

## ESSAY

# GRIDLOCK RULES: WHY WE NEED FILIBUSTER REFORM IN THE U.S. SENATE

SENATOR JEANNE SHAHEEN\*

*The increasing use of the filibuster in recent decades has led to numerous proposals to redesign the procedural rules of the Senate. In this Article, Senator Jeanne Shaheen draws on her experience with procedural delays and participation in continuing reform efforts to articulate a vision for practical, effective filibuster reform. The existence of the filibuster is explained through the history of Senate procedure, and factors contributing to the rising use of the tactic are examined. Senator Shaheen evaluates several possible procedural changes proposed in recent years and concludes that shifting the burden of continuing a filibuster to the minority by requiring 41 votes to defeat a cloture motion would be the single most effective step.*

### I. INTRODUCTION

I was proud when President Obama nominated Susan B. Carbon, a district court judge in my home state of New Hampshire, to be the Director of the Office on Violence Against Women in the Department of Justice. As Governor of New Hampshire, I had nominated Susan Carbon to a full-time district court judgeship and had worked with her for years on state domestic violence issues. I was honored to introduce her and testify on her behalf at her confirmation hearing before the Senate Judiciary Committee. Judge Carbon was eminently qualified and her nomination was unanimously recommended by the Judiciary Committee on December 3, 2009.<sup>1</sup>

Judge Carbon was a recognized national leader on domestic violence issues and nominated to lead an office that enjoys strong bipartisan support. Domestic violence remains a significant problem in the United States. Every 52 seconds a woman is victimized by a spouse or partner.<sup>2</sup> These crimes devastate victims' lives. They shatter families. The Office on Violence Against Women provides assistance to communities across the country that are working to end domestic violence, sexual assault, and stalking.<sup>3</sup> Never-

---

\* Member, United States Senate (D-N.H.). B.A., Shippensburg University, 1969; M.S.S., University of Mississippi, 1973. The former governor of New Hampshire, Senator Shaheen is the only woman in American history to be elected both a governor and U.S. Senator. The author would like to thank Judy E. Reardon, Moira McConaghy, and Emily Livingston for their assistance.

<sup>1</sup> S. COMM. ON THE JUDICIARY, 111TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING (Dec. 3, 2009).

<sup>2</sup> *Crime Clock*, OFFICE FOR VICTIMS OF CRIME, [http://ovc.ncjrs.gov/gallery/posters/pdfs/Crime\\_Clock.pdf](http://ovc.ncjrs.gov/gallery/posters/pdfs/Crime_Clock.pdf) (last visited Oct. 14, 2012).

<sup>3</sup> *About the Office on Violence Against Women*, U.S. DEP'T OF JUSTICE, <http://www.ovw.usdoj.gov/overview.htm> (last updated Apr. 2012).

theless, Carbon's confirmation was held up for over two months when one Republican senator took advantage of Senate rules to delay all executive branch nominations because of issues wholly unrelated to the respective nominees.<sup>4</sup> Carbon was finally confirmed on February 11, 2010—by unanimous consent.<sup>5</sup>

During those two months I found myself in the position of explaining to a nonpartisan, earnest public servant, eager to assume a new position of national leadership on an important issue, that her confirmation was being blocked because a senator wanted a defense contract awarded to a certain company in his state.

My experience with the Carbon nomination made it clear to me that the “filibuster” process in the Senate needs to be reformed. In this essay I will use the term “filibustering” for any use of dilatory or obstructive tactics to block a measure from coming to a vote.<sup>6</sup>

This essay will describe the relevant Senate rules, why they don't work well in today's hyper-partisan and less collegial Senate, and which reforms I believe make the most sense. Based on what I have witnessed on the Senate floor over the last four years and my work with other senators to attempt to reform the rules in 2011, I believe the most effective change we could make would be to shift the burden to filibustering senators to produce 41 votes to continue debate.<sup>7</sup>

## II. THE SENATE RULES

The Senate was designed by the Founding Fathers to be the slower, more deliberative body.<sup>8</sup> Thomas Jefferson “asked George Washington why

<sup>4</sup> On February 5th, 2010, *CongressDaily* reported that Richard Shelby, an Alabama Republican, was secretly blocking the confirmation of about seventy Obama appointees, including Susan Carbon, over a dispute involving a defense contract and an FBI facility for his state. Dan Friedman & Megan Scully, *Reid: Shelby Has Hold On All Nominees*, NAT'L J.'S CONGRESSDAILY, Feb. 5, 2010, <http://www.nationaljournal.com/daily/reid-shelby-has-hold-on-all-nominees-20100205>. On February 8th, he lifted his holds on all but three Department of Defense nominees. *Senator Lifts Holds on Most Nominees*, N.Y. TIMES, Feb. 9, 2010, at A17.

<sup>5</sup> 156 CONG. REC. S587 (daily ed. Feb. 11, 2010).

<sup>6</sup> For example, “calling up amendment after amendment, requesting the reading of the amendments, asking for roll call votes, suggesting the lack of a quorum. Because the time consumed by all those activities was free time, not chargeable to the senator, the process could theoretically last indefinitely.” IRA SHAPIRO, *THE LAST GREAT SENATE* 20 (2012).

<sup>7</sup> Under the current rules, the burden is on those who oppose a filibuster to produce 60 votes to end the filibuster. See SENATE COMM. ON RULES AND ADMINISTRATION, *SENATE MANUAL*, S. DOC. NO. 112-1, Rule XXII, at 20–22 (2011).

<sup>8</sup> James Madison, arguing for the creation of a Senate, stated:

In order to judge of the form to be given to this institution, it will be proper to take a view of the ends to be served by it. These were first to protect the people agst. their rulers: secondly to protect the people agst. the transient impressions into which they themselves might be led.

JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 193 (Ohio Univ. Press 1966) (Notes of June 26, 1787). The ability to require the reading aloud of amend-

he had accepted the idea of a Senate. Washington responded, ‘Why did you pour that coffee into your saucer?’ Jefferson answered, ‘To cool it.’ Washington replied, ‘even so we put legislation into the senatorial saucer to cool it.’”<sup>9</sup> The Senate rules over time were designed to reflect that intention. Under the rules, there is an opportunity for extensive floor debate and for individual senators to offer amendments to pending legislation, thereby slowing down the passage of legislation. In contrast, in the House of Representatives floor debate is generally limited to one hour.<sup>10</sup> The majority Republicans on the House Committee on Rules aptly describe the difference between how the Senate and House operate: “[W]hile the main rule in the House is ‘whoever has 218 votes wins,’ the rule in the Senate is different: ‘There’s nothing you can do without 60 votes.’ While the House is designed as a majoritarian institution, the *Senate is structurally designed to protect the rights of the Minority.*”<sup>11</sup> Because of its rules allowing extensive debate and amendment of legislation, the United States Senate has long been described as the world’s “greatest deliberative body.”<sup>12</sup>

The possibility of unlimited debate in the Senate derives from Rule XXII,<sup>13</sup> which requires a three-fifths vote of the Senate to end debate, and

---

ments was ended in 2011 so long as the amendment was submitted 72 hours before it was called up and was available in printed or electronic form. S. Res. 29, 112th Cong. (2011) (enacted).

<sup>9</sup> SHAPIRO, *supra* note 6, at xii.

<sup>10</sup> RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-57, Rule XVII, cl. 2, at 753 (2011).

<sup>11</sup> *Basic Training: Senate Rules from a House Perspective*, HOUSE OF REPRESENTATIVES COMMITTEE ON RULES - REPUBLICANS, <http://rules-republicans.house.gov/Educational/Read.aspx?ID=8> (last visited Nov. 4, 2012).

<sup>12</sup> SHAPIRO, *supra* note 6, at xiii.

<sup>13</sup> The relevant section of Rule XXII reads:

Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?” And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o’clock p.m. on the day following the filing of the cloture motion if an amendment in

Rule XIX, which prohibits a senator from “interrupt[ing] another Senator in debate without his consent . . . ,”<sup>14</sup> combined with the fact the Senate rules lack a “previous question motion.”<sup>15</sup> It should be noted that the original Senate rules did have a previous question motion, but it was eliminated in 1806. Vice President Aaron Burr suggested its elimination as part of a more general argument that the Senate should have more simple rules.<sup>16</sup> Attempts to reinstate the previous question motion in the late 19th and early 20th century failed.<sup>17</sup>

Pursuant to Rule XXII, the objection of just one senator to a bill proceeding triggers a filibuster, and to end a filibuster, there must be a three-fifths vote of the Senate members (a “cloture” vote).

Rule XXII also establishes the amount of time spent on a cloture vote; it requires that a cloture vote not be held until two calendar days after a motion for cloture is filed, and it provides that if cloture is obtained, there can be up to 30 hours of debate post-cloture.

Between 1806 and 1917 there was no rule to limit debate.<sup>18</sup> In 1917 Rule XXII was adopted.<sup>19</sup> The impetus for this change was:

---

the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 112-1, Rule XXII, § 2, at 20–22 (2011).

<sup>14</sup> *Id.*, Rule XIX, at 18.

<sup>15</sup> A “previous question motion” is a non-debatable motion that, if adopted, ends debate and results in an immediate vote on the pending matter. The House rules allow for previous question motions. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-57, Rule XIX, cl. 1, at 799.

<sup>16</sup> *Examining the Filibuster: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 17 (2010) [hereinafter *Examining the Filibuster*] (statement of Sarah A. Binder, Professor, Dep’t of Political Sci., George Washington Univ.) (“When Senators met in 1806, they dropped the motion from the rule book. Why? Not because Senators we think in 1806 sought to protect minority rights and extended debate. They seemed to get rid of the rule by mistake because Aaron Burr told them to.”).

<sup>17</sup> *Id.* at 18.

<sup>18</sup> *Id.* at 116 (statement of Emmet J. Bondurant, Esq., Member, Common Cause Nat’l Governing Bd.).

<sup>19</sup> *Filibuster and Cloture*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) (last visited Oct. 14, 2012).

[a]t the outset of World War I, Republican Senators successfully had filibustered President Wilson's proposal to arm merchant ships . . . . He demanded the Senate create a cloture rule, and the press dubbed the rule a war measure, and the public . . . burned Senators in effigy around the country. Adoption of Rule XXII occurred because Wilson and the Democrats framed that rule as a matter of national security. They fused procedure with a policy and they used the bully pulpit to shame Senators into reform.<sup>20</sup>

While there is always resistance to changing the filibuster process, Rule XXII has been revised a number of times since 1917. Successful attempts at rules reform are usually the result of compromise when it appears there may be the votes for a more far-reaching reform.<sup>21</sup>

In 1949, it was amended to clarify that cloture may be applied to end debate on procedural motions,<sup>22</sup> such as the motion to proceed.<sup>23</sup>

In 1959, the Senate changed the threshold required for cloture from two-thirds of senators duly chosen and sworn (67, when 100 seats are filled) to two-thirds of senators present and voting.<sup>24</sup> The impetus for this rules change was the repeated and successful filibustering of civil rights legislation.<sup>25</sup>

In 1975, the threshold for cloture was changed to three-fifths of senators duly chosen and sworn, except for measures that change Senate rules, for which the threshold at two-thirds of senators present and voting was kept. The 1975 thresholds remain in place.<sup>26</sup> The 1975 effort was led by then-Senator Walter Mondale (D-Minn.). He and other proponents of reform wanted the threshold to be three-fifths of those present and voting.<sup>27</sup> The Senate majority leader, Michael Mansfield (D-Mont.), negotiated a compromise:

he persuaded conservative Democrats to accept a threshold of three-fifths of senators duly chosen and sworn (60 if 100 or 99 seats are filled) for most legislation and, in order that the conservatives would not have to fear additional reform in the foreseeable future, persuaded liberal Democrats to accept retention of the old

---

<sup>20</sup> *Examining the Filibuster*, *supra* note 16, at 18 (statement of Sarah A. Binder).

<sup>21</sup> Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 260 (2004).

<sup>22</sup> *Examining the Filibuster*, *supra* note 16 at 20 (statement of Gregory J. Wawro, Assoc. Professor, Dep't of Political Sci., Columbia Univ.).

<sup>23</sup> A motion to proceed is a debatable motion to bring a bill or other measure up for consideration on the Senate floor.

<sup>24</sup> *Examining the Filibuster*, *supra* note 16, at 20–21 (statement of Gregory J. Wawro).

