

# ESSAY

## THE EFFECT OF MODERN PARTISANSHIP ON LEGISLATIVE EFFECTIVENESS IN THE 112TH CONGRESS

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*This article examines the recent phenomenon of extreme partisanship in the United States Senate. Throughout history, the Senate has been a legislative body dedicated to debating and resolving the nation's most pressing issues. However, in recent years, paralyzing partisanship in Washington has severely impeded the Senate's work. Several Senate procedures, including the rules surrounding filibusters, cloture, and filling the amendment tree, have exacerbated this problem. In this article, Senator Snowe describes the effects of extreme partisanship on the Senate and offers her thoughts about how future Congresses should avoid such setbacks going forward.*

### I. INTRODUCTION

Throughout our nation's history, the United States Senate has largely been revered as a place where the problems facing our nation are solved after lengthy consideration and fervent debate. The United States Constitution provides the Senate with restrictions and responsibilities unique from those of the House of Representatives, including, for instance, the requirement that Senators be at least thirty years old before serving and "the sole Power to try all Impeachments."<sup>1</sup> In the *Federalist* papers, James Madison made clear the difference between the two houses of the Legislative Branch of American government: "The [H]ouse of Representatives will derive its powers from the people of America . . . The Senate[,] on the other hand[,] will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate."<sup>2</sup>

In a famous anecdote, George Washington and Thomas Jefferson were discussing the need for a Senate. Washington, a proponent for the establishment of a Senate, asked Jefferson why he poured his coffee into a saucer. "To cool it," said Jefferson, to which Washington responded, "Even so, we

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<sup>1</sup> U.S. CONST. art. I, § 3.

<sup>2</sup> THE FEDERALIST NO. 39, at 193 (James Madison) (Clinton Rossiter ed., 1992).

pour legislation into the senatorial saucer to cool it.”<sup>3</sup> Whether or not the story is true, it is a fitting analogy for the unique and lofty purpose of the United States Senate.

In 1835, Alexis de Tocqueville visited the Senate, and wrote of it in absolutely gushing terms.<sup>4</sup> “[T]he Senate,” he said, “is composed of eloquent advocates, distinguished generals, wise magistrates, and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe.”<sup>5</sup> He added that Senators “represent only the elevated thoughts which are current in the community, and the generous propensities which prompt its nobler actions, rather than the petty passions which disturb, or the vices which disgrace it.”<sup>6</sup> To de Tocqueville, the United States Senate was a model of governance.

Fast forward to modern times, and the United States Senate is viewed in a less sophisticated—and less praiseworthy—manner. An April 16, 2012 story in the *Washington Examiner* states that the United States Senate in 2011 was “the laziest in 20 years.”<sup>7</sup> It’s part of the “worst Congress ever” according to multiple observers, including the *Washington Post*’s Ezra Klein<sup>8</sup> and Congressional scholar Norm Ornstein, who bemoans the “decline in institutional loyalty and other norms, the near disappearance of meaningful debate and deliberation, and a sharp decline in the ‘regular order.’”<sup>9</sup>

The *Washington Times* has determined that the Senate of 2011 ranks at the very bottom of its Legislative Futility Index—a compilation of various “yardsticks of activity such as time spent in session, number of pages compiled in the Congressional Record, [and] number of bills passed and votes taken.”<sup>10</sup> The second worst session of the Senate? The second session of the 112th Congress, or the Senate of 2012.<sup>11</sup> Congressional scholar Sarah Binder perhaps summed up the state of today’s Senate best and most succinctly: “The Senate, besieged by its members’ and leaders’ partisanship, seems barely up to the task of solving vexing national problems, let alone the easy

<sup>3</sup> While this story has often been repeated, its veracity is very much in doubt. Nonetheless, it serves as an adequate metaphor for the Senate as a place for consideration and reasoned debate. The Thomas Jefferson Found., Inc., *Senatorial Saucer*, MONTICELLO.ORG, <http://www.monticello.org/site/research-and-collections/senatorial-saucer> (last visited Oct. 8, 2012).

<sup>4</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 259–60 (Henry Reeve trans., Sever & Francis 1863) (1835, 1840).

<sup>5</sup> *Id.* at 259.

<sup>6</sup> *Id.* at 260.

<sup>7</sup> Paul Bedard, *Report: Democrat-Controlled Senate Laziest in 20 Years*, WASH. EXAMINER (Apr. 16, 2012), <http://washingtonexaminer.com/report-democrat-controlled-senate-laziest-in-20-years/article/493996#.UJRHOWB8uDB>.

<sup>8</sup> Ezra Klein, *14 Reasons Why This is the Worst Congress Ever*, WASH. POST (July 13, 2012, 8:00 AM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever>.

<sup>9</sup> Norman Ornstein, *Worst. Congress. Ever.*, FOREIGN POLICY, July 19, 2011, [http://www.foreignpolicy.com/articles/2011/07/19/worst\\_congress\\_ever](http://www.foreignpolicy.com/articles/2011/07/19/worst_congress_ever).

<sup>10</sup> Stephen Dinan, *Senate Succeeds at Something: Futility*, WASH. TIMES, July 25, 2012, at A1.

<sup>11</sup> *Id.*

ones.”<sup>12</sup> Former Congressman Mickey Edwards (R-Okla.) went a step further: “If democracy is more about process—how decisions are made and who makes them—than about the policies that result,” he wrote, “the United States Senate has become not merely dysfunctional, but an actual threat to the functioning of America’s system of government.”<sup>13</sup>

What has happened? Why is the 112th Congress on pace to pass the fewest number of laws since 1947? Why is it that we no longer seem even capable of passing most pieces of legislation in a bipartisan manner? The answer lies largely in the rampant partisanship and polarization omnipresent in today’s Washington, as this Article will set out to detail.

