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# Filibuster Abuse

*By Mimi Marziani*

*Foreword by Susan Liss*

## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

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The Brennan Center's Democracy Program works to repair the broken systems of American democracy. We encourage broad citizen participation by promoting voting and campaign reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the right of citizens – not special interests – at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

## ABOUT THE FILIBUSTER REFORM PROJECT

In January 2010, the Brennan Center launched a special, year-long project to address procedural dysfunction in the U.S. Senate. Our ultimate goal is to restore legislative accountability in the Senate by reforming the rules that currently incentivize relentless and unprincipled obstruction. New rules should facilitate actual debate, deliberation and compromise — reflecting the intent of our Founders and allowing the Senate to effectively address the pressing demands of Twenty-First century America. This goal reinforces the Brennan Center's core mission — to promote a robust and functioning democracy.

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## ACKNOWLEDGEMENTS

I am particularly grateful to Susan Liss, whose wisdom and expertise guides all of the Center's work in this arena. I am thankful for Michael Waldman's "big picture" vision of filibuster reform and for Fritz Schwartz's editorial insight at every step along the way. Diana Lee was essential at each stage of this report, providing careful research and editorial feedback – thank you! I also appreciate the many other individuals who helped research, edit, and produce this report, including Jeanine Plant-Chirlin, Deborah Francois, Hariqbal Basi and Matt Robinson.

The Brennan Center is grateful to The William C. Bullitt Foundation, Democracy Alliance Partners and the Open Society Foundations for their generous support of our Filibuster report.

# FOREWORD

*By Susan Liss*

When the history of the 111<sup>th</sup> Congress is written, the inability of the Senate to function as the deliberative body envisioned by the Founders will be at the center of any analysis. Time and again, the Senate failed to vote – or even deliberate – on bills that could address the serious issues facing our nation. Presidential appointees, federal judicial nominees, legislation addressing unemployment benefits, the environment, disclosure of political campaign contributions, and myriad other critical issues have been stalled or shelved. Why? Because the arcane rules of Senate procedure have repeatedly prevented crucial issues like these from reaching the Senate floor.

In recent years, a minority of senators have used these rules to engage in relentless obstruction, imposing a *de facto* 60-vote requirement for all Senate business that brings the body far from its constitutional ideal. (As explained in the pages that follow, the Framers of our Constitution clearly did not intend for 60 votes to be the norm.) We are caught in a procedural arms race where stalemate often results. What has been accomplished has been riddled with unprincipled concessions to appease filibustering senators that distort the final product.

The current situation is simply unsupportable. There can be no doubt that the anger and frustration expressed by so many Americans about the inability of government to make their lives better can be directly attributed to the Senate's repeated failure to act. To cite just one example, the DISCLOSE Act garnered strong public support, won the vote of 59 senators, but could not become law. No wonder that recent polls show that just 21% of Americans approve of how Congress is doing its job.\*

The Brennan Center has not previously studied the filibuster or Senate procedure, and took no part in earlier debates about its use and abuse. We write at a time when control of the body by one party is diminished, and when no one knows who will have the majority two years from now. Now, when the partisan implication of filibuster reform is unclear, is the ideal time to modernize Senate rules. For whichever party wields the gavel, our democracy is ill served by a Senate that is tangled in obsolete and easily-abused rules of its own making.

The Brennan Center has studied the history of the filibuster, and has examined in depth earlier efforts to change the Senate Rules in order to facilitate legislative action. This report summarizes our findings. We set forth in great detail the harms caused by the effective requirement for 60 votes imposed every time a

\* RealClearPolitics.com, Congressional Job Approval, [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last visited Dec. 8, 2010).

filibuster is threatened. The report also describes the problems resulting from the abuse of “holds,” another obstructionist tactic. Most important, the report suggests a plan to change the Senate’s rules at the beginning of the next Congress, a plan that presents an opportunity to end the partisan gridlock and restore the Senate’s role in our democracy.

Only the Senate itself has the power to repair this aspect of our broken system. For the sake of our democracy, we urge the Senate to address the current state of dysfunction by amending its rules at the beginning of the next Congress. Our democracy and our citizens deserve no less.

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# I. INTRODUCTION

Over the last decade, Senate procedures have increasingly been used to prevent decision-making rather than to promote deliberation and debate. The threat of a filibuster – coupled with a 60-vote requirement to force any substantive vote – has affected nearly every action in the Senate during the last several years, under both Republican and Democratic majorities. As a result, the Senate has effectively ceased operating as the majoritarian institution our founders intended for it to be. For the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary to conduct regular Senate business.

This *de facto* supermajority voting rule takes the Senate far from its constitutional ideal. The Constitution was largely a response to the failings of the Congress of the Confederation. The Articles of Confederation required a supermajority vote to legislate in several key areas – like coining money, appropriating national funds, and determining the size of the army and navy. A common result was stalemate; legislators frequently found themselves unable to muster support from a supermajority of the states for essential governmental matters. Alexander Hamilton, reflecting on this failure, noted that while supermajority requirements were supposed to add stability to government, their “real operation [was] to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure . . . of an insignificant, turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority.”<sup>1</sup>

So, in drafting the new Constitution, the Framers decided that a supermajority vote was appropriate only in seven, extraordinary situations – which they specifically listed. For example, a two-thirds vote is needed to override a presidential veto, to expel a member of the Senate, or to convict a federal officer of an impeachable offense. For ordinary business, on the other hand, the Framers clearly anticipated the use of majority voting rules. Indeed, they even assigned a tie-breaker: Under Article I, Section 3, Clause 4, the vice president “shall have no Vote, unless [the Senate] be equally divided.” Plus, the Constitution expressly states that a bill must “pass” the Senate and the House before it may be enacted into law. As legal scholars have forcefully argued, the term “pass” – like the term “elect” – embodies a principle of majoritarianism that binds both chambers with equal force. This makes perfect sense – after all, that is how we still understand the plain meaning of those terms today.

While the Framers undoubtedly intended for the Senate to be a thoughtful body, they sought to achieve this goal through a variety of structural features meant to facilitate deliberation – such as the Senate’s smaller size, longer terms, older members and egalitarian structure. There is no indication that the Framers anticipated for the Senate’s rules to allow unlimited debate.

In fact, the first House and the first Senate had nearly identical rulebooks. Both included a motion for a “previous question,” whereby a simple majority can cut off obstruction and force an up-or-down vote. Today, the House still uses this rule. The Senate removed this provision in 1806, not due to a desire to promote unlimited debate, but because it was unnecessary. At the time, the Senate was a small, fraternal place with little need to rein in relentless obstruction. Although this move ultimately gave way to the filibuster, this was not the original intention. Removing the previous question motion appears to have been nothing more than an administrative decision with unintended consequences.

## First, Some Terminology...

### Filibusters & Cloture

The term “filibuster” refers to any dilatory tactic that is strategically deployed to obstruct legislative action. As one of the most distinctive procedural features of the U.S. Senate, filibusters are commonly associated with senators who engage in prolonged, and perhaps irrelevant, floor debate to prevent the adoption of a measure or nomination that is favored by the majority. In fact, today’s filibusters almost never involve actual continuous floor speeches — today’s filibusters are largely silent and often occur before a proposal even reaches the Senate floor.

The possibility of filibustering exists because the Senate, unlike the House of Representatives, lacks any procedure through which a simple majority could force a debatable measure to a vote. Senate Rule XXII — the “Cloture Rule” — provides the only way to overcome a filibuster by ending debate and forcing a vote; however, it requires a supermajority vote to do so. Under this rule, three-fifths of the entire Senate (currently, 60 senators) must vote to invoke cloture. When a cloture motion is successfully adopted, further consideration of the matter at issue is limited to 30 hours.

There is one important exception to this 60-vote requirement: In order to invoke cloture on any measure to amend the Senate Rules, two-thirds of those senators “present and voting” must vote affirmatively. Assuming no vacancies and full attendance, 67 votes are thus required to end a filibuster on any proposal to reform the Cloture Rule itself.

Although obviously related, a filibuster and a cloture motion are two distinct procedural features. Accordingly,

there can be a filibuster without a cloture vote and vice versa. Typically, even the viable threat of a filibuster is enough to place a hold on legislation; this may effectively kill the measure or result in a number of responses other than a cloture vote. Likewise, cloture motions may be filed to preempt anticipated filibusters rather than to overcome filibusters that are already in progress.

### Holds

The practice of placing “holds” is an informal custom by which a single senator can indefinitely and anonymously stop legislation or nominations from reaching the Senate floor. To place a hold, a senator sends a letter to her party’s leadership indicating her desire to halt progress on a specified bill or nominee. These requests are seldom made public, so there is no way for the public to monitor how many requests are made, who is responsible for the delay, or the reasons behind the hold.