<sup>25</sup> *Id.* at 20.

<sup>26</sup> STEVEN S. SMITH, BROOKINGS INST., ISSUES IN GOVERNANCE STUDIES: THE SENATE SYNDROME 1–2 (2010).

<sup>27</sup> *Examining the Filibuster*, *supra* note 16, at 56 (statement of Gregory J. Wawro).

threshold of two-thirds of senators present and voting for measures changing the Senate rules.<sup>28</sup>

In 1985, the amount of post-cloture debate time was reduced from up to 100 hours to up to 30 hours.<sup>29</sup>

Multiple filibusters can occur on one bill. On just one piece of legislation there can be a filibuster on a motion to proceed, a substitute amendment, final passage of the bill, and the appointment of a conference committee to work out differences with the House version of the bill. In fact, there can be three potential cloture votes on getting to a committee of conference with the House: (1) on the motion to disagree with the House; (2) on the motion to request a Conference with the House; and (3) on the motion to request that the Chair of the committee with jurisdiction over the bill be authorized to appoint conferees.<sup>30</sup>

One way the Senate can end debate on a question even though there may be senators who still want to speak on it is to move to table the pending question. The motion is not debatable, and requires only a simple majority vote to be adopted. Because the adoption of a motion to table effectively kills the measure being debated, a tabling motion is not useful to a majority trying to pass legislation or confirm a nomination. Its chief use is to end debate on dilatory amendments.

Senate procedure is governed not only by the Standing Rules of the Senate, but also by standing and special orders, and precedent formed by past rulings on procedural questions.<sup>31</sup> For example, in 1980 the majority

<sup>28</sup> SMITH, *supra* note 26, at 4.

<sup>29</sup> *Examining the Filibuster*, *supra* note 16, at 23–24 (statement of Stanley I. Bach, Senior Specialist in the Legis. Process, Cong. Research Serv.).

<sup>30</sup> Pursuant to Rule XV, any Senator may divide the question if more than one proposition is included in a motion. SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 112-1, Rule XV, at 13–14 (2011). A rules change would be required in order to combine the three motions now necessary to create a conference committee into one motion.

<sup>31</sup>

The published precedents of the Senate expound the ways in which the Senate has interpreted and applied its rules. The precedents both complement and supplement the rules of the Senate . . . . The brevity of the Senate's standing rules often makes the body's precedents particularly important as a determinant of proceedings.

. . . .  
Precedents usually are established when the Senate votes on questions of order (i.e., on a point of order that the presiding officer has submitted to the body, or on whether to uphold or overturn a ruling of the presiding officer), or when the presiding officer decides a question of order and this ruling is not appealed. Historically, the Senate follows such precedents until "the Senate in its wisdom should reverse or modify that decision" . . . .

[P]recedents based on a vote of the Senate have more weight than those based on rulings of the presiding officer.

leader, Robert Byrd (D-W. Va.), established a precedent that there was no debate on motions to proceed to nominations.<sup>32</sup>

It has become common for the majority leader to file cloture on motions to proceed preemptively,<sup>33</sup> because he has been informed that at least one senator may object to the motion to proceed or because he anticipates that many amendments to the bill may be filed. Because a successful cloture vote precludes non-germane amendments, filing cloture gives the majority leader leverage to negotiate which amendments will be taken up and how long the debate will be on each.

The majority leader generally wants to avoid votes on non-germane amendments. Some senators offer non-germane amendments for the purpose of obtaining roll call votes on controversial issues<sup>34</sup> or because an amendment is the only opportunity to address an issue that will otherwise not be brought to the floor. Under the Senate rules amendments only have to be germane if cloture has been invoked or in three other limited scenarios.<sup>35</sup>

To bolster his negotiating leverage on which amendments will be considered, the majority leader sometimes “fills the amendment tree.”<sup>36</sup> By precedent the first senator recognized by the presiding officer is the majority leader. Under Senate procedures, a senator may offer amendments to a pending bill in the order in which he or she is recognized. Because the majority leader is recognized first, he is able to offer a certain number of amendments to the legislation up to the maximum possible. This creates what is called the “amendment tree.” Once the maximum number of amendments has been offered by the majority leader, no more are allowed, and the “tree” is considered “filled.”<sup>37</sup>

<sup>32</sup> 151 CONG. REC. 10,834 (2005) (statement of Sen. Mitch McConnell (R-Ky.)).

<sup>33</sup> For example, on the veterans jobs bill (S.3457), 158 CONG. REC. S5,950 (daily ed. Aug. 2, 2012) (motion of Sen. Harry Reid (D-Nev.)), and a bill to reauthorize the Small Business Innovation Research program (S.493), 157 CONG. REC. S1,543 (daily ed. Mar. 10, 2011) (motion of Sen. Reid), the majority leader filed for cloture before anyone objected on the record to proceeding to the bill. In a process known as “hotlining,” the majority and minority leaders ask their caucus members if any intend to object to a bill before the majority leader brings it to the floor. *Basic Training*, *supra* note 11.

<sup>34</sup> For example, in September 2012 Senator Rand Paul (R-Ky.) filed amendments (S. Amdts. 2838, 2841) to end foreign aid to Libya, Egypt, and Pakistan on legislation to boost employment of veterans (S. 3457) and to keep the federal government funded on a temporary basis (H.R.J. Res. 117). 158 CONG. REC. S6,368 (daily ed. Sept. 13, 2012); 158 CONG. REC. S6,468 (daily ed. Sept. 19, 2012).

<sup>35</sup> In addition to after a successful cloture vote, the only other scenarios where the Senate will not consider non-germane amendments are when: (1) a unanimous consent agreement specifies only germane amendments will be taken up; (2) a rule-making provision in a statute so requires (e.g., provisions of the Congressional Budget and Impoundment Act of 1974 governing consideration of budget resolutions and reconciliation bills); or (3) they are offered on a general appropriations bill. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 9 (2008).

<sup>36</sup> CHRISTOPHER DAVIS, CONG. RESEARCH SERV., RS22854, FILLING THE AMENDMENT TREE IN THE SENATE 1–2 (2011).

<sup>37</sup> *Id.*

The successful negotiation of a “unanimous consent agreement” allows the Senate majority leader to bring a bill to the floor in an orderly, structured manner.