## II. BEGINNING OF THE 112TH CONGRESS

The 112th Congress began in January 2011 with a renewed sense of optimism for bipartisanship following a very productive lame duck session in November and December of 2010. The term “lame duck” refers to the period of time following the election of a new president and/or Congress and the beginning of the next Congress on January 3rd of the following year. In the 2010 lame duck session, Congress was able to pass a number of high-profile and significant pieces of legislation, including: a two-year extension of the 2001/2003 tax rates;<sup>14</sup> the annual National Defense Authorization Act (“NDAA”) for the following year;<sup>15</sup> repeal of the military’s Don’t Ask, Don’t Tell (“DADT”) policy;<sup>16</sup> and a continuing resolution to keep the government operating into March of the following year.<sup>17</sup> Congress also ratified the New Strategic Arms Reduction Treaty (“New START”).<sup>18</sup> Some of these bills were routine authorizations, like the NDAA, and others were more ceremonial pieces of legislation, such as the naming of post offices. Yet, in the end, Congress passed 98 laws in the final two months of the year.<sup>19</sup>

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<sup>12</sup> Sarah Binder, *Through the Looking Glass, Darkly: What has Become of the Senate?*, 9 FORUM, no. 4, at art. 2, 13, available at [http://www.brookings.edu/~media/research/files/articles/2011/12/senate-binder/12\\_senate\\_binder.pdf](http://www.brookings.edu/~media/research/files/articles/2011/12/senate-binder/12_senate_binder.pdf).

<sup>13</sup> Mickey Edwards, *The Dysfunctional Senate*, ATLANTIC (Feb. 7, 2010, 3:49 PM), <http://www.theatlantic.com/politics/archive/2010/02/the-dysfunctional-senate/35503>.

<sup>14</sup> Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296.

<sup>15</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137.

<sup>16</sup> Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

<sup>17</sup> Continuing Appropriations and Surface Transportation Extensions Act, Pub. L. No. 111-322, 124 Stat. 3518 (2010).

<sup>18</sup> Treaty with Russia on Measures for Further Reduction & Limitation of Strategic Offensive Arms, U.S.-RUSS., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (2010). The Senate vote on the New START Treaty occurred on December 22, 2010. S. TREATY DOC. NO. 111-5, Vote No. 298, Dec. 22, 2010 (Treaty Ratified 71-26).

<sup>19</sup> *Browse Public Laws: 111th Congress*, LIBRARY OF CONG., <http://thomas.loc.gov/home/LegislativeData.php?&n=PublicLaws&c=111> (last visited Oct. 31, 2012) (laws passed by the Congress in November and December 2010 are Pub. L. No. 111-285 through Pub. L. No. 111-383).

Additionally, many people, including myself, believed that the challenges facing our nation were too great for us to resort to the partisanship of recent years. Unemployment remained far too high at 9.4 percent in December 2010.<sup>20</sup> The Department of Commerce's Bureau of Economic Analysis on December 22, 2010 announced that Gross Domestic Product grew at an annual rate of 2.6 percent in the third quarter of 2010<sup>21</sup>—better than previously, but no indication that our economy was out of the woods.

### III. CONGRESS: THE MOST POLARIZED SINCE RECONSTRUCTION

The 2010 Midterm elections were viewed by many as a desire for change in Washington after two years of Democratic control of both the Executive and Legislative Branches of the Federal government. According to a late November 2010 Marist poll, 72 percent of respondents said “Republicans should work with Democrats and President Barack Obama to get things done.”<sup>22</sup> Yet little has changed for the positive with respect to how Congress has operated in the two years following that historic election, which resulted in “the largest reshuffling of the House of Representatives in 50 years.”<sup>23</sup>

Indeed, political scientists who study Congress have noted that the two chambers remain more polarized than at any point in recent memory. Keith Poole and Howard Rosenthal, two such scholars, have written:

[p]olarization declined in both chambers from roughly the beginning of the 20th Century until World War II. It was then fairly stable until the late 1970s and has been increasing steadily over the past 25 years . . . Interestingly, Congresses 100-112, if anything, mark an acceleration of the trend (especially in the House). Note, however, that the acceleration is smooth and does not show a particular jump in polarization induced by the large Republican freshman class elected in 1994. Polarization in the House and Senate is now at the highest level since the end of Reconstruction.<sup>24</sup>

So Congress has become progressively more divided and polarized over time, arriving at today's pinnacle of partisanship.

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<sup>20</sup> *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/LNS14000000> (last visited Nov. 2, 2012).

<sup>21</sup> U.S. Dep't of Commerce, *National Income and Product Accounts Gross Domestic Product, 3rd Quarter 2010*, BUREAU OF ECON. ANALYSIS (Dec. 22, 2010), [http://www.bea.gov/newsreleases/national/gdp/2010/gdp3q10\\_3rd.htm](http://www.bea.gov/newsreleases/national/gdp/2010/gdp3q10_3rd.htm).

<sup>22</sup> *11/29: Voters Want Compromise Across the Aisle But Doubt it Will Happen*, MARIST POLL (Nov. 29, 2011), <http://maristpoll.marist.edu/1129-voters-want-compromise-across-the-aisle-but-doubt-it-will-happen>.

<sup>23</sup> Marjorie Connelly & Bill Marsh, *Rightward, March*, N.Y. TIMES, Nov. 7, 2010, at WK3.

<sup>24</sup> Keith Poole & Howard Rosenthal, *The Polarization of Congressional Parties*, VOTEVIEW (May 10, 2012), [http://voteview.com/political\\_polarization.asp](http://voteview.com/political_polarization.asp) (emphasis omitted).