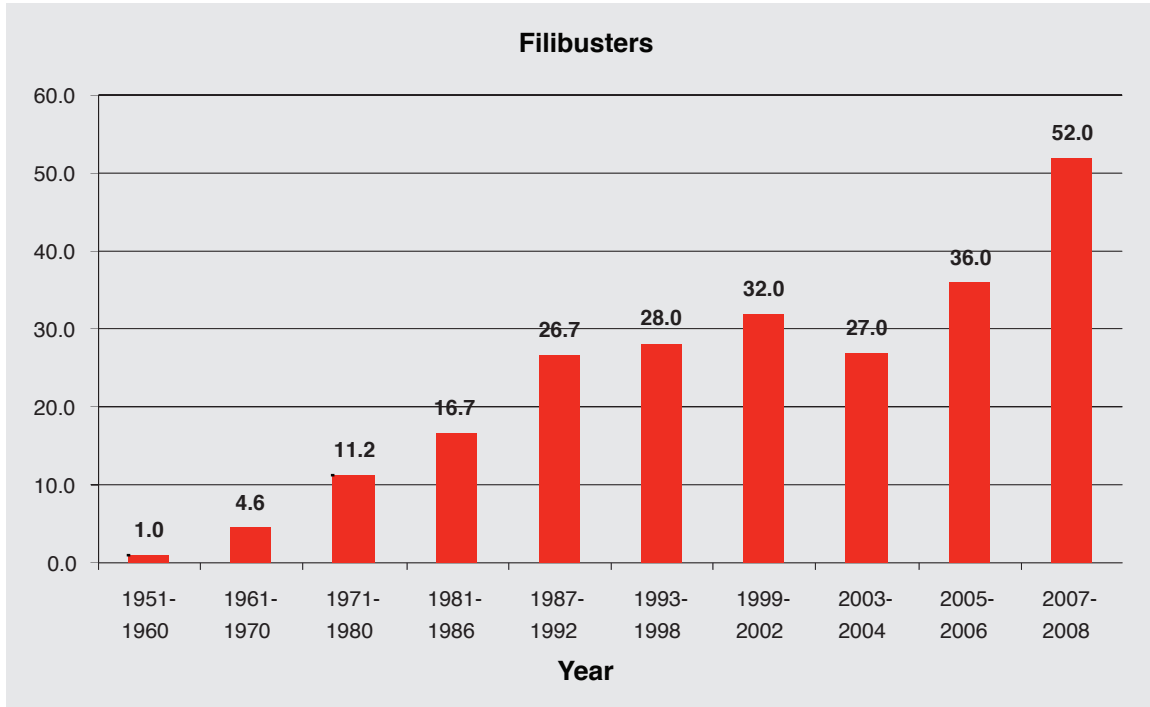
A request for an indefinite hold contains two implicit threats: first, it signals a senator’s intent to object to a unanimous consent agreement; and then, to filibuster the targeted legislation or nomination. Given the scarcity of floor time in the contemporary Senate, such threats are commanding — Senate leaders, fearing retaliatory obstruction and the possibility of gridlock, are generally unwilling to disregard them. As any senator can place a hold, this practice gives individual senators considerable power. Often, senators use this tactic to gain bargaining leverage over other senators or over members of the Executive branch.

And, the consequences of the relentless obstruction that plagues today’s Senate are serious indeed. As explained below, the modern filibuster — constant and unprincipled — has grave effects upon our democracy. As it currently operates, the filibuster devalues the Senate as an institution, disrupts Congress’ proper operation, threatens to derail governmental checks and balances, and blunts legislative accountability. These problems are exacerbated by the filibuster’s close cousin, the indefensible practice of “holds” that allows a single senator to stop legislation or nominations from reaching the Senate floor. Indeed, holds placed for no reason other than to obstruct are, for all practical purposes, indistinguishable from a threat to filibuster.

Even more alarming, the frequency of filibusters continues to rise. Throughout the 1990s, there were, on average, about 29 identifiable filibusters per congressional session.<sup>2</sup> This number is ever increasing: There were 32 filibusters in the 107<sup>th</sup> Congress, 27 in the 108<sup>th</sup>, and 36 in the 109<sup>th</sup>. In the 110<sup>th</sup> Congress, there were approximately



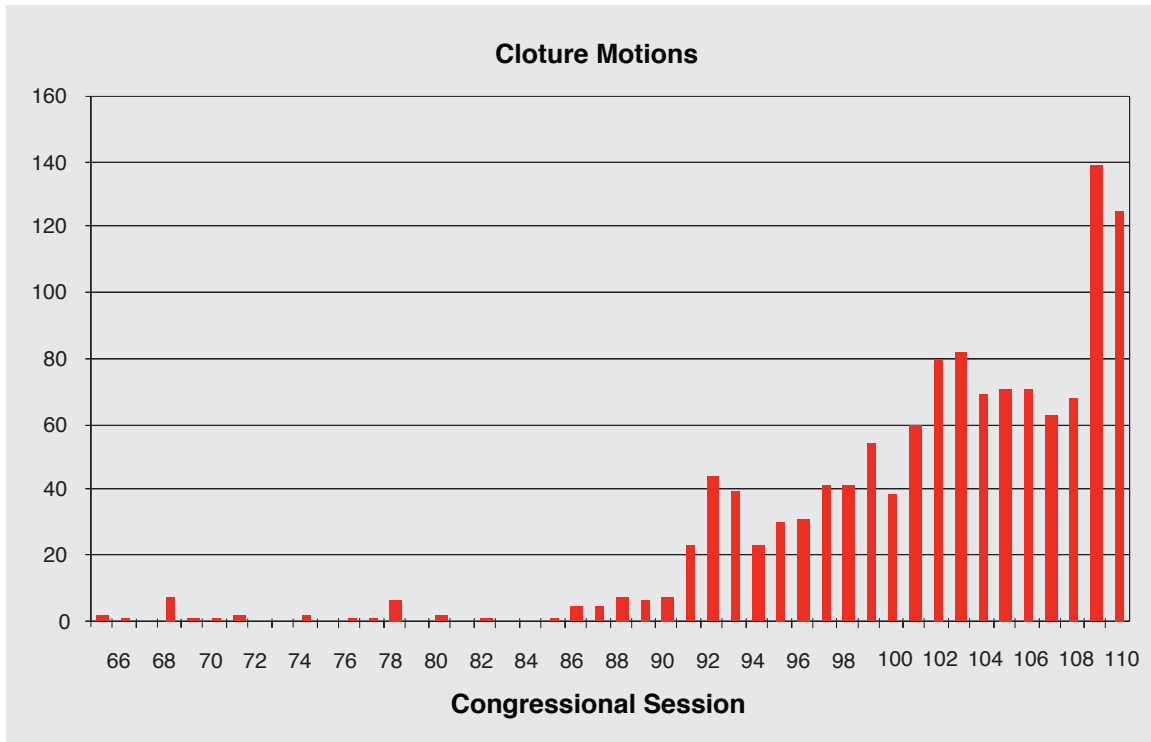
52 filibusters – a 44 percent spike from the previous session. While filibusters used to be reserved for controversial issues, almost all business in today’s Senate is affected by the filibuster, routinely thwarting noncontroversial actions like appropriations bills and low-level executive appointments.



Unsurprisingly, recent years have also seen an unprecedented number of cloture motions filed – the only way under the Senate’s current rules to end obstruction and force an up-or-down vote. Under Rule XXII, three-fifths of the entire Senate (currently, 60 senators) must vote to invoke cloture. And, as obstructionists can filibuster the same bill at several points during the legislative process, several cloture motions may be necessary to reach a substantive vote on any particular measure. Amazingly, the 125 cloture motions that have been filed this Congress (as of November 23<sup>rd</sup>) exceed the total number of cloture motions filed from 1919, when the Cloture Rule was first enacted, until 1975.<sup>3</sup> This number is also more than double the average number of cloture motions filed per session from 1975 through 2005.

Each cloture motion consumes hours and hours of the Senate’s valuable time. In addition to the time it takes to properly file each cloture motion and conduct a vote, the Senate Rules allow obstructionists to insist upon 30 hours of further consideration after a successful vote for cloture. In total, even for a measure that most senators support, a determined minority can usually delay passage for as much as two weeks.

Many fear that the Senate is perilously close to total breakdown.<sup>4</sup>



This extreme dysfunction is unlikely to correct itself without exposure, awareness and remedial action. If our democratic processes are to be used as the Framers intended – to address and resolve the pressing problems of our nation on behalf of our country’s citizens – we must find solutions to repair this broken part of our system immediately.

Thankfully, numerous senators have begun to challenge the Senate’s arcane procedural rules and traditions. Several – like veteran Senator Tom Harkin (D-Iowa) and freshman Senator Tom Udall (D-NM) – have made rules reform their first priority for the next Senate, which starts in January. And, under the leadership of Chairman Senator Charles Schumer (D-NY), the Senate’s Committee on Rules and Administration has held a series of hearings this year examining the filibuster’s history, its current impact on the functioning of the Senate, and proposals for reform. These hearings have created a robust legislative record supporting the need for reform.

In addition to testifying in person at one of these hearings, the Brennan Center submitted four sets of written testimony. These are reproduced in edited versions in the pages that follow. We hope that this report will illuminate the extent of dysfunction in today’s Senate and the ways our democracy is suffering as a result. We also hope to alleviate any remaining constitutional doubts about the Senate’s ability to reform itself. As explained below, it is clear that a majority of the Senate can, and should, override obstruction and amend its rules at the start of the next congressional session.

