusion and a vote. I believe in freedom of debate, but it is not freedom when a handful of men can deny the overwhelming majority the right to even secure a final vote on a measure.

Frequently filibusters are thought of in connection with civil-rights legislation, but the veto exercised by filibusters is by no means exclusive to the civil-rights field. Important foreign policy and defense measures, such as the League of Nations Charter and President Wilson's ship-arming bill, can and have fallen victim of the filibuster. I am sure that Senators are familiar with the study prepared by the Legislative Reference Service listing the outstanding Senate filibusters from 1841 to 1955. This study shows that by far the greater number of filibusters concerned things other than civil rights—including appropriation bills, rivers and harbors bills, the admission of various States, including Oklahoma, Arizona, and New Mexico. In 1880, in an evenly divided Senate not unlike the one we have today, a measure to reorganize the Senate was filibustered from March 24 to May 16, until two Senators resigned, giving the Democrats a majority.

Mr. President, I doubt that there is any member of a legislative body who does not at some time think a measure about to be enacted is bad and not in the public interest. But the democratic way to fight that measure is to do so in debate, by the use of parliamentary procedure, by logic—and then to accept the decision. Any other way leads to paralysis of the legislative body.

Paralysis of the National legislative branch might someday occur at a critical period in history and we would be powerless to act. I therefore urge my colleagues to support the Anderson motion.

Many of us supporting the Anderson motion have different ideas as to which rule should replace rule 22. After adopting Mr. ANDERSON's motion to take up consideration of rules, we should be able to agree upon a rule that would assure free debate, sufficient protection of the view of the minority, and would, at the same time, be a more workable and fairer rule than the one we have at the present time. Even a simple rule of two-thirds of those present and voting would be more just than the present rule 22, and it is difficult to understand how any Senator can ask for more protection than this.

Mr. ANDERSON. Mr. President, I yield to the Senator from Minnesota [Mr. HUMPHREY] for a parliamentary inquiry.

Mr. HUMPHREY. Mr. President, I had intended to inquire of the Chair relating to a matter or two, and I rise now for that purpose.

Prior to propounding my parliamentary inquiry, I should like to say that I note in the RECORD at page 11 a motion of the Senator from Texas [Mr. JOHNSON] to lay on the table the Anderson motion.

I also note that a unanimous-consent agreement was arrived at which would permit us to have an orderly discussion of this crucial matter of Senate rules today. Therefore, Mr. President, my parliamentary inquiry is this:

In light of these developments and in light of what transpired yesterday, and thus far today, under what rule is the Senate presently proceeding?

I should like to have the Chair's view on that question.

The VICE PRESIDENT. The Senator from Minnesota is aware that the answer to that question is that the Senate is proceeding under the unanimous-consent agreement. The Chair is cognizant of the fact that the Senator from Minnesota and other Senators will propound parliamentary inquiries relating to this subject, and, consequently, it would perhaps be helpful if the Chair indicated by a general statement the Chair's opinion in regard to the parliamentary situation in which the Senate will find itself after the vote which will be taken on the motion to lay on the table.

The Chair emphasizes this because, strictly speaking, a parliamentary inquiry is for the purpose of guiding the Senate in its deliberations so that the Senate will know the effect of votes or other actions which are taken on specific matters. Therefore, the statement which the Chair now makes relates specifically to the question of what the parliamentary situation will be as the Senate votes on the matter currently being discussed. That question, and others which have been discussed in the debate today, in effect, go back to the basic question, Do the rules of the Senate continue from one Congress to another?

Although there is a great volume of written comment and opinion to the effect that the Senate is a continuing body with continuing rules, as well as some opinion to the contrary, the Presiding Officer of the Senate has never ruled directly on this question. Since there are no binding precedents, we must first turn to the Constitution for guidance.

The constitutional provision under which only one-third of the Senate membership is changed by election in each Congress can only be construed to indicate the intent of the framers that the Senate should be a continuing parliamentary body for at least some purposes. By practice for 167 years the rules of the Senate have been continued from one Congress to another.

The Constitution also provides that "each House may determine the rules of its proceedings." This constitutional right is lodged in the membership of the Senate and it may be exercised by a majority of the Senate at any time. When the membership of the Senate changes, as it does upon the election of each Congress, it is the Chair's opinion that there can be no question that the majority of the new existing membership of the Senate, under the Constitution, have the power to determine the rules under which the Senate will proceed.

The question, therefore, is, "How can these two constitutional mandates be reconciled?"

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 section 3 of rule 22 in practice has such an effect.

The Chair emphasizes that this is only his own opinion, because under Senate precedents, a question of constitutionality can only be decided by the Senate itself, and not by the Chair.

At the beginning of a session in a newly elected Congress, the Senate can indicate its will in regard to its rules in one of three ways:

First. It can proceed to conduct its business under the Senate rules which were in effect in the previous Congress and thereby indicate by acquiescence that those rules continue in effect. This has been the practice in the past.

Second. It can vote negatively when a motion is made to adopt new rules and

by such action indicate approval of the previous rules.

Third. It can vote affirmatively to proceed with the adoption of new rules.

Turning to the parliamentary situation in which the Senate now finds itself, if the motion to table should prevail, a majority of the Senate by such action would have indicated its approval of the previous rules of the Senate, and those rules would be binding on the Senate for the remainder of this Congress unless subsequently changed under those rules.

If, on the other hand, the motion to lay on the table shall fail, the Senate can proceed with the adoption of rules under whatever procedures the majority of the Senate approves.

In summary, until the Senate at the initiation of a new Congress expresses its will otherwise, the rules in effect in the previous Congress in the opinion of the Chair remain in effect, with the exception that the Senate should not be bound by any provision in those previous rules which denies the membership of the Senate the power to exercise its constitutional right to make its own rules.

Mr. ANDERSON. Mr. President, I yield 1 minute to the Senator from Minnesota.

Mr. HUMPHREY. Mr. President, I wish to express my appreciation to the Presiding Officer for his opinion.

I had other parliamentary inquiries which I was prepared to state, but I find it unnecessary to state them. They have been comprehensively covered in the final remarks of the Vice President as to the apparent acquiescence in a readoption of the Senate rules by a successful motion to table. The Vice President has made the point perfectly clear.

I think we now, at last, have the issue before us clearly defined. We now have an opinion from the Vice President concerning the question whether or not the Members of the Senate—those who are new to this Chamber as a result of the most recent election, and those who have served in other years—may, if they wish, exercise their constitutional right to determine the rules of the Senate, the rules of procedure which shall govern our proceedings in this Chamber. I think that is the issue. Once that issue has been decided by a defeat of the motion to table, then we shall come to the issue of the rule itself, and the substance of the new rules.

I wish to make my position quite clear to my colleagues. I think every Member of the Senate knows that I believe in extended debate. I believe in the rights of minorities. I want it to be clear that I am not one of those who believe we should try to cut off debate summarily. I believe in walking the extra mile in terms of procedural protections necessary for the freedom of discussion, freedom of debate, and freedom of inquiry.

We have had reassurance in the Vice President's opinion.

Mr. JOHNSON of Texas. Mr. President, I yield 2 minutes to the Senator from North Dakota.

Mr. LANGER. Mr. President, I ask unanimous consent to have printed at this point in the RECORD the remarks I made on the floor of the Senate on March 11, 1945, concerning the rules of the Senate and the entire matter of cloture.

I have not changed my views as I expressed them at that time. I followed the distinguished Senator from Wisconsin, Robert M. La Follette, when he stated at that time that the only remedy the minority had in matters of this kind was unlimited debate. I agree with that principle, and I shall vote not to change the rules.

There being no objection, the remarks were ordered to be printed in the RECORD, as follows:

Mr. LANGER. Mr. President, very briefly I want to state my position on this motion. In the 80th Congress I led the fight to have the Republican Party carry out its pledges. The Republican Party at that time did not do so. On June 7, 1948, I brought to the attention of the Senate that in the Republican platform of 1944 the Republicans had placed the following planks. First:

"We pledge the establishment by Federal legislation of a permanent Fair Employment Practice Commission."

Second:

"ANTIPOLL TAX

"The payment of any poll tax should not be a condition of voting in Federal elections and we favor immediate submission of a constitutional amendment for its abolition."

Third:

"ANTILYNCHING

"We favor legislation against lynching and pledge our sincere efforts in behalf of its early enactment."

And, Mr. President, fourth:

"INDIANS

"We pledge an immediate, just, and final settlement of all Indian claims between the Government and the Indian citizenship of the Nation. We will take politics out of the administration of Indian affairs."

Mr. President, day after day I stood upon this floor, when the Republicans had a majority, begging them to carry out the solemn promises, the definite pledges they had made to the people of the United States, and it is significant to note that I got exactly 7 votes on 3 of the measures, and that only 1 of them was passed.

Mr. President, if I were assured that after this appeal had been decided my colleagues on the other side would make a sincere effort to carry out the wishes of President Truman, I would not take the few minutes I am taking. I have a definite idea as to their intentions. I wish to make perfectly clear the reason why I shall vote to overrule the decision of the Vice President yesterday afternoon.

In the first place, North Dakota holds a rather peculiar distinction. At the time rule 22 was adopted that grand and popular Viking, the late Senator Gronna, of North Dakota, was 1 of 3 Senators to vote against it. Also at that time there was in the Senate a man who was beloved all over the country, and particularly by the people of North Dakota. I refer to the late Senator Robert La Follette, Sr., one of the fighting champions—and one of the greatest—in behalf of the common people. Mr. La Follette was elected to the Senate in 1905. Because he had a lieutenant governor who disagreed with him politically he waited until 1906 before he came to the Senate. In 1917, 11 long years after Mr. La Follette first became a Member of this body, the question of cloture came up.

Mr. President, I believe that no other question which has arisen in the Senate during the 8 years I have been a Member has resulted in my receiving more telegrams and more telephone calls than I have received in this case, after announcing a few days ago that I would vote not to sustain the anticipated ruling of the Vice President.

In order that my position may be very clear, I wish to say that I fully agree with the late Robert La Follette, Sr. On March 8, 1917, in speaking of rule 22, just before the vote took place, Mr. La Follette said:

"With a rule such as is here proposed in force at that time, with an iron hand laid upon this body from outside, with a Congress that in 3 years has reduced itself to little more than a rubber stamp, let me ask you, Mr. President, if you do not think a rule of this sort would be bound to be pretty effective cloture? Especially is that true as some of the proposed legislation was of a character that appealed to certain Senators upon this side of the Chamber who, coming from States where the manufacture of munitions is a mighty important industry, are impressed with legislation that benefits the interests they represent?"

Mr. La Follette continued—and I invite this to the attention of every man who pretends to be a progressive. Everyone who has studied history knows that Rome, after 450 fine years, fell when Julius Caesar made himself a dictator and when he subjugated the Roman Senate to his will. The English Parliament was strong for many hundred years, until Gladstone succeeded in abolishing the right of free discussion, at the time when the matter of freedom for Ireland came up for debate in Parliament.

I read at this time what Senator La Follette said when a proposal for cloture was before the Senate 32 years ago:

"Mr. President, believing that I stand for democracy, for the liberties of the people of this country, for the perpetuation of our free institutions, I shall stand while I am a Member of this body against any cloture that denies free and unlimited debate. Sir, the moment that the majority imposes the restriction contained in the pending rule upon this body, that moment you will have dealt a blow to liberty, you will have broken down one of the greatest weapons against wrong and oppression that the Members of this body possess. This Senate is the only place in our system where, no matter what may be the organized power behind any measure to rush its consideration and to compel its adoption, there is a chance to be heard, where there is opportunity to speak at length, and where, if need be, under the Constitution of our country and the rules as they stand today, the constitutional right is reposed in a Member of this body to halt a Congress or a session on a piece of legislation which may undermine the liberties of the people and be in violation of the Constitution which Senators have sworn to support. When you take that power away from the Members of this body, you let loose in a democracy forces that in the end will be heard elsewhere, if not here."

I have not time to quote all of Mr. La Follette's speech. He gave one or two quotations. Here is one from a former Senator from Indiana, Senator Turpie, who, some 50 years previously, had made a statement in regard to limitation of debate. This is what Senator Turpie said:

"I heard this body characterized the other day as a voting body. I disclaim that epithet very distinctly. I have heard it described elsewhere as a debating body. I disclaim that with equal disfavor. This body is best determined by its principal characteristic. The universal law and genius of language have given a name to this body derived from its principal attribute. It is a deliberative body—the greatest deliberative body in the world."

That was the first time, so far as I have been able to ascertain, that that description of the United States Senate was given. He continued:

"Now, voting is an incident to deliberation, and debate is an incident to deliberation; but when a body is chiefly characterized as deliberative, there is much deliberation apart

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.

...

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

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

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 ofter 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 threefifths 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 Minorty Leaders, the Senate shall proceed to vote on the adoption of that motion, and if that question shall be decided

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

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

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 ⅗th 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

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 Dangerous Dysfunction

BYLINE: By PAUL KRUGMAN

SECTION: Section A; Column 0; Editorial Desk; OP-ED COLUMNIST; Pg. 31

Unless some legislator pulls off a last-minute double-cross, health care reform will pass the Senate this week. Count me among those who consider this an awesome achievement. It's a seriously flawed bill, we'll spend years if not decades fixing it, but it's nonetheless a huge step forward.

It was, however, a close-run thing. And the fact that it was such a close thing shows that the Senate -- and, therefore, the U.S. government as a whole -- has become ominously dysfunctional.

After all, Democrats won big last year, running on a platform that put health reform front and center. In any other advanced democracy this would have given them the mandate and the ability to make major changes. But the need for 60 votes to cut off Senate debate and end a filibuster -- a requirement that appears nowhere in the Constitution, but is simply a self-imposed rule -- turned what should have been a straightforward piece of legislating into a nail-biter. And it gave a handful of wavering senators extraordinary power to shape the bill.

Now consider what lies ahead. We need fundamental financial reform. We need to deal with climate change. We need to deal with our long-run budget deficit. What are the chances that we can do all that -- or, I'm tempted to say, any of it -- if doing anything requires 60 votes in a deeply polarized Senate?

Some people will say that it has always been this way, and that we've managed so far. But it wasn't always like this. Yes, there were filibusters in the past -- most notably by segregationists trying to block civil rights legislation. But the modern system, in which the minority party uses the threat of a filibuster to block every bill it doesn't like, is a recent creation.

The political scientist Barbara Sinclair has done the math. In the 1960s, she finds, "extended-debate-related problems" -- threatened or actual filibusters -- affected only 8 percent of major legislation. By the 1980s, that had risen to 27 percent. But after Democrats retook control of Congress in 2006 and Republicans found themselves in the minority, it soared to 70 percent.

Some conservatives argue that the Senate's rules didn't stop former President George W. Bush from getting things done. But this is misleading, on two levels.

First, Bush-era Democrats weren't nearly as determined to frustrate the majority party, at any cost, as Obama-era Republicans. Certainly, Democrats never did anything like what Republicans did last week: G.O.P. senators held up spending for the Defense Department -- which was on the verge of running out of money -- in an attempt to delay action on health care.

More important, however, Mr. Bush was a buy-now-pay-later president. He pushed through big tax cuts, but never tried to pass spending cuts to make up for the revenue loss. He rushed the nation into war, but never asked Congress to pay for it. He added an expensive drug benefit to Medicare, but left it completely unfunded. Yes, he had legislative victories; but he didn't show that Congress can make hard choices and act responsibly, because he never asked it to.

So now that hard choices must be made, how can we reform the Senate to make such choices possible?

Back in the mid-1990s two senators -- Tom Harkin and, believe it or not, Joe Lieberman -- introduced a bill to reform Senate procedures. (Management wants me to make it clear that in my last column I wasn't endorsing inappropriate threats against Mr. Lieberman.) Sixty votes would still be needed to end a filibuster at the beginning of debate, but if that vote failed, another vote could be held a couple of days later requiring only 57 senators, then another, and eventually a simple majority could end debate. Mr. Harkin says that he's considering reintroducing that proposal, and he should.

But if such legislation is itself blocked by a filibuster -- which it almost surely would be -- reformers should turn to other options. Remember, the Constitution sets up the Senate as a body with majority -- not supermajority -- rule. So the rule of 60 can be changed. A Congressional Research Service report from 2005, when a Republican majority was threatening to abolish the filibuster so it could push through Bush judicial nominees, suggests several ways this could happen -- for example, through a majority vote changing Senate rules on the first day of a new session.

Nobody should meddle lightly with long-established parliamentary procedure. But our current situation is unprecedented: America is caught between severe problems that must be addressed and a minority party determined to block action on every front. Doing nothing is not an option -- not unless you want the nation to sit motionless, with an effectively paralyzed government, waiting for financial, environmental and fiscal crises to strike.

The Times & Transcript (New Brunswick)

January 22, 2010 Friday

U.S. Constitution throws a curve ball; Even with control of White House and Congress, pesky filibuster vexes Democrats

SECTION: NEWS; Pg. C1

Canadians might be justifiably baffled by the spectacle of a U.S. president whose party enjoys a commanding majority in Congress being humbled and hobbled by the election of a single opposition senator.

But the architects of the U.S. Constitution were determined that Barack Obama, nor anyone else in the office he currently holds, would ever acquire the type of arbitrary powers that recently allowed Stephen Harper to shut down Parliament on a whim.

"Our constitutional structure is meant in part to protect the rights of minorities from what is sometimes called the tyranny of the majority," Nelson Lund, a constitutional law professor at George Mason University, said yesterday.

"There are lots of features of the system to make it relatively easy for minorities of various types to block legislation, because the designers of our constitutional system thought that simple majorities could easily get carried away by passions of one kind or another."

After winning the crucial Massachusetts Senate seat that the late Ted Kennedy held for almost 50 years, Scott Brown will soon become the 41st Republican in the chamber, breaking the Democrats' filibuster-proof majority.

The election has vexed Democrats and the White House, and they've spent the week trying to come up with a way to pass health-care reform without having to take another vote in the Senate.

All this despite a rare occurrence in contemporary American politics - the same political party in firm control of both houses of Congress and the White House.

It happened under Franklin D. Roosevelt during the Great Depression, and again under Lyndon Johnson after his 1964 landslide election victory.

What resulted from those congressional Democratic monopolies were two historical pieces of sweeping legislation. Roosevelt's New Deal brought social security to Americans while Johnson's Great Society featured a number of social reforms aimed at ending poverty and racial injustice.

And so why not health care for Obama?

Blame the skyrocketing use of the filibuster, a long-winded form of senatorial obstruction aimed at delaying or entirely preventing a vote on any given proposal by extending debate indefinitely. The mere threat of it generally stops legislation dead in its tracks.

The rules of the 100-member Senate chamber allow just 41 members - the exact number of Republicans now in place there - to block action that is favoured by the majority in both houses of Congress, and by the president. Consequently, some critics say the filibuster renders the United States largely ungovernable, in addition to making it one of the most difficult democracies in the world in which to pass laws.

The filibuster wasn't part of the founding fathers' expansive list of checks and balances as they drew up the constitution, a longtime Capitol Hill veteran points out, although the document does give each house of Congress the power to "determine the rules of its proceedings."

Yet the tactic has been used periodically since the early 1800s to defeat legislation and in recent years, the threat of a filibuster has been employed successfully with increasing regularity.