There is additional evidence that points to today's polarized atmosphere in the Congress. As part of the *National Journal's* annual Vote Ratings, the magazine analyzes the votes of members of Congress on liberal and conservative scales regarding economic, social, and foreign-policy issues.<sup>25</sup> According to the February 25, 2012 article unveiling the 2011 vote ratings, “[f]or the second year in a row but only the third time in the 30 years that *National Journal* has published these ratings, no Senate Democrats compiled a voting record to the right of any Senate Republican, and no Republican came down on the left of any Senate Democrat.”<sup>26</sup>

For the Senate, this is a dramatic change in composition from just three decades prior. “In 1982, when *National Journal* published its first set of voting ratings, 58 Senators—a majority of the 100-member chamber—compiled records that fell between the most conservative Democrat (Edward Zorinsky of Nebraska) and the most liberal Republican (Lowell Weicker of Connecticut).”<sup>27</sup>

The magazine reported a similar trend in the House of Representatives.<sup>28</sup> “The House in 1982 was chock-full of ‘Boll Weevils’ (conservative Democrats) and ‘Gypsy Moths’ (liberal Republicans),” as I can personally attest.<sup>29</sup> “That year’s *National Journal* ratings found 344 House members whose voting records fell between the most liberal Republican and the most conservative Democrat. Today, the number is 16,” which represents less than four percent of the entire chamber.<sup>30</sup>

Additionally, the political reality in many states has changed over the past few decades. There are fewer so-called “swing states” today, as the “red” states get redder and the “blue” states bluer. One indication of this trend is the dwindling number of Senators whose state voted for the opposite party’s nominee in the previous presidential election. For instance, I represent Maine as a Republican, but my state has voted for the Democratic nominee for president in each election since 1992.<sup>31</sup> After the 1984 elections, there were 49 such Senators, a number that rose to 57 following the 1986 elections.<sup>32</sup> Today, the number stands at 25, which will become 21 with the advent of the 113th Congress.<sup>33</sup> Such a phenomenon ensures less political

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<sup>25</sup> Cf. John Aloysius Farrell, *Divided We Stand*, NAT’L J., Feb. 23, 2012, available at <http://www.nationaljournal.com/magazine/divided-we-stand-20120223>.

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See *Election Results*, MAINE.GOV, <http://www.maine.gov/sos/cec/elec/prior1st.htm> (last visited Oct. 14, 2012).

<sup>32</sup> See FED. ELECTION COMM’N, FEDERAL ELECTIONS 86 3–8 (1987); FED. ELECTION COMM’N, FEDERAL ELECTIONS 84 3–23 (1985); FED. ELECTION COMM’N, FEDERAL ELECTIONS 82 1–7 (1982); CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 1980 1–70 (1981).

<sup>33</sup> See FED. ELECTION COMM’N, FEDERAL ELECTIONS 2008 43–78 (2009); FED. ELECTION COMM’N, FEDERAL ELECTIONS 2010 38 (2011); *2012 Presidential Election Results*, WASH.

incentive for members to work together, because the states themselves are becoming more homogeneously conservative or liberal.

Without a doubt, polarization has taken root in both chambers of the United States Congress for a variety of reasons. Consider, for instance, the constant demands for content and ratings among the 24-hour news cycle, which serves to accelerate the polarization of viewpoints and entrench policymakers before thoughtful debate even has the opportunity to take hold. Indeed, I often refer to this phenomenon as being defined through the prism of either Fox News on the one hand, or MSNBC on the other.

Additionally, contemplate the role the explosion of so-called “third party groups” has had in recent years. Funded by single-ideology advocates, these groups spend 71 percent of their budgets funding campaign activities to oppose, rather than support, candidates.<sup>34</sup> And these groups have astounding amounts of money. In 1990, just 23 years ago, total outside spending in that election was just \$7.2 million.<sup>35</sup> Fast forward to 2010, and it was \$295 million, a number that reflects the recent rise of so-called Super PACS.<sup>36</sup> In 2012, the total exceeded \$1 billion.<sup>37</sup>

The question is, what impact has the polarization borne from such factors had on the effectiveness of the two Congressional bodies to function as problem-solving, legislative institutions? There are a number of timely and illustrative examples of how the widespread polarization in Congress has affected our ability to perform our jobs as legislators. Many of these concern procedural norms within the Senate—such as the cloture rule, filibuster, and right to unlimited debate. As Binder has noted, “Both parties expect that the other party will fully exploit its procedural rights, leaving each side to take increasingly aggressive steps that anticipate and attempt to undercut the other party’s tactics.”<sup>38</sup> We now have what amounts to a “parliamentary arms race between the two political parties and their leaders,” she notes, and what I call a perversion of the norms—distorting the traditions and rules of the Senate to serve an individual party’s political goals.<sup>39</sup> Let me begin by examining some recent trends regarding Senate rules and procedures that

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POST, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president> (last visited Nov. 10, 2012); *2012 U.S. Senate Election Results*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/senate> (last visited Nov. 10, 2012). This figure assumes that Senator-elect Angus King (I-Me.) will caucus with the Democratic party.

<sup>34</sup> Becca Heller, *A Half-Billion in Outside Influence: What Else Could the Money Buy?*, SUNLIGHT FOUND. REPORTING GRP. (Sept. 27, 2012), <http://reporting.sunlightfoundation.com/2012/what-could-we-buy-half-billion>.

<sup>35</sup> Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Nov. 1, 2012).

<sup>36</sup> *Id.*

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

<sup>38</sup> Binder, *supra* note 12.

<sup>39</sup> Binder, *supra* note 12.

have become factors of enhanced polarization and decreased legislative effectiveness, before turning to specific pieces of affected legislation.