## II. HOW FILIBUSTER ABUSE HARMS OUR GOVERNMENTAL STRUCTURE

### Filibuster Abuse Devalues the Senate

The Framers intended the Senate to be a deliberative institution, different from the House of Representatives in both function and character.<sup>5</sup> With a smaller assembly of older members with longer, staggered terms of service, the Senate was intended to balance the “tendency to err from fickleness and passion” expected from the House.<sup>6</sup> Proponents of the filibuster paint it too as a feature of the Senate’s original design, one that facilitates deliberation and compromise by extending the period for debate. A right to unlimited debate was not, however, envisioned by the Framers.<sup>7</sup> Moreover, and perhaps more importantly, the modern filibuster seldom fosters deliberation and compromise.

In the contemporary Senate, the filibuster is relentlessly wielded as a tool of obstruction, driven by partisan or strategic motives.<sup>8</sup> In the fall of 2009, for instance, a filibuster blocked a bill to extend unemployment benefits for weeks, even after the House approved the measure with substantial bipartisan support. The hold-up had little to do with the merits of the benefits – senators were apparently squabbling about unrelated issues.<sup>9</sup> Incredibly, when the bill finally reached the Senate floor, it passed unanimously.<sup>10</sup> Similarly, in February of this year, Senator Richard Shelby (R-AL) announced that he would place a blanket hold on every pending executive nomination

#### The Stealth Filibuster

Today’s stealth filibuster was created by a significant change in Senate procedure that occurred in the 1960s. As a response to repeated civil rights filibusters, then-Senate Majority Leader Mike Mansfield (D-MT) developed a two-track system for handling floor debate. Unlike filibusters of the past, which delayed all Senate business during the course of any prolonged debate, the new system limited the time to debate filibustered legislation and allowed new business to continue on a separate track. This eliminated the type of all-night debate sessions famously depicted in *Mr. Smith Goes to Washington*. Over time, the filibuster evolved from this two-track system into the phantom affair it is today.

A 1963 *Time* magazine article paints a colorful picture of the new system:

The traditional Senate filibuster was tedious, to be sure—relays of Senators, hour after hour, croaking hoarse-voiced recitations of the glories of Southern recipes or readings from reference books. But

the filibuster could also be dramatic, full of tension and conflict and suspense. By keeping the Senate in session around the clock, the majority tried to wear the filibustering minority down in an ordeal of exhaustion. Cots were set up in the Senate cloakroom, and bleary, rumped Senators stumbled from them to answer middle-of-the-night quorum calls.

But all that has changed. Gone is the ordeal, the struggle, the drama. All that is left is talk. Last week a filibuster was going on in the Senate, and it was the dullest show in town. Majority Leader Mike Mansfield took the life out of the filibuster by limiting it to gentlemanly hours: from noon to around 6 p.m. Even if Mansfield carries out his threat to lengthen the working day to twelve hours, the Southerners would still return fresh to each day’s round of talk.

*The Congress: The New-Style Filibuster*, TIME (Feb. 1, 1963), <http://www.time.com/time/magazine/article/0,9171,829749,00.html#ixzz0dTrT2aD0>.

(70 in total), thereby holding the Senate ransom to obtain earmarked funding for his home state of Alabama. The Senator made no pretences that his holds were based on objections to any nominee; instead, he was seeking a strategic bargaining position.<sup>11</sup> Indeed, a review of voting records shows that some senators simply refuse to agree to allow an up-or-down vote as a matter of course.<sup>12</sup> Presumably, they believe there is political advantage in continuously blocking all legislative progress.

Not only does the modern filibuster routinely fail to advance substantive deliberation, it often *discourages* public debate. Today's stealth filibuster does not require debate from, or even the presence of, the filibustering senator.<sup>13</sup> Instead, the mere threat of a filibuster prevents votes from reaching the floor.<sup>14</sup> If discussion occurs at all, it is blocked from public view; deals are struck in backrooms behind closed doors, with no official record of the proceedings. As one legal academic bluntly put it, “[t]his cannot be called a procedure that enhances the quality of deliberation or protects the free speech of individual senators.”<sup>15</sup>

Often, to overcome paralysis, the majority must appease individual senators whose votes are needed to reach a supermajority. This provides substantial leverage to these pivotal few and concessions are regularly made that do not promote the collective good. For instance, before agreeing to supply the 60<sup>th</sup> vote for the recent health care reform bill, one senator notoriously negotiated special federal funding for the cost of Medicare expansion in his home state. As this example and others show, a legislative process held hostage by the filibuster repeatedly yields incoherent and compromised results.

Finally, the modern filibuster has spurred an obsession with procedure that threatens to take precedence over substantive lawmaking. For example, as witnessed in the recent health care reform debate, legislators increasingly force bills through alternative procedural routes – like reconciliation – in order to beat the filibuster.<sup>16</sup> The majority party also frequently employs a procedural tactic called “filling the amendment tree.” Because Senate Rules restrict the number of amendments pending at any given time, the majority leader can shut out all other, potentially germane, amendments by offering one amendment after another, *i.e.*, occupying all available branches of the tree.<sup>17</sup> In these ways and others, time that should be spent on policy deliberation is wasted on an endless game of procedural chess, in which success is measured not by the passing of effective legislation, but by the advancement of individual or party goals.

### The 60-Vote Senate

Now, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary for all legislative action. Historically, policy-makers assumed that 51 votes would be enough to pass even the most contentious legislation. For instance, in a December 8, 1964 memo concerning the Medicare bill, Mike Manatos wrote to Lyndon Johnson's campaign director, “...if all our supporters are present and voting, we would win by a vote of 55 to 45.” Franklin Roosevelt's notorious attempt to pack the Supreme Court provides another example. Then-U.S. Attorney General Homer Cummings voiced publically that the administration's position was “promising” when he learned of 53 supportive votes. By contrast, a recent *New York Times* article reported, “To get the 60 votes needed to pass their bill, Democrats scrapped the idea of a government-run public insurance plan.”

Memorandum by Mike Manatos to Larry O'Brien (Dec. 8, 1964), available at <http://voices.washingtonpost.com/ezra-klein/obriencropped.jpg>; JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 300 (2010); Robert Pear, *Negotiating to 60 Votes, Compromise by Compromise*, N.Y. TIMES, Dec. 19, 2009, <http://www.nytimes.com/2009/12/20/health/policy/20care.html>.

Relentless obstruction devalues the Senate, leaving it far from the distinguished institution envisioned by our Framers. Even worse, however, is that the Senate's dysfunction is uncontainable; it taints Congress as a whole.

## Filibuster Abuse Disrupts Congress

Under Article I, Section 7 of the Constitution, a bill must pass the Senate and the House before it may be enacted into law.<sup>18</sup> As discussed above, the Senate's current operation, requiring a *de facto* supermajority vote for ordinary legislative action, offends constitutional intent that majority voting rules be used by both houses. Even more alarming, the gridlock caused by this supermajoritarian requirement alters the balance of power between the Senate and the House, disrupting the Constitution's bicameral design.

The power of this minority veto is acutely felt by members of the House. Wisconsin Congressman David Obey, announcing his retirement after over 40 years of public service, lamented: "The wear and tear is beginning to take its toll. . . . There has to be more to life than explaining the ridiculous, accountability-destroying rules of the Senate to confused, angry, and frustrated constituents."

Statement by David R. Obey, Representative, Wisconsin's 7<sup>th</sup> Congressional District (May 5, 2010), [http://www.obey.house.gov/index.php?option=com\\_content&task=view&id=924](http://www.obey.house.gov/index.php?option=com_content&task=view&id=924).

When a minority of the Senate uses the filibuster to block that chamber's proceedings, it sabotages the overall legislative process. In this way, and as the Senate currently operates, 41 senators enjoy a disproportionately large, negative power over the lawmaking process. As one legal academic put it:

A minority veto of this sort enables a polarized, unified minority party determined to oppose the main thrust of the majority's agenda to bring government to a halt. The minority cannot itself govern, of course. But neither can the majority in the presence of this kind of veto and polarized parties.<sup>19</sup>

Unsurprisingly, whereas bills used to be blocked by both chambers in roughly equal number, today most legislation dies in the Senate.<sup>20</sup> This continuous threat of death by filibuster provides the Senate with a substantial bargaining advantage vis-à-vis the House, particularly during conference negotiations.<sup>21</sup>

In addition, there is little doubt that the modern filibuster in fact prevents both chambers from fulfilling Congress' Article I duties. The self-perpetuating pattern of an increasing number of filibusters and growing workload makes it virtually impossible for the Senate to accomplish all of its duties;<sup>22</sup> as a result, key legislative items are blocked from the Senate floor because there is not enough time to go around. Appropriations bills are a prime example. By constitutional design, these bills originate in the House before moving to the Senate for amendment. Although, year after year, the House submits such measures to the Senate in a timely fashion, Congress consistently fails to enact appropriations bills by deadline.<sup>23</sup> The consequences are substantial – agencies are left adrift and ineffectual, wondering if they will ever receive sufficient funding for their work.

The filibuster's impact thus reaches far beyond the walls of the Senate. Congressional dysfunction, in turn, has even graver implications for our democracy writ large.