These agreements . . . can limit debate time, structure the amendment process, and waive points of order against specific provisions or amendments. The agreements are negotiated by the majority leader, in consultation with the minority leader, committee chairmen, and interested senators. These negotiations are conducted in private meetings or, less frequently, on the Senate floor. A unanimous consent agreement must be accepted by all senators on the floor when the majority leader or his designee formally offers the agreement. The objection of one senator prevents the agreement from taking effect. An individual senator can then request the leadership to modify the unanimous consent agreement to accommodate his or her concerns.<sup>38</sup>

A unanimous consent agreement has the same authority as a Standing Rule and is enforceable on the Senate floor. “Consent agreements have the effect of changing all Senate rules and precedents that are contrary to the terms of the agreement.”<sup>39</sup>

### III. THE RULES DO NOT WORK WELL IN TODAY’S SENATE

Because there is the possibility of unlimited debate and the fact the Senate operates smoothly only if most issues are resolved by unanimous consent, the current rules only work if there is a sense of comity and responsibility among all senators for the functioning of the Senate. There must also be a political will to work cooperatively with members of both parties.

For a number of reasons comity has dissipated among senators and there are now those who not only lack a sense of responsibility for making the Senate function well, but who use the rules to make sure the Senate does not function well. Working with colleagues across the political aisle has become the exception, and members risk attacks from the base of their own party if they engage in bipartisan legislative efforts.<sup>40</sup>

Senators no longer socialize as they did in the past, the two parties have become more polarized, the twenty-four hour news cycle and electronic media motivates senators to think in the short-term, and there are a handful of

---

<sup>38</sup> SCHNEIDER, *supra* note 35, at 4.

<sup>39</sup> LYNCH & BETH, *supra* note 31, at 5.

<sup>40</sup> For example, veteran Senator Richard Lugar, who lost the Republican U.S. Senate primary in Indiana in 2012, “was criticized throughout the campaign for what critics described as his tendency to cooperate with Democrats.” Monica Davey, *G.O.P. Voters Topple Lugar After 6 Terms*, N.Y. TIMES, May 3, 2012, at A1. His primary opponent “has said that bipartisanship has led the nation to the brink of bankruptcy, and that the nation’s current circumstances call for a time of confrontation, not collegiality.” *Id.*



senators who simply do not care if their obstruction of the Senate engenders resentment from other senators, including those in their party.

Unfortunately, I don't think these conditions are likely to change.

Senators no longer spend enough time in Washington to get to know each other outside of the Senate.

For much of our history, lawmakers lived in Washington for uninterrupted weeks at a time. Democrats and Republicans moved their families to Washington and socialized at card games or Georgetown salons. These interactions made rivals less likely to demonize each other in their official business and more likely to reach agreement. "It's harder to give somebody a real hard time when you were out with them and their spouse the night before," [former Majority Leader Trent] Lott reasons. Now lawmakers disparage such clubby ways. They've given themselves virtually unlimited travel allowances, so they can leave their families in their home states and fly to Washington for three-day workweeks that leave no time to create personal bonds. It's no coincidence that this change brought along with it stalemate and division over the nation's wars and finances.<sup>41</sup>

My former colleague from New Hampshire, Judd Gregg (R), attributed part of the polarization to "the rising number of senators—now nearly fifty—who come from the House, rather than from governorships or other positions where bipartisan cooperation is still permissible. 'A lot of senators don't understand the history or tradition of the institution,' Gregg said. 'Substantive, thoughtful, moderate discussion is pushed aside.'"<sup>42</sup>

The lack of collaboration in today's Senate is perhaps best illustrated by the blocking of afternoon Senate hearings that occurred in my second year in the Senate while the majority party was trying to complete action on health care reform. Rule XXVI archaically requires unanimous consent for committee hearings to be held after two in the afternoon when the Senate is in session.<sup>43</sup> Because they were so upset about the imminent passage of health care reform, anonymous Republican senators objected to allowing the Armed Services Committee and the Subcommittee for Contracting Oversight of the Homeland Security Committee to hold afternoon hearings, despite the fact high-ranking U.S. military officials had flown in from overseas to testify.<sup>44</sup>

The majority and minority leadership both assume the other party will manipulate the rules, and act accordingly:

---

<sup>41</sup> Dana Milbank, *The Senate's Torn Fabric*, WASH. POST, June 27, 2012, at A17.

<sup>42</sup> George Packer, *The Empty Chamber*, THE NEW YORKER, Aug. 9, 2010, at 36, 42.

<sup>43</sup> SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 112-1, Rule XXVI, at 43 (2011).

<sup>44</sup> See Meredith Shiner, *Senate GOP Shuts Down Hearings*, POLITICO (Mar. 24, 2010, 6:37 PM), <http://www.politico.com/news/stories/0310/34964.html>.

In today's Senate, each party assumes that the other party will fully exploit its procedural options—the majority party assumes that the minority party will obstruct legislation and the minority assumes that the majority will restrict its opportunities. Leaders are expected to fully exploit the rules in the interests of their parties. The minority is quick to obstruct and the majority is quick to restrict.<sup>45</sup>

Steven S. Smith, a professor at Washington University who has worked on Capitol Hill, described in his testimony at a hearing of the Senate Committee on Rules and Administration in 2010 how filibustering today stifles open debate and transparency:

[J]ust consider what these minority strategies and the majority responses have contributed to. They have moved many policy decisions from committee rooms to party leadership offices as leaders try to bargain over cloture. It has led to the demise of standard amending opportunities on the Senate floor. It has elevated packaging strategies and the use of omnibus bills. It has contributed to the demise of the appropriations process as majority leaders do not dare bring most appropriations bills to the Senate floor. It has . . . led to the avoidance of conferences on a wide range of important legislation.<sup>46</sup>

Individual senators are willing to obstruct the Senate to advance their own agenda and do not care if it angers other senators. For example, in September 2012 Senator Rand Paul (R-Ky.) held up the passage of a bill to keep the federal government funded on a temporary basis until he got a vote on his bill to end foreign aid to Libya, Egypt, and Pakistan.<sup>47</sup> When the vote was taken, only ten senators voted for Senator Paul's bill.<sup>48</sup> Senator Paul boasted of his intention to filibuster all legislation until he got a vote on his measure to end foreign aid to these three countries.<sup>49</sup>

Nor does mounting a filibuster require a senator to sacrifice his or her time in the way it once did. While most people imagine a filibuster to be a senator talking for hours like Jimmy Stewart's character in *Mr. Smith Goes to Washington*, the fact is that a senator no longer needs to be on the floor to maintain a filibuster. A procedural change made in 1975 allows other mea-

---

<sup>45</sup> SMITH, *supra* note 26, at 1–2.