#### IV. HOW POLARIZATION HAS IMPACTED LEGISLATING

##### A. Political Messaging

Much of what occurs in Congress today is what is often called “political messaging.” Rather than putting forward a plausible, realistic solution to a problem, members on both sides offer legislation that is designed to make a political statement. Specifically, the bill or amendment is drafted to make the opposing side look bad on an issue and it is not intended to ever actually pass.

Several Capitol Hill-based newspapers have written about this phenomenon, which is regularly employed by both Republicans and Democrats. A March 19, 2012 article in *Roll Call* noted that “Senate Majority Whip Dick Durbin ([D]-Ill.) has been working with Democrats facing re-election to help organize and develop message amendments to counter the GOP on gas prices and the Keystone XL oil pipeline, another tool Republicans have used this year to attack the president on jobs.”<sup>40</sup> So while Republicans continued to hold votes on the Keystone XL pipeline—which the President indicated he had concerns with at that time—Democrats decided to offer their own versions of messaging amendments to put pressure on Republicans.

The *New York Times* editorial board discussed the issue in a June 8, 2012 editorial entitled *The Bills to Nowhere*.<sup>41</sup> The authors wrote that “[p]olitical-message bills have sprouted like weeds in the last few years, the product of extreme polarization and stalemate. Elected officials have to show that they’re doing something, so they propose bills designed only to create a talking point against the other side.”<sup>42</sup> The *Times* cited several examples, including legislation to repeal parts of the health care reform law passed in 2010—which has passed the House of Representatives, but not the Senate—and the Paycheck Fairness Act, which was “designed to embarrass Mitt Romney and other Republicans.”<sup>43</sup>

As I have often said, messaging amendments don’t put food on the table, and they don’t help create jobs. They are just that: messaging. And they fail to help members of Congress solve the very real problems facing the nation. They represent the easy way out, so to speak; we demonstrate that we’re arguing about issues that often matter greatly to the American people, but nothing gets accomplished.

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<sup>40</sup> Meredith Shiner, *In Senate, Democrats Try to Pad Resumes*, *ROLL CALL*, Mar. 19, 2012, at 1.

<sup>41</sup> Editorial, *The Bills to Nowhere*, *N.Y. TIMES*, June 8, 2012, at A26.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

*B. Filibuster*

The filibuster is a unique maneuver. There is no Senate rule that sets forth the use of a filibuster; it is a procedure that is employed to prevent a piece of legislation from receiving a vote.<sup>44</sup> As the Congressional Research Service has noted, “possibilities for filibustering exist because Senate rules deliberately lack provisions that would place specific limits on Senators’ rights and opportunities in the legislative process.”<sup>45</sup>

There has been much discussion of the term filibuster in recent years because it is an easy concept to understand at its basic level—blocking a vote. But the filibuster is much more complicated precisely because there are no rules related to it. Instead, Senate rules require 60 votes to agree to limit debate in what is known as the “cloture” rule (more in the next section).<sup>46</sup> As such, any time the Senate does not agree to cloture, one can declare that the bill has been “filibustered,” whether or not that was the intent of those voting against the motion.

But, in a very real sense, the filibuster has the potential to bring the Senate to a grinding halt. If the minority were to filibuster every piece of legislation that comes to the Senate floor, the Senate would be unable to make progress on those bills, and nothing could be accomplished. As such, there has been a public debate both inside and outside the Senate regarding whether there is a necessity for filibuster reform.<sup>47</sup>

Proponents of reform, like Ezra Klein, point to the *Federalist* papers to justify their belief.<sup>48</sup> Specifically, in *Federalist 22*, Alexander Hamilton describes requiring a supermajority to pass all legislation or nominations in direct terms: “its real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junta, to the regular deliberations and decisions of a respectable majority.”<sup>49</sup>

But to those who view the filibuster as a tool to slow the action of the Senate in order to provide appropriate time to consider legislation, eliminating or significantly changing the filibuster represents a threat to minority rights, essentially blocking the minority from having a say in the final passage of any legislation. What is clear, however, is that the filibuster is part of

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<sup>44</sup> See *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 Nov. 2, 2012).

<sup>45</sup> See RICHARD S. BETH ET AL., CONG. RESEARCH SERV., RL30360, *FILIBUSTER AND CLOTURE IN THE SENATE 1* (2011) (emphasis omitted).

<sup>46</sup> See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-425, *INVOKING CLOTURE IN THE SENATE 1* (2011).

<sup>47</sup> Manu Raju & Scott Wong, *Filibuster Talks to Drive Senate Recess*, POLITICO (Jan. 6, 2011), <http://www.politico.com/news/stories/0111/47186.html>.

<sup>48</sup> See Ezra Klein, *Is the Filibuster Unconstitutional?*, WASH. POST., May 15, 2012, at A11 (citing Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 493–94 (2011)).

<sup>49</sup> *Id.*



the ongoing discussion on how to make the Senate more effective and less deadlocked. But there are two other rules and procedures that have received far less attention—but deserve a closer look—in explaining the modern Senate.

### C. The Cloture Rule

In a 2010 piece for *The New Yorker*, author George Packer rightly stated that “[m]any of the Senate’s antique rules and precedents have been warped beyond recognition by the modern pressures of partisanship.”<sup>50</sup> One need look no further than the cloture rule for a fundamental example of the truth of this statement.