## Filibuster Abuse Threatens to Derail Our System of Government

Our Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity”<sup>24</sup> – a system integral to the proper functioning of our government. “The existence of checks and balances between competing branches, each with an incentive to monitor and prevent the other’s misbehavior,” ensures intragovernmental accountability.<sup>25</sup> This structure “allows government officials not just to report each other’s bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers.”<sup>26</sup> Our country’s Framers recognized this arrangement as a necessary supplement to the electoral accountability provided by democratic elections.<sup>27</sup> The modern filibuster, however, threatens to derail this careful balance.

As James Madison famously argued in Number 51 of the Federalist Papers:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

To start, the modern filibuster impacts the relationship between the legislative and executive branches in a number of ways. First, Congressional stalemate is likely to push the President to seek policy change through administrative action.<sup>28</sup> The result is a troubling expansion of executive power that is likely to remain unchecked. Indeed, as then-Professor Elena Kagan has chronicled, this is precisely what happened during Bill Clinton’s presidency.<sup>29</sup> President Clinton responded to legislative inaction by issuing numerous directives to administrative agencies – ultimately, with little resistance from the deeply-divided Congress.

[President Clinton’s] political calculus depended on a judgment, confirmed in practice, that Congress would fail to override presidential directives. . . . [I]n general, a Republican Congress proved feckless in rebuffing Clinton’s novel use of directive authority – just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan’s use of a newly strengthened regulatory review process.<sup>31</sup>

Second, the modern filibuster may prevent Congress from properly monitoring the executive branch for another reason. When a substantially large, cohesive group of senators – such as all members of the minority party – removes itself from the legislative process by continuously opposing initiatives and never affirmatively lawmaking, the majority party is left with full oversight responsibilities.<sup>31</sup> When that same majority party controls the Senate and the Presidency, Congress is unlikely to aggressively monitor executive actions. Now, the minority party has only a singular, blunt tool – the filibuster – that incentivizes obstruction, not action. Democracy would be better served if the minority were instead empowered by more tailored methods to monitor executive power.

Third, when relentless minority obstruction prevents the President from fulfilling his responsibilities under the Appointments Clause, the filibuster impinges upon the President’s constitutional duty to “take Care that the Laws

be faithfully executed.”<sup>32</sup> Anticipating that “the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body,”<sup>33</sup> the Framers placed primary responsibility to make appointments with the President. Accordingly, the President “shall nominate” and “shall appoint” high-ranking executive officers, while the Senate provides “Advice and Consent.”<sup>34</sup> Although requiring the Senate’s approval provides an essential check on Presidential power, a *minority* of senators has no constitutional right to endlessly delay or actually veto the President’s picks. In fact, during the Constitutional Convention, James Madison adamantly rejected any arrangement that could permit a nationally popular minority to control federal appointments.<sup>35</sup>

Moreover, there is evidence that the modern filibuster is actually preventing the President from executing his duties. On March 27<sup>th</sup> of this year, after waiting an average of 214 days per nomination, President Barack Obama resorted to temporary recess appointment of 15 individuals nominated to serve in key administrative agencies.<sup>36</sup> He explained:

Most of the men and women whose appointments I am announcing today were approved by Senate committees months ago, yet still await a vote of the Senate. At a time of economic emergency, two top appointees to the Department of Treasury have been held up for nearly six months. I simply cannot allow partisan politics to stand in the way of the basic functioning of government.

This trend has not improved. As of November 19, 2010, there were 151 non-judicial, civilian nominations pending before the Senate, meaning that 151 executive posts were vacant.<sup>37</sup>

Finally, the modern filibuster also impedes Congress’ ability to check the courts’ power of judicial review. As envisioned by the Constitution, Congress can respond to judicial decisions in a variety of ways – by fixing unconstitutional provisions of otherwise valid statutory schemes, by holding evidentiary hearings to create a factual record in support of legislation, by clarifying improperly vague laws, and so on. A Congress paralyzed by the filibuster, however, has little ability to counteract or refine judicial decisionmaking.

There is thus no question that the modern filibuster disrupts the balance of powers between the legislative, executive and judicial branches. Upsetting our Constitution’s structural safeguards leaves our democracy in a vulnerable state. Especially now, during this era of war, economic crises, and social unrest, we cannot afford to allow the Senate’s procedural dysfunctions to derail our entire system of government.

### Empowering the Minority Party

Many scholars have suggested more productive ways to empower the minority party. For instance, NYU Professor of Law Richard Pildes has explained:

[I]f we want to empower congressional checks on executive power that are more likely to be effective during unified government, we can consider measures that would give the minority party, which has the appropriate incentives, greater tools to oversee the executive branch. Some other democracies do so. As I and others have described, we might consider giving the minority control of a certain oversight committee, such as an auditing committee; enabling the minority to call hearings under certain circumstances; or otherwise increasing the opposition party’s ability to get information from the executive branch. These measures are not minority-veto rights, but ways of enabling more effective oversight.

Richard Pildes, *Ungovernable America?: The Causes and Consequences of Polarized Democracy* (presented at Thomas M. Jorde lecture, April 14, 2010), available at [http://www.law.nyu.edu/ecm\\_dlv3/groups/public/@nyu\\_law\\_website\\_\\_news/documents/documents/ecm\\_pro\\_065536.pdf](http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__news/documents/documents/ecm_pro_065536.pdf).

## **Filibuster Abuse Blunts Legislative Accountability**

Finally, our Constitution is ordained and established by “We the People” and our government is “a government of the people.”<sup>38</sup> For our democracy to properly function, the American people must be able to monitor elected officials and hold them responsible for their decisions. We do this by voting and through other forms of political participation – for instance, by speaking out in favor or in protest of government action, by lobbying elected officials, and by asking the courts to check unlawful governmental activity when it harms us. But, to properly exercise these rights, voters must be able to weigh the choices made by their legislators.

The Senate’s current system, marked by constant filibustering, seriously undermines legislative accountability. To start, filibusters blur who is responsible for the Senate’s failure to address problems. Voters are left to wonder: Should we fault the majority for failing to override the filibuster or should we hold the minority responsible for obstructing the majority’s will? Who is truly to blame?

Similarly, a successful filibuster prevents senators from engaging in genuine decision-making. Rather than being forced to take a stand on a particular policy, senators cast a procedural vote concerning whether to invoke cloture and force an up-or-down vote. When cloture fails and a substantive vote is never taken, constituents are left to guess how their representatives would have voted on the underlying policy matter, thereby furthering the information deficits that already plague the electorate.<sup>39</sup> Moreover, as we saw in the recent debate over health care reform, a relentless focus on procedure can overshadow more important discussion about substance.

Even worse, today’s filibusters are silent, private affairs. No longer do filibustering senators take the floor and speak until they are physically unable to filibuster any longer. Accordingly, in any given situation, it can be very difficult – if not impossible – to discern who is behind the obstruction. This routine lack of transparency diffuses legislative accountability even further.

To properly exercise our right to choose, voters must be able to weigh the choices made by legislators. A dysfunctional system marked by gridlock, paralysis and minority vetoes makes genuine choice impossible, rendering a serious blow to the core democratic value of accountability.



### III. WHY INDEFINITE AND ANONYMOUS HOLDS ARE WHOLLY INDEFENSIBLE

As senators have become increasingly frustrated by rampant obstructionism – and the resulting gridlock – the practice of holds has come under particular scrutiny. A “hold” refers to the informal custom by which a single senator can indefinitely and anonymously stop legislation or nominations from reaching the Senate floor. Temporary holds can play a minor, but useful role. They may be requested on a temporary basis for a specified reason – for instance, to accommodate a senator’s travel schedule or to give a senator additional time to review a long bill. In the contemporary Senate, however, holds are too often placed indefinitely and wielded as tools for obstruction – they are, for all practical purposes, indistinguishable from a threat to filibuster. Such holds do nothing to foster substantive debate; instead, they are used to prevent bills or nominees from ever being publicly discussed. Even worse, Senate “etiquette” allows these indefinite holds to be placed anonymously, thereby shielding obstructionists from being held accountable for their actions. There is little doubt that indefinite and anonymous holds dishonor democratic values.

#### **Indefinite and Anonymous Holds are a Rampant Form of Obstruction in Today’s Senate**

The ability of a single senator to privately request that a bill or a nomination be indefinitely held from proceeding to floor debate is a relatively new custom. Although there is some evidence that holds were recognized as early as 1958,<sup>40</sup> most agree that the practice was not routinized until the 1970s.<sup>41</sup> Holds developed in tandem with an increased reliance on complex unanimous consent agreements to structure the Senate’s day-to-day business. Such agreements provide one of the few ways that Senate leadership can preemptively limit debate, amendments and motions when a measure is considered on the Senate floor, and thus facilitate efficiency and predictability. In the modern era, as constraints upon the Senate’s floor time have become more and more severe,<sup>42</sup> unanimous consent agreements have become the primary method for managing the Senate’s calendar.

A request for an indefinite hold contains two implicit threats: first, it signals a senator’s intent to object to a consent agreement; and then, to filibuster the targeted legislation or nomination.<sup>43</sup> Given the scarcity of floor time in the contemporary Senate, such threats are commanding – Senate leaders, fearing retaliatory obstruction and the possibility of gridlock, are generally unwilling to disregard them.<sup>44</sup> As any senator can place a hold, this practice gives individual senators considerable power. Often, senators use this tactic to gain bargaining leverage over other senators or over members of the Executive branch.