<sup>46</sup> *Examining the Filibuster*, *supra* note 16 at 483 (statement of Steven S. Smith, Professor of Soc. Scis., Washington Univ.).

<sup>47</sup> Walter Pincus, *The U.S. Senate, a Dysfunctional Day in the Life*, WASH. POST, Sept. 24, 2012, at A17.

<sup>48</sup> S. 3576, Vote No. 196, Sept. 22, 2012 (Bill Defeated 81-10).

<sup>49</sup> Press Release, Sen. Rand Paul, U.S. Senate, Sen. Paul Filibuster Succeeds (Sept. 21, 2012), available at [http://paul.senate.gov/?p=press\\_release&id=614](http://paul.senate.gov/?p=press_release&id=614) (“In a series of Dear Colleague letters and direct correspondence to Senate Democrat Leader Harry Reid (Nev.) over the past few weeks, Sen. Paul has indicated his intention to hold up all pending legislation before the Senate in a filibuster until his legislation was brought before the Senate to deliberate and vote”).

sure to move forward by unanimous consent while a filibuster is underway. This has had the unintended consequence of making senators pay less of a price for filibustering and therefore be more willing to engage in the practice. “By 1975, the Senate had implemented a ‘two-track system’ for considering legislation, which allowed the Senate to ‘continue to work on all other legislation on one ‘track,’ while a filibuster against a particular piece of legislation was theoretically in progress on the other ‘track.’”<sup>50</sup> Before this, “all Senate legislation moved on ‘one-track,’ so that filibustering senators ‘had to hold the floor virtually without interruption and without rest’ and had to risk blame for making ‘all Senate business . . . grind to a complete halt.’”<sup>51</sup> Thus, under the two-track system it is possible in the Senate to act on non-controversial legislation and nominations while a non-talking filibuster is underway on another bill.

Blocking passage of a bill with a filibuster used to be rare and generally only used for controversial legislation, such as civil rights legislation in the 1950s and early 1960s.<sup>52</sup> Today, non-controversial bills and nominees routinely face filibusters. My partner on a number of measures to reduce wasteful spending, Senator Tom Coburn (R-Okla.), “has placed hundreds of holds since 2005,” according to his communications director, John Hart.<sup>53</sup> From 1917—when the Senate first adopted cloture rules for ending debate—to 1971 there was an average of one cloture motion filed each year.<sup>54</sup> From 1971 to 1993 there was an average of 13.5 cloture votes per year. From 1993 to 2007, that number increased to an average of 24 cloture votes per year. From 2007 through 2010 there was an average of 50 cloture votes per year.<sup>55</sup> Interestingly, in the current 112th Congress (2011–2012) there has been a decrease in the number of cloture votes taken; in a year and a half there have been a total of 58 cloture votes.<sup>56</sup> This drop off is likely attributable to the significant decrease in cloture motions filed by the majority leader after the number of senators in the Democratic caucus fell to 53 from 60 following the 2010 election,<sup>57</sup> which meant that the chances of obtaining cloture were unlikely.

The fact that filibusters often have nothing to do with the merits of the underlying measure is underscored by the attempt to extend unemployment compensation benefits in September 2009. While passage of the bill was

---

<sup>50</sup> Gold & Gupta, *supra* note 21, at 253.

<sup>51</sup> *Id.* at 252–53.

<sup>52</sup> *Examining the Filibuster*, *supra* note 16, at 20 (statement of Gregory J. Wawro).

<sup>53</sup> Dan Keating et al., *Members of Congress Trade in Companies While Making Laws That Affect Those Same Firms*, WASH. POST, June 23, 2012, at A1.

<sup>54</sup> *Senate Action on Cloture Motions*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited Nov. 4, 2012) (lists cloture motions filed, cloture votes taken, and instances of cloture invoked).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> David Nather, *Harry Reid’s Math Problem*, POLITICO (Mar. 4, 2011, 7:13 AM), <http://www.politico.com/news/stories/0311/50660.html>.

held up for a month by a filibuster threat, the legislation eventually passed by a vote of 98 to 0.<sup>58</sup> In the fall of 2009, Republican senators engaged in a strategy of prolonging debate over legislation they supported, such as the unemployment benefits extension and funding for veterans health care,<sup>59</sup> in order to delay floor action on health care reform.<sup>60</sup>

There is limited time in any given year to take up measures on the floor. Certain bills must be passed, e.g. the National Defense Authorization Act, appropriations bills to keep government running, authorizations for existing programs that will otherwise expire. The majority leader must make tough decisions on which bills and nominations deserve this finite floor time.

“In principle, a truly determined minority of Senators, even one too small to prevent cloture, usually can delay for as much as two weeks the time at which the Senate finally votes to pass a bill that most Senators support.”<sup>61</sup> For example, pursuant to Rule XXII, one senator can trigger cloture votes on both a motion to proceed and a motion for passage of the bill, each necessitating a two-calendar-day delay on the cloture votes and then a 30-hour period of session time before the votes on the motions themselves can be taken.

There are 12 appropriations bills produced by the Senate Appropriations Committee; if each one was taken up separately on the floor and two weeks was used on each it would take up 24 weeks of floor time. This has led to omnibus appropriations bills, combining most or all of the appropriations bills into one measure, which denies senators—and the public—a full and open debate on each spending bill.

If just one senator indicates he or she will object to proceeding to a bill or nomination by unanimous consent, the majority leader is less likely to bring it to the floor, even if he is confident of obtaining cloture, because of the amount of time it will take up. Moreover, routine filibustering makes it difficult for the public to know who to hold accountable for the lack of progress on issues. People know the Senate is not functioning well, but often don’t know which senators or which party is responsible. Voters elect a majority of senators from one party, and then are frustrated that the majority party cannot pass its agenda. For example, the DISCLOSE Act, a response to the Supreme Court’s *Citizens United* decision, won the vote of 59 senators, but could not become law because it was one vote shy of the 60 needed for cloture on a motion to proceed to the bill.<sup>62</sup>

As the Chair of Committee on Rules and Administration, Chuck Schumer (D-N.Y.), said at one of his committee’s hearings on filibuster reform:

<sup>58</sup> H.R. 3548, Vote No. 334, Nov. 4, 2009.