The Senate instituted a cloture rule in 1917 in order to curtail the routine filibusters of the day.<sup>51</sup> At the time it was established, the rule required a two-thirds majority in order to end debate—a remarkably high bar.<sup>52</sup> In 1975, the number of votes required for cloture was reduced to three-fifths, or sixty votes.<sup>53</sup> The presence of a cloture rule underscores the imperative of working together in passing major legislation. Indeed, over the ninety-five years since the cloture rule was instituted, the party in charge has had a filibuster-proof supermajority for only fifteen of those years.<sup>54</sup>

In the years after the cloture rule was passed, it was scarcely utilized.<sup>55</sup> It was not until the early 1970s that we witnessed a Congress with the instances of cloture reaching double digits.<sup>56</sup> In the last three Congresses, however, the Senate has reached triple digits in the number of cloture motions filed—shattering the previous high of eighty-two motions in the 104th Congress.<sup>57</sup> Indeed, over the course of 2007 through the present, the 385 cloture motions filed represent twenty-eight percent of all such motions since 1917;

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<sup>50</sup> George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38, 45.

<sup>51</sup> See *Cloture Rule*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/minute/Cloture\\_Rule.htm](http://www.senate.gov/artandhistory/history/minute/Cloture_Rule.htm) (last visited Oct. 13, 2012).

<sup>52</sup> See *id.*

<sup>53</sup> See *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. 13, 2012).

<sup>54</sup> The instances in which one party held a supermajority, or filibuster-proof majority, were the 74th, 75th, 76th, 77th, 89th, 94th, 95th, and first half of the 111th Congresses (in some instances, Independents who caucused with the majority party were included as part of the supermajority). See *Party Division in the Senate, 1789–Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Nov. 1, 2012). The Democrats lost the supermajority in early 2010 (halfway through the 111th Congress) with the election of Senator Scott Brown (R-Mass.), who famously became the 41st Republican Senator. Meredith Shiner, *Scott Brown is Sworn in as 41st GOP Sen.*, POLITICO (Feb. 4, 2010), <http://www.politico.com/news/stories/0210/32552.html>.

<sup>55</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. 2, 2012).

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

<sup>57</sup> *Id.*

the 271 cloture votes are twenty-seven percent of all cloture votes; and the 161 motions invoked add up to thirty-seven percent of the total.<sup>58</sup>

So why the dramatic increase in cloture in recent years? The majority in the Senate would argue that its hands are tied because it believes the minority will filibuster each and every bill presented to the Senate. The minority would argue that the majority has diminished the rights of its senators to offer amendments to legislation (more in this trend in the next section) and thoroughly and appropriately debate bills according to historical precedent. Additionally, it is not the minority's prerogative to file cloture motions—that power rests with the Majority Leader—and so the rise in these instances is at his discretion.<sup>59</sup> He can file a cloture motion as soon as he brings legislation to the floor, before any discussion occurs or any filibuster is clearly delineated.<sup>60</sup>

It is also important to note that both the percentage of cloture petitions that are vitiated—or withdrawn—as well as the percentage of cloture votes passing is on the rise. In the 2000s, the percentage of cloture petitions withdrawn averaged twenty-two percent.<sup>61</sup> In the 112th Congress, the figure has skyrocketed to thirty-nine percent.<sup>62</sup> And the fifty-three percent success rate for passing cloture votes in the 112th Congress represents the highest in the last 40 years.<sup>63</sup> Therefore, there is a careful distinction to be made in correlating the filibuster with the cloture motion, as not every cloture motion is filed in response to a filibuster.

The Senate Majority and Minority Leaders, Harry Reid and Mitch McConnell, reached a “gentleman’s agreement” at the outset of the 112th Congress to avoid this scenario.<sup>64</sup> Specifically, “McConnell . . . promised to reduce the number of times the minority will block efforts to begin debate on legislation. Reid, in exchange . . . pledged to limit the number of times he will refuse Republicans opportunities to offer amendments.”<sup>65</sup> Regrettably, the agreement has not been maintained in large part due to the modern pressures of partisanship within the Senate.<sup>66</sup> Both members of the Senate and outside analysts have questioned whether the breakdown in such an agree-

<sup>58</sup> See *id.*

<sup>59</sup> See generally Davis, *supra* note 46.

<sup>60</sup> See Davis, *supra* note 46, at 2.

<sup>61</sup> John Barrasso, *Reid Doubles Down on Senate Dysfunction*, SENATE REPUBLICAN POL’Y COMM. (July 24, 2012), <http://www.rpc.senate.gov/policy-papers/reid-doubles-down-on-senate-dysfunction>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Manu Raju, *Filibuster Reform Goes Bust*, POLITICO (Jan. 28, 2011), <http://www.politico.com/news/stories/0111/48325.html>.

<sup>65</sup> Alexander Bolton, *Reid, McConnell Reach Agreement on Speeding Pace of Senate Business*, THE HILL (Jan. 27, 2011), <http://thehill.com/homenews/senate/140745-reid-mcconnell-reach-agreement-on-speeding-senates-pace-of-business>.

<sup>66</sup> See Ezra Klein, *There’s Too Much Trust in the Senate*, WASH. POST (June 22, 2012, 10:48 AM), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/22/theres-too-much-trust-in-the-senate>.

ment is cause for the Senate to reassess its rules.<sup>67</sup> Regardless of one's views, it seems unlikely that the use of cloture will return to the exception, rather than the rule, in coming years.

#### D. *Filling the Amendment Tree*

As has been noted, the United States Senate is unique among institutions of government. One of its hallmarks is the protection the body gives to the rights of the minority. While the House of Representatives, and many parliamentary-style bodies, are premised on majority rule, the Senate provides unprecedented deference to the party out of power. The effect of this has been debated over the centuries. Some believe that this only serves to gum up the works, so to speak, frustrating the majority and allowing for undue roadblocks to accomplish legislative goals. Others believe that such focus on minority rights fits perfectly with the intent of the Senate to be “the world’s greatest deliberative body,” as it slows things down (think of the Washington-Jefferson saucer conversation) and allows for unfettered, thorough, and in-depth consideration and debate of issues.