To place a hold, a senator sends a letter to her party’s leadership indicating her desire to halt progress on a specified bill or nominee.<sup>45</sup> These requests are seldom made public, so there is no way for the public to monitor how many requests are made, who is responsible for the delay, or the reasons behind the hold. Reports leaked to the press and the staggering numbers of currently-pending nominations make clear, however, that holds are rampant in today’s Senate. Senator Majority Leader Harry Reid (D-NV), for instance, has repeat-

edly voiced his frustration with holds; according to him, there are frequently “scores and scores” of them.<sup>46</sup> Twice this year, two different senators have been exposed for placing dozens of holds at once – in February, Senator Shelby placed a blanket hold on at least 70 pending nominees;<sup>47</sup> in March, Senator Jim Bunning (R-KY) submitted holds on all pending executive branch nominees.<sup>48</sup> Moreover, *The Hill* recently reported interviews with two senators who, when asked, were not even able to recall all of their holds (each corrected his initial claim after subsequently confirming with his staff).<sup>52</sup>

These anecdotes conform to the available empirical evidence. Currently, 151 executive nominees are languishing before committees.<sup>50</sup> The Senate’s Executive Calendar shows 57 judicial or executive branch nominees who have been approved by their relevant committee and are simply waiting for a final floor vote.<sup>51</sup> According to the U.S. Courts website, 50 of the pending judicial nominations constitute “emergencies” due to the number of days the position has been vacant and the number of active cases in that jurisdiction.<sup>52</sup>

### **Indefinite and Anonymous Holds Harm Our Democratic Process**

Holds have myriad negative effects on our democratic process. Perhaps most obviously, holds disrupt the nomination process directed by the Constitution. Under the Appointments Clause, the President “shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint”<sup>53</sup> certain public officers, including high-level executive positions and federal judges. There is little doubt that this process demands action from both the President and the Senate – that much is evident from the plain text of the Clause and confirmed by reports from the Constitutional Convention<sup>54</sup> and by sections of the Federalist Papers.<sup>55</sup> As the Supreme Court has explained, “By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.”<sup>56</sup>

When a nomination is put on hold indefinitely, the Senate may never fulfill its duty to either confirm or reject that appointment. For instance, after waiting in confirmation limbo for approximately 15 months, the president’s appointment to the Federal Election Commission (FEC), John J. Sullivan, finally withdrew his candidacy. Despite receiving unanimous bipartisan approval at a Senate Rules Committee hearing, Senators John McCain (R-AZ) and Russ Feingold (D-WI) placed a hold on the nomination in an attempt to manipulate President Obama’s other FEC nominations.<sup>57</sup> Instead of making a final decision on Mr. Sullivan’s appointment, the Senate simply did not act at all. Not even a cloture vote was cast. Inaction in such circumstances is contrary to constitutional expectations; even worse, it blunts legislative accountability. When faced with outcomes of this sort, the public is left without knowledge of who deserves their praise or blame.

Indeed, indefinite holds regularly prevent the type of substantive deliberation that leads to compromise and collaboration. Rather than persuading colleagues about the merits of proposed legislation or the credentials of a certain nominee, a senator can just halt progress on a bill or appointment she finds objectionable. Senators also frequently use holds to gain leverage over unrelated matters, preferring hostage-taking to engaging in actual debate. Examples of this tactic abound.<sup>58</sup>

### Held Hostage by Holds

- In March 2009, Senator Robert Menendez (D-NJ) placed a hold on two crucial environmental nominees to protest a wholly unrelated issue – a widely-supported provision of the omnibus spending bill to ease rules on travel and imports to Cuba.
- When Senator Shelby placed a hold on over 70 nominees earlier this year, he did so to obtain earmarked funding for his home state. According to Senator Shelby, he staged the delays due to “unaddressed national security concerns” in Alabama.
- Senator Jim Bunning put a months-long hold on the appointment of Miriam Sapiro, nominated to be the deputy United States trade representative, over a Canadian law banning candy-flavored cigarettes. Senator Bunning lifted the hold only after Democrats agreed to confirm a member of the Republican party for a position on the Federal Maritime Commission.
- Martha Johnson spent nearly a year waiting to be confirmed as Administrator of the General Services Administration due to Senator Christopher “Kit” Bond’s (R-MO) hold, a tactic to receive approval for a federal office building in Kansas City.
- Senator Jim Webb (D-VA) placed holds on all pending military nominations until his demand for information on a closed military command in his home state was met.

When these hostage ploys are successful, individual senators benefit – sometimes at the expense of the greater good. Such a flawed process rarely yields anything but flawed results.

Finally, the practice of secret holds shields obstructionists from political accountability, repudiating a core democratic value. With little risk of external sanctions, there is little to constrain the use of holds and other dilatory devices. As one political scientist has pointed out, after examining the increasingly routine use of holds, “For legislation on which the political sanctions would otherwise be negative, this is a significant change in the calculus of obstruction.”<sup>59</sup> The result is what we have seen in recent years – a seemingly endless rise in holds and filibusters.

## IV. CHANGING THE SENATE'S RULES AT THE START OF THE NEXT CONGRESS

As several legal scholars and political scientists have detailed in full, the Senate has wrestled with its rules governing debate and cloture for over a century.<sup>60</sup> During this time, numerous senators have agreed that the Senate possesses inherent constitutional authority to override obstruction and determine its rules by majority vote, notwithstanding any contrary traditions or provisions within the Senate Rules themselves. Several Vice Presidents, sitting as Presidents of the Senate, have agreed. And, in 1975, the Senate formally adopted that view as well, setting an important precedent.

### Rules Reform in the Senate

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

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

“It is the opinion of the Chair that while the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the

Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress. Any provision of Senate Rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. It is also the opinion of the Chair that [Rule XXII] in practice has such an effect.”

Thus, Nixon continued, “the Senate has three options at the start of each new Congress: (1) proceed to conduct business under the standing rules, thereby adopting them for the new session; (2) vote down any motion to change the rules, also thereby adopting them for the new session; or (3) vote affirmatively to proceed with the adoption of new rules by a majority vote.” While the Senate decided to operate under the standing rules for the remainder of the 1957 congressional session, Nixon's interpretation of the Senate's rulemaking power has been repeatedly embraced by members of the Senate.

103 CONG. REC. 178-89 (1957).

Today, a group of senators led by Senator Tom Udall has made clear that they too recognize that a majority of the Senate must be able to effect rules change at the start of the 112<sup>th</sup> Congress. As a matter of constitutional law, their position is undoubtedly correct. The Senate has continual constitutional authority to “determine the Rules of its Proceedings.” Under the constitutional principle prohibiting statutes or rules that bind the exercise of lawmaking power by a future legislature (the so-called principle against legislative entrenchment), the Senate cannot trap future Senates under supermajority barriers to change. Entrenchment not only impermissibly detracts from the Senate's own power, it also blunts legislative accountability. Moreover, the notion that the Senate's overlapping term structure justifies entrenchment is fatally flawed. Even assuming that the Senate is a “continuing body” in some meaningful way, this alone cannot explain

why the Senate has the power to commit *itself* for perpetuity. Instead, such binding exceeds the authority granted to the Senate by the American people.

For these reasons, elaborated upon below, a simple majority of the Senate must be able to cut off obstruction and vote to revise the Senate Rules at the start of a new Congress – otherwise, the Rules themselves would be unconstitutional.

## The Senate has Inherent Rulemaking Power Under the Constitution

Article I, Section 5, Clause 2 of the Constitution authorizes each chamber of Congress to “determine the Rules of its Proceedings.”<sup>61</sup> The Rulemaking Clause was never discussed at the Constitutional Convention, nor was it the subject of any public debate surrounding the adoption of the Constitution – the provision apparently provoked no controversy.<sup>62</sup> But, lack of argument should not be taken to mean that this provision is insignificant. Instead, the power to set its procedure is an obviously vital aspect of Congress’ legislative authority.

The Rulemaking Clause is necessary for each house to perform its constitutional lawmaking duties. While the Constitution grants Congress “all legislative Powers” within Article I,<sup>63</sup> and specifies that all legislation must “pass”

As Justice Joseph Story put it in his seminal treatise on constitutional law:

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

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

both houses in order to become law,<sup>64</sup> it provides no guidance for legislative procedure. Without ordering mechanisms of some kind, it is difficult to imagine how Congress would be able to achieve a quorum, let alone determine which national problems require federal legislative attention or what solutions are most desirable.

The Supreme Court has recognized that Congress’ rulemaking authority is a key part of its legislative power. Accordingly, the executive and judicial branches cannot interfere with congressional rules on the grounds that “some other way would be better, more accurate, or even more just.”<sup>65</sup> Even the Supreme

Court lacks the power to question “the advantages or disadvantages, the wisdom or folly” of any particular rule.<sup>66</sup> Indeed, to cripple the Senate or House’s ability to set procedure would impinge upon their clear constitutional authority to do so, disrupting the careful separation of powers achieved by our Constitution’s design.