<sup>59</sup> This bill also ultimately passed in a 98-0 vote. S. 1963, Vote No. 352, Nov. 19, 2009.

<sup>60</sup> Mike Lillis, *GOP Agenda: Just Stall*, WASH. INDEP. (Dec. 7, 2009, 12:12 AM), <http://washingtonindependent.com/69795/gops-go-to-play-stall>.

<sup>61</sup> RICHARD S. BETH, VALERIE HEITSHUSEN & BETSY PALMER, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE* 18 (2011).

<sup>62</sup> S. 3628, Vote No. 240, Sept. 23, 2010.

“The Senate is supposed to be the saucer that cools the drink, but to me it sometimes feels like an icebox where reasonable pieces of legislation get put in a permanent deep freeze.”<sup>63</sup>

That being said, there were significant accomplishments in 2009–2010 when the Democratic majority either held 59 seats in the Senate and only needed one Republican to end a filibuster, or briefly held 60 seats. The “stimulus” bill to boost economic growth,<sup>64</sup> the Affordable Care Act,<sup>65</sup> Wall Street Reform,<sup>66</sup> and the confirmation of two Supreme Court justices<sup>67</sup> are a few examples of successful action during these two years.

Those who wrote our Constitution would be surprised to find that in today’s Senate it routinely requires a supermajority to pass legislation.<sup>68</sup>

[T]here is ample evidence that the framers preferred majority rather than supermajority voting rules. The framers knew full well the difficulties posed by supermajority rules, given their experiences in the Confederation Congress under the Articles of Confederation (which required a supermajority vote to pass measures on the most important matters). A common result was stalemate; legislators frequently found themselves unable to muster support from a supermajority of the states for essential matters of governing.<sup>69</sup>

Alexander Hamilton, writing in the Federalist papers on the experience with the Articles of Confederation supermajority requirement, stated its “real operation [was] to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure . . . of an insignificant,

<sup>63</sup> *Examining the Filibuster*, *supra* note 16, at 466 (opening statement of Sen. Charles Schumer, Comm. Chairman).

<sup>64</sup> American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong., 123 Stat. 115 (2009) (passed 61-37).

<sup>65</sup> The Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong., 124 Stat. 119 (2009) (passed 60-39).

<sup>66</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong., 124 Stat. 1376 (2010) (passed 59-39).

<sup>67</sup> Sonia Sotomayor was confirmed Aug. 6, 2009. 155 CONG. REC. S8,945 (daily ed.) (vote no. 262) (68-31). Elena Kagan was confirmed Aug. 5, 2010. 156 CONG. REC. S6,830 (daily ed.) (vote no. 229) (63-37).

<sup>68</sup> In the Constitution, the framers specified that supermajority votes would be necessary in only seven situations: overriding a presidential veto (Art 1, Cl. 7), expelling a member of Congress (Art 1, Cl. 5), ratifying a treaty (Art 2, Cl. 2), convicting a federal officer of an impeachable offense (Art 1, Cl. 3), passing a Constitutional amendment (Art 5), calling for a Constitutional convention (Art 5), and ratification by the states of a constitutional amendment (Art 5). Later, two more supermajority requirements were adopted as amendments to the Constitution—restoring the ability of certain rebels to serve in the government (14th Amendment) and removal of the President after the Vice President and Cabinet approve such removal and the President contests the removal (25th Amendment).

<sup>69</sup> Letter from Sarah Binder et al. to Members of the Senate (Dec. 20, 2010), *available at* <http://www.brookings.edu/research/opinions/2010/12/02-filibuster-mann-binder>.

turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority.”<sup>70</sup>

Nor is there any evidence that the framers intended for filibusters to occur.

There is no question that the framers intended the Senate to be a deliberative body. But they sought to achieve that goal through structural features of the chamber intended to facilitate deliberation—such as the Senate’s smaller size, longer and staggered terms, and older members. There is no historical evidence that the framers anticipated that the Senate would adopt rules allowing for a filibuster. In fact, the first House and the first Senate had nearly identical rulebooks . . . .<sup>71</sup>

#### IV. 2010–2011 EFFORT TO REFORM THE FILIBUSTER

In September 2010 a group of senators began meeting at the suggestion of long time reform proponent Senator Tom Harkin (D-Iowa) to devise a strategy for amending the filibuster rules at the beginning of the 2011 session. Senators first elected in 2006 and 2008 who participated included Michael Bennet (D-Colo.), Al Franken (D-Minn.), Amy Klobuchar (D-Minn.), Jeff Merkley (D-Or.), Tom Udall (D-N.M.), and myself. Veteran senators, in addition to Senator Harkin, who joined the effort were Dick Durbin (D-Ill.), Frank Lautenberg (D-N.J.), Barbara Mikulski (D-Md.) and Chuck Schumer. As we got closer to beginning the next Congress in 2011, Senator Carl Levin (D-Mich.) began attending to raise constructive concerns about various proposals.

##### A. *Proposals for Reform*

A number of possible rule changes to reduce the gridlock in the Senate were discussed by this group, including the following:

##### 1. *Eliminate the Filibuster on Motions to Proceed*<sup>72</sup>

Filibustering a motion to proceed is in effect a method to prevent debate of an issue, not a way of preserving the right to debate and amend. I do not believe a minority of senators should be able to block a bill from even being considered on the Senate floor. Those who oppose this idea argue that it is at the point of a motion to proceed that both sides have the most incentive to negotiate a unanimous consent agreement on what the amendment process

---

<sup>70</sup> THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

<sup>71</sup> Binder et al., *supra* note 69.

<sup>72</sup> A resolution making this change was defeated in 2011. S. Res. 10, 112th Cong. (2011).

will be.<sup>73</sup> Unfortunately, in today's environment this theoretical incentive rarely leads to successful negotiations.