One of the Senate’s giants and foremost legislative historians, former Senator Robert Byrd (D) of West Virginia—who served as both Majority and Minority Leader during his fifty-one years in the Senate—was also one of its strongest and most eloquent defenders of minority rights. He referred to the institution as “the one place in the whole government where the minority is guaranteed a public airing of its views,”<sup>68</sup> a place “for open and free debate and for the protection of political minorities.”<sup>69</sup> And he advised that “as long as the Senate retains the power to amend and the power of unlimited debate, the liberties of the people will remain secure.”<sup>70</sup> It is essential, then, that each Senate uphold and protect the rights of the minority. It is also in the best interest of both parties, as they can fall in and out of the majority at the discretion of the voters.

As such, a recent—and disturbing—trend related to the rights of the minority is the increase of instances in which the Majority Leader has “filled the amendment tree.”<sup>71</sup> Because the Senate engages in full and open debate, members are allowed to offer unlimited amendments to legislation that is being considered on the Senate floor.<sup>72</sup> Even if the amendment never receives a vote, it provides an opportunity for that Senator to highlight an issue of concern to him or her, and offers a voice for his or her constituents. Of

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<sup>67</sup> See *id.*

<sup>68</sup> 143 CONG. REC. 22 (1997).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Cf. Mark Strand, *Filling the Tree*, CONG. INST. (June 12, 2008), <http://conginst.org/2008/06/12/filling-the-tree>.

<sup>72</sup> *Senate Legislative Process*, U.S. SENATE [http://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm#3](http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm#3) (last visited Nov. 3, 2012).

course, it would be impossible to vote on every amendment filed under this scenario.<sup>73</sup> And so, under the normal course of action, the Senate will debate a bill and a number of amendments, voting on them, until a reasonable time has passed, then move to invoke cloture on the bill—limiting debate, but still ensuring that amendments ruled germane to the underlying bill by the Senate Parliamentarian are eligible to be voted on.

What has occurred on numerous occasions in recent years, instead, has been the Senate Majority Leader moving to “fill the tree” and decide—unilaterally—which amendments are voted on. In essence, the Senate’s powers are reduced to the whims of one individual, who determines both the number of amendments that the Senate will vote on, as well as which amendments will receive a vote. This procedure is truly antithetical to the traditional operation of the United States Senate. The effective result is what occurs in the House of Representatives with the so-called “closed rule,” which prevents amendments and substitutes from being offered to a bill.

As of November 11, 2012, the current Majority Leader has filled the tree more than sixty times since he assumed this leadership role in 2007.<sup>74</sup> That is an average of over ten instances per year.<sup>75</sup> This may not sound dramatic, until it is compared with previous Majority Leaders. From 1991 through 2006, the previous six Majority Leaders employed this tactic roughly 40 times collectively.<sup>76</sup>

One egregious example of this trampling of minority rights is action on the Small Business Jobs and Tax Relief Act in July 2012.<sup>77</sup> The Majority Leader bypassed the committee process and brought the bill directly to the Senate Floor.<sup>78</sup> The minority then voted in this instance to allow the Senate to proceed to the bill as part of an 80–14 vote on July 10th,<sup>79</sup> but the Majority Leader still “filled the amendment tree” and dictated that there would be votes on only two amendments, both of his personal choosing.<sup>80</sup> Every other Senator was prohibited from having his or her concerns even raised, let alone voted upon. As such, the legislation progressed no further, as Republicans largely voted against invoking cloture on the bill on July 12th.<sup>81</sup>

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<sup>73</sup> In a traditional open amendment process, Senators can offer any amendment to an underlying bill, regardless of whether or not it is germane to that legislation. At times, Senators come to the floor to file several hundred amendments.

<sup>74</sup> Barrasso, *supra* note 61.

<sup>75</sup> See Barrasso, *supra* note 61.

<sup>76</sup> Barrasso, *supra* note 61.

<sup>77</sup> S. 2237, 112th Cong. (2012).

<sup>78</sup> See *Bill Summary & Status 112th Congress (2011–2012) S.2237: All Congressional Actions*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:68:/temp/~bdzVCd:@@X> (last visited Nov. 5, 2012).

<sup>79</sup> S. 2237, Vote No. 174, July 10, 2012.

<sup>80</sup> Daniel Strauss, *Senate Stalls on Small-business Bill, Bush-Era Tax Rate Extension Proposals*, THE HILL (July 11, 2012), <http://thehill.com/blogs/floor-action/senate/237449-senate-fails-to-move-forward-on-small-business-bill-bush-era-tax-rate-proposals>.

<sup>81</sup> S. 2237, Vote No. 177, July 12, 2012.

The danger inherent in this new trend is obvious. If not for the ability of unlimited debate, the right to an open amendment process, and consideration of minority rights, what differentiates the Senate from the House of Representatives?

#### V. "THE FORMERLY ROUTINE IS NOW THE TENDENTIOUS"

In writing this piece, I am not in search of some halcyon day of the United States Senate, when everything was cordial and Senators passed legislation without rigorous, passionate debate and no one was disappointed. That day never existed, and it never will. However, the purpose of this article is to explore how partisanship has brought the United States Senate in particular to a low point, in both public opinion (Congress's approval rating now hovers around the low teens) and legislative accomplishment.<sup>82</sup>

In exploring the underlying factors that have helped bring the Senate to this state, let me offer a few examples of how the Senate has worked properly in the past. These instances reinforce the notion that we must be able to work in the future to regain the trust of the American people and achieve major goals for the nation.

I am frequently reminded of a bipartisan retreat for members of the House of Representatives in Hershey, Pennsylvania in the 1990s where accomplished historian David McCullough put Congress in perspective:

"Think what your institution has achieved," he observed. "It was Congress that created the Homestead Act. It was Congress that ended slavery. It was Congress that ended child labor. It was Congress that built the Panama Canal and the railroads. It was Congress that created Social Security. It was Congress that passed the Voting Rights Act. It was Congress that sent Lewis and Clark to the West and sent us on voyages to the moon."<sup>83</sup>

He pointed out that some acts of Congress, like the Marshall Plan and Lend Lease, were achieved under crisis conditions<sup>84</sup>—much like those our economy is experiencing today.

More recently, some Congressional achievements that I have been a part of demonstrate that the system can still work. In 1986, Congress did the seemingly impossible by overhauling our tax code<sup>85</sup>—something that is desperately required again today, twenty-seven years later. In fact, bipartisan

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<sup>82</sup> Jeffery Jones, *Congress' Approval Poised to Be Lowest in an Election Year*, GALLUP (Sept. 14, 2012), <http://www.gallup.com/poll/157475/congress-approval-poised-lowest-election-year.aspx>.

<sup>83</sup> David McCullough, Address to Bipartisan Congressional Retreat (March 1997) (transcript available at [http://capitolwords.org/date/1997/03/13/E460-2\\_bipartisan-congressional-retreat](http://capitolwords.org/date/1997/03/13/E460-2_bipartisan-congressional-retreat)).

<sup>84</sup> *Id.*

<sup>85</sup> Ron Wyden & Olympia Snowe, *Power of Partnership*, POLITICO (Nov. 2, 2011), <http://www.politico.com/news/stories/1111/67455.html>.

tax reform seemed so far-fetched when President Ronald Reagan first proposed it in his 1984 State of the Union address, members in the chamber laughed. Reagan, in his characteristic wit, asked: “I said something funny?”<sup>86</sup> But we set to work, and we discovered that working together, Republicans and Democrats can lower rates for businesses and working families and make the Tax Code fairer by eliminating tax breaks. Working together, Democrats and Republicans can make tax compliance less of a burden on U.S. taxpayers and a bipartisan effort can promote economic growth and certainty by moving away from what has become common practice of temporary tax extensions. Indeed, the 1986 law helped spur a period of economic confidence in which more than 6.3 million jobs were created in the following two years.<sup>87</sup>

In 1995, the Senate began debating the welfare reform bill, and it was believed by many to be an exercise in futility. But—in small groups—members from both parties, sensing the exhaustion and despair of a welfare system begun with the best of intentions, set aside their party labels and focused on the first major overhaul since the Great Society. I and other moderate Republicans worked with Senator Orrin Hatch (R-Utah) and Senator Chris Dodd (D-Conn.)—a true “odd couple” when it comes to the Senate—and with Majority Leader Bob Dole (R-Kan.) to reach agreement on child care, triggering a compromise which allowed the Senate to pass welfare reform by an astonishing 87–12 vote.<sup>88</sup> Ultimately, this bill became the foundation for the final reform package signed into law by President Clinton.<sup>89</sup>

These lessons are critical for members of both sides to recall. At present, as many have noted, it seems that the Senate is incapable of handling the smallest matters, let alone grand challenges like tax reform, job creation, and economic growth. Indeed, the Senate has failed to pass a budget resolution—as mandated by the Constitution<sup>90</sup> and in statute<sup>91</sup>—in over 1,250 days, or three-and-a-half years.<sup>92</sup>

As a March 2012 *New York Times* article titled *The Formerly Routine is Now Tendentious* aptly describes:

Some things that Congress does are meant to be difficult: budgets, tax law changes, the health care overhaul, the undoing of the health care overhaul. But there are a host of things that used to be

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<sup>86</sup> 1984 State of the Union Address, 20 WEEKLY COMP. PRES. DOCS. 87, 90 (Jan. 25, 1984).

<sup>87</sup> Wyden & Snowe, *supra* note 85.

<sup>88</sup> H.R. 4, Vote No. 443, Sept. 19, 1995.

<sup>89</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

<sup>90</sup> U.S. CONST. art. I, § 8.

<sup>91</sup> Congressional Budget and Impoundment Control Act, 2 U.S.C. § 601 (2006).

<sup>92</sup> *Grim Milestone: Democrat-Led Senate Fails to Pass a Budget for Three and a Half Years*, SENATE REPUBLICAN CONFERENCE (Oct. 29, 2012), <http://www.republican.senate.gov/public/index.cfm/2012/10/grim-milestone-democrat-led-senate-fails-to-pass-a-budget-for-three-and-a-half-years>.

almost routine that the 112th Congress has managed to make laborious and at times downright tedious—a departure from the traditional desires of members to pass legislation during an election year and claim accomplishments to trot out back home.<sup>93</sup>

Even in 2011—the year after an election year, when Congress traditionally works in a more bipartisan manner to pass legislation that must be passed but that members do not want to consider during the more politicized election years—was highly unproductive.<sup>94</sup> One example stands out more than any other: the debt ceiling debacle.

## VI. DEBT CEILING DEBACLE

As a new Congress was sworn in at the beginning of January 2011, we knew repairing and revitalizing the economy would be challenging. But we needed to start the work immediately, because at that time, there had been no appreciable, demonstrable improvement in our economy.

At the outset, Secretary of the Treasury Timothy Geithner wrote to members of Congress on January 6, 2011, about the imperative of raising the debt ceiling,<sup>95</sup> and I—like many of my colleagues—assumed we would find a means of addressing the issue. After all, we had done so before. According to the Treasury Department, Congress had acted seventy-eight times since 1960 to “raise, extend or alter” the definition of the debt limit.<sup>96</sup> Forty-nine of those instances occurred under Republican presidents, and twenty-nine times under Democratic presidents.<sup>97</sup> Furthermore, we had just undertaken a successful lame duck at the end of the 111th Congress, which seemed to promise more cooperation and bipartisanship that we had witnessed of late.

In his letter, Secretary Geithner wrote that the debt limit would have to be increased as early as March 31st, and he urged Congress to act quickly.<sup>98</sup> Indeed, Secretary Geithner wrote:

[d]efault would effectively impose a significant and long-lasting tax on all Americans and all American businesses and could lead to the loss of millions of American jobs. Even a very short-term or limited default would have catastrophic economic consequences

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<sup>93</sup> Jennifer Steinhauer, *The Formerly Routine is Now Tendentious*, N.Y. TIMES, Mar. 24, 2012, at A12.

<sup>94</sup> See, e.g., Ben Pershing, *In 2011, Fewer Bills, Fewer Laws and Plenty of Blame*, WASH. POST (Dec. 5, 2011), [http://www.washingtonpost.com/politics/in-2011-fewer-bills-fewer-laws-and-plenty-of-blame/2011/12/05/gIQA566iXO\\_story.html](http://www.washingtonpost.com/politics/in-2011-fewer-bills-fewer-laws-and-plenty-of-blame/2011/12/05/gIQA566iXO_story.html).

<sup>95</sup> Letter from Timothy Geithner, Sec’y, U.S. Dep’t of the Treasury, to Harry Reid, Majority Leader, U.S. Senate (Jan. 6, 2011), available at <http://www.treasury.gov/connect/blog/Documents/Letter.pdf>.

<sup>96</sup> *Debt Limit*, U.S. DEP’T OF THE TREASURY (July 20, 2012), <http://www.treasury.gov/initiatives/pages/debtlimit.aspx>.

<sup>97</sup> *Id.*

<sup>98</sup> Letter from Timothy Geithner to Harry Reid, *supra* note 95.

that would last for decades . . . For these reasons, I am requesting that Congress act to increase the limit early this year, well before the threat of default becomes imminent.<sup>99</sup>

After an initial warning that a default could occur within three months, increasing the debt limit should have been one of the first matters we tackled. There was nothing on our legislative calendar that should have prevented us from dealing with this critical issue in a systematic manner. Yet we delayed and deferred action on the issue, as the date for default continued to move into the future. First, Secretary Geithner said we needed to act before May 16th, instead of March 31st.<sup>100</sup> Then, on May 16th, Secretary Geithner announced that we would run out of money on August 2nd.<sup>101</sup> In the meantime, on April 18th, Standard & Poor's revised its outlook on our nation's AAA credit rating—which we had held consistently since 1941—to negative, indicating that a downgrade was possible.<sup>102</sup> It wasn't until August 1st that the House finally passed the Budget Control Act to avert a default, and the Senate followed suit in the early morning hours of August 2nd.<sup>103</sup>

As a result of this wholly dysfunctional exercise, our economy suffered. We ultimately did lose our sterling AAA credit rating from Standard & Poor's, which cited “[t]he political brinksmanship of recent months highlights what we see as America's governance becoming less stable, less effective and less predictable,” in making its determination.<sup>104</sup> Furthermore, a study by three economists for the American Enterprise Institute released in October 2011 showed that the debt ceiling dispute precipitated the worst uncertainty of any event in the last thirty years, including September 11th and the fall of Lehman Brothers.<sup>105</sup> In the end, this incident “underscored for many Americans the utter dysfunction in our politics and the disdain of our elected officials for finding solutions to big problems,” in the words of noted Congressional scholars Thomas E. Mann and Norman J. Ornstein.<sup>106</sup>

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<sup>99</sup> Letter from Timothy Geithner to Harry Reid, *supra* note 95.

<sup>100</sup> Letter from Timothy Geithner, Sec'y, U.S. Dep't of the Treasury, to Harry Reid, Majority Leader, U.S. Senate (Apr. 4, 2011), available at <http://www.treasury.gov/connect/blog/Documents/FINAL%20Letter%2004-04-2011%20Reid%20Debt%20Limit.pdf>.

<sup>101</sup> Letter from Timothy Geithner, Sec'y, U.S. Dep't of the Treasury, to Harry Reid, Majority Leader, U.S. Senate (May 16, 2011), available at <http://www.treasury.gov/connect/blog/Documents/20110516Letter%20to%20Congress.pdf>.

<sup>102</sup> See NIKOLA SWANN, STANDARD & POOR'S, CREDIT FAQ: A CLOSER LOOK AT THE REVISION OF THE OUTLOOK ON THE U.S. GOVERNMENT RATING 2 (2011).

<sup>103</sup> Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

<sup>104</sup> NIKOLA SWANN, STANDARD & POOR'S, RESEARCH UPDATE: UNITED STATES OF AMERICA LONG-TERM RATING LOWERED TO 'AA+' ON POLITICAL RISKS AND RISING DEBT BURDEN; OUTLOOK NEGATIVE 3 (2011).

<sup>105</sup> See Steven J. Davis, Scott R. Baker & Nicholas Bloom, *Business Class: Policy Uncertainty is Choking Recovery*, AM. ENTER. INST. (Oct. 6, 2011), <http://www.aei.org/article/business-class-policy-uncertainty-is-choking-recovery>.

<sup>106</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 3-4 (2012).



This should have been the example we used over the past year to change our ways and work together to solve the immense problems facing our country. This debacle should have been a rallying cry for