While Congress has broad discretion to set procedural rules, the House and Senate cannot pass rules that “ignore constitutional restraints or violate fundamental rights.”<sup>67</sup> One such restraint is that Congress’ rulemaking power is continuous, just like its other enumerated powers within Article I. As the Supreme Court has explained, “the power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be

exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”<sup>68</sup> So, the D.C. Circuit, recognizing the continuous nature of the rulemaking authority, has specifically held that a subsequent Congress may, by majority vote, disregard procedural restrictions meant to apply to future amendments of a particular statute.<sup>69</sup>

There is little doubt that the House and the Senate understand both the significance and the continuous nature of their rulemaking authority. The House, of course, has historically exercised its power to establish new rules at the start of each term, and formally recognizes its right to do so in the House Manual.<sup>70</sup> Senate Rule V, on the other hand, creates a default rule providing that the Rules carry over until the Senate chooses to change them. And, the Senate Rules have been subject only to relatively minor amendment over the years. In less formal ways, however, the Senate changes its procedure constantly – through unanimous consent agreements, for instance. And, both chambers occasionally enact statutes with procedural restrictions that allegedly apply to future Congresses.<sup>71</sup> These statutes typically contain disclaimers, however, explaining that these laws do not, in fact, reduce either house’s rulemaking power. Disclaimer or not, if a majority of a future House or future Senate disagrees with these procedural restrictions, they frequently simply ignore them.<sup>72</sup>

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

### The Controversy of Senate Rule V

Senate Rule V – stating that the Senate Rules “shall continue from one Congress to the next Congress unless they are changed as provided in these rules” – was added in 1959 as part of a compromise deal between senators seeking to rein in obstruction and those who wanted to retain the filibuster. Ultimately, Rule XXII was tightened to make it easier for the Senate to cut off debate, but Rule V was added to discourage future rules reform.

The debate over adding Rule V was spirited, with many senators claiming that it was unconstitutional. Senator Jacob Javits (R-NY), for one, vehemently criticized the proposed rule: “Are we going to follow the Constitution of the United States or are we going to follow a rule made by one Senate for all succeeding time, to bind all Senates? In other words, are we going to try to give ourselves an extra-constitutional power or are we going to obey the Constitution?”

Others argued that the Rule was harmless because it could have no legal significance. Senator Thomas Hennings (D-MO), for example, repeatedly assured his colleagues that Rule V was “without final force or effect.” Or, as Senator John Cooper (R-KY) put it, “I do not think [Rule V] would have any legal or constitutional effect, but certainly might have some psychological effect.”

86 CONG. REC. 124, 447-50 (1959).

## The Constitution Contains a Principle Against Legislative Entrenchment

If the Senate Rules could not be changed by a majority vote of future Senates, they would also violate another fundamental constitutional principle – that one legislature cannot bind future legislatures by insulating statutes or procedural rules from subsequent appeal.<sup>73</sup> This anti-entrenchment principle has deep roots in English parliamentary practice. In fact, in his famous commentaries on English law, William Blackstone put it unequivocally: “Acts of parliament derogatory from the power of subsequent parliaments bind not.”<sup>74</sup> At the time of our country’s founding, this principle was widely accepted as fundamental.

Similarly, the Supreme Court has long held that legislative entrenchment is unconstitutional. In 1810, Chief Justice John Marshall, recognizing that “one legislature cannot abridge the powers of a succeeding legislature,” asserted that “[t]he correctness of this principle, so far as respects general legislation, can never be controverted.”<sup>75</sup> Almost 200 years later, quoting Justice Marshall’s words, Justice Antonin Scalia noted that the Court’s cases “have uniformly endorsed this principle.”<sup>76</sup> Indeed, a survey of the relevant case law confirms that the Supreme Court has reaffirmed this “centuries-old concept”<sup>77</sup> time and time again.<sup>78</sup>

Speaking to the House of Representatives in 1790, James Madison addressed fears that a bill temporarily establishing the Nation’s capital in Philadelphia would later prevent the capital from moving to Washington D.C. He explained:

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

2 Annals of Cong. 1666 (1790).

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

Just as the members of Congress lack power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms. Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.<sup>80</sup>

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

our Constitution, such requirements at least represent the procedural preferences of the present majority.

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

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

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

### **Entrenchment of the Senate Rules Further Blunts Legislative Accountability**

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

Political accountability is a necessary part of our system of representative government by design. For our democracy to properly function, the American people must be able to monitor elected officials and hold them responsible for their decisions. Accordingly, the Court has repeatedly emphasized that democracy requires elected officials to be answerable to voters for their policy choices.<sup>81</sup> Indeed, in the Court's words, “freedom is most secure if the people themselves . . . hold their federal legislators to account for the conduct of their office.”<sup>82</sup>

### **Form Versus Substance**

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



On their face, by tying today's Senate to the procedural preferences of a Senate long past, the Senate Rules disrupt "the direct line of accountability" that is supposed to exist "between the National Legislature and the people who elect it."<sup>83</sup> The people, no matter how much they may dislike the current Senate Rules, are left without effective recourse. The officials responsible for the rules are, of course, no longer in office. The current representatives are in a disadvantaged position vis-à-vis the Senate past – their ability to respond to their constituent's current desires is greatly frustrated. Moreover, by insulating the 60-threshold Cloture Rule from amendment, the Senate Rules perpetuate the accountability problems now posed by the filibuster itself.

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

### **The Senate's Overlapping Term Structure Cannot Justify Unconstitutional Entrenchment**

There is, primarily, one defense offered to justify binding future Senates to the Senate Rules – the notion that the Senate's overlapping term structure justifies entrenchment because there are no past or future Senates, just one continuous Senate. As Professor Aaron-Andrew Bruhl forcefully argues in his recent law review article on the topic, however, the Senate's structure cannot defend entrenchment of the Senate Rules.<sup>84</sup>

To start, there is no reason to believe that the Framers intended for the structural differences between the Senate and the House to reduce the scope of the Senate's rulemaking power. The Senate's overlapping terms were principally meant to stabilize the institution by ensuring greater predictability of its membership. The Framers hoped that this stability would inspire confidence in the U.S. government, thereby strengthening our international image and curbing domestic corruption.<sup>85</sup> But, there is *no* evidence that the Framers also wished that the Senate's rules be insulated from change.<sup>86</sup> Instead, the Framers expressly granted each chamber the same continuous power to establish their procedural rules.

#### **What If...**

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

Moreover, there are serious practical inconsistencies with the continuing body defense.<sup>87</sup> In many ways, the Senate does not act like a continuing body at all – instead, it treats the start and finish of the two-year congressional term as a significant event. The most notable, perhaps, is that pending bills – even those that have been passed by the House and approved by

Senate committees – die at the end of each Congress. Similarly, pending nominations cannot survive the end of a term, but must be resubmitted by the President to the next Congress.<sup>88</sup> And, the Senate's power to confine non-

members for contempt is typically limited to a legislative session. Even at its farthest reach of authority, the Senate can never confine someone for longer than a congressional term.<sup>89</sup>

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

[D]oes it extend to making [self-binding] commitments? I would say no. The [Senate's] principals ... *have* a way of making political commitments. The principals do this through making and amending a constitution. The Senate, through its commitment to a set of rules that are not laid down in the Constitution, has arrogated that constitutive power to itself.<sup>90</sup>

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

## V. CONCLUSION

This December, the entire Republican Senate caucus signed a letter pledging to filibuster all legislative measures – thereby preventing them from reaching the Senate’s floor – until the upper chamber considered about-to-expire tax cuts and pending budget legislation. And yet, there was no real need for this. The Senate already agreed with the Administration that they must reach agreement on these top-priority issues by the end of the term. In other words, there was never any serious doubt that these questions would be resolved. Nothing more than an aggressive act of procedural brinkmanship, the letter underscores just how dysfunctional the Senate has become. By sending that letter, members of the minority party boldly stated that they will not permit debate on the myriad other important issues pending before the Senate – including repealing the widely unpopular “Don’t Ask, Don’t Tell” legislation that silences gay men and woman in our armed forces and approving an important new arms control treaty with Russia. In other words, rampant, unprincipled obstruction once again prevented the “world’s greatest deliberative body” from deliberating – or, for that matter, from doing very much at all.

Clearly, the time for reform is upon us.

At the start of the next Congress in January 2011, the Senate must make procedural reform its very first priority. We the People deserve a Senate with fair and equitable rules meant to facilitate debate, deliberation, and, eventually, substantive decision-making. At most, there should only be one opportunity – one bite at the apple, so to speak – to filibuster any given measure or nomination. And, as noted previously, the rules should allow the minority party ways to meaningfully participate, including the right to offer germane amendments. Furthermore, it should be difficult for obstructionists to delay action preferred by the majority – in other words, the Rules should place a burden upon filibustering senators. This could be done by amending the Senate Rules to require a certain number of votes to sustain a filibuster rather than requiring a supermajority vote to break a filibuster. In a similar vein, filibustering senators could be forced to stay on the Senate floor and actually debate, like filibusters of the past. Changes like these would go a long way towards reducing the frequency of filibusters – bringing us back to a Senate where the filibuster was an extraordinary tool reserved for matters of extraordinary importance.