## 2. *Limit Filibuster to One Per Bill*

As discussed previously, today on one bill there can be filibusters on the motion to proceed, passage of a substitute amendment, final passage of the bill, and three on formation of a committee of conference. If the purpose of filibustering is to preserve the right to debate and amend, one filibuster per bill should be sufficient.

## 3. *Reduce the Cloture Threshold*

Reducing the cloture threshold from three-fifths of the membership to three-fifths of those present and voting would make it slightly easier to obtain cloture and would put pressure on those supporting the filibuster to show up and vote. One problem with basing the threshold on the number of members of the Senate is that those who want a measure to move forward must produce 60 votes for cloture; the number of votes cast opposing cloture is irrelevant.

## 4. *Shift Burden to Filibustering Senators*<sup>74</sup>

Requiring 41 votes to continue a filibuster, rather than 60 to end one, would shift the burden to filibustering senators.

## 5. *Reduce Post-Cloture Debate Time*

Reducing the amount of post-cloture debate time on all or some cloture votes from 30 hours would open up floor time for the consideration of more bills. This would make particular sense for confirming nominations, since amendments are not offered to nominations.<sup>75</sup> There were no cloture votes on judicial nominations until 1968 and none on executive nominations until 1980.<sup>76</sup> As a former governor, I know how important it is for the chief executive to get her team in place as soon as possible.

---

<sup>73</sup> *Examining the Filibuster*, *supra* note 16, at 600–01 (statement of Sen. Judd Gregg).

<sup>74</sup> A resolution proposing this change was filed in 2011. S. Res. 440, 111th Cong. (2010).

<sup>75</sup> *Examining the Filibuster*, *supra* note 16, at 607 (statement of Marty Paone, Exec. Vice President, Prime Policy Grp.).

<sup>76</sup> It should be noted that there are other delays in the nomination process besides the filibuster. In recent years there has been a more extensive vetting process by both the Executive Branch and Senate Committees. There also were 1,200 appointments that require Senate confirmation. However, in June 2011 a bill, S. 679, sponsored by the Chair of the Rules Committee, Chuck Schumer, and the Ranking Member, Lamar Alexander (R-Tenn.), eliminated the need for Senate confirmation for a significant number of Presidential appointments. S. 679 eliminated the confirmation requirement for about 200 of the 1,200 posts in the executive branch as well as for more than 2,800 members of the U.S. Public Health Service and National

### 6. *Require a Talking Filibuster*<sup>77</sup>

Following a failed cloture vote, filibustering senators would be required to stay on the floor and speak indefinitely instead of holding the current “silent filibusters.” If they fail to do so, the filibuster would end. As discussed previously, silent filibusters impose no cost on filibustering senators—they don’t need to be on the floor and can be doing other business.

### 7. *Only Require a Simple Majority to Invoke Cloture*

Senator Tom Harkin has been proposing for 20 years, both when he’s been in the minority and the majority, to decrease the number of senators needed, eventually down to a simple majority, on successive cloture votes on the same legislation.<sup>78</sup> While this would address the ability of the minority to block majority will, it would not address what I think is the most serious problem with filibusters, the using up of floor time. Indeed, it would exacerbate that problem.

### 8. *Require More than One Senator to Object to Proceeding by Unanimous Consent*

This would address the problem of the rogue senator whose filibuster is not even supported by his or her party leadership.

### 9. *Guarantee Consideration of Amendments*

In order to garner enough votes for filibuster reform, any significant change to the filibuster process would require some reasonable protection of the rights of minority senators to offer amendments.

## B. *Implementing Reforms*

I believe the most effective rules changes would be eliminating the filibuster on motions to proceed, reducing the amount of post-cloture debate below 30 hours, requiring a talking filibuster, and shifting the burden to filibustering senators to produce 41 votes to continue debate. If we do make

---

Oceanic and Atmospheric Administration Officer Corps. 112th Cong. § 2 (2011). The bill also creates a working group on streamlining paperwork for nominations § 4. It passed the Senate in a strong 79-20 bipartisan vote on June 29, 2011. 157 CONG. REC. S4,178 (daily ed.) (vote no. 101). The bill passed the House a year later and was signed by the President on Aug. 10, 2012. 158 CONG. REC. H5,448 (daily ed. July 31, 2012) (vote no. 537).

<sup>77</sup> A resolution making this change was introduced and defeated in 2011. S. Res. 21, 112th Cong. (2011).

<sup>78</sup> In 1995, Sen. Harkin, when he was a member of the minority party, introduced an amendment to S. Res. 14. S. Amdt. 1, 104th Cong. In 2011, he introduced S. Res. 8, 112th Cong.



a significant reform to the filibuster rules, I also think it is critical to guarantee the minority the right to offer some number of non-dilatory amendments.

Of these, I believe shifting the burden to filibustering senators to produce 41 votes to continue a filibuster would be the single most effective change we could make. The burden should be on those who want to delay action to show up and vote. With the burden, as it is now, on those who want to pass a bill or confirm a nomination to produce 60 votes to end a filibuster, senators who support a filibuster do not even need to vote to prevail—all they need is one senator on the floor to object to any attempt to move a bill forward by unanimous consent. Testifying before the Senate Rules and Administration Committee in 2010, Senator Gregg, who generally opposed changes to the filibuster process, acknowledged shifting the burden to filibustering senators would make sense.<sup>79</sup>

Over the course of the summer and fall of 2010 the Senate Committee on Rules and Administration held six hearings on filibuster reform.

Perhaps more controversial than any proposed substantive change to the rules was what the process would be. While Rule XXII expressly states that it takes two-thirds of those present and voting to change the rules (67 votes if all 100 senators are present), Senator Tom Udall was a strong proponent of the argument that at the beginning of a new Congress it only takes a simple majority vote to amend the rules. A longstanding constitutional principle, upheld in the Supreme Court, holds that one legislature cannot bind its successors.<sup>80</sup> Moreover, vice presidents of both parties, sitting as President of the Senate, have made advisory rulings that at the beginning of a Congress the Senate is not bound by the rules of its predecessors and has the constitutional right to adopt its rules of procedure by a simple majority vote.<sup>81</sup> Proponents of the idea that a simple majority vote at the beginning of a new Congress can change the rules call it the “constitutional option.”<sup>82</sup>

Those who contend that the Senate Standing Rules carry over to a new Congress unless changed according to the process set forth in the Rules argue that the Senate is a “continuing body” because only one-third of the membership is up for re-election every two years.<sup>83</sup> This rationale is undercut by the fact that legislation that never receives a floor vote by the end of a Congressional session does not get carried over to a new Congress.