"Everybody sets their own rules, and there are rules of the Senate and rules of the House of Representatives," said Stephen Hess, a senior fellow at the Brookings Institution think tank who first came to Washington in the 1950s to work for Dwight D. Eisenhower.

"The filibuster basically benefits whoever's not in power, and there is a certain logic to it - there are times that a minority must be heard and should be heard. But it's reached a point where it's become all-pervasive. In the 1950s, very rarely did you ever have a filibuster. Clearly, now, for virtually all legislation, you need 60 votes."

Some of the most famous filibusters include Senator Huey Long's in the 1930s to thwart several bills he felt worked against the common man. Long, a famous orator, recited Shakespeare and read recipes during his filibuster. In 1957, Strom Thurmond filibustered for more than 24 hours against the Civil Rights Act.

There has long been a hue and cry from Democrats and Republicans alike to do away with the filibuster, usually when each party is in power and seething as they watch their bills die on the Senate floor time and again.

But less self-motivated political observers frequently point out that no other democracy has a comparable barrier to majority rule. And only the complex congressional manoeuvre known as "reconciliation" - politicos in D.C. call it the "nuclear option" - can end a filibuster.

According to research by UCLA political scientist Barbara Sinclair, about eight per cent of major U.S. legislation in the 1960s was subjected to obstructionist measures like filibusters. Today, it's closer to 70 per cent. Since Obama took office, there have been dozens of filibusters or other acts of legislative obstruction.

Vice-President Joe Biden railed against the Republicans' routine use of the filibuster as he spoke at an event last weekend.

"As long as I have served ... I've never seen, as my uncle once said, the constitution stood on its head as they've done. This is the first time every single solitary decision has required 60 senators. No democracy has survived needing a super-majority," Biden said.

Senator Sheldon Whitehouse, a Democrat from Rhode Island, also recently expressed dismay about the rise of the filibuster.

"Never since the founding of the republic, not even in the bitter sentiments preceding the Civil War, was such a thing ever seen in this body," Whitehouse said on the Senate floor.

Biden and his former Senate colleagues have tools at their disposal, however, to beat back the filibuster.

Every two years, when the Senate's newly elected members take their seats, a brief opportunity for reform emerges, enabling 51 senators - or 50 senators plus the vice-president - to eliminate the filibuster by simple majority vote. Ordinarily, it takes 67 votes to abolish a Senate rule.

A freshman Democratic senator has another idea to ensure party politics don't interfere with Senate reform. Oregon's Jeff Merkley suggests both parties come up with new rules to do away with the filibuster, but set the effective date six or eight years into the future, so the senators voting on it won't know what party will be in power when the changes kick in.

The New York Times

February 21, 2010
OP-ED CONTRIBUTOR

Why I'm Leaving the Senate

By EVAN BAYH

BASEBALL may be our national pastime, but the age-old tradition of taking a swing at Congress is a sport with even deeper historical roots in the American experience. Since the founding of our country, citizens from Ben Franklin to David Letterman have made fun of their elected officials. Milton Berle famously joked: "You can lead a man to Congress, but you can't make him think." These days, though, the institutional inertia gripping Congress is no laughing matter.

Challenges of historic import threaten America's future. Action on the deficit, economy, energy, health care and much more is imperative, yet our legislative institutions fail to act. Congress must be reformed.

There are many causes for the dysfunction: strident partisanship, unyielding ideology, a corrosive system of campaign financing, gerrymandering of House districts, endless filibusters, holds on executive appointees in the Senate, dwindling social interaction between senators of opposing parties and a caucus system that promotes party unity at the expense of bipartisan consensus.

Many good people serve in Congress. They are patriotic, hard-working and devoted to the public good as they see it, but the institutional and cultural impediments to change frustrate the intentions of these well-meaning people as rarely before. It was not always thus.

While romanticizing the Senate of yore would be a mistake, it was certainly better in my father's time. My father, Birch Bayh, represented Indiana in the Senate from 1963 to 1981. A progressive, he nonetheless enjoyed many friendships with moderate Republicans and Southern Democrats.

One incident from his career vividly demonstrates how times have changed. In 1968, when my father was running for re-election, Everett Dirksen, the Republican leader,

approached him on the Senate floor, put his arm around my dad's shoulder, and asked what he could do to help. This is unimaginable today.

When I was a boy, members of Congress from both parties, along with their families, would routinely visit our home for dinner or the holidays. This type of social interaction hardly ever happens today and we are the poorer for it. It is much harder to demonize someone when you know his family or have visited his home. Today, members routinely campaign against each other, raise donations against each other and force votes on trivial amendments written solely to provide fodder for the next negative attack ad. It's difficult to work with members actively plotting your demise.

Any improvement must begin by changing the personal chemistry among senators. More interaction in a non-adversarial atmosphere would help.

I'm beginning my 12th year in the Senate and only twice have all the senators gathered for something other than purely ceremonial occasions. The first was during my initial week in office. President Bill Clinton had been impeached and the Senate had to conduct his trial. This hadn't happened since 1868, and there were no rules in place for conducting the proceedings.

All of us gathered in the Old Senate Chamber. For several hours we debated how to proceed. Finally, Ted Kennedy and Phil Gramm, ideological opposites, were given the task of forging a compromise. They did, and it was unanimously ratified.

The second occasion was just days after Sept. 11. Every senator who could make it to Washington gathered in the Senate dining room to discuss the American response. The nation had been attacked. The building in which we sat had been among the targets, and only the heroism of the passengers prevented the plane from reaching its destination. We had to respond to protect the country. There were no Republicans or Democrats in the room that day, just Americans. The spirit of patriotism and togetherness was palpable. That atmosphere prevailed for only two or three weeks before politics once again intervened.

It shouldn't take a constitutional crisis or an attack on the nation to create honest dialogue in the Senate. Let's start with a simple proposal: why not have a monthly lunch of all 100 senators? Every week, the parties already meet for a caucus lunch. Democrats gather in one room, Republicans in another, and no bipartisan interaction takes place.

With a monthly lunch of all senators, we could pick a topic and have each side make a brief presentation followed by questions and answers. Listening to one another, absent the posturing and public talking points, could only promote greater understanding, which is necessary to real progress.

Perhaps from this starting point, we can move onto more intractable problems, like the current campaign finance system that has such a corrosive effect on Congress. In the Senate, raising in small increments the $10 million to $20 million a competitive race requires takes huge amounts of time that could otherwise be spent talking with constituents, legislating or becoming well-versed on public policy. In my father's time there was a saying: "A senator legislates for four years and campaigns for two." Because of the incessant need to raise campaign cash, we now have perpetual campaigns. If fund-raising is constantly on members' minds, it's difficult for policy compromise to trump political calculation.

The recent Supreme Court ruling in Citizens United v. Federal Election Commission, allowing corporations and unions to spend freely on ads explicitly supporting or opposing political candidates, will worsen matters. The threat of unlimited amounts of negative advertising from special interest groups will only make members more beholden to their natural constituencies and more afraid of violating party orthodoxies.

I can easily imagine vulnerable members approaching a corporation or union for support and being told: "We'd love to support you, but we have a rule. We only support candidates who are with us at least 90 percent of the time. Here is our questionnaire with our top 10 concerns. Fill it out." Millions of campaign dollars now ride on the member's response. The cause of good government is not served.

What to do? While fundamental campaign finance reform may ultimately require a constitutional amendment, there are less drastic steps we can take to curb the distorting influence of money in politics. Congress should consider ways to lessen the impact of the Citizens United decision through legislation to enhance disclosure requirements, require corporate donors to appear in the political ads they finance and prohibit government contractors or bailout beneficiaries from spending money on political campaigns.

Congress and state legislators should also consider incentives, including public matching funds for smaller contributions, to expand democratic participation and

increase the influence of small donors relative to corporations and other special interests.

In addition, the Senate should reform a practice increasingly abused by both parties, the filibuster. Historically, the filibuster was employed to ensure that momentous issues receive a full and fair hearing. Instead, it has come to serve the exact opposite purpose — to prevent the Senate from even conducting routine business.

Last fall, the Senate had to overcome two successive filibusters to pass a bill to provide millions of Americans with extended unemployment insurance. There was no opposition to the bill; it passed on a 98-0 vote. But some senators saw political advantage in drawing out debate, thus preventing the Senate from addressing other pressing matters.

Admittedly, I have participated in filibusters. If not abused, the filibuster can foster consensus-building. The minority has a right to voice legitimate concerns, but it must not employ this tactic to prevent progress on everything at a critical juncture for our country. We need to reduce the power of the minority to frustrate progress while still affording them some say.

Filibusters have proliferated because under current rules just one or two determined senators can stop the Senate from functioning. Today, the mere threat of a filibuster is enough to stop a vote; senators are rarely asked to pull all-nighters like Jimmy Stewart in "Mr. Smith Goes to Washington."

For this reason, filibusters should require 35 senators to sign a public petition and make a commitment to continually debate an issue in reality, not just in theory. Those who obstruct the Senate should pay a price in public notoriety and physical exhaustion. That would lead to a significant decline in frivolous filibusters.

Filibusters should also be limited to no more than one for any piece of legislation. Currently, the decision to begin debate on a bill can be filibustered, followed by another filibuster on each amendment, followed by yet another filibuster before a final vote. This leads to multiple legislative delays and effectively grinds the Senate to a halt.

What's more, the number of votes needed to overcome a filibuster should be reduced to 55 from 60. During my father's era, filibusters were commonly used to block civil rights

legislation and, in 1975, the requisite number of votes was reduced to 60 from 67. The challenges facing the country today are so substantial that further delay imperils the Republic and warrants another reduction in the supermajority requirement.

Of course, the genesis of a good portion of the gridlock in Congress does not reside in Congress itself. Ultimate reform will require each of us, as voters and Americans, to take a long look in the mirror, because in many ways, our representatives in Washington reflect the people who have sent them there.

The most ideologically devoted elements in both parties must accept that not every compromise is a sign of betrayal or an indication of moral lassitude. When too many of our citizens take an all-or-nothing approach, we should not be surprised when nothing is the result.

Our most strident partisans must learn to occasionally sacrifice short-term tactical political advantage for the sake of the nation. Otherwise, Congress will remain stuck in an endless cycle of recrimination and revenge. The minority seeks to frustrate the majority, and when the majority is displaced it returns the favor. Power is constantly sought through the use of means which render its effective use, once acquired, impossible.

What is required from members of Congress and the public alike is a new spirit of devotion to the national welfare beyond party or self-interest. In a time of national peril, with our problems compounding, we must remember that more unites us as Americans than divides us.

Meeting America's profound challenges and reforming Congress will not be easy. Old habits die hard. Special interests are entrenched. Still, my optimism as I serve out the remainder of my final term in the Senate is undiminished. With the right reforms, members of Congress can once again embody our best selves and our highest aspirations.

In my final 11 months, I will advocate for the reforms that will help Congress function as it once did, so that our generation can do what Americans have always done: convey to our children, and our children's children, an America that is stronger, more prosperous, more decent and more just.

Evan Bayh, the governor of Indiana from 1989 to 1996 and a senator since 1999, announced his retirement from the Senate last week.

Milwaukee Journal Sentinel (Wisconsin)

February 21, 2010 Sunday
Final Edition

FILIBUSTERS
The tyranny of the minority in the U.S. Senate
As distasteful as a tyranny of the majority, it should compel the Senate to change its filibuster rules.

BYLINE: O. RICARDO PIMENTEL

SECTION: J Crossroads; Pg. 3

There may well be more behind Evan Bayh's announced departure from the U.S. Senate than meets the eye. That doesn't mean that the Indiana Democrat's parting shots about gridlock, loss of comity, unbridled partisanship and general congressional ineffectiveness are any less true.

Congress is paralyzed.

The hard stuff is just not getting done. And there is little reason to doubt, absent reform of U.S. Senate rules in particular or a genuine change in the culture, that what the country has just seen on health care won't be repeated when it comes to the nation's other pressing problems.

Jobs. Economic stimulus. Infrastructure rebuilding. Cap-and-trade or dealing with climate change generally. Immigration reform. The deficit. A looming reckoning on Medicare and Social Security.

They are all - or should be - on Congress' plate. And that's where they will likely stay - with the nation stuck at the window eyeing the morsels longingly.

Distressingly, however, with control of Congress potentially hanging in the balance in November elections, partisans see more advantage in obstruction than true negotiation - though it doesn't take an election year to trigger these base instincts. As others have observed, a culture of perpetual electioneering has descended on Congress - every issue with even the faintest hint of political advantage is held hostage to partisan ideology masquerading as principle.

And that's evident even in the U.S. Senate, the "deliberative body." "Dithering body" is more like it these days.

Blame that magic number: 60.

Sen. Tom Harkin has some other numbers in mind: 57, 54, down to simple majority in a 100-member Senate. The Iowa Democrat has reprised his proposal to change the Senate's filibuster rule. Sixty, of course, is the number of votes it now takes to shut down debate and proceed to a vote for a bill. It wasn't always so. The Senate decreased that from 67 in 1975. And, arguably, the filibuster - unmentioned in the U.S. Constitution - wasn't even intended to block legislation in perpetuity but to simply delay it.

Whether Senate Republicans or Democrats have been in charge, this tool has been misused. But Republicans have developed it into an art form more recently. From 1949 to 1970, there were 30 cloture votes; in 2009, there were 39 alone. There were 112 cloture votes in the 110th Congress, from 2007-2009.

Harkin's proposal - which he first introduced in 1995 when Democrats were in the Senate minority - has merit. Up to a point. And that point for us is 50 + 1, a simple Senate majority.

Built into the Senate by the Founding Fathers is fear of a tyranny of the majority. Rhode Island has the same number of senators as California. And by serving six years rather than House members' two-year terms, senators were thought to be more immune to political expediencies.

Yes, by all means, the Senate should reform its rules as Harkins suggests - the number of votes necessary after two weeks going down to 57 and to 54 two weeks later. But not down to simple majority. A progressive diminishment will, in our view, spur good-faith negotiation as a matter of necessity. But a simple majority would allow the minority to be treated too roughly - to the detriment of a nation whose electorate does show all the signs of being split on major issues.

Most citizens, however, don't elect senators with the thought in mind, "OK, that'll make sure nothing gets done." They elect them to vote convictions - to actually accomplish something by putting country first.

Yes to filibuster reform. Otherwise, what we're left with is a tyranny of the minority, every bit as offensive as the opposite.

The Baltimore Sun

February 23, 2010 Tuesday
FINAL EDITION

THE FILIBUSTER GOES TOO FAR; OUR VIEW: REPUBLICANS THREATEN ENDLESS DEBATE; NOW MAKE THEM GO THROUGH WITH IT

SECTION: EDITORIAL; Pg. 12A

One of the most perplexing things about contemporary Washington is that Democrats simultaneously hold the largest majority any party has had in the Senate in decades and are utterly unable to move forward with important legislation. The key to this paradox is the Senate rule that allows for the filibuster - unlimited debate on a motion that can only be stopped by a vote of three-fifths of the chamber, or 60 senators. So the reason nothing much is getting done in Washington is that filibusters are going on all the time, right?

Not exactly. There have been no marathon debates in the Senate about health care or the stimulus bill. Senators aren't sleeping on cots in the chamber as aides ferry coffee to some lone Republican passionately making his case that the president wants to socialize medicine. The way Senate rules currently work, the minority party merely has to announce its intent to filibuster if it wants to stop a piece of legislation. Senate Majority Leader Harry Reid could force the Republicans to go through with it, but the way the rules work, the filibuster actually puts the onus on the majority, not the minority, to keep the debate going. A lone dissenter can object to a motion to end debate by universal consent, but if the majority fails to keep a quorum in the chamber at any given time, the Senate can be forced to adjourn.

The filibuster should be an extraordinary tool to prevent the majority from trampling the views of the minority, but the way the Senate's rules are now, it has become a routine part of business. There is no disincentive for the minority party to use the tactic, and so it has. Although the threat of the filibuster has been used extensively by Republicans to block the current Democratic majority, Democrats frequently invoked the tactic during the Bush administration, and over all the number of filibusters has increased steadily since the current rules went into effect in the 1970s, regardless of which party was in power.

Sen. Evan Bayh of Indiana, the Democrat who announced last week that he would not seek re-election because of his frustration with partisanship in Washington, suggested in a New York Times op-ed on Sunday that the rules need to be reformed. He proposed limiting the number of filibusters on any piece of legislation to one (unlike the current rules that allow filibusters on each procedural step along the way); reducing the number of votes needed to cut off debate to 55; and for a filibuster to require a petition signed by 35 senators indicating their willingness to actually debate the issue indefinitely. "Those who obstruct the Senate should pay a price in public notoriety and physical exhaustion," Senator Bayh wrote. A handful of other Democratic senators are now talking about filibuster reform, too.

The problem is, any of these proposals would require a change to the Senate rules, and it takes 67 votes to do that.

There are a couple of ways around the problem. A legislative technique called "reconciliation" allows straight up-or-down votes on matters related to the budget, but it's unclear how far that could be stretched on a matter like health care reform. Another way out would be to get the presiding officer of the Senate - Vice President Joe Biden - to declare the requirement of a supermajority to rewrite Senate rules to be unconstitutional. (A Supreme Court ruling from 1892 would give him some cover.) Then, after some parliamentary maneuvering, Democrats could change the filibuster rules by a simple majority vote.

As clear as it is that the filibuster has gotten out of hand, using that tactic to reform it would probably be a bad idea. Americans may not like the idea of the filibuster, but they like changing the rules in the middle of the game even less.

So what is Senator Reid to do? The only way to fight the routinization of the filibuster may be to engage in one. Take any one of the issues Republicans have vowed to fight to the death and make them actually do it. If that means Democrats are the ones who would have to take to the cots and talk all night, so be it. That would show some backbone and conviction - not to mention an eagerness to debate the details of their proposals in public. That's something Americans would respond to.

The Christian Science Monitor

March 3, 2010 Wednesday

Obama health care reconciliation: save your outrage for the unconstitutional filibuster;
Forget President Obama's health care reconciliation. The real abuse of power is the filibuster.

BYLINE: Tom De Luca

The debate over healthcare reform should have been about doctors, patients, insurance and drug companies, and coverage. Instead, much of the attention has been focused on a "preexisting condition" in the Senate: the filibuster.

A filibuster allows a senator to delay or defeat legislation through endless talk - or merely the threat of it. That gives the minority breathtaking power to cause gridlock and discredit the majority by stopping it from pursuing the program it was elected on. That is exactly what 41 Senate Republicans are doing to 59 Democrats right now.

The filibuster has become so potent a political weapon that President Obama is reportedly approving the use of the controversial "reconciliation" process to pass healthcare reform. Under this method, Democrats could turn the reform bill into law with a simple majority of senators instead of the 60 now needed to end a filibuster. Critics are calling reconciliation an "abuse of power," "undemocratic," and "the nuclear option." The real undemocratic abuse of power, however, is the present way in which the filibuster is used.

While the use of a simple majority through reconciliation to pass legislation would restore constitutional sanity to the Senate, it does not go far enough. The Senate should rewrite the filibuster rule entirely. Full and thorough debate should be preserved, but the unconstitutional practice of requiring supermajorities to pass important legislation must be ended.

Many of us first learned about the filibuster in "Mr. Smith Goes to Washington."

In that classic film, the filibuster is our quintessential American hero Sen. Jefferson Smith's last hope of stopping corruption and symbolically saving the American republic.

In the real world of American politics today, however, the filibuster has become the weapon of choice to thwart a democratically elected majority on important legislation. Once rare, it's now used routinely. Filibusters used to be hard work. Senators had to actually stand and talk in the Senate 24/7 until they literally dropped. Now they merely need to threaten a filibuster to stop legislation from ever coming to a vote.

This usurpation is more than an unheroic partisan power grab. It is an unconstitutional change in which the entire Senate - and both parties - are complicitous.

The Framers were explicit about those rare cases, such as constitutional amendments, in which supermajorities are required. They fashioned a document that assumed the majority rule principle for legislation, and based important arguments for the constitution's ratification on that assumption.

In "The Federalist No. 10," James Madison defended the newly proposed constitution on the grounds that it created the kind of republic that could prevent factions from undermining liberty. He was most worried by the abusive potential of a majority faction and prescribed, not supermajority rule, but a large and strong republic supplemented by federalism and separation of powers.

Minority factions could be more easily handled, he believed, by simply applying the "republican principle" of majority rule, enabling "the majority to defeat [the minority's] sinister views by regular vote."

The filibuster also upends the Great Compromise of 1787 that gave us a bicameral legislature. Small-population states wanted congressional representation based on state equality, while large-population states wanted to base it on the number of inhabitants in a state (or the amount of taxes it contributed).

The deal was to have both: a Senate and a House of Representatives. In granting an extraconstitutional veto to a minority faction of senators, the filibuster increases their (and their states') power relative to that of other senators (and states). It also upsets the balance of power with the House and its members. The filibuster undermines the state equality and proportionality principles at the same time.

Debates over when "extraordinary majorities" would be required were part of the horse-trading that led to final agreement on the constitution. Southern states, for example, depended on agricultural exports and some wanted a legislative supermajority to be required for passage of laws that affected navigation, something the New England shipping states opposed. They traded this demand away for a 20-year guarantee of continuance of the slave trade and a ban on export taxes. Because sectional and state interests played an important role in these deals and compromises, it is inconceivable that the back door would have been left open for supermajorities to sneak in.

Article I, Section 5 offers filibuster-defenders one slim reed to grasp: that "Each House may determine the rules of its proceedings." However, it also says that each senator shall have "one vote" and that "a majority of each [House] shall constitute a quorum to do business." The filibuster both deviates from the equality of power idea intrinsic to the "one vote" principle, and changes the meaning of the words "to do business" - unless they were intended by the Founders to mean "do nothing but talk."

The filibuster "rule" is in reality not a rule at all. It is a structural change to the meaning of the Constitution itself, something even a unanimous Senate is not empowered to do. Its defenders should ask themselves this question: If the filibuster "rule" were written into the constitution's draft, would the constitution have been ratified? Without a new round of debates and compromises, the answer is no.

As the president of the Senate, Vice President Joe Biden should rule unconstitutional any use of the filibuster to block major legislation. As a political matter, such a move would be highly controversial, but as a constitutional matter, it merely restores the Framers' intent regarding using majority votes to move legislation in each house of congress - something conservatives should support. After all, the status quo distorts the Constitution. And it robs the vice president of the only real power he has: to cast the tiebreaking vote when the Senate is "equally divided," an impossibility if the meaningful vote is the one that requires 60 senators to end debate.

If Mr. Biden takes this step and gets attacked, it would be a perfect time to treat his Senate colleagues to a filibuster of his own, by reading to them, in its entirety, "The Federalist No. 51," which explains how to avoid excessive concentration of power: "Ambition must be made to counteract ambition," Madison wrote. "The interest of the man must be connected with the constitutional rights of the place." In protecting his own power from Senate usurpation, Biden would also be fulfilling Madison's constitutional plan. Mr. Smith would be very proud. But not as proud as Madison.

Tom De Luca, a professor of political science at Fordham University, is coauthor of "Liars! Cheaters! Evildoers! Demonization and the End of Civil Debate in American Politics."

POLITICO

Amending the filibuster rule

By: Sen. Tom Udall
March 5, 2010 05:04 AM EDT

Reading former Sen. Lincoln Chafee's recent article in POLITICO, "Ban Filibuster Abuse for the Good of All" (Feb. 26), I was struck by how much we agree on about the serious dysfunction of the U.S. Senate.

We agree that the days of reasonable use of the filibuster under extraordinary circumstances are long gone. We agree that the consequences of filibuster abuse extend far beyond Congress — it is the American people who pay the price. And we agree that there are ways to fix the problem.

But we differ on how to fix it. Chafee talks of a new Gang of 14 — the senators who came together in 2005 to stop the use of the "nuclear option." My proposal is the "constitutional option" — and its history dates back to 1917.

The constitutional option is found in Article 1, Section 5 of the Constitution, which states that "each House may determine the Rules of its Proceedings." It also states that a "Majority of each [House] shall constitute a Quorum to do Business." So the Framers provided a means for the Senate, and the House, to consider, by a majority vote, the adoption of rules as the need arose.

In the 1950s, Sen. Clinton Anderson of New Mexico was a leading proponent of the constitutional option. I am the proud successor to Anderson's seat — and to his dedication to making the Senate a functional legislative body.

In Anderson's day, the toxic partisanship we face now had not yet poisoned the system. But the manipulative use of the filibuster had taken hold. It was used to block some of the most important legislation of that time — including civil rights bills now considered among the Senate's greatest accomplishments.

At the beginning of each Congress in 1953, 1957 and 1959, Anderson and a bipartisan group of senators moved that the newly constituted Senate determine its rules of procedure by a simple majority vote. Though these motions were tabled, Anderson gained more support each year. In 1959, then-Majority Leader Lyndon B. Johnson was forced to offer a compromise proposal to amend the filibuster rule — Rule XXII.

The current version of Rule XXII was adopted in 1975, when Sens. Walter Mondale and James Pearson again used the constitutional option to compel filibuster reform. Only three sitting senators — Robert Byrd (D-W.Va.), Daniel Inouye (D-Hawaii) and Patrick Leahy (D-Vt.) — were in Congress then. This means that 97 of us have never voted on the rule that has effectively prevented the Senate from acting on hundreds of bills already passed by

the House, as well as on scores of presidential appointments.

The constitutional option is grounded in the common law principle, long upheld in the Supreme Court, that one legislature cannot bind its successors. Senate 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." This provision in Rule V, combined with the Rule XXII requirement for two-thirds of senators to end a filibuster on a rules change, makes any change in the rules virtually impossible.

The Senate we serve in today is bound by decisions made by senators decades ago — or, as Byrd once put it, "by the dead hand of the past."

Though Chafee made changing the rules sound easy, under the existing rules it is, in fact, daunting. There is a better way. Under Article 1, Section 5, the Senate has the right — and responsibility — to make new rules when the old ones don't work.

As Sen. Orrin Hatch wrote in 2005, both conservative and liberal scholars "agree that a simple majority can change Senate rules at the beginning of a new Congress."

In January, I introduced a resolution prompting the next Senate to execute the constitutional option and adopt its own rules. In addition, at the beginning of the 112th Congress, I will follow in Anderson's tradition and offer a motion for the Senate to exercise its constitutional right to approve its rules of procedure by a simple majority vote.

We don't have to make drastic changes. We can modify the filibuster in a way that still respects minority rights but prevents our current state of minority rule. We have the next 10 months to discuss reasonable changes that would help restore the collegiality and comity of the "world's greatest deliberative body."

Sen. Tom Udall (D-N.M.) is a member of the Senate Committee on Rules and Administration.

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The Washington Post

March 7, 2010 Sunday

Bending the rules has twisted the Senate

BYLINE: Ezra Klein

SECTION: OUTLOOK; Pg. B02

Ask a kid who just took civics how a bill becomes a law and she'll explain that Congress takes a vote and, if a majority supports the bill, the bill goes to the president. That's what we teach in textbooks, but it's not what we practice in Washington. In reality, the Senate has become a battleground to determine who's better at manipulating the rules. The party that wins gets to decide if a bill becomes a law.

For the minority, everything depends on their skill with Rule XXII. For the majority, it's all about their understanding of the budget reconciliation process. For the country, it's a mess.

Rule XXII is more commonly known as the filibuster. In theory, the filibuster is there to protect the minority's ability to speak its mind. This was particularly important in the days before airplanes and television cameras. The majority could rush something to a vote while crucial members of the opposition were back home in their states. The filibuster gave the minority time to slow the process and rally its troops.

As time went on, the filibuster became more common as a tool of pure obstruction. In 1917, Woodrow Wilson convinced the Senate to limit it: Now, two-thirds of the Senate could vote to invoke "cloture," which would close debate. In 1975, Congress lowered the threshold to three-fifths of the Senate, or 60 votes.

In theory, the filibuster should have become less prevalent as it became easier to break. But it instead became constant. Between 2007 and Friday, the Senate had to call 216 cloture votes to break filibusters. That's more than it had to call between 1919 and 1976.

There's a simple story about why the minority party has started demanding more cloture votes even when they know they'll lose them. After a call for cloture, the Senate must wait two days to take the vote. After lawmakers vote, they must take 30 hours of post-cloture debate. And filibusters can be mounted against the motion to debate, on amendments, on the vote on the bill itself . . . on everything, really. A single, committed crank can waste weeks forcing the majority to break his filibusters.

But the filibuster can, in certain circumstances, be defused. The budget reconciliation process was created in the Budget Act of 1974. Back then, Congress passed a budget at the beginning of the year and then an updated version at the end of the year. Budget reconciliation was a way to, yes, reconcile the two versions faster than would be possible under the ordinary rules. It limited debate to 20 hours, and since the filibuster is nothing but an endless lengthening of debate (or a threat to do so), it short-circuited the filibuster.

Congress doesn't pass two budgets anymore, and reconciliation, like the filibuster, has expanded beyond its original purpose: It's been used to pass the Bush tax cuts and Reagan's tax increases, welfare reform, the Balanced Budget Acts of 1995 and 1997, the Children's Health Insurance Program and COBRA, and much more. Of the 21 reconciliation bills that have passed since 1981, 16 have been signed by Republican presidents. So the GOP's feigned astonishment that the maneuver might be used to pass a few fixes to health-care reform legislation rings hollow.

But reconciliation has its problems. It's limited to provisions with a direct impact on the federal budget, and a rule passed by Democrats further limits it to laws that reduce the deficit (a response to Bush using reconciliation for budget-busting tax cuts). That means that to activate the 51-vote magic, legislators have to write specific bills that abide by the rules of reconciliation. That's fine for a tax change, but it wouldn't work for, say, regulating private insurers. Disagreements are settled by the Senate parliamentarian, Alan Frumin, who acts as umpire in rule-related disputes. (The parliamentarian can be overruled by the vice president, though that doesn't happen in practice).

This is the consequence of running the Senate by twisting the rules. It's not just that you have the 60-vote filibuster process competing against the 51-vote reconciliation process. It's that you have the Senate wasting days and weeks in cloture votes for doomed filibusters and rewriting legislation to conform to the odd limits of reconciliation. And as the minority becomes less responsible with the filibuster (and oh boy, have minority Republicans become less responsible with the filibuster), the majority needs to use reconciliation more often.

Even a kid in civics class would recognize that this is all nuts. The Senate should return to majority rule, or it should decide to raise the threshold to 60 votes. But treating the laws of the body like an arsenal rather than a road map is making the Senate slow, unwieldy and incomprehensible. It's no way to run a country.

Ezra Klein blogs on domestic and economic policy for The Washington Post, at washington-post.com/ezraklein.

The Wichita Eagle
Found on WichitaEagle.com
The Wichita Eagle (Kansas)

March 21, 2010 Sunday

Rules about filibusters are not carved in stone

BYLINE: Dave Seaton
SECTION: a; Pg. 3

Republican senators repeatedly have used the threat of a filibuster to stymie health reform and other legislation. Democrats, when they were in the minority, used the threat to prevent confirmation votes on a number of President George W. Bush's judicial nominees.

But filibuster rules are not carved in stone. A Kansas senator helped create the current rules, and there is a lesson in that 1975 change that could help bring reform today.

A filibuster is when one or a few senators try to talk a bill to death. The tactic was most dramatically used by Southern segregationists, all Democrats, against civil rights legislation in the late 1950s and 1960s.

At that time, 66 votes (two-thirds) were required to end debate. Today, 60 votes (three-fifths) are required.

Sen. James B. Pearson, R-Kan., actively helped make that modification happen. Pearson joined Sen. Walter Mondale, D-Minn. to offer a resolution to modify Rule 22, the "cloture" rule that governs how the Senate ends debate.

Pearson and Mondale believed in their institution's tradition of protecting the right of individual senators to speak and vote as they saw fit. But both men also came to believe the overuse of the filibuster had tipped the balance against the will of the majority.

As Pearson put it, there is a time for debate, and there is a time to act.

Mondale and Pearson reminded their colleagues that until 1806 the Senate, like the House of Representatives, had ended debate by simple majorities. They recalled that the existing cloture rule had been put in place during World War I at the urging of President Wilson to expedite legislative action.

In early 1975, the Mondale-Pearson resolution came to the floor for debate. After weeks of maneuvering through motions to table, and motions to recommit, Sen. Russell Long, D-La., came up with a compromise. He proposed that 60 votes be permanently required for cloture, regardless of how many senators were present and voting.

The parliamentarian advised Vice President Nelson Rockefeller that he could deny a motion to reopen a matter already closed and could rule that Rule 22 could be changed by a simple majority. Rockefeller so ruled.

The compromise eventually passed by a vote of 73-21.

The Constitution gives the Senate power to make its own rules. There is a U.S. Supreme Court decision upholding the assertion that the Senate can change its rules by a simple majority, but, in fact, everyone knows any attempt to do this can be filibustered.

That is not to say a new compromise, a la Long, could not be carved out and accepted.

In spite of today's hyperpartisanship, respect for the rights of the minority remains strong in the Senate. But considering the frustration with Washington, D.C., being expressed in the electorate today, on the left as well as the right, there seems to be a real prospect that Rule 22 will be revisited soon.

Dave Seaton is the retired publisher of the Winfield Daily Courier. He served as James Pearson's press secretary from 1969 to 1974.

Providence Journal-Bulletin (Rhode Island)

March 21, 2010 Sunday

At last, return the Senate to majority rule

BYLINE: STEVEN HILL

SECTION: NEWS; Commentary; Pg. 10

WASHINGTON

The recent news that Anthem Blue Cross plans to jack up individual premiums as much as 40 percent is just the latest example of our failing health-care system.

But beyond the immediate health-care crisis a more fundamental national principle is at stake in the health-care vote. And it affects not only health care but also pending legislation on global climate change, re-regulation of the financial industry, and more. That is the notion that the majority should rule.

If Senate Republicans insist on abusing the quirky rules of the Senate, such as the filibuster, which requires 60 out of 100 votes to end debate and vote on legislation, President Obama should push his health-care package through the Senate via the reconciliation process.

Reconciliation, which would allow 51 out of 100 Senators to pass health-care legislation, would restore the constitutional principle of majority rule that has been hijacked in the filibuster-gone-wild Senate. Nowhere is it written in the Constitution that a supermajority is required to pass legislation in the Senate.

Indeed, the Constitution requires the use of supermajority rules by one or both houses of Congress in only seven specific situations (including overriding a presidential veto, confirming treaties, removing a president or other leaders who have been impeached by the House).

But the filibuster rule is not among them.

The Constitution s drafters clearly knew how to impose a supermajority rule when they wanted to, yet they didn t impose one for ending debate in the Senate. Various constitutional scholars have concluded that ordinary majority rule is the Constitution s default baseline, except in those seven explicit instances.

The filibuster rule is merely a peculiarity of antiquated Senate tradition, part of an anti-majoritarian streak that once protected a minority of slaveholding states. Such anti-majoritarianism was opposed by leading constitutional figures. James Madison and Alexander Hamilton warned about the creation of any legislative body that contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail (Hamilton, Federalist Paper number 22).

The problem with supermajority thresholds, as Hamilton and Madison pointed out, is that they allow a rump minority to exercise a veto over what the vast majority wants. Currently the 41 Republican senators represent barely a third of the nation s populace. Yet through the filibuster they can strangle any legislation favored by senators representing the other two-thirds.

The resulting paralysis and gridlock undermine the Senate s credibility.

Very few national legislatures require a supermajority to pass legislation, though one comparable situation we can point to is in California. There, a two-thirds legislative supermajority is required to pass a budget or alter revenues, and also has resulted in paralysis.

Not only should Obama and congressional Democrats invoke reconciliation, they should retire the anti-majoritarian filibuster to the dustbin of history. Some political leaders believe that doing so would require

67 votes, and if you can t get 60 votes to end a filibuster how could you possibly get 67 votes to change the Senate rule that established the filibuster?

But Prof. Vikram Amar of the University of California at Davis School of Law other legal experts have concluded that only a Senate majority is necessary to abolish the filibuster. The Constitution allows the Senate or the House to determine the rules of its proceedings by a simple majority vote. The rule establishing the filibuster itself was passed by only a majority, and a bare majority of an earlier Senate cannot legally bind future Senates to a two-thirds vote. To try and do so, writes Professor Amar, would be in violation of deep constitutional and American values.

Another possibility would be to reform the filibuster, as proposed by Iowa Democratic Sen. Tom Harkin. Senator Harkin would allow the debate-ending requirement to be lowered gradually the longer a measure is debated. Initially ending debate might require 60 votes, but after a few days of debate it would be re-set at 57 votes. Days later, the requirement would be lowered to 54, and so forth.

In that way, a bare majority could not circumvent discussion and deliberation at the outset, but neither could a recalcitrant minority hold up majoritarian action indefinitely, writes Professor Amar.

So by either using reconciliation, modifying the filibuster, or getting rid of it entirely, President Obama would return the Senate to the original majority rule vision of Madison and Hamilton. And he would pass health-care legislation that will allow millions of fellow Americans to benefit from a level of health-care security already enjoyed by the president and the senators.

NOTES: Steven Hill is author of the recently published Europe s Promise: Why the European Way is the Best Hope in an Insecure Age and political-reform director of the New America Foundation, a liberal group.

Roll Call
May 12, 2010 Wednesday

Ugly Senate;
New Reform Wave Rising to Combat Senate Obstructionism

In his characteristically blunt retirement announcement last week, House Appropriations Chairman David Obey declared that he was "bone tired" after 42 years in Congress.

"All I do know," added the Wisconsin Democrat, "is that there has to be more to life than explaining the ridiculous, accountability-destroying rules of the Senate to confused, angry and frustrated constituents."

As all of us who work on Capitol Hill know - but most citizens only dimly understand - 60 votes are required for any but the most trivial legislation to even be considered on the Senate floor, and a single Senator can block a bill or nomination by placing a hold on it, openly or anonymously.

Both parties, when they've been in the minority, have used threats of filibusters and holds to obstruct the flow of legislation and nominations, and both parties, when in the majority, have denounced the "obstructionism" of the minority.

You'd think, as a result, that there would be a bipartisan consensus to change things - because, of course, this year's majority could be next year's minority.

But that would ignore both the short-term thinking and savage partisanship that dominate politics in this city. So, each party - right now, it's the Republicans - works to perfect obstructionism with new uses of the procedural tricks they've seen the other employ.

We're pleased that a new reform spirit is taking hold in the Senate, with Democratic freshman and sophomore Members announcing plans to push for rules changes at the outset of the next Congress, and with Sens. Chuck Grassley (R-Iowa) and Ron Wyden (D-Ore.) taking a new shot at "secret holds."

The junior Democrats are proposing to try in January to amend Senate rules by majority vote instead of the two-thirds called for in the rules themselves. This tactic worked successfully in 1975 to lower the threshold for breaking a filibuster from 67 to 60 votes.

Of course, the Senate was designed by the nation's framers to slow down legislation that might speed with undue haste through the House. We wouldn't expect the Senate to turn itself into a strict, majority-rules chamber.

But instead of having significant legislation subject to two filibusters - one on a motion to proceed, another to get to a vote - the rules could call for one, prior to final passage, and could shorten the period of debate on cloture motions from the present 30 hours.

Rules need to be changed so that executive branch nominees are guaranteed an up-or-down vote. Judicial nominations - since they are for life - might still be subject to filibuster, but they, too, ought not be "held" by a single Senator.

Senate leaders should end the practice of "secret holds" forthwith - since they are only possible because leaders enable privately delivered threats to deny unanimous consent to proceed on a bill or nomination. The latest Grassley-Wyden proposal would require that holds be imposed in writing to leaders and published after two days.

Because partisan polarization is as endemic as it is, we have no illusions that rules changes will end the problem of Senate gridlock. Loosening it some would help.

The National Journal

May 17, 2010

Is The Senate Functional?

BYLINE: Eliza Newlin Carney

SECTION: RULES OF THE GAME

Senators bent on ending the logjams and secrecy that tie up the world's greatest deliberative body lost a key parliamentary fight last week, but the emotional debate over filibusters and so-called secret holds is just warming up.

Sixteen months into a contentious session marked by Senate deadlocks, rules disputes, disrupted hearings, stalled executive branch nominations and scuttled legislation, a growing chorus of lawmakers, experts and activists are shouting: enough.

The secret hold and the filibuster may have outlived their usefulness.

On Capitol Hill, junior senators led by New Mexico Democrat**Tom Udall** have met twice with Majority Leader **Harry Reid**, D-Nev., to vent their frustrations. Reid recently suggested that senators who won't follow the rules on anonymous holds should be referred to the Senate ethics panel. Reform-minded senators have introduced several measures aimed at freeing the Senate up to act with a simple majority, as opposed to the two-thirds supermajority that has become the status quo.

The Senate Rules and Administration Committee will hold the second in a series of hearings examining the filibuster this week. Today, a Brookings Institution conference on the filibuster, which now blocks votes far more often than in previous decades, will ask leading experts a question that seems to pop up a lot these days: Is the Senate functional?

Republicans tend to argue that the rules are just fine, while Democrats by and large are the ones pushing for parliamentary fixes. But senators on both sides of the aisle accuse one another of procedural shenanigans. Democrats charge Republicans with obstructing action to score political points. Republicans say Democrats are abusing their majority and stifling debate. And some Senate Republicans are unhappy with holds, too.

Sen. **Charles Grassley**, R-Iowa, has toiled for years with Sen. **Ron Wyden**, D-Ore., to end secret holds, which enable a single senator to anonymously block action on a bill or nominee. In theory, the Senate changed those rules in 2007 to require a senator imposing a hold secretly to go public within six session days. But in practice, that rule is not enforced, and senators routinely hand off secret holds as the six-day deadline approaches, prompting charges of "hold laundering."

Last week, Wyden and Grassley set out to attach a measure to tighten disclosure rules for holds as an amendment to the Senate's pending Wall Street reform bill. But Sen. **Jim DeMint**, R-S.C., foiled that effort with a second-degree amendment widely regarded as a poison pill -- a measure that would have set a one-year deadline for completing fencing along the U.S.-Mexico border.

In a signal of the growing procedural rancor on Capitol Hill, Wyden and his allies publicly sparred with DeMint over whether and how the Wall Street bill could be amended. Sen. **Claire McCaskill**, D-Mo., also took to the Senate floor last week to decry holds and point to the dozens of executive branch nominees who are waiting for release from the "land of secret holds." McCaskill has rounded up 58 colleagues, including a couple of Republicans, to sign a letter asking Senate leaders to ban secret holds and pledging to voluntarily swear off them.

The process of changing rules, of course, will hit a familiar wall: Senate leaders can't overcome a filibuster and clear the way for a vote -- known as invoking cloture -- without 60 votes, a rule that dates in one form or

another to 1917. Some scholars argue that this supermajority rule is what must change if the Senate is to function efficiently again.

"There is no good justification for ruling by supermajorities," said **Sarah Binder**, a senior fellow at the Brookings Institution who teaches political science at George Washington University. "An established principle of legislatures is working by majority rule, and allowing the majority will to move the legislature."

But Senate Republicans -- even those who deplore secret holds -- unapologetically defend the filibuster as crucial to protecting minority rights. And when they're in the minority, Democrats tend to look on the filibuster more kindly, too. Both the secret hold and the filibuster may have outlived their usefulness. But secret holds are particularly pernicious, and in the short term give reform advocates a more realistic target.

"It's hard for senators to justify the anonymous character of holds, let alone a single senator holding the entire Senate hostage," said Binder. "That doesn't seem particularly defensible to me."

Some wonder whether Senate gridlock is even that much of a problem, given that Congress enacted sweeping health care reform legislation this year and may soon follow suit with Wall Street legislation. If Republicans manage to win control of the Senate in November, the issue will fade. But if Democrats retain control with a smaller margin, as many expect, the fight over holds and filibusters will only intensify. As Binder put it: "We'll see a lot more obstruction, and a lot more calls for reforming the rules."

San Gabriel Valley Tribune (California)

June 19, 2010 Saturday

Perspectives: Filibustering procedure on shaky constitutional ground, blocks bills, hurts both parties

BYLINE: By Bob Edgar

SECTION: OPINION

Sorry, folks, a majority just isn't good enough anymore.

As Senate Democrats tried to begin debate on financial regulatory reform recently, 57 were in favor and only 41 opposed. That does not, however, add up to victory in the U.S. Senate, where 60 votes are needed to cut off a filibuster, and almost everything is at risk of being filibustered. As a result, a mere 41 senators can block nearly everything.

To any observer outside the beltway, this is shocking to say the least. Despite a global financial meltdown, the resulting economic pain on Main Street and a daily succession of Wall Street outrages including a fraud case against Goldman Sachs, could regulatory reform really fail even with the support of 57, or even 59 senators?

Meanwhile, rumblings of a filibuster are growing over President Obama's nominee to the Supreme Court, Ellen Kagan. Even a liberal nominee would make no change to the current 5-4 split on the court. But Sen. Jeff Sessions of Alabama, the top Republican on the Senate Judiciary Committee, refused to rule out a filibuster, declaring only a "mainstream" nominee could prevent it.

These senators are not operating under any pretext that they need more time to deliberate and consider how to vote. Instead, the goal is to prevent debate entirely.

Originally fairly obscure, the filibuster has grown out of control, taking on a dominant role in Senate lawmaking. Today filibusters are not just reserved for the biggest fights in Washington, but everyday business. In fact, since the current session of Congress began, there have been 50 votes to end filibusters. The 50th came a few weeks ago when Sen. Tom Coburn moved to block an extension of unemployment benefits for jobless Americans. (Colburn had placed a hold on it before Easter recess, leaving 200,000 families without a paycheck while Congress went on vacation.)

Senators no longer take to the floor to filibuster. They merely threaten it. By making the filibuster standard operating procedure and setting the bar at 60 votes before holding an up or down vote, the Senate has rigged the game against progress and in favor of endless obstructionism that paralyzes the entire government. This arcane tactic may earn the chamber more attention from the president and colleagues in the House, but it also cements its reputation as a swamp of inaction.

The filibuster has always been remarkably undemocratic (just 21 states can provide the necessary 41 senators), but some politicians argue that protecting the rights of the minority is exactly the point. In reality, the Senate is already designed to do this through equal representation of small states - and with remarkable power. When the first Senate met, the population ratio of the largest state, Virginia, to the smallest, Delaware, was 12 to 1. Today, California has 70 times the population than tiny Wyoming. The minority is very well-protected.

The filibuster is a political tool, not a part of checks and balances. Democrats and Republicans both know it. It has been used by both sides to block up or down votes. Progressives note how the threat of a filibuster took the public option off the table for health care reform, endangers the Employee Free Choice Act, and delayed

historic civil rights legislation until it was long overdue. Conservatives balk at failed oil drilling in Alaska's wildlife refuge, the defeat of Robert Bork, or attempts to reform Social Security.

It also rests on extremely shaky constitutional ground. Sure, the Senate can make its own rules, but no Senate rule can break the law or violate the Constitution. (Try adopting a rule that barred women senators from voting on Tuesdays.) The Constitution explicitly lays out the five different actions that require a supermajority vote, but otherwise calls for a majority to do business. The right of a determined minority to perpetually delay a vote violates the democratic principle of majority rule.

The unprecedented abuse of the filibuster is getting worse, hurts both parties, and cannot be tolerated. With all the work that is left to do this year, including finance regulatory reform, the appointment of a new justice to the Supreme Court, and more, America cannot afford rampant obstructionism. The Senate created these undemocratic rules, and now it needs to end them.

www.commoncause.org

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Monday, June 21, 2010

Filibuster's Time Has Expired

By Fred Harris
Former Chairman of the Democratic National Committee

The United States Senate was once called "the world's greatest deliberative body." But not so much, now. A major reason is the maddening legislative gridlock caused by excessive use of the filibuster — a minority's talking a bill or presidential nomination to death, or threatening to do so, to prevent a Senate majority from voting.

U.S. Sen. Tom Udall, D-N.M., is determined to change things. But that is harder than you would think. The Senate, unlike the House, is a "continuing body" because only one-third of senators are elected each two years and, therefore, always keeps the same rules unless senators affirmatively vote to alter them. The Senate filibuster rule, Rule XXII, requires a vote of three-fifths of the entire Senate — 60 votes — to invoke "cloture" — that is, to cut off debate so the Senate can act. But Rule XXII includes this provision: No change may be made in this particular rule except by a two-thirds vote of senators present.

Prior to 1917, Senate rules made no mention of filibusters or how to end one. Filibusters existed, but were rare. Then, just before America's entry into World War I, President Woodrow Wilson pressed Congress for a law allowing U. S. merchant ships to be armed against German U-boat attacks.

The House of Representatives rapidly passed this "Armed Ships Bill," and the Senate would have, too, except that a filibuster blocked action. President Wilson declared: "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 ... have rendered the great Government of the United States helpless and contemptible."

But at the next session of Congress, public opinion forced the Senate to adopt Rule XXII, providing that "cloture"could be voted — and debate ended — by two-thirds of senators present (later changed to three-fifths of the entire Senate).

Even so, until the 1960s filibusters were still rarely used. When the Senate finally broke a filibuster and passed the 1964 Civil Rights Act and, afterwards, the Voting Rights Act of 1965, observers assumed that Senate filibusters would mostly disappear. Not so.

The country was changing — and so was the Senate. Television and wider press coverage caused Americans to become more aware of what Congress was doing, and people grew more active in pressuring Congress, both directly and through aggressive new interest groups. Activists put greater heat on senators and were less willing to simply settle for a "no" vote against a measure they opposed. Thus, Senate filibusters greatly increased.

Too, Americans' partisan identification and ideology shifted: lower-economic and working-class voters, as well as African Americans and Hispanics, increasingly identified themselves as Democrats and were progressive in their views; the others increasingly identified themselves as Republicans and tended toward conservative views. These ideological and issue differences were especially pronounced among party activists.

The changes in the electorate changed party nomination results, so that both liberal House and Senate Republicans and hard-right House and Senate Democrats largely disappeared. In Congress, then, each party became more internally homogeneous and more unlike the other on issues. The House and Senate became much more bitterly partisan.

Virtually all major votes became party-line votes — where a majority of one party voted against a majority of the other party. And in the Senate, filibusters that had mostly been the work of ad hoc coalitions of individual members, became party-line filibusters by whichever party was in the minority but had more than 40 members.

Prior to the 1960s, there were only about five Senate filibusters during each two-year Congress. Now, in just the last Congress alone — the one just before this one — 112 cloture petitions were filed, to stop or prevent filibusters. And while filibusters once often worked to force legislative compromises, they now nearly always work simply to prevent the Senate from voting on a measure or nomination at all, or even taking it up for Senate consideration.

Three former presidents of the Senate — Vice Presidents Nixon, Humphrey and Rockefeller — each ruled that at the beginning of a new Congress, the Senate can change its rules by majority vote and that the two-thirds requirement to change the filibuster rule is unconstitutional. So, Udall intends to move to change the filibuster rule at the Senate's first meeting next January. He expects that Vice President Joe Biden, as president of the Senate, will follow precedent and rule in favor of a majority vote, that this ruling will be appealed to the full Senate, and that a majority will sustain the ruling of the chair. A Senate majority can then change the filibuster rule —

abolishing it or seriously curtailing it.

Let's hope Udall is successful because as Massachusetts Sen. Henry Cabot Lodge once said: "To vote without debating is perilous, but to debate and never vote is imbecile."

Fred Harris is a UNM Professor Emeritus of Political Science. The former U.S. senator from Oklahoma sought the 1976 Democratic presidential nomination.

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Regional Edition

Filibuster Nation

BYLINE: Harold Meyerson

SECTION: EDITORIAL COPY; Pg. A13

Judging by the first public meetings on health-care reform that members of Congress have begun convening in their districts, America is in Second Coming time, in the William Butler Yeats sense. The best may or may not lack all conviction, as Yeats wrote in his classic poem, but the worst are sure as hell full of passionate intensity.

Last weekend, right-wing Republicans stormed a number of such meetings across the country, shouting down members of the House and, in Philadelphia, Sen. Arlen Specter and Health and Human Services Secretary Kathleen Sebelius. In Austin, protesters blocked Democratic Rep. Lloyd Doggett's car and made it impossible for him to talk to constituents about such matters as appointments to military academies.

What's particularly curious about these two protests is that they took place on very liberal turf -- Philadelphia and Austin -- yet the local liberals and people of color seemed absent. Philadelphia is a heavily African American city, yet one strains to see any blacks among the protesters on the YouTube clips. The activists who have been whipped into a frenzy, and who have dominated the recess meetings so far, appear to be conservative whites.

Part of this imbalance is the result of the inherent difficulty in winning universal health insurance in a nation where five out of six Americans are already insured, however imperfectly and expensively. Securing an integrated national system may be essential to slowing the spiraling costs that make us less competitive than other nations, and securing a universal system may be a moral imperative, but neither is a cause that has sent millions into the streets. As yet, such institutional supporters of health-care reform as the unions and Obama's own legions aren't turning out crowds to match the right at the town meetings.

The right, by contrast, seems perpetually fired up, and not just on health care. At a town meeting last month, Rep. Mike Castle (R-Del.) was booed and heckled when he wouldn't concur with a noisy "birther" who argued that President Obama had been born in Kenya. This bit of social psychosis is limited almost entirely to Republicans: 77 percent of Americans, according to one recent poll, believe that Obama was born in the USA, but only 42 percent of Republicans do.

When future historians look back at this passage in our nation's history, I suspect they'll conclude that this Obama-isn't-American nuttiness refracted the insecurities and, in some cases, the hatred that a portion of conservative white America felt about having a black president and about the transformation of what many thought of as their white nation into a genuinely multiracial republic. But whatever the reasons, a mobilized minority is making a very plausible play to thwart a demobilized majority.

Meanwhile, that's exactly what's happening in Congress. Indeed, the very rules of the Senate empower mobilized minorities over majorities even when those majorities are mobilized, too. When the filibuster is employed, it takes 60 percent of the Senate, not 50 percent plus one, to enact legislation.

The rise of the filibuster should give constitutional originalists some pause. When the Senate first convened in 1789, just months after the Constitution was ratified, its rules allowed for calling the question (ending debate) by a simple majority vote. The Constitution had taken care to specify five kinds of issues that did require a two-thirds supermajority: treaty ratifications, expulsions of members, impeachments, the override of presidential vetoes and constitutional amendments. The Senate adhered to its simple majority rule for question-calling until 1806, when the rule lapsed because it seemed unnecessary: Scarcely any votes to call a question had been taken in the 17 years of the Senate's existence.

With that, the possibility of the filibuster was born, but filibusters didn't really come into use until Southern senators began using the maneuver to attempt to block civil rights legislation of the 1950s and '60s. They only became routine in the past few years, as the minority party in the Senate -- the Democrats until 2006, and the Republicans since -- sought to block legislation that had majority support but not the backing of a supermajority. In the 2007-08 session of Congress, Republicans forced 112 cloture votes, nearly doubling the Democrats' record when they were in the minority.

Simply put, that number means that the Senate now runs by minority rule. A more corrosive attack on the first principle of democracy, that of majority rule, is hard to conceive. The increasingly routine use of the filibuster stymies the efficacy of government (in itself a conservative objective) and negates the consequences of elections.

But minority rule is what today's Republicans are all about. Hence we see disruption in the districts and stagnation in the Senate. When and whether the majority will bestir itself to reestablish democracy's first principle is anybody's guess. Abolishing the filibuster would be a good start -- and perhaps a necessary step to enact to big changes like health reform.

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SANTA FE NEW MEXICAN.com

Understanding Your World: Udall works to reverse Senate's fall from grace

By William M. Stewart | For The New Mexican

8/13/2010

Tom Udall may be New Mexico's freshman senator, but he is engaged in a daring fight to reform the U.S. Senate, that once-august chamber of distinguished debate. I say "once-august," because at one time the Senate was often referred to as "the world's greatest deliberative body." It was also one of the most productive. The Senate enjoyed enormous respect.

In recent years, however, it has descended into the politics of vitriol and obstruction, when even the most important legislation can take weeks, perhaps months, to enact. An abused filibuster tactic requires 60 votes to overcome, extremely difficult to do in today's Senate, especially when the current Republican strategy is to obstruct at all costs. In this, the Republicans have been remarkably successful. Why stop now? Blocking nominees for federal judgeships and executive posts for private reasons is so extensive that today some 76 of those nominees languish in the halls of the Senate. The individual senators responsible for the blocks are seldom, if ever, held accountable for their obstruction. The current performance of the Senate is one of the reasons why Americans are fed up with government in general.

Udall has been fighting to change the Senate's time-hallowed rules, in which the same rules continue from one session to the next because changing them requires 67 votes. In other words, it is extremely difficult to do. Udall has proposed a daring "constitutional option." Article One, Section 5 of the U.S. Constitution states that "each House may determine the Rules of its proceedings" at the beginning of the new Congress. So, theoretically, a senator next January could propose debating Senate rules from scratch, including the filibuster. New rules could be passed with a simple majority. All of this is laid out in a devastating article by George Packer in the Aug. 6 issue of *The New Yorker*. In it, he refers to the Senate as "The Empty Chamber." According to Packer, Udall has been fighting hard for the past year to build support for the "constitutional option."

But the Senate is slow, and often reluctant to change. In part, this is because it was formed to slow down what the founding fathers feared might be a rambunctious House of Representatives, elected every two years and far more subject to an often populist public opinion. This is why the Senate was not directly elected until World War I. In its first years, it actually met in secret, and for much of the 19th century was considered to be the less important of the two houses. Nevertheless, the deliberative nature of the Senate has been by and large successful and the rules that make it so are treasured by more senior senators. Few want to upset the apple cart.

But the old rules seem to have become an albatross around the neck of the Senate, especially when the opposition party is determined to use them to block legislation it deems harmful — which in practice means anything the Obama administration proposes. Republicans are not alone in their devotion to the old rules; so are a number of senior Democratic senators who remember how useful the filibuster was when they were in the minority.

Senate Minority Leader Mitch McConnell, R-Ken., is not at all unhappy with the Senate's performance. At a recent *Christian Science Monitor* breakfast, he asserted that the place was working much as it was designed to work, "a place where time was taken, things were thought over and consensus was reached if consensus was appropriate."

And indeed, in the first 18 months of the Obama presidency, a lot has been accomplished: the economic recovery act, health care overhaul, financial regulatory reform and confirmation of two Supreme Court justices and a revamped student loan system. The problem is that so much of what has been accomplished has been done so with such anger and bitterness that genuine progress has gone little noticed. McConnell and company are on schedule to match their 2007-2008 record of forcing 139 cloture votes to end filibusters. And the Democrats have resorted to compromises and cajoling, as well as cringe-making deals, to move ahead. It's discouraging and brings the Senate into disrepute.

New senators, still full of idealism, hoped to find a better place and a better system. They have found neither, and many are deeply discouraged. Tom Udall has got it right. This is a battle worth making. For all our sakes, we can only hope that he succeeds.

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Main Edition

Plenty to say about filibusters

BYLINE: Bill Steiden; Staff

SECTION: NEWS; Pg. 4A

Most Americans' image of the filibuster dates to 1939. That was when James Stewart gave an Oscar-nominated performance in "Mr. Smith Goes to Washington," the movie that made the filibuster part of the American lexicon.

All day, all night

The effort by Stewart's character, wide-eyed greenhorn Sen. Jefferson Smith, to stop a vote to expel him from the Senate ends in appropriately dramatic fashion: Shamed by the steadfast courage the exhausted Smith shows as he refuses to yield the floor during his 23-hour talkathon, a villainous fellow senator confesses that it is he, not Smith, who is corrupt and should be dismissed.

Helping to seal the popular image of the filibuster, then-Democratic Sen. Strom Thurmond of South Carolina, in a contrastingly ignoble scene, spent a record 24 hours, 16 minutes, on the Senate floor in 1957, blocking a vote on civil rights legislation.

Given this history, Americans can't be blamed for thinking the parliamentary procedure with the funny name is a relic of an era when politicians, right or wrong, were ever-ready to engage in verbal warfare over the great issues of the day.

In fact, the filibuster is more common than ever --- though in markedly different form.

Unlimited debate

Speech is at the core of the filibuster. Senate rules place no limit on debate. That is a central difference between the Senate and House of Representatives.

The latter body, its 435 members elected every two years, has long had strict rules on the length of debate. The exclusive, 100-member Senate, insulated by its six-year terms, is supposed to be where bills are given more thorough, thoughtful consideration, preventing the too-hasty adoption of potentially ill-formed legislation.

Most of the time, if needed, the leaders of the majority and minority parties in the Senate agree on how long to allow for debate before bringing a matter to a vote. But if they fail to concur, either party can make a motion for cloture --- French for "conclusion." A supermajority of 60 votes --- three-fifths of the entire Senate --- ends debate and brings a bill to the floor, where, in most cases, it can be approved or defeated by a simple majority.

For many years, cloture votes were exceedingly rare, and filibustering required the sort of fortitude Thurmond displayed. But in the 1970s, Senate leaders, seeking to keep a threatened filibuster from shutting down the Senate, worked out a scheduling system for filibuster speeches that ultimately led to the current practice.

Now, if the minority party insists on cloture and can credibly show it controls sufficient votes to prevent a 60-vote majority, action on a bill halts without the drama of senators speaking until they drop.

Switching sides

The current Republican minority, which came into power in 2006, has taken the use of filibusters to a new level. During the 110th Congress in 2007 and 2008, there were more than 100 cloture votes --- the most on record.

The 111th Congress, which runs through the end of this year, will likely run a close second, with 65 cloture votes so far. The Republicans have used the filibuster, or the threat of it, to block legislation on climate change, campaign finance disclosure and immigration reform and to repeatedly delay votes on issues such as extending unemployment benefits. Perhaps more important, they've been able to use it to win concessions in legislation that eventually passed, such as financial institution reform.

Democrats, who defended the 60-vote cloture requirement when they used it to their advantage, now argue that it unconstitutionally usurps the will of voters who gave them a Senate majority. They accuse Republicans of employing the filibuster in an attempt to cripple Barack Obama's presidency.

Republicans counter that the filibuster is a necessary bulwark against an "extreme" Democratic agenda, and point to dissent in their opponents' ranks that allowed them to keep using the filibuster even when Democrats held a supposedly filibuster-proof 60-vote majority from April 2009 through last January.

Outside observers say the explosion of filibustering is part of what contributes to the public impression that the Democratic-majority Congress is hidebound and ineffective --- adding momentum to this fall's GOP drive to unseat Democratic incumbents.

The bottom line is that it leaves a handful of centrist senators --- independent Joe Lieberman of Connecticut, Republicans such as Olympia Snowe of Maine and Scott Brown of Massachusetts, and Democrats including Ben Nelson of Nebraska and Mary Landrieu of Louisiana --- with outsized influence. In a Senate divided 57-41 (with two independents who favor the Democrats), their votes alone can determine the outcome of almost any major legislation, and they can demand major changes in a bill as the price for their support. That led earlier this year to Nelson's infamous "Nebraska compromise," in which he allegedly promised his vote on health insurance reform in return for a guarantee that his state would be shielded from higher Medicaid costs that would affect the other 49."

Seeking cloture

Not all cloture motions result in filibusters, but the two maneuvers are linked. So it is indicative of the increasing polarization of the Senate that cloture votes, held about 10 times before the mid-1970s, have occurred an average of 35 times a year in the current decade.

Use of filibusters began accelerating during the early 1990s, when an increasingly restive Republican minority, tired of being ignored by the Democratic leadership, employed the tactic to thwart the early agenda of then-President Bill Clinton.

Later in the decade, Democrats, now in the Senate minority, used filibusters to stop enactment of some portions of the GOP Contract with America.

During the presidency of George W. Bush, Democrats upped the ante, defying what many saw as presidential privilege by filibustering the confirmation of conservative judicial nominees. Then-Senate Majority Leader Bill Frist, R-Tenn., was so perturbed that he threatened to use what was termed the "nuclear option" to kill the filibuster.

Frist's tactic called for Vice President Dick Cheney, in his role as president of the Senate, to declare filibustering of judicial nominees unconstitutional. The prospect of such an unprecedented use of power alarmed

senators on both sides of the aisle. Before it could happen, a bipartisan coalition of lawmakers stepped in to defuse the crisis with an agreement to exercise restraint on filibusters.

Filibuster

From the Dutch vrijbuiter, later flibutor or fleebuter: A freebooter, or piratical adventurer. (From the Concise Oxford Dictionary of English Etymology)

Changing the rules

Despite the arguments about the constitutionality of filibusters, the Constitution is silent on the subject. In fact, there was no procedure for cutting off debate in the Senate until 1917, when it adopted the cloture rule in response to a filibuster by anti-war senators against a bill allowing the arming of U.S. merchant ships during World War I. Until 1959, cloture required two-thirds of all senators, or 67 votes. That year, it was decreased to two-thirds of senators present, then to the current 60 votes --- three-fifths of the entire Senate --- in 1975.

Senate Majority Leader Harry Reid, D-Nev., has said he will consider trying to kill filibusters with a rule change as the next Senate begins meeting in January. Normally, such a change would require 67 votes --- a two-thirds majority that Republicans could easily deny to the Democrats. But parliamentary experts point to a one-day window as the Senate opens when organizational rules can be passed by a simple majority, with the assistance of the Senate president, Vice President Joe Biden, who could overrule any objections.

Democrats, however, aren't united behind Reid. Some have called for less drastic changes, such as lowering the requirement for cloture to three-fifths of all senators present, rather than the current requirement of three-fifths of the entire Senate. Others have proposed returning to the days when a filibuster required a Mr. Smith-like commitment to round-the-clock speeches. Another idea is to revive a 1990s proposal to lower the cloture requirement over several successive votes on disputed issues, encouraging compromise.

Only one thing is for sure: If Democrats lose control of the Senate in November, they --- like the Republicans now --- will find the filibuster a handy tool.

Sources: U.S. News&World Report, U.S. Senate Historian's Office, "Filibuster: Obstruction and Lawmaking in the U.S. Senate" by Gregory J. Wawro and Eric Schickler, "Filibustering: A Political History of Obstruction in the House and Senate" by Gregory Koger, POLITICO, Washington Post, New York Times, Washington Times, Korea Times

The New York Times

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Late Edition - Final

A Filibuster Fix

BYLINE: By NORMAN ORNSTEIN.

Norman Ornstein is a resident scholar at the American Enterprise Institute and a co-author of "The Broken Branch: How Congress Is Failing America and How to Get It Back on Track."

SECTION: Section A; Column 0; Editorial Desk; OP-ED CONTRIBUTOR; Pg. 19

Washington

AFTER months of debate, Senate Democrats this summer broke a Republican filibuster against a bill to extend unemployment benefits. But the Republicans insisted on applying a technicality in the Senate rules that allowed for 30 more hours of floor time after a successful vote to end debate. As a result, the bill -- with its desperately needed and overdue benefits for more than 2 million unemployed Americans -- was pointlessly delayed a few days more.

The Senate, once the place for slow and careful deliberation, has been overtaken by a culture of obstructionism. The filibuster, once rare, is now so common that it has inverted majority rule, allowing the minority party to block, or at least delay, whatever legislation it wants to oppose. Without reform, the filibuster threatens to bring the Senate to a halt.

It is easy to forget that the widespread use of the filibuster is a recent development. From the 1920s to the 1950s, the average was about one vote to end debate, also known as a cloture motion, a year; even in the 1960s, at the height of the civil rights debates, there were only about three a year.

The number of cloture motions jumped to three a month during the partisan battles of the 1990s. But it is the last decade that has seen the filibuster become a regular part of Senate life: there was about one cloture motion a week between 2000 and 2008, and in the current Congress there have been 117 -- more than two a week.

Even though there might be several motions for cloture for each filibuster, there clearly has been a remarkable increase in the use of what is meant to be the Congressional equivalent of a nuclear weapon.

Filibusters aren't just more numerous; they're more mundane, too. Consider an earlier bill to extend unemployment benefits, passed in late 2009. It faced two filibusters -- despite bipartisan backing and its eventual passage by a 98-0 margin. A bill that should have zipped through in a few days took four weeks, including seven days of floor debate. Or take the nomination of Judge Barbara Milano Keenan to the United States Court of Appeals for the Fourth Circuit: she, too, faced a filibuster, even though she was later confirmed 99 to 0.

Part of the problem lies with today's partisan culture, in which blocking the other party takes priority over passing legislation or confirming candidates to key positions. And part of the problem lies with changes in Senate practices during the 1970s, which allowed the minority to filibuster a piece of legislation without holding up other items of business.

But the biggest factor is the nature of the filibuster itself. Senate rules put the onus on the majority for ending a debate, regardless of how frivolous the filibuster might be.

If the majority leader wants to end a debate, he or she first calls for unanimous consent for cloture, basically a voice vote from all the senators present in the chamber. But if even one member of the filibustering minority is present to object to the motion, the majority leader has to hold a roll call vote. If the majority leader can't round up the necessary 60 votes, the debate continues.

Getting at least 60 senators on the floor several times a week is no mean feat given travel schedules, illnesses and campaign obligations. The most recent debate over extending unemployment benefits, for example, took so long in part because the death of Senator Robert Byrd, a Democrat from West Virginia, left the majority with only 59 votes for cloture. The filibuster was brought to an end only after West Virginia's governor appointed a replacement.

True, the filibuster has its benefits: it gives the minority party the power to block hasty legislation and force a debate on what it considers matters of national significance. So how can the Senate reform the filibuster to preserve its usefulness but prevent its abuse?

For starters, the Senate could replace the majority's responsibility to end debate with the minority's responsibility to keep it going. It would work like this: for the first four weeks of debate, the Senate would operate under the old rules, in which the majority has to find enough senators to vote for cloture. Once that time has elapsed, the debate would automatically end unless the minority could assemble 40 senators to continue it.

An even better step would be to return to the old "Mr. Smith Goes to Washington" model -- in which a filibuster means that the Senate has to stop everything and debate around the clock -- by allowing a motion requiring 40 votes to continue debate every three hours while the chamber is in continuous session. That way it is the minority that has to grab cots and mattresses and be prepared to take to the floor night and day to keep their filibuster alive.

Under such a rule, a sufficiently passionate minority could still preserve the Senate's traditions and force an extended debate on legislation. But frivolous and obstructionist misuse of the filibuster would be a thing of the past.

SANTA FE NEW MEXICAN.com

Udall still pursuing filibuster reform

By | The New Mexican

9/26/2010

Tom Udall's autumn offensive against the filibuster is under way: New Mexico's junior senator last week presented his "constitutional option" to the Senate Rules Committee. He figures the idea is gaining some traction; that perhaps, when the next Congress convenes in January, filibuster reform will get serious debate and quick action.

Without picking heavily on the filibuster, by which a bill can be "talked to death," or in modern form merely threatened to death with the presence of enough senators to block it, Udall is taking aim at the Senate's Rule XXII. It's the one demanding 60 votes to overcome minority action delaying the passage of bills. It's that rule that allows the Senate's Republican minority to obstruct so many overdue reforms.

As the Senate in session is conducted, it would take a two-thirds majority — as many as 67 votes, depending on who's present and voting — to change that 60-vote requirement. The two-thirds rule has become customary, carrying over from Congress to Congress, by early-session proclamation, but it's anything but mandatory.

Udall says that, by bowing to precedent set by previous congresses, the Senate has gotten itself into a box — unnecessarily so. He points out that there's Supreme Court precedent that one legislature can't bind the actions of a future legislature, yet he notes that its what's been happening for years.

And for years, the minority party — Democrat and Republican — has made a mockery of "majority rule." America today is seeing the filibuster as a tool of Republican sabotage of overdue social and economic reforms. But only five years ago, it was minority Democrats torpedoing President George W. Bush's judicial nominations and Republican congressional programs.

At that time, there were Republican stirrings against the filibuster. But facing what they saw as the need for 67 votes they didn't have, the elephants backed away — and some of their leaders now label that effort "a dumb idea." Under the circumstances, it was.

Udall's remedy for tyranny by the minority, however, is simplicity itself: The U.S. Constitution, in Article I, Section V, allows both the Senate and the House of Representatives to set their own rules at the beginning of each Congress — every two years. To do so requires only a majority.

So, assuming the Democrats come out of the Nov. 2 election with 51 seats, they could lower the 60-vote barrier to, say, 57, 55 or even 51; whatever the majority decides when the 112th Congress convenes.

Udall seems to have caught the attention of Senate Majority Leader Harry Reid, who has railed a lot lately against the filibuster. If Reid wins his re-election contest in Nevada and keeps his leadership position, he might prove to be the ally Udall needs most in a debate on fresh rules.

We can't help wondering if, someday, Udall might regret having brought up his constitutional approach: What if, some November — 2012, 2014? — it's the Republicans in charge of the Senate? That possibility weighs on some of his Democratic colleagues' minds ...

But give our senator credit; he's willing to live with such an outcome — and that speaks well for his high principles.

Las Cruces Sun-News (New Mexico)
September 25, 2010 Saturday

Sen. Udall looks to change rules

BYLINE: By Walt Rubel Sun-News
SECTION: OPINION

The U.S. Senate voted on cloture for a military appropriations bill Tuesday that included provisions ending "don't ask, don't tell," and implementing the DREAM Act. When all the votes were counted, 56 senators had voted "yea," 43 had voted "nay."

Most places, a 56-43 vote means passage. In the U.S. Senate, where 60 votes are needed to overcome the filibuster that is applied to just about every substantive bill these days, a 56-43 tally means they were four votes short. That is why Republicans were so jubilant in January when Scott Brown won the Senate seat left vacant by the death of Ted Kennedy, giving them the 41st vote needed to block Democratic legislation.

The Senate was intended by the founders to be the more deliberative of the two bodies. Only one-third of its seats are up for election every two years. And its rules provide greater protection for the minority party.

However, U.S. Sen. Tom Udall, D-N.M., who was elected to the Senate in 2008 after serving for a decade in the House, questions if today's Senate hasn't gone beyond what the founders had envisioned.

"I believe more strongly than ever that our Senate rules are broken," Udall said Wednesday in testimony before the Senate Rules Committee. He went on to say there had been "unprecedented obstruction in the last few years."

Udall is not proposing ending the filibuster rule, which requires at least 60 votes to begin debate on a bill, but he does think the Senate should discuss and vote on that rule and others at the start of each new legislative session, every two years.

Rule 22 was first adopted by the Senate in 1917, and allowed the majority to invoke cloture and end a filibuster with a two-thirds majority vote. In 1975, the Senate reduced the number of votes needed to three-fifths, or 60 votes. It has not been changed since, and Udall points out that only two members of the current Senate, Daniel Inouye and Patrick Leahy, have ever voted on the rule.

Udall said that on the first day of the 2011 session in January, he will introduce the Constitutional Option, which will require senators to vote on the rules. And he said rules can be changed at the start of the session with a simple majority vote - something not everyone will agree with.

He credits former Sen. Clinton P. Anderson, D-N.M., for inspiration. The proposal, he said, would make each Senate accountable for its own rules, as mandated by the Constitution.

"The fact that we are bound by a super-majority requirement that was established 93 years ago also violates the common-law principle that a legislature can not bind its successors," Udall argues. This graph can cut if needed

Democrats would be wise to recognize that majorities don't last forever, and sometimes obstruction is not such a bad thing when you're the minority party. That may be enough to force them to think twice about changing the cloture rule. But a review of a rule first used to end debate on the Treaty of Versailles might be overdue.

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Harkin continues efforts to reform filibuster, end abuses

Senator: Colleagues must give up some power for good.

By CHRISTINIA CRIPPES ccrippes@thehawkeye.com

Fifteen years ago, when Sen. Tom Harkin, D-Iowa, first tried to reform the filibuster, he saw the procedural supermajority vote needed to begin and end debate could be used as a weapon.

He predicted at the time the use of a filibuster would only grow, turning into a sort of arms race between the two parties and stymying progress in the Senate.

In 1985, when Harkin joined the Senate, there were 40 cloture motions filed to hold up voting on a particular bill. Ten years later when the senator brought forth his filibuster reform bill, for which he got just 19 supportive votes, there 80 cloture motions filed.

The year before Harkin decided to renew his efforts, there were 140 cloture motions filed.

"We've just got to recognize that the place is not working and that we need some reform of the filibuster," Harkin said during a conference call with reporters on Friday.

Because of the "dysfunctional" nature of the Senate, Harkin proposed earlier this year a reform bill similar to his legislation 15 years ago when Democrats were in the minority as opposed to now. On Wednesday, he testified before a Senate Rules Committee hearing on his legislation and why the law needs fixing.

He met a challenge in Sen. Lamar Alexander, R-Tenn., and Sen. Pat Roberts, R-Kan., who argued it was a valuable tool used by both parties. Alexander in particular pointed to Democrats' past desires to prevent the privatization of Social Security and prevent going to war.

"As I listened to both Alexander and Roberts, I heard history: 'Oh, you were bad here; we were bad there. This and that,'" Harkin said. "The power of a senator comes not from what a senator can do, it comes from what a senator can stop."

He said senators have to be able to give up a little bit of that power "for the good of the country and for the good of the Senate."

Sen. Bob Bennett, R-Utah, lost his primary bid for re-election so felt no need to hold on to such power. As ranking member of the Rules Committee, he acknowledged an unease over what has been happening in the Senate though he wasn't sure both parties agreed on a solution.

During the conference call, Harkin pointed to the scope of the problem in just one example: his

committee's food safety bill that has been in a holding pattern since the beginning of this year.

"If I got that bill on the floor of the Senate, it would get over 90 votes guaranteed, but one senator (on Thursday) stopped it," Harkin said. "Well, that's an abuse, but when you've got certain senators that are willing to abuse the system like that, and it's gotten out of hand. Then, the system has to be changed."

He knows, though, there's quite an obstacle in getting senators to be willing to give up the power to stop something.

"It's not going to get better; it's going to get worse," Harkin said during the hearing. "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. This is not a representative democracy. Certainly, it is not the kind of representative democracy envisioned and intended by the Constitution."

Harkin's proposal would be to simply slow, not stop, legislation. The first vote would require the currently necessary 60 votes to proceed to or end debate; after three days, the figure would drop to 57; and after three more days it would drop to 54; and then finally, to 51, or a simple majority.

He said this method would promote majority rule, while also allowing deliberation and compromise. Roberts, who suggested looking at how amendments are proposed, said he worried, though, that it would discourage consensus-building when the majority could ultimately push through the 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," Harkin disagreed in his prepared testimony before the committee.

At the same hearing, Sen. Tom Udall, D-N.M., had a more modest proposal to require only a majority vote to change the rules at the beginning of each Congress, so that the senators are accountable to the rules themselves.

"For my proposal to be enacted, we would have to really first do what Udall's saying, and he is right ..." Harkin said. "Three vice presidents in the past, two Republicans and one Democrat, ruled that the Udall proposal could be done - that was Vice President (Richard) Nixon, Vice President (Nelson) Rockefeller and Vice President (Hubert) Humphrey."

Though Harkin's proposal has yet to gain much traction on either side of the aisle, Sen. Charles Schumer, D-N.Y., the chairman of the Rules Committee said more hearings are planned.

"I think we can agree on both sides of the aisle that the system is broken," Schumer said near the outset of the hearing.

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The Empty Chamber; Just how broken is the Senate?

BYLINE: George Packer

SECTION: FACT; The Political Scene; Pg. 38 Vol. 86 No. 23

"This is just one of those days when you want to throw up your hands and say, 'What in the world are we doing?' " Senator Claire McCaskill, the Missouri Democrat, said.

"It's unconscionable," Carl Levin, the senior Democratic senator from Michigan, said. "The obstructionism has become mindless."

The Senators were in the Capitol, sunk into armchairs before the marble fireplace in the press lounge, which is directly behind the Senate chamber. It was four-thirty on a Wednesday afternoon. McCaskill, in a matching maroon jacket and top, looked exasperated; Levin glowered over his spectacles.

"Also, it's a dumb rule in itself," McCaskill said. "It's time we started looking at some of these rules."

She was referring to Senate Rule XXVI, Paragraph 5, which requires unanimous consent for committees and subcommittees to hold hearings after two in the afternoon while the Senate is in session. Both Levin and McCaskill had scheduled hearings that day for two-thirty. Typically, it wouldn't be difficult to get colleagues to waive the rule; a general and an admiral had flown halfway around the world to appear before Levin's Armed Services Committee, and McCaskill's Subcommittee on Contracting Oversight of the Homeland Security Committee was investigating the training of Afghan police. But this was March 24th, the day after President Barack Obama signed the health-care-reform bill, in a victory ceremony at the White House; it was also the day that the Senate was to vote on a reconciliation bill for health-care reform, approved by the House three nights earlier, which would retroactively remove the new law's most embarrassing sweetheart deals and complete the yearlong process of passing universal health care. Republicans, who had fought the bill as a bloc, were in no mood to make things easy.

So, four hours earlier, when Levin went to the Senate floor and asked for consent to hold his hearing, Senator Richard Burr, Republican of North Carolina, and a member of Levin's committee, had refused. "I have no personal objection to continuing," Burr said. But, he added, "there is objection on our side of the aisle. Therefore, I would have to object."

Burr had to object on behalf of his party because he was the only Republican in the chamber when Levin spoke. In general, when senators give speeches on the floor, their colleagues aren't around, and the two or three who might be present aren't listening. They're joking with aides, or e-mailing Twitter ideas to their press secretaries, or getting their first look at a speech they're about to give before the eight unmanned cameras that provide a live feed to C-SPAN2. The presiding officer of the Senate-freshmen of the majority party take rotating, hour-long shifts intended to introduce them to the ways of the institution-sits in his chair on the dais, scanning his BlackBerry or reading a *Times* article about the Senate. Michael Bennet, a freshman Democrat from Colorado, said, "Sit and watch us for seven days-just watch the floor. You know what you'll see happening? Nothing. When I'm in the chair, I sit there thinking, I wonder what they're doing in China right now?"

Between speeches, there are quorum calls, time killers in which a Senate clerk calls the roll at the rate of one name every few minutes. The press gallery, above the dais, is typically deserted, as journalists prefer to hunker down in the press lounge, surfing the Web for analysis of current Senate negotiations; television screens alert them if something of interest actually happens in the chamber. The only people who pay attention to a speech are the Senate stenographers.

On this afternoon, two portly bald men in suits stood facing the speaker from a few feet away, tapping at the transcription machines, which resembled nineteenth-century cash registers, slung around their necks. The Senate chamber is an intimate room where men and women go to talk to themselves for the record.

Like many other aspects of senatorial procedure, Rule XXVI, Paragraph 5 is a relic from the days when senators had to hover around their desks to know what was happening on the floor during the main afternoon debate. (The desks, some built as long ago as 1819, are mahogany, and their lids lift up, like those in an old schoolhouse; the desks of the Majority and Minority Leader are still equipped with brass spittoons.) In the press lounge, McCaskill said, with light sarcasm, "Somebody told me the rule is to make sure people pay attention to what's happening on the floor during debate and not be distracted by committee work. Clearly, it's an old rule."

The Republicans had turned this old rule into a new means of obstruction. There would be no hearings that afternoon; the general and the admiral would have to come back another day. Like investment bankers on Wall Street, senators these days direct much of their creative energy toward the manipulation of arcane rules and loopholes, scoring short-term successes while magnifying their institution's broader dysfunction.

Around five o'clock, the chamber began to fill, as the reconciliation bill came up for a vote; there were twenty-three amendments pending, all from Republicans, and perhaps many more to come. Ordinarily, debate and voting on an amendment might take two legislative days, but under the rules of the reconciliation bill the senators were to dispatch the amendments one after another, as in a hot-dog-eating contest, with a minute of debate for each side. The goal was to finish the bill by the end of the evening, so that senators wouldn't miss a day of their spring recess-apparently, the only thing worse than a government takeover of the health-care system. The usual longueurs of the Senate, where forty minutes can tick away on the antique clock above the rear double doors without a word's being spoken, were about to yield to a frenzy. Harry Reid, the Majority Leader, from Nevada, had predicted that the process, known as Vote-O-Rama, would go past two in the morning, and had warned senators to stay close to the chamber.

Max Baucus, of Montana, the manager of the bill for the Democrats, rose and said, "This is the first time in recent memory that a reconciliation bill has all the amendments on one side only. These are clearly amendments designed to kill the reconciliation and, therefore, kill health-care reform. So I very much hope that all of these amendments are defeated."

Tall, gaunt Judd Gregg, of New Hampshire, the bill's Republican manager, took the floor. "The position on the other side of the aisle is: no amendments allowed, even if they are good," he said. Indignation rouged his cheeks, and his voice rose half an octave. "Obviously, they presume the Republican Party is an inconvenience. The democratic process is an inconvenience. It also appears, considering the opposition to this out in America, that the American people are an inconvenience."

The Senate chamber is laid out in four concentric semicircles, with adjacent desks almost touching on the crowded Democratic side, and the desks of the much smaller Republican minority spaced loosely apart. The design is meant to emphasize the senators' unity. But Baucus and Gregg avoided eye contact across the six feet of aisle that now divides the chamber into two constantly warring factions. Senators are required, by custom, to speak of one another in the third person, directing their anger and sarcasm through whichever poor freshman happens to be the presiding officer at the moment. Rule XIX, Paragraphs 2 and 3-one of the original rules drawn from Thomas Jefferson's "Manual of Parliamentary Practice"-bars senators from imputing unworthy conduct or motives to another senator, and from insulting any senator's state. But there is no rule against finger-wagging, and Baucus wagged his at Gregg while shouting at Al Franken, of Minnesota, who had started a shift in the presiding officer's chair: "Mr. President, make no mistake, the intent of every single one of the amendments offered on the other side of the aisle is to kill health-care reform. . . . A senator on the other side of the aisle stood up and said that this is hopefully the President's Waterloo. They want to kill health-care reform!"

The voice of Stuart Smalley filled the chamber: "The time of the senator has expired."

For the next nine hours, the chamber became the stage of a theatrical whose ending, like almost everything that happens on the Senate floor, was known in advance to all. The Republican goal in Vote-O-Rama was to embarrass the Democrats while appearing to suggest useful changes; the Democratic goal was to prevent any change to the bill, so that it wouldn't have to return to the House, where it might be voted down. Several of the Republican amendments had been designed to make Democrats look hypocritical, by forcing them to vote against policies that the Party typically supports. One amendment, for example, declared that the health-care bill could not be linked to a tax hike on individuals making less than two hundred thousand dollars a year. Other amendments were more nakedly partisan, and outlandish. David

Vitter, a Louisiana Republican, proposed an amendment that repealed the entire law. Senator Tom Coburn, a Republican obstetrician from Oklahoma, introduced an amendment to insure that veterans diagnosed with mental illness would not be denied the right to own firearms, and another to prevent "convicted child molesters, rapists, and sex offenders" from buying erectile-dysfunction drugs with taxpayer funds. Coburn got through the minute he was allotted to explain his Viagra amendment without cracking a smile. "This is not a game amendment," he insisted. "It actually saves money."

So many senators snickered that the presiding officer banged his gavel for order.

"The amendment offered by the senator from Oklahoma makes a mockery of this Senate," Baucus declared. "It is a crass political stunt aimed at making thirty-second commercials, not public policy." Baucus asked for the yeas and nays, and a clerk called the roll at a ragged pace. "Mr. Coburn, Mr. Cochran, Ms. Collins." Thirty-five-second pause. "Mr. Conrad, Mr. Corker." Ten seconds. "Mr. Cornyn." Senators pay no attention to the sound of their name; they cast votes when they're so inclined-wandering in late, shuffling down the chamber's gentle blue-carpeted steps to the swarm of colleagues milling about in the well, where the clerks sit at a table, and then holding a finger up or down. At one point, John McCain-now just one of a hundred senators and struggling to stay in office-spent half a minute waving stiff-armed, trying to catch the eye of a clerk so he could cast his vote. In the end, two Democrats-Evan Bayh, of Indiana, and Ben Nelson, of Nebraska-joined the Republicans in opposing Viagra for sex offenders. The amendment was defeated.

The carpeting in the chamber absorbs voices, and during the long night one of the few that rose above the muffled drone was that of Charles Schumer, who said to Gregg, "Get to work! Stop screwing around with health care!" Sporadically, a sharp cackle emanated from Al Franken, who wandered the chamber, looking for Republicans he could charm into laughing. Observed from the press gallery, the senators in their confined space began to resemble zoo animals-Levin a shambling brown bear, John Thune a loping gazelle, Jim Bunning a maddened grizzly. Each one displayed a limited set of behaviors: in conversations, John Kerry planted himself a few inches away, loomed, and clamped his hands down on a colleague's shoulders. Joe Lieberman patted everyone on the back. It became clear which senators were loners (Russ Feingold, Daniel Akaka) and which were social (Blanche Lincoln, Lindsey Graham); which senators were important (Dick Durbin, Jon Kyl) and which were ignored (Bayh, Bunning).

Past midnight, Durbin slumped at his desk, one hand over his face, yawning painfully. Susan Collins was going through her mail. Twenty-three amendments had been voted down, and the Republicans were proposing a fresh batch. "Can we get some order?" Bunning growled, before he introduced a proposal to let senior citizens opt out of parts of Medicare. It was the only amendment that any Republicans joined the Democrats to defeat.

Harry Reid controls the Senate's schedule, but Mitch McConnell, of Kentucky, who is the Minority Leader, can object. Since nearly everything in the Senate depends on unanimous consent, the main business of the place is a continuous negotiation between these two supremely unsentimental men. That night, they played a game of chicken: McConnell, unsmiling, his eyes riveted ahead, held out the prospect of dozens more amendments; Reid, a former boxer, was hunched and mumbling, playing rope-a-dope, vowing to fend off amendments all night. The two leaders left the chamber to confer privately about how to proceed. Inside, the atmosphere of a slumber party set in. Debbie Stabenow, of Michigan, her hand across her heart, sang a sentimental duet with Robert Menendez, of New Jersey. Exhaustion momentarily eased the partisan divide. Claire McCaskill sat down beside Tom Coburn, held up an erect finger in his face, as if casting her Viagra vote, then let it go limp. Coburn could be heard to joke, "The longest it lasted was thirty seconds."

At two-forty-five in the morning, Reid suddenly declared the Senate adjourned. The Senate parliamentarian had just found two small violations of the reconciliation rules, meaning that in the morning, despite the Democrats' efforts, the bill would go back to the House for another vote. At the bang of the gavel, the senators fled. In the parking lot, on the Capitol's northeast side, McCaskill climbed into her S.U.V. Levin, in a cramped sedan, was chauffeured off into the empty streets. On a marble ledge near the exit, Arlen Specter sat alone, a ghost in a brown suit, staring straight ahead, as if waiting for someone to take him away.

The Senate reconvened at 9:45 A.M. Around two in the afternoon, the members gathered for the final vote, and the Democrats were giddy. Tom Harkin, of Iowa, and Christopher Dodd, of Connecticut, even exchanged a hug. "Everyone's tired," Reid declared before the final vote. "This legislative fight is one for the record books." He was so fatigued that he initially voted the wrong way. Lindsey Graham came in late, delaying the tally by ten minutes. "Way to go, Lindsey, way to stretch it out," Sam Brownback told him. A few Republicans lingered and took in the moment, like players on the losing team at the end of the World Series. After a year of work, health-care reform had passed, 56-43, and for a moment the chamber's Tweeting pygmies had become legislative giants.

The Senate is often referred to as "the world's greatest deliberative body." Jeff Merkley, a freshman Democrat from Oregon, said, "That is a phrase that I wince each time I hear it, because the amount of real deliberation, in terms of exchange of ideas, is so limited." Merkley could remember witnessing only one moment of floor debate between a Republican and a Democrat. "The memory I took with me was: 'Wow, that's unusual-there's a conversation occurring in which they're making point and counterpoint and challenging each other.' And yet nobody else was in the chamber."

Tom Udall, a freshman Democrat from New Mexico, could not recall seeing a senator change another senator's mind. "You would really need a good hour or two of extensive exchange among folks that really know the issue," he said. Instead, 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." From time to time, senators of the same party carry on a colloquy-"I would be interested in the distinguished senator from Iowa's view of the other side's Medicare Advantage plan"-that has been scripted in advance by aides.

While senators are in Washington, their days are scheduled in fifteen-minute intervals: staff meetings, interviews, visits from lobbyists and home-state groups, caucus lunches, committee hearings, briefing books, floor votes, fund-raisers. Each senator sits on three or four committees and even more subcommittees, most of which meet during the same morning hours, which helps explain why committee tables are often nearly empty, and why senators drifting into a hearing can barely sustain a coherent line of questioning. All this activity is crammed into a three-day week, for it's an unwritten rule of the modern Senate that votes are almost never scheduled for Mondays or Fridays, which allows senators to spend four days away from the capital. Senators now, unlike those of several decades ago, often keep their families in their home states, where they return most weekends, even if it's to Alaska or Idaho-a concession to endless fund-raising, and to the populist anti-Washington mood of recent years. (When Newt Gingrich became Speaker of the House, in 1995, he told new Republican members not to move their families to the capital.) Tom Daschle, the former Democratic leader, said, "When we scheduled votes, the only day where we could be absolutely certain we had all one hundred senators there was Wednesday afternoon."

Nothing dominates the life of a senator more than raising money. Tom Harkin, the Iowa Democrat, said, "Of any free time you have, I would say fifty per cent, maybe even more," is spent on fund-raising. In addition to financing their own campaigns, senators participate at least once a week in the Power Hour, during which they make obligatory calls on behalf of the Party (in the Democrats' case, from a three-story town house across Constitution Avenue from the Senate office buildings, since they're barred from using their own offices to raise money). Lamar Alexander, the Tennessee Republican, insisted that the donations are never sufficient to actually buy a vote, but he added, "It sucks up time that a senator ought to be spending getting to know other senators, working on issues."

In June, 2009, top aides to Max Baucus, whose Finance Committee was negotiating the health-care-reform bill, took time to meet with two health-care lobbyists, who themselves were former Baucus aides. (Baucus received more than a million dollars from the industry for his 2008 reëlection campaign.) That month, according to Common Cause, industry groups were spending $1.4 million a day to lobby members of Congress. Udall, speaking of the corrosive effect of fund-raising and lobbying, said, "People know it in their heart-they know this place is dominated by special interests. The over-all bills are not nearly as bold because of the influence of money."

Daschle sketched a portrait of the contemporary senator who is too busy to think: "Sometimes, you're dialling for dollars, you get the call, you've got to get over to vote, you've got fifteen minutes. You don't have a clue what's on the floor, your staff is whispering in your ears, you're running onto the floor, then you check with your leader-you double check-but, just to make triple sure, there's a little sheet of paper on the clerk's table: The leader recommends an aye vote, or a no vote. So you've got all these checks just to make sure you don't screw up, but even then you screw up sometimes. But, if you're ever pressed, 'Why did you vote that way?'-you just walk out thinking, Oh, my God, I hope nobody asks, because I don't have a clue."

Aides, at the elbows of senators as they shuttle between their offices and the Capitol, have proliferated over the past few decades, and they play a crucial role. Lamar Alexander, who has an office of fifty people, pointed out that staff members, who are younger and often more ideological than their bosses, and less dependent on institutional relationships, tend to push senators toward extremes. Often, aides are the main actors behind proposed legislation-writing bills, negotiating the details-while the senator is relegated to repeating talking points on Fox or MSNBC.

One day in his office, Udall picked up some tabloids from his coffee table and waved them at me. "You know about all these rags that cover the Hill, right?" he said, smiling. There are five dailies-*Politico*, *The Hill*, *Roll Call*, *CongressDaily*, and *CQ Today*-all of which emphasize insider conflict. The senators, who like to complain about the trivializing effect of the "24/7 media," provide no end of fodder for it. The news of the day was what Udall called a "dust-up" be-

tween Scott Brown, the freshman Massachusetts Republican, and a staffer for Jim DeMint, the arch-conservative from South Carolina; the staffer had Tweeted that Brown was voting too often with the Democrats, leading Brown to confront DeMint on the Senate floor over this supposed breach of protocol. Bloggers carry so much influence that many senators have a young press aide dedicated to the care and feeding of online media. News about, by, and for a tiny kingdom of political obsessives dominates the attention of senators and staff, while stories that might affect their constituents go unreported because their home-state papers can no longer afford to have bureaus in Washington. Dodd, who came to the Senate in 1981 and will leave next January, told me, "I used to have eleven Connecticut newspaper reporters who covered me on a daily basis. I don't have one today, and haven't had one in a number of years. Instead, D.C. publications only see me through the prism of conflict." Lamar Alexander described the effect as "this instant radicalizing of positions to the left and the right."

Both Alexander and Gregg said that the Senate had been further polarized by the rising number of senators-now nearly fifty-who come from the House, rather than from governorships or other positions where bipartisan coöperation is still permissible. "A lot of senators don't understand the history or tradition of the institution," Gregg said. "Substantive, thoughtful, moderate discussion is pushed aside."

Encumbered with aides, prodded by hourly jolts from electronic media, racing from the hearing room to the caucus lunch to the Power Hour to the airport, senators no longer have the time, or perhaps the inclination, to get to know one another-least of all, members of the other party. Friendships across party lines are more likely among the few spouses who live in Washington. After Udall joined the Senate, last year, he was invited to dinner by Alexander, because Jill Cooper Udall and Honey Alexander had become friends through a women's social club. It remains the only time Udall has set foot in the house of a Republican senator. (Vice-President Joe Biden, in his autobiography, recalls that, in the seventies, a bipartisan group of senators and their wives hosted a monthly dinner: "In those days Democrats and Republicans actually enjoyed each other's company.") When I asked Chris Dodd how well he knew, for example, Jim DeMint, Dodd said, "Not at all. Whereas Jesse Helms and I knew each other pretty well." He repeated something that Jon Kyl, the Republican whip, from Arizona, had recently said to him: "There's no trust." Dodd, whose father was a senator, went on, "That's really all there is-this place really operates on that. I don't think anyone would argue with that conclusion. And if that's missing . . . "

There remains a veneer-badly chipped-of comity. On the floor, senators still refer to members of the opposing party as "friends." Gregg described Kent Conrad, a Democrat from North Dakota, as "one of my best friends in the Senate," and both Gregg and Alexander ticked off examples of little-known legislation that they are currently working on with Democrats; Alexander and Ben Cardin, of Maryland, have introduced a bill to ban mountaintop-removal coal mining. Udall noted that he had become friendly with John McCain when they went on a congressional tour of Iraq. But opportunities to bond are rare. On the first floor of the Capitol, there is a private dining room for senators, the "inner sanctum," where Republicans and Democrats used to have lunch (at separate tables, but in the same room). In the seventies, old bulls such as James Eastland, Hubert Humphrey, and Jacob Javits held court there; later, Daniel Patrick Moynihan did. "You learned, and also you found out what was going on," Dodd said, adding, "It's awfully difficult to say crappy things about someone that you just had lunch with." These days, the inner sanctum is nearly always empty. Senators eat lunch in their respective caucus rooms with members of their party, or else "downtown," which means asking donors for money over steak and potatoes at the Monocle or Charlie Palmer. The tradition of the "caucus lunch" was instituted by Republicans in the fifties, when they lost their majority; Democrats, after losing theirs in 1980, followed suit. Caucus lunches work members on both sides into a state of pep-rally fervor. During one recent Republican lunch, Jim Bunning referred to Harry Reid as an idiot. "At least he had the courtesy to do it behind closed doors," Alexander joked, adding, "We spend most of our time in team meetings deciding what we're going to do to each other."

In 2007, Alexander and Lieberman started a series of bipartisan Tuesday breakfasts. "They kind of dwindled off during the health-care debate," Alexander said. Udall has tried to revive the Wednesday inner-sanctum lunch. For the first few months, only Democrats attended. Then, one Wednesday in May, Susan Collins, the Maine Republican, showed up, joking nervously about being a turncoat; to protect her reputation, her presence was kept secret.

These efforts at resurrecting dead customs are as self-conscious and, probably, as doomed as the get-togethers of lovers who try to stay friends after a breakup. Ira Shapiro, a Washington lawyer and a former aide to Senator Gaylord Nelson, of Wisconsin, put it this way: "Why would they want to have lunch together when they hate each other?"

The upper chamber of Congress was a constitutional compromise between popular sovereignty and state sovereignty. The Senate was designed, as part of the separation of powers, to check the impulses of the House and the popular will. For some Federalists, it also had an aristocratic purpose: to collect knowledge and experience, and to guard against a

levelling spirit that might overtake the majority. When Alexis de Tocqueville visited the Senate, in 1832, he was deeply impressed by the quality of its members: "They represent only the lofty thoughts [of the nation] and the generous instincts animating it, not the petty passions." But he also recognized that "a minority of the nation dominating the Senate could completely paralyze the will of the majority represented in the other house, and that is contrary to the spirit of constitutional government." As long as the Senate continued to be composed of America's most talented statesmen, Tocqueville implied, it would restrain its own anti-democratic potential.

Robert A. Caro, in "Master of the Senate," the third volume of his life of Lyndon Johnson, argues that after the Civil War the Senate was captured by wealthy and sectional interests, ending a more high-minded age when Daniel Webster, Henry Clay, and John C. Calhoun engaged in brilliant debate. Aside from spasms of legislation at the start of the Presidencies of Woodrow Wilson and Franklin Roosevelt, Caro writes, the Senate remained controlled by an alliance of Southern racists and Republican corporate shills, and was "the dam against which the waves of social reform dashed themselves in vain-the chief obstructive force in the federal government." By the fifties, the Senate had become far more conservative than the public. And not just conservative: William S. White, in his 1956 book "Citadel," called the Senate "to a most peculiar degree, a *Southern* Institution . . . growing at the heart of this ostensibly national assembly" and "the only place in the country where the South did not lose the war."

By mid-century, it had become a journalistic cliché to call the Senate broken. Otto Preminger's 1962 film "Advise and Consent," based on the novel by Allen Drury, is about the Senate of that period, and it presents Democrats and Republicans as equally amoral, calculating, and power-hungry. But the institution, as depicted by Preminger, still works, in its way: though the deals stink, they get cut. The senators know their colleagues and the rules; they back-stab one another in the lunchroom, then drink cocktails and play cards on Saturday nights. There are no lobbyists, no fund-raisers, no media, no constituents-only senators' intricate relations with one another. The Senate is its own world.

In a memoir, Johnson's longtime aide Harry McPherson recalls learning that the Senate's "famous 'club' atmosphere is based on the members' mutual acceptance of responsibility and concentration on the tasks at hand. . . . They thrust hard at one another in debate over serious matters," but, he writes, "understanding and accommodation in the ordinary course of the Senate day was essential to sanity." Johnson, the most powerful Majority Leader in history, bent the Senate to his will and forced it to become more efficient. He saw his colleagues as either "whales"-the heavyweight chairmen who negotiated legislation-or "minnows," the followers who went along with the brokered deals. And when, in 1958, a formidable new class of liberal Democrats entered the Senate-including Edmund Muskie, Eugene McCarthy, and Philip Hart-the legislative machinery began to produce reform. Michael Janeway, the author of "The Fall of the House of Roosevelt," worked as a summer staff member between 1958 and 1962. "They used to talk to each other-that's my most vivid recollection," he said. "If Wayne Morse talked of constitutional law on the floor, the Southerners would come in to hear him. The same with Hubert Humphrey on farm policy. My strongest impression was of it being a deliberative body, drawing each other out-sometimes pedantically." Senators who ran for office in order to work on foreign policy, social welfare, or urbanization had to win credibility with the whales. "But if you wanted to do something there was a mechanism by which you could do it," Janeway said.

In the sixties and seventies, Southern-conservative control was broken by a coalition of left-of-center Democrats and moderate Republicans. Donald Ritchie, the Senate historian, who started working there in 1976, described the Senate of those decades as "a bipartisan liberal institution." The Civil Rights Act of 1964 was written largely out of the office of the Republican Minority Leader, Everett Dirksen. Every major initiative-voting rights, open housing, environmental law, campaign reform-enjoyed bipartisan support. In the rare event of a filibuster, the motion to end debate was often filed jointly by leaders of both parties. When Medicare-that government takeover of health care for the elderly-was passed, in 1965, it won 70-24.

The Senate's momentum nurtured superb talent: William Fulbright, Everett Dirksen, Henry Jackson, Frank Church, Howard Baker. In 1969, George McGovern chaired a select committee on hunger that actually held bipartisan "field hearings" in poor regions, calling witnesses in migrant labor camps, and then, with Bob Dole's indispensable support, greatly expanded the food-stamp program. The intensity of senatorial purpose in those years must strike today's legislators as profoundly humbling. After Joe Biden came to the Senate, in 1973, Hubert Humphrey took him aside and said, "You have to pick an issue that becomes yours. That's how you attract your colleagues to follow you, Joe. That's how you demonstrate your bona fides. Don't be a gadfly." Humphrey's career advice: "You should become Mr. Housing. Housing is the future."

The Senate's modern decline began in 1978, with the election of a new wave of anti-government conservatives, and accelerated as Republicans became the majority in 1981. "The Quayle generation came in, and there were a number of

people just like Dan-same generation, same hair style, same beliefs," Gary Hart, the Colorado Democrat, recalled. "They were harder-line. They weren't there to get along with Democrats. But they look accommodationist compared to Republicans in the Senate today." Church, McGovern, Javits, and Birch Bayh were gone. Ira Shapiro, the former aide, who is writing a book about the Senate of the sixties and seventies, said, "It was a huge loss of the most experienced, accomplished senators being replaced by neophytes. All of a sudden, in 1981, more than half the Senate had been there less than six years." He added, "The shattering of the great Senate has long-term effects that keep showing up. It gets worse over time, but it just never gets restored. There was a phrase I heard from Helms and the younger ones: 'Others didn't want to make waves; I wanted to drain the swamp.' "

After C-SPAN went on the air, in 1979, the cozy atmosphere that encouraged both deliberation and back-room deals began to yield to transparency and, with it, posturing. "So Damn Much Money," a recent book by the Washington *Post* reporter Robert G. Kaiser, traces the spectacular rise of Washington lobbying to the same period. Liberal Republicans began to disappear, and as Southern Democrats died out they were replaced by conservative Republicans. Bipartisan coalitions on both wings of the Senate vanished. The institutionalist gave way to the free agent, who controlled his own fund-raising apparatus and media presence, and whose electoral base was a patchwork of single-issue groups. Members of both parties-Howard Metzenbaum, the Ohio Democrat; Jesse Helms, the North Carolina Republican-took to regularly using the Senate's rules to tie up business for narrowly ideological reasons. The number of filibusters shot up in the eighties and continued to rise in the following decades, as the parties kept alternating control of the Senate and escalating a procedural arms race, routinely blocking the confirmation of executive and judicial appointees. Democrats filibustered Republican nominees to the bench; then Republicans threatened to ban the filibuster in such cases-the so-called "nuclear option." Older members were perturbed when, in 2004, the Republican Majority Leader, Bill Frist, went to South Dakota to campaign against the Democratic Minority Leader, Tom Daschle (who went on to lose). A few years earlier, such an action would have been unthinkable.

The weakened institution could no longer withstand pressures from outside its walls; as money and cameras rushed in, independent minds fell more and more in line with the partisans. Rough parity between the two parties meant that every election had the potential to make or break a majority, crushing the incentive to coöperate across the aisle. The Senate, no longer a fount of ideas, became a backwater of the U.S. government. During the Clinton years, the main action was between the White House and the Gingrich House of Representatives; during the Bush years, the Republican Senate majority abdicated the oversight role that could have placed a vital check on executive power.

Norman Ornstein, a congressional expert at the American Enterprise Institute, said that the Senate has increasingly become populated by "ideologues and charlatans." He went on, "When we do get good people who come in, they very quickly get ground up by the dynamic and the culture of the parties. And once you get there, look at what it takes to stay there." He spoke of Charles Grassley, the Iowa Republican, who, nearing the end of his career, spent much of last year working closely with his friend Max Baucus on the health-care bill. Then, in August, Grassley went home and, faced with angry Republican voters and the prospect of a primary challenge from the right, started warning about "pulling the plug on Grandma." Ornstein added that similar pressures had led John McCain to begin "altering his behavior and abandoning every issue, including campaign-finance reform."

One morning in April, I visited Harry McPherson, the former L.B.J. aide, at the offices of the legal and lobbying firm D. L. A. Piper, in downtown Washington. McPherson, who is eighty, had on his desk the firm's spiral-bound directory for the 111th Congress. I asked him who, in Johnsonian terms, were the whales of the current Senate. McPherson ran his finger down the list of senators. He did it again. "I'm trying here, looking for a remote descendant. Judas Priest, look at this." He was stumped. "Well, I see some good people, I see some people who are going to get coalitions together over time." He put the directory aside. "I'm just having the damnedest time."

Down the hall from McPherson's office was that of Mel Martinez, a former Republican senator from Florida; he was hired last year, two weeks after resigning his Senate seat without completing his first term. (He has since moved on to JPMorgan Chase.) William Cohen, the former Maine senator and Secretary of Defense, has an office downstairs. Tom Daschle works at D. L. A. Piper; his predecessor as Democratic leader, George Mitchell, was the firm's chairman, until President Obama appointed him to be his Middle East envoy. One feature of the diminished U.S. senator is the ease with which he moves from legislating to lobbying. Between 1998 and 2004, half the senators who left office became lobbyists. In 2007, Trent Lott, a Republican leader in the Senate less than a year into his fourth term, abruptly resigned and formed a lobbying firm with former Senator John Breaux, just a few weeks before a new law took effect requiring a two-year waiting period between serving and lobbying.

When you spend your days at the Senate, it's easy to forget about everything else. The House of Representatives seems miles away (it's just down a corridor and across the rotunda), the White House is another country, and actual foreign countries are unimaginable. The place remains insular, labyrinthine, and opaque-even physically. Senators commute thirty seconds between their offices and the chamber by electric subway cars that run along a tunnel under Constitution Avenue. Many signs are misleading or obsolete (the gilded lettering over the visitors' gallery says "Men's Gallery"), and the Capitol is filled with secret passageways and spare rooms, called hideaways, doled out according to seniority, where senators can read, drink, doze, and wait for the buzzer announcing an imminent vote. The most pervasive authority over the institution is not the Constitution or the Bible but, rather, an impenetrable sixteen-hundred-page tome, by Floyd M. Riddick, called "Senate Procedure: Precedents and Practices," which only the late Robert Byrd, of West Virginia, was known to have read in its entirety. The procedures are so abstruse that a parliamentarian must sit below the presiding officer and, essentially, tell him or her what to say.

After half a century, the picture given by Preminger's "Advise and Consent" is still faintly visible. "The Senate, by its nature, is a place where consensus reigns and personal relationships are paramount," Lamar Alexander said. "And that's not changed." Which is exactly the problem: it's a self-governing body that depends on the reasonableness of its members to function. Sarah Binder, a congressional scholar at George Washington University, said, "To have a chamber that rules by unanimous consent-it's nutty! Especially when you've got Jim Bunning to please."

In 2006 and 2008, sixteen Democrats entered the Senate, giving the Party its current majority of fifty-nine to forty-one (counting two independents). They include moderates, like Jon Tester, of Montana, and Mark Warner, of Virginia; liberals, like Sherrod Brown, of Ohio, and Sheldon Whitehouse, of Rhode Island; policy specialists, like Amy Klobuchar, of Minnesota, and Jeff Merkley; and iconoclasts, like Claire McCaskill. Their interest in legislating has won the admiration of senior senators. "If they can stay, I think they'll be terrific," Chris Dodd said. "My worry is they won't stay. Because it's not productive."

The Democratic class of 2008 arrived with President Obama, expecting to usher in a dynamic new era. Instead, their young Senate careers have passed in a daily slog of threatened filibusters and "secret holds"-when a senator anonymously objects to bringing an appointment up for a vote, which requires unanimous consent. On April 20th, Claire McCaskill took the trouble to read off the names of fifty-six Obama nominees languishing in the limbo of secret holds, and Jon Kyl objected to every one of them. Just getting a bill to the floor for debate can require days of tactical gamesmanship between the party leaders. There were times when Warner wondered if anyone had ever quit in the first year. Michael Bennet said, "We find ourselves at a moment in our history when the questions are huge ones, not small ones, and where things have been put off for a really long period of time." He mentioned the national debt, energy policy, and the financial crisis. "Yet you have a Senate that's designed not to advance change but to slow it."

We were talking in his hideaway, a windowless room in the Capitol basement, which had a mini-fridge stocked with bottled water, black leatherette furniture circa 1962, and a TV tuned to C-SPAN2 on mute; Senator Kyl's mouth was moving. Bennet, the former superintendent of schools in Denver, was appointed to a vacant seat in 2009, and already has to defend it this year. He described the Senate with the dry bluntness of an outsider who hasn't allowed himself to grow too attached. Bennet repeated a story he had heard about a new congressman giving his maiden speech: "And then some more veteran guy came over and said, 'Son, you're talking like this place is on the level. It's not on the level.' As the fifteen months or so have gone by that I've been here, the less on the level it seems."

Earlier this year, the Senate's procedural absurdities became national news twice in one month. On February 4th, *CongressDaily* reported that Richard Shelby, an Alabama Republican, was secretly blocking the confirmation of seventy Obama appointees over a dispute involving defense earmarks for his state. (His tactics exposed, Shelby-whose office maintains that he was responsible for fewer than fifty holds-lifted all but three.) Later that month, Bunning spent several days and a late night on the Senate floor, filibustering to prevent benefits from being paid to millions of unemployed Americans. When Merkley tried to reason with him, Bunning responded, "Tough shit." (Eventually, Republicans persuaded Bunning to stop.)

These incidents elicited a brief outcry, but the extent of the Senate's routine folly remains largely hidden. For example, Grassley and Ron Wyden, of Oregon, have been trying since 1997 to end the practice of secret holds, without success. In 2007, the Senate passed a bill banning secret holds that last longer than six days. But to get around the ban two or more senators can pass the hold back and forth-it's called "rolling holds"-and their party leader facilitates the game by keeping their names secret.

Many of the Senate's antique rules and precedents have been warped beyond recognition by the modern pressures of partisanship. The hold, for example, was a courtesy extended to senators in the days of horse travel, when they needed

time to get back to Washington and read a bill or question an appointee before casting their vote. Sarah Binder, who co-authored a book on the filibuster, calls the procedure a historical accident: in 1806, the Senate got rid of a little-used rule that allowed the "previous question" to be called to a vote. Suddenly, there was no inherent limit on debate, and by the eighteen-thirties senators had begun taking advantage of this loophole, derailing the proceedings by getting up and talking until their voice, legs, or bladder gave out. (The word "filibuster" comes from *vrijbuiter*-old Dutch for "looter.")

In 1917, Woodrow Wilson, with his wartime legislative agenda blocked by filibusters, forced the Senate to pass Rule XXII, which allowed a two-thirds majority to bring a floor debate to an end with a "cloture" vote. For decades, the rule was rarely used; between 1919 and 1971, there were only forty-nine cloture votes, fewer than one per year. In the seventies and eighties, the annual average rose to about a dozen. (Frustration with this increase led the Senate, in 1975, to lower the threshold for cloture to sixty votes.) In the nineties and early aughts, the average went up to twenty-five or thirty a year, as both parties escalated their use of the filibuster when they found themselves in the minority. After the Republicans lost their majority in 2006, filibusters became everyday events: there were a hundred and twelve cloture votes in 2007 and 2008, and this session Republicans are on target to break their own filibuster record.

The tally of cloture votes reflects only a small fraction of senatorial obstruction. Three hundred and forty-five bills passed by the House have been prevented from even coming up for debate in the Senate. "Why?" Steny Hoyer, the outraged Democratic Majority Leader of the House, asked me. "Because they do not do their business in a way that facilitates noncontroversial things. Thankfully, the House of Representatives is not becoming the Senate." Last week, six House Democrats expressed their displeasure with the upper chamber by staging a sit-in of sorts on the Senate floor.

Seventy-six nominees for judgeships and executive posts have been approved by committees but, because of blocks, haven't come up for a vote in the full Senate, leaving courtrooms idle and jobs unfilled across the upper levels of the Obama Administration. (The Democrats also practiced the art of blocking nominees during the Bush Administration.) There's often no objection to the individual being blocked: after an eight-month hold, Martha Johnson, nominated to run the General Services Administration, was confirmed 96-0. On an issue like health-care reform, when the objection was substantive, Republicans ransacked Riddick's "Senate Procedure" for every conceivable way to delay a debate and vote. Judd Gregg even sent a memo on stalling tactics to his Republican colleagues. Tom Coburn demanded the reading aloud of an entire seven-hundred-and-sixty-seven-page amendment proposed by Bernie Sanders, the Vermont socialist; Senate clerks, working in half-hour shifts, were three hours into the chore when Sanders withdrew the amendment in frustration.

Under McConnell, Republicans have consistently consumed as much of the Senate's calendar as possible with legislative maneuvering. The strategy is not to extend deliberation of the Senate's agenda but to prevent it. Tom Harkin, who first proposed reform of the filibuster in 1995, called his Republican colleagues "nihilists," who want to create chaos because it serves their ideology. "If there's chaos, things will tend toward simple solutions," Harkin said. "In chaos people don't listen to reason." McConnell did not respond to requests for an interview, but he has often argued that the Republican strategy reflects the views of a majority of Americans. In March, he told the *Times*, "To the extent that they"-the Democrats-"want to do things that we think are in the political center and would be helpful to the country, we'll be helpful. To the extent they are trying to turn us into a Western European country, we are not going to be helpful."

One of the mysteries of the Senate is how Mitch McConnell has been able to keep his members in line, on vote after vote. Why do moderates with years of experience and their own power base back home-Richard Lugar, of Indiana; Susan Collins, of Maine; George Voinovich, of Ohio-keep siding with the more extreme members of their caucus? Alexander said that McConnell listens well to all his members, adding, "When you have your back against the wall and the gallows are hanging in front of you, it tends to unify. Operating with forty members-it concentrates the mind."

Lindsey Graham described to the *Times* how McConnell exhorted his caucus after the disastrous 2008 election: "He said if we didn't stick together on big things, we wouldn't be relevant." Last December, the Republicans decided to filibuster a military-spending bill in order to delay the looming vote on health care until as close to Christmas as possible. Thad Cochran, the Republican ranking member of the Appropriations Committee, promised Daniel Inouye, the chairman, that he wouldn't join the effort. But at the last minute Cochran, who has been in the Senate since 1979 and brings disproportionate amounts of defense money to Mississippi, told Reid that his leadership wouldn't allow him to vote with the Democrats and end the filibuster-even on a matter of national security. (The Democrats were able to impose cloture, and the vote on health care finally took place on Christmas Eve.)

Republican defections have been rare. In early 2009, Collins and Olympia Snowe, also of Maine, voted for the stimulus bill, along with Arlen Specter (who promptly switched parties). Snowe also voted for the Finance Committee's

health-care-reform bill last October, the only Republican to do so. But in December, at the pivotal moment, she voted against the version that went before the full Senate. "I wasn't interested in expanding this program beyond the Finance Committee version-it grew by a thousand pages," Snowe said. She wasn't included in the negotiations with White House officials that took place in an elegant conference room across from Reid's suite of offices, and said that the Democrats "did not accept any of my proposals. As I said to the President, it was all windup and no pitch." McConnell was able to exploit her alienation. A friend of Snowe cited another reason for her reversal: "She actually said to me once that she had never felt the pressure that she felt on health care, never before had that pressure been quite as evident to her or quite as real or troubling. Kyl and McConnell were saying things like 'You just can't let us down, we're all in this together. You're a senior Republican member of this caucus, and you just have to hang tough with us. We expect it and you're going to do it.' "

Reid doesn't use such tough tactics; he has achieved his position, in spite of his public shortcomings, by being the senator who helped other Democrats, always answered their calls, and got them what they wanted through masterly maneuvering. This has made him enormously popular within the Democratic caucus, but it doesn't give him the leverage of McConnell, let alone of Lyndon Johnson.

In the current Senate, it has become normal for a handful of senators, sometimes representing just ten or twenty per cent of the country's population, to hold everything up. And the status quo has become sufficiently frustrating that a few new senators have considered a radical option: mutiny.

Tom Udall, who is sixty-two, is older than most freshman senators. He has the crow's-feet of a Westerner who has spent time in the sun, and a slow, good-natured voice. His father, Stewart, was an Arizona congressman and the Interior Secretary for Presidents Kennedy and Johnson; his uncle Mo was a legendary Arizona representative; his cousin Mark is a freshman senator from Colorado. Udall served five terms in the House before winning a Senate seat from New Mexico, in 2008. And yet he has the air of a political Candide-he is always earnest, capable of disappointment but not cynicism. "I ran on the idea that the Senate should not be a graveyard for good ideas," he said. "Then to be on the inside-the thing that strikes you is how one senator can hold up the whole show."

In his first year in office, Udall decided to do something audacious: he would try to change the Senate's rules. Customarily, the rules continue session after session, and a provision in Rule XXII requires sixty-seven votes to amend them, making it extremely difficult. ("Rule XXII is a Catch-22," Ted Kennedy used to joke.) Udall embraced a different idea-the "constitutional option." Article I, Section 5 of the Constitution states that "each House may determine the Rules of its Proceedings" at the beginning of the new Congress. So, in theory, a senator could take the floor next January and propose debating its rules from scratch, including the filibuster. New rules could be passed with a simple majority. There's even a precedent for this: moves to revisit the rules by invoking the constitutional option have been made three times, most recently in 1975. Udall has spent much of the past year trying to build support for the idea.

At the request of Udall and others, Schumer, who is the chairman of the Rules Committee, has held a series of hearings on the filibuster, calling witnesses such as Sarah Binder, the historian, and Walter Mondale, who was in the Senate when the constitutional option was invoked in 1975. Dick Durbin, the second-highest-ranking Democrat, has organized working groups among newer members on other internal reforms, such as ending secret holds and choosing committee chairs by caucus vote rather than by seniority. (Lamar Alexander wryly suggested to me that Schumer and Durbin were competing for the favor of newer members, in case Harry Reid loses his seat in the fall and they run against each other for Majority Leader.)

For Republican institutionalists, such as Alexander and Gregg, the push for rules reform is folly. "If you want a parliamentary form of government, go over to the House," Gregg, who is about to retire, scoffed. "Why even run for the Senate?" Udall's plan for next January, he said, would be a "gigantic mistake."

"They'll get over it," Alexander said of the Democrats' enthusiasm for rules reform. "And they'll get over it quicker if they're in the minority next January. Because they'll instantly see the value of slowing the Senate down to consider whatever they have to say." He added that the Senate "may be getting done about as much as the American people want done." The President's ambitious agenda, after all, has upset a lot of voters, across the political spectrum. None of the Republicans I spoke to agreed with the contention that the Senate is "broken." Alexander claimed that he and other Republicans were exercising the moderating, thoughtful influence on legislation that the founders wanted in the Senate. "The Senate wasn't created to be efficient," he argued. "It was created to be inefficient." At one of the filibuster hearings, in April, Alexander, sitting across the table from Udall, said that, for all the times the Democrats charge the Republicans with obstructing legislation, "we could say that's 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."

Newcomers like Udall seem to think that the Senate has grown so absurd and extreme that some kind of reform is inevitable. Perhaps they need more time to plumb the depths of the institution's intransigence. According to Sarah Binder, a change in rules is extremely unlikely; Republicans would be implacably opposed to, say, weakening the filibuster, and so would some Democrats, especially long-serving ones. "I would oppose that," Chris Dodd said, adding of the freshmen, "These are people who have never been in the minority." For older Democrats, who have put in their years, grown adept at working the rules, and now chair powerful committees, the reform impulse could be a threat. (Among senior senators, the sole enthusiast for rules reform is Tom Harkin.) One senator spoke of the Senate as being divided not between whales and minnows but, rather, between bulls and calves. The older Democrats are too accustomed to the Senate's ways to share the frustrations of the newcomers; the handful of older moderate Republicans are too weak to challenge the newer radicals who now dominate the caucus.

Even if the freshmen Democrats can somehow reform the filibuster next January, the Senate will remain a sclerotic, wasteful, unhappy body. The deepest source of its problems is not rules and precedents but, rather, its human beings, who have created a culture where Tocqueville's "lofty thoughts" and "generous impulses" have no place.

A few days after passing health-care reform, the Senate struggled to its feet to take on a second large task. Financial regulatory reform should have been the easiest piece of major legislation of the Obama Presidency, the likeliest to win real bipartisan support. The financial crisis had been catastrophic for millions of Americans, and after the 2008 bailout Wall Street had become even more hated than the Senate was. In April, a lineup of bankers from Goldman Sachs appeared before Senator Levin's subcommittee on investigations, and managed to appear as arrogant, callous, and evasive as their reputations had suggested. The public demanded action. Some Republicans had a genuine desire to pass a bill. If health-care reform had been a war of attrition, financial reform was a promising liaison.

The affair began with a Republican, Bob Corker, and a Democrat, Mark Warner-both multimillionaires serving their first term, both considered centrists. Corker is a small, dapper former construction magnate who became the mayor of Chattanooga; Warner is a tall, preppily dressed former telecommunications entrepreneur who became the governor of Virginia. Chris Dodd, the Banking Committee chairman, assigned them to work together on the section of the bill having to do with the liquidation of troubled firms-making sure that there would never be another taxpayer bailout. They worked through the winter, in Warner's office, in Corker's office, over dinner, sometimes without staff, as if they were members of a Senate from the past. They hosted a series of afternoon seminars, inviting guests such as Ben Bernanke, Alan Greenspan, and Sheila Bair. Corker and Warner were sometimes said to be the only Democrat and Republican still talking to each other. In January, *Business Week* called them the Senate's "Odd Couple." By February, they had finished their work.

Meanwhile, discussions about the entire bill between Dodd and Richard Shelby, the top Republican on the committee, dragged on, repeatedly breaking down. Finally, on February 10th, Dodd called Corker, who, though he was one of the committee's junior members, agreed to be the chairman's Republican negotiating partner. When Corker informed McConnell and Shelby, they expressed surprise. "It was an odd place to be," Corker recalled. "And yet that night we began meeting." The junior Republican savored the rare experience of creating, rather than opposing, legislation. In response, Shelby's conservative staff tried to undermine Corker, spreading rumors among Republicans and their lobbyists that he was giving too much away. (A Shelby aide said that staff members were simply informing other Republicans of the Party's line on financial reform.)

On March 10th, Dodd concluded that he had to move a bill to the floor. He called Corker and said, "You've been a great partner." He was ending their talks after only a month. "It's a little stunning, I've got to be honest," Corker told reporters afterward. Someone close to the negotiations compared Corker to Dickens's Miss Havisham, unable to get over the rebuff, forever awaiting the arrival of her groom, all her clocks stopped. Corker later said that Dodd had ended the talks under pressure from the White House and other Democrats. Dodd said that Corker had been unable to bring any other Republicans with him. "Baloney," Corker said. "If Dodd had reached an agreement with me, we'd've had at least twenty-five Republican votes."

The bill that Dodd brought before the Senate, after a year of discussions with Democrats and Republicans alike, incorporated the bipartisan plan of Warner and Corker to prevent another bank bailout: setting up a fifty-billion-dollar fund, paid for by the banks, to insure orderly liquidation, and establishing a risk council to detect warning signs of another crisis. But in mid-April Mitch McConnell-who had just met with Wall Street executives in New York, and was now parroting talking points from a memo written by the Republican strategist Frank Luntz-called it a "partisan bill" that "will guarantee perpetual taxpayer bailout of Wall Street banks." McConnell presented a letter, signed by all forty-one Republicans, suggesting that they would filibuster the financial-reform bill.

His remarks amounted to a repudiation of Corker's work as well as of Dodd's. The next day, April 15th, Corker pleaded with his colleagues, in his Tennessee twang, "Let's come to the floor and let's act like adults. Let's tone down the rhetoric. Let's don't exaggerate the pluses or minuses. Let's do what the Senate was created to do. . . . We were supposed to be the people that took some of the red-hot activities that sometimes come from the other body and sat down with cooler heads and resolved the issues like adults. We can do that. As a matter of fact, I would say, if we cannot do that on financial regulation, an issue that really doesn't have any real philosophical bearings to it . . ." Corker didn't allow the thought to ripen-he had already gone farther than almost any Republican would have dared.

Dodd spoke later in the day and completed Corker's speech: "I know my friends on the other side of the aisle are faced with a difficult choice between supporting their party leadership and participating in this complicated, difficult debate. I am not naïve. I know that is a hard place to be. But if we can't act like U.S. senators for the sake of this issue . . . then why are we even here?" He went on, "We work for an American public that is sick and tired of feeling like no one is looking out for their interests, like the political hacks and lobbyists hold all the cards in these discussions. The minority seems intent on proving them right. . . . I have been here a long time. I know this institution is better than that. I know there are friends of mine on the other side of the aisle who care about this bill, who want to be a part of the debate, who want to be part of the solution."

In the same speech, Dodd joined the partisan fight, accusing McConnell of lying about the bill. Turning crimson-faced, he chopped the air with his hand as he shouted, "I have to ask myself, why did I go through this process over the last four or five months, agreeing to much of what they were offering, and there is not a single political vote to show for it. . . . I have to say to the younger members, the newer members coming along: be careful!"

Corker, having heard that Dodd was speaking, returned to the chamber and asked to respond. "You and I went a long way," Corker told Dodd. "Then we stopped. On March 10th it ended. I understand that, look, you were losing Democrats on your committee."

"And I was not gaining Republicans," Dodd replied.

"You had one, and that is all you asked for when you started. I never said I could speak for anybody but myself. And I did not leave the table." Corker urged Dodd to keep talking to Republicans-their differences could be sorted out in a few days.

But this was not McConnell's agenda. Instead, financial reform became a slightly more polite repeat of the health-care-reform brawl: the Republicans threatened filibusters, the Democrats threatened all-nighters, and thousands of lobbyists prowled the Capitol, charging their Wall Street clients more than a billion dollars. On April 28th, I was sitting in the ornate Reception Room with Jim Manley, Reid's spokesman. On the other side of the wall, there was the noise of furniture scraping across a tile floor. "Those are cots being set up in the L.B.J. Room," Manley said. "Very little happens around here without a deadline." The cots persuaded Republicans to allow the bill to move to the floor for debate. A few weeks later, on May 20th, yet another filibuster was defeated by yet another cloture motion, and financial reform finally came to a vote. It passed, 59-39. Only four Republicans had joined the majority. Corker wasn't among them. He had even voted for an amendment, offered by his Republican colleague Jeff Sessions, of Alabama, that would have scrapped Corker's work of many months with Warner.

"The idea of watching Bob Corker vote for the Sessions amendment!" Dodd said afterward, sitting in his red-curtained office, under a print of Holbein's portrait of Thomas More. "It's the Senate, I guess." McConnell's strategy of obstruction had once again come close to succeeding, Dodd said, but he knew that a "shrinking number" of Republicans were frustrated. The previous day, Dodd had said to Susan Collins, "God, I would have loved to have you as my ranking member on this." Collins responded, "We could have had such a great time on this bill."

Warner, who said that he believed in bipartisanship because "the American people don't trust either political party enough to give them a blank check," was astonished that so few Republicans voted for financial reform. "There was zero substantive reason why this couldn't have been eighty votes," he said. I asked him why Bob Corker had voted no on the bill. Warner started to talk about the consumer-protection title, and then said, "If you want to vote against something, you can always find your reasons."

But Corker hadn't seemed to want to vote against it. He had spent months trying to act like a U.S. senator, alienating himself from his own party and then the other party, and on the day of the vote he held the floor for the better part of thirty minutes, as if he were still reluctant to let the effort go. "I am obviously disappointed," he said. "I think I have spent as much time as any senator . . . on policy regarding our financial system. I think any bill-even this bill-has good

things in it. There is no question. And I appreciate the thrust. But I think there is a lot of overreaching, and I think not enough time was spent on some of the core issues."

As the senators cast their votes, I noticed Robert Kaiser, the author of "So Damn Much Money," in the press gallery. I later asked him if, with the passage of two big reform bills in three months, we were witnessing a possible renewal of the Senate. "If you can engage public opinion in a way politicians can understand, public opinion can still blow away money and interest groups," he said. "But over the past few decades the reflex has grown in the Senate that, all things considered, it's better to avoid than to take on big issues. This is the kind of thing that drives Michael Bennet nutty: here you've arrived in the United States Senate and you can't do fuck-all about the destruction of the planet."

After the final vote on financial reform, the Republicans flew home, and the Democratic leaders held a press conference, smiling before the microphones outside the Senate chamber. Reid said, "For those who wanted to protect Wall Street, it didn't work." He then excused himself: he had to join Biden for a telephone fund-raiser with "some Nevadans."

Durbin said, "I was stunned that only four Republicans would join us in passing this historic legislation. What does it take to bring the Republican Party into the conversation about the future of America?"

Dodd, glowing with triumph, said, "I wanted to demonstrate that the Senate of the United States could conduct its business much as our founders intended. We did that."

On July 21st, President Obama signed the completed bill. The two lasting achievements of this Senate, financial regulation and health care, required a year and a half of legislative warfare that nearly destroyed the body. They depended on a set of circumstances-a large majority of Democrats, a charismatic President with an electoral mandate, and a national crisis-that will not last long or be repeated anytime soon. Two days after financial reform became law, Harry Reid announced that the Senate would not take up comprehensive energy-reform legislation for the rest of the year. And so climate change joined immigration, job creation, food safety, pilot training, veterans' care, campaign finance, transportation security, labor law, mine safety, wildfire management, and scores of executive and judicial appointments on the list of matters that the world's greatest deliberative body is incapable of addressing. Already, you can feel the Senate slipping back into stagnant waters.