Ultimately, once all senators have had a reasonable opportunity to express their views, every measure or nomination should be brought to a yes-or-no vote in a timely manner. This is, after all, what our Framers intended – a Senate where elected representatives debate important issues and then make decisions. For the sake of our democracy, the Senate’s rules must be reformed to bring us closer to that ideal.

## ENDNOTES

- <sup>1</sup> THE FEDERALIST NO. 22, at 120 (Alexander Hamilton) (Barnes & Noble ed., 2006).
- <sup>2</sup> All filibuster statistics are taken from BARBARA SINCLAIR, *The New World of U.S. Senators, in CONGRESS RECONSIDERED* 7 (9<sup>th</sup> ed. 2009).
- <sup>3</sup> All cloture motion statistics are taken from the website of the United States Senate, Senate Action on Cloture Motions, [http://senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited Nov. 23, 2010).
- <sup>4</sup> See SINCLAIR, *supra* note 2, at 20; THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH* 212-216 (2006); Paul Krugman, *A Dangerous Dysfunction*, N.Y. TIMES, Dec. 21, 2009, at A31.
- <sup>5</sup> In the Federalist Papers, for example, James Madison writes that the more stringent qualifications of a senator “is explained by the nature of the senatorial trust; which, require[es] greater extent of information and stability of character.” THE FEDERALIST NO. 62, at 342 (James Madison) (Barnes & Noble Ed., 2006).
- <sup>6</sup> G. J. GRAHM & S. G. GRAHM, *FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT* 116 (1984).
- <sup>7</sup> See Josh Chafetz & Michael Gerhardt, Debate: Is the Filibuster Constitutional?, 158 U. PA. L. REV. PENNUMBRA 245, 250-51 (2010) (Chafetz Opening Statement); see also SARAH BINDER & STEVEN SMITH, *POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE* 30-33 (1997).
- <sup>8</sup> See BINDER & SMITH, *supra* note 7, at 90-92; Gerard Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 1, 25 (forthcoming 2011), available at <http://ssrn.com/abstract=1564747>; GREGORY WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 13 (2006).
- <sup>9</sup> See Jessica Brady & Emily Pierce, *GOP Run Over in Game of Chicken*, ROLL CALL, Nov. 5, 2009, [http://www.rollcall.com/issues/55\\_53/news/40279-1.html](http://www.rollcall.com/issues/55_53/news/40279-1.html) (“[A] 29-day impasse [] finally broke this week when Reid filed motions to end the Republicans’ attempted filibuster and dared them to vote against the politically popular measure. No Republicans opposed. . . .”); Mike Lillis, *Expansion of Unemployment Insurance Stalled by ACORN, Immigration Amendments*, WASH. INDEPENDENT, Oct. 20, 2009, <http://washingtonindependent.com/64513/expanded-unemployment-benefits-stalled-by-gop-acorn-immigration-amendments> (“The stalling of legislation to expand unemployment insurance has little to do with the benefit itself.”).
- <sup>10</sup> U.S. Senate, Roll Call Votes 111<sup>th</sup> Congress - 1<sup>st</sup> Session, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00334](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00334) (last visited May 14, 2010) (Vote summary on passage of the Bill, H.R. 3548 as Amended).
- <sup>11</sup> According to Senator Shelby, he staged the delays due to “unaddressed national security concerns.” Scott Wilson & Shailagh Murray, *Sen. Richard Shelby of Alabama Holding Up Obama Nominees for Home-state Pork*, WASH. POST, Feb. 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020502098.html>.
- <sup>12</sup> Senator Jim DeMint, for instance, has voted against 93% of the cloture motions filed in this congressional session; Senator Jim Bunning has voted against 91.3%. Filibusted, The Whole List, <http://filibusted.us/senators> (last visited Dec. 3, 2010). Expressing this mindset, one top senator recently declared that “[t]here will

be no cooperation [with the majority party] for the rest of the year.” Editorial, *After Health Reform, Is Anyone Willing to Compromise?*, WASH. POST, Mar. 24, 2010.

<sup>13</sup> See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 200-09 (1997).

<sup>14</sup> See WAWRO & SCHICKLER, *supra* note 8, at 259-260; Fisk & Chemerinsky, *supra* note 13, at 203; Magliocca, *supra* note 8, at 24.

<sup>15</sup> See Magliocca, *supra* note 8, at 24.

<sup>16</sup> Thomas Mann, Norman Ornstein, Raffaella Wakeman & Fogelson-Lubliner, Op-Ed, *Reconciling With the Past*, N.Y. TIMES, Mar. 7, 2010, at WK12; see also BINDER & SMITH, *supra* note 7, 192-194.

<sup>17</sup> See *Examining the History of the Senate Filibuster: 1789-2008*, Hearing before the Senate Comm. on Rules & Admin. 111<sup>th</sup> Cong. 3 (2010) (statement of Senator Pat Roberts); CONG. RESEARCH SERVICE, SENATE AMENDMENT PROCESS: GENERAL CONDITIONS AND PRINCIPLES 2 (2001).

<sup>18</sup> U.S. CONST. art. I, § 7. As the Supreme Court has explained, “[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.” *INS v. Chadha*, 462 U.S. 919, 951 (1982).

<sup>19</sup> Richard Pildes, *Ungovernable America?: The Causes and Consequences of Polarized Democracy* (presented at Thomas M. Jorde lecture, April 14, 2010), available at [http://www.law.nyu.edu/ecm\\_dlv3/groups/public/@nyu\\_law\\_website\\_\\_news/documents/documents/ecm\\_pro\\_065536.pdf](http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__news/documents/documents/ecm_pro_065536.pdf).

<sup>20</sup> SINCLAIR, *supra* note 2, at 18.

<sup>21</sup> See Josh Schatz, House Stymied by Senate Rules, CONG. Q., April 19, 2010, at 960; see also BRUCE OPPENHEIMER, *The Process Hurdles: Energy Legislation from the OPEC Embargo to 2008*, in CONGRESS RECONSIDERED 300-03 (9<sup>th</sup> ed. 2009) (describing House caving to Senate due to filibuster threat).

<sup>22</sup> See BINDER & SMITH, *supra* note 7, at 14 (Table 1-3).

<sup>23</sup> THOMAS MANN & NORMAN ORNSTEIN, *Is Congress Still the Broken Branch?*, in CONGRESS RECONSIDERED Table 3-3 (9<sup>th</sup> ed. 2009).

<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

<sup>25</sup> Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. R. 2311, 2343 (2006) (citing Thomas Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 718 (1993) and W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 16 (1965)).

<sup>26</sup> *Id.* at 2344.

<sup>27</sup> THE FEDERALIST NO. 51, at 288 (James Madison) (Barnes & Noble ed., 2006).

<sup>28</sup> See Levinson & Pildes, *supra* note 25, at 2362.

<sup>29</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311-15 (2001).

- <sup>30</sup> *Id.* at 2313-2314.
- <sup>31</sup> Pildes, *supra* note 19, at 42.
- <sup>32</sup> U.S. CONST. art. II, § 3; *see also* U.S. CONST. art. II, § 2. As federal judges are nominated for life, judicial nominations raise different constitutional considerations. The instant discussion deals with non-judicial nominations only.
- <sup>33</sup> *Edmond v. United States*, 520 U.S. 651, 659 (1997). Indeed, Alexander Hamilton was adamant that the President was better positioned than Congress to make federal appointments.
- [I]n every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight.
- THE FEDERALIST NO. 76, at 419 (Alexander Hamilton) (Barnes & Noble ed., 2006).
- <sup>34</sup> U.S. CONST. art. II, § 2.
- <sup>35</sup> Adam White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 116-17, 123-24 (2005).
- <sup>36</sup> Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (March 27, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.
- <sup>37</sup> U.S. Senate, Nominations in Committee (Civilian), [http://www.senate.gov/pagelayout/legislative/one\\_item\\_and\\_teasers/nom\\_cmtec.htm](http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm) (last visited November 19, 2010).
- <sup>38</sup> *McCulloch v. Maryland*, 17 U.S. 316, 404-05 (1819) (“The government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).
- <sup>39</sup> Jane Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 757 (2004) (“One need not demean the broad public to say that research has overwhelmingly indicated that many voters simply don’t know very much about legislative policy or politics.”) & note 90 (citing variety of studies).
- <sup>40</sup> *See* GREGORY KOGER, *FILIBUSTERING, A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE*, 174 (2010).
- <sup>41</sup> *See id.* at 174-76; *see also* CONG. RESEARCH SERVICE, PROPOSALS TO REFORM “HOLDS” IN THE SENATE 2 (2007); C. Lawrence Evans & Daniel Lipinski, *Holds, Legislation and the Senate Parties* 1 (2005) (presented at the Conference on Senate Parties, University of Oxford) (on file with author).
- <sup>42</sup> *See* Steven S. Smith & Marcus Flathman, *Managing the Senate Floor: Complex Unanimous Consent Agreements since the 1950s*, 14 LEGIS. STUD. Q. 349, 350 (1989). According to Smith, an increased work load coupled with an increased number of amendment offered by individual senators made floor time increasingly scarce. *See also* KOGER, *supra* note 40, at 175 (blaming “the combination of spotty attendance and legislative activ-

ism” for increasing scarcity of floor time).