The threat of making a rules change by a simple majority has sometimes been what is necessary to reach a compromise on a rules change.

---

<sup>79</sup> *Examining the Filibuster*, *supra* note 16, at 603 (statement of Sen. Judd Gregg).

<sup>80</sup> See *Newton v. Comm'rs*, 100 U.S. 548, 559 (1879).

<sup>81</sup> See 103 CONG. REC. 11 (1957) (Vice President Nixon); 115 CONG. REC. 600–01 (1969) (Vice President Humphrey); *Examining the Filibuster*, *supra* note 16, at 473 (statement of Sen. Tom Udall) (Vice President Rockefeller).

<sup>82</sup> *Examining the Filibuster*, *supra* note 16, at 621 (statement of Sen. Robert Bennett (R-Utah)).

<sup>83</sup> 4 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 1791 (Donald C. Bacon et al. eds., 1995).

Each time the Senate rules have been amended, the body has followed the rules-change procedures set forth in the rules themselves. Yet, on at least four occasions those changes were forced by attempts to use the constitutional option. In 1917, 1959, 1975, and 1979 amendments to the Senate debate rules passed that might well not have happened but for the threat that the constitutional option might be exercised.<sup>84</sup>

Employing the constitutional option was a procedure many senators thought would permanently poison relationships in the Senate. Indeed, when then-Majority Leader Bill Frist (R-Tenn.) became frustrated in the spring of 2005 by the minority's delaying of confirmation of President Bush's judicial nominees, he proposed changing Rule XXII by a simple majority vote. "The minority promised to retaliate by 'going nuclear'—making the Senate ungovernable by obstructing nearly all Senate action."<sup>85</sup>

When a group of seven Democratic senators and seven Republican senators announced they both would oppose changing the rules by a majority vote and support confirmation of the blocked nominees, Senator Frist abandoned his attempt to change the rules.<sup>86</sup>

The two-thirds majority requirement for changing the rules is a very high threshold to meet. Since the adoption of Rule XXII in 1917, the majority party in only five Congresses has had more than two-thirds of the Senate's membership.<sup>87</sup>

As we approached the beginning of the next Congress it became increasingly clear that most members of even the majority party would not support significant filibuster reform, and without the threat that the majority would make a significant change, the minority party had no incentive to agree to any compromise on rules reform.

Nevertheless, two changes were made at the beginning of 2011. A resolution sponsored by Mark Udall (D-Colo.) creating a Standing Order that the reading of amendments is waived by a non-debatable motion if the amendment has been submitted at least 72 hours before the motion and is available in printed or electronic form was adopted in an 81-15 vote.<sup>88</sup> Secret holds were eliminated by the adoption in a 92-4 vote of a resolution introduced by Senator Ron Wyden (D-Or.), which I cosponsored.<sup>89</sup> Under the Wyden resolution, a Standing Order was established prohibiting one senator from objecting to a unanimous consent request on behalf of another senator, unless the name of the senator with the objection is disclosed.<sup>90</sup>

---

<sup>84</sup> Gold & Gupta, *supra* note 21, at 260 (discussing passage of rule-change procedure).

<sup>85</sup> SMITH, *supra* note 26, at 1.

<sup>86</sup> *Id.* at 12.

<sup>87</sup> *Id.* at 24.

<sup>88</sup> S. Res. 29, 112th Cong. (2011).

<sup>89</sup> S. Res. 28, 112th Cong. (2011).

<sup>90</sup> *Id.* at § 1.

Three other resolutions to change the rules failed. Senator Harkin's proposal, which I cosponsored, to amend Rule XXII to have successive votes lowering the threshold for cloture, only garnered 12 votes.<sup>91</sup> Senator Tom Udall's comprehensive package to revise Rule XXII, which I cosponsored, failed in a 44-51 vote.<sup>92</sup> The Udall resolution would have eliminated the cloture vote on motions to proceed, guaranteed the minority the right to offer germane amendments, required talking filibusters on cloture motions on passage, and limited post-cloture debate on nominations to two hours.<sup>93</sup> A resolution introduced by Senator Jeff Merkley, requiring talking filibusters on all matters, failed in a 46-49 vote.<sup>94</sup>

Despite my strong belief that the filibuster requires further reform, I would be remiss not to acknowledge that the possibility of filibuster often does lead to compromise and the consensus needed to pass major legislation. That is why I do not support a complete elimination of the filibuster in the Senate. I believe it should be possible to further streamline the process to make the Senate more productive while still protecting the right of individual senators to debate and offer amendments to legislation.

## V. CONCLUSION

There may be growing support for changing the filibuster process at the beginning of the next Congress. Majority Leader Harry Reid (D-Nev.), who opposed the reform efforts in 2011, stated in July 2012 that he would push for rules changes if Democrats retained a majority after the 2012 election.<sup>95</sup>

President Obama also has expressed his support for filibuster reform, stating: "I will say that as just an observer of our political process that if we do not fix how the filibuster is used in the Senate, then it is going to be very difficult for us over the long term to compete in a very fast moving global environment."<sup>96</sup>

But it may well take the obstruction of the passage of popular legislation despite majority support in the Senate, something akin to the events at the onset of World War I that led to the adoption of Rule XXII, to make the fundamental change I think is necessary to reflect the current realities of the U.S. Senate.

---

<sup>91</sup> S. Res. 8, 112th Cong. (2011) (12-84 vote).

<sup>92</sup> S. Res. 10, 112th Cong. (2011).

<sup>93</sup> *Id.*

<sup>94</sup> S. Res. 21, 112th Cong. (2011).

<sup>95</sup> Suzy Khim, *Harry Reid Promises Filibuster Reform if Dems Win the Election*, WASH. POST WONKBLOG (Jul. 7, 2012, 10:40 AM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/17/harry-reid-promises-filibuster-reform-if-dems-win-the-election/>.

<sup>96</sup> Interview by John Stewart with President Barack Obama, *The Daily Show* (Comedy Central television broadcast Oct. 28, 2010).