<sup>43</sup> Not surprisingly, most modern filibusters begin with a hold request. See KOGER, *supra* note 40, at 180-86.

<sup>44</sup> See Smith & Flathman, *supra* note 42, at 353.

<sup>45</sup> See Evans & Lipinski, *supra* note 41, at 4.

<sup>46</sup> J. Taylor Rushing, *At Least Three Senators Who Oppose Secret Holds Have Secret Holds of Their Own*, THE HILL, May 17, 2010, <http://thehill.com/homenews/senate/98291-few-sens-admit-to-secret-holds>; SEE ALSO David Weigel, *Reid Blasts Republicans Over Surgeon General Vote Delay, Other Holds, and Filibusters*, WASH. INDEPENDENT, Oct. 29, 2009, <http://washingtonindependent.com/65699/reid-blasts-republicans-over-surgeon-general-vote-delay-other-holds-and-filibusters>.

<sup>47</sup> See Evan McMorris-Santoro, *Report: Shelby Blocks All Obama Nominations In The Senate Over AL Earmarks*, TALKING POINTS MEMO, Feb. 4, 2010, <http://tpmdc.talkingpointsmemo.com/2010/02/report-shelby-blocks-all-obama-nominations-in-the-senate-over-al-earmarks.php>; Scott Wilson & Shailagh Murray, *Sen. Richard Shelby of Alabama Holding Up Obama Nominees for Homestate Pork*, WASH. POST, Feb. 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020502098.html>.

<sup>48</sup> See Jonathan Karl, *Sen. Bunning Agrees to Allow Vote on Unemployment Extension Bill*, A.B.C. NEWS, Mar. 2, 2010, <http://blogs.abcnews.com/theworldnewser/2010/03/sen-bunning-blocking-several-dozen-senate-nominations.html>.

<sup>49</sup> See Rushing, *supra* note 46.

<sup>50</sup> U.S. Senate, Nominations in Committee (Civilian), *supra* note 37.

<sup>51</sup> U.S. Senate, Executive Calendar 3-14, [http://www.senate.gov/legislative/LIS/executive\\_calendar/xcalv.pdf](http://www.senate.gov/legislative/LIS/executive_calendar/xcalv.pdf) (last visited November 29, 2010).

<sup>52</sup> United States Courts, Judicial Emergencies, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited November 29, 2010).

<sup>53</sup> U.S. CONST. art. II, § 2.

<sup>54</sup> See James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 341 (1989) (chronicling historical record of Appointments Clause, concluding that “if we are to achieve the ends the Framers desired, the Senate must play an active role . . .”); see also Lee Renzin, *Advice, Consent, and Senate Inaction – Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1752-56 (1998) (“Records of the constitutional debates reveal that the Framers, after lengthy discussions, settled on a judicial selection process that would involve both the Senate and the President.” *Id.* at 1753).

<sup>55</sup> See THE FEDERALIST NO. 76, at 420 (Alexander Hamilton) (Barnes & Noble ed., 2006) (“To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.”); THE FEDERALIST NO. 77, at 422 (Alexander

Hamilton) (Barnes & Noble ed., 2006) (“It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.”).

<sup>56</sup> Edmond v. United States, 520 U.S. 651, 659-60 (1997).

<sup>57</sup> Josh Isreal & Aaron Mehta, *Held Up for 15 Months, Withdrawn FEC Nominee Laments “Broken” Process*, THE HILL, Oct. 7, 2010, <http://thehill.com/homenews/campaign/123031-withdrawn-fec-nominee-laments-broken-confirmation-process>.

<sup>58</sup> See, e.g., Juliet Eilperin, Nominations on Hold For 2 Top Science Posts, WASH. POST., Mar. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/02/AR2009030202425.html>; Shailagh Murray & Karen DeYoung, *Momentum Grows for Relaxing Cuba Policy*, WASH. POST., Mar. 30, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/29/AR2009032902460.html>; Helene Cooper, *Legislative Limbo Strands Many of Obama’s Nominees*, N.Y. TIMES, Dec. 27, 2009, <http://www.nytimes.com/2009/12/28/us/politics/28nominees.html>; Roxana Tiron, *Webb Lifts Holds Over Nominees*, THE HILL, Nov. 18, 2010, <http://thehill.com/homenews/senate/130019-webb-lifts-holds-over-military-nominees>. See also *supra* note 47.

<sup>59</sup> KOGER, *supra* note 40, at 174.

<sup>60</sup> See WAWRO & SCHICKLER, *supra* note 8, at 62-87; BINDER & SMITH, *supra* note 7, at 161-197; Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 217-60 (2004); Fisk & Chemerinsky, *supra* note 13, at 209-213; see also John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 513-518 (2004).

<sup>61</sup> U.S. CONST. art. 1, § 5, cl. 2.

<sup>62</sup> See Roberts, *supra* note 60, at 532; Aaron–Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. R. 1401, 1424 (2010).

<sup>63</sup> U.S. CONST. art. I, § 1.

<sup>64</sup> U.S. CONST. art. I, § 7.

<sup>65</sup> United States v. Ballin, 144 U.S. 1, 5 (1892); accord United States v. Smith, 286 U.S. 6, 33 (1932).

<sup>66</sup> Ballin, 144 U.S. at 5; accord Smith, 286 U.S. at 48 (“The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.”).

<sup>67</sup> Ballin, 144 U.S. at 5.

<sup>68</sup> Id.

<sup>69</sup> Metzenbaum v. Fed. Energy Regulatory Comm’n, 675 F.2d 1282, 1286-88 (D.C. Cir. 1982). Specifically, the plaintiffs challenged the validity of amendments to a federal law, alleging that the amendments were made in violation of procedures set out by the statute itself. The court found that Congress’ continual right to exercise its rulemaking power was limited only by other aspects of the Constitution. Thus, Congress’ decision to over-



ride these procedural limitations was valid. *See also* Roberts, *supra* note 60, at 535.

<sup>70</sup> Roberts, *supra* note 60, at 536.

<sup>71</sup> *See, e.g.*, Roberts, *supra* note 60, at 536-37 (discussing rules statutes generally); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (focusing on so-called “fast track” legislation”).

<sup>72</sup> *See* Bruhl, *supra* note 71, at 366-71. As Professor Bruhl explains:

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

*Id.* at 366.

<sup>73</sup> While legislative entrenchment is prohibited, constitutional entrenchment is considered to be different and permissible. *See* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (distinguishing constitutional provisions from ordinary legislation which is “alterable when the legislature shall please to alter it”); *see also* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 417-439 (2003) (defending Constitution as beneficial example of symmetric entrenchment).

<sup>74</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*90.

<sup>75</sup> *Fletcher v. Peck*, 10 U.S. 87, 135 (1810).

<sup>76</sup> *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (Scalia, J., concurring).

<sup>77</sup> *United States v. Winstar*, 518 U.S. 839, 872 (1996).

<sup>78</sup> *See, e.g., id.*; *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932) (“[T]he will of a particular Congress does not impose itself upon those in succeeding years.”); *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (“[E]ach subsequent legislature has equal power to legislate upon the same subject.”); *Douglas v. Kentucky*, 168 U.S. 488, 497-98 (1897); *Butcher’s Union Co. v. Crescent City*, 111 U.S. 746, 751 (1884); *Stone v. Mississippi*, 101 U.S. 814 (1880); *Newton v. Commissioners*, 100 U.S. 548, 554-55 (1880); *Boyd v. Alabama*, 94 U.S. 645, 650 (1877); *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1854).

<sup>79</sup> *Ohio Life Ins.*, 57 U.S. at 431.

<sup>80</sup> Fisk & Chemerinsky, *supra* note 13, at 249 (quoting Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. J. 379, 384-425 (1987)).

<sup>80</sup> *See, e.g.,* *Cook v. Gralike*, 531 U.S. 510 (2001); *Printz v. United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.”); *New York v. United States*, 505 U.S. 144, 168 (1992) (invalidating federal “commandeering” provision because “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished”); *Missouri v. Jenkins*, 495 U.S. 33, 69 (1990) (“In our system ‘the legislative department alone has access to the pockets of the people’ . . . for it is the Legislature that is accountable to them and represents their will.”).

<sup>82</sup> Cook, 531 U.S. at 528.

<sup>83</sup> *Id.*

<sup>84</sup> Bruhl, *supra* note 62. The discussion here owes much to his persuasive analysis.

<sup>85</sup> See THE FEDERALIST NO. 62 (James Madison) (Barnes & Noble Ed., 2006); Vik D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1118 (1988). As James Madison concluded, “[n]o government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.” THE FEDERALIST NO. 62, at 347.

<sup>86</sup> The notable exceptions are those few procedural requirements that are set by constitutional mandate, like the provision specifying that a majority constitutes a quorum. See Bruhl, *supra* note 62, at 1443 & n.145.

<sup>87</sup> See Bruhl, *supra* note 62, at 1444-1456 for a detailed exposition of these arguments.

<sup>88</sup> *Id.* at 1445 (citing MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 154–55 (2004)).

<sup>89</sup> *Id.* at 1448-54.

<sup>90</sup> *Id.* at 1430 (emphasis added).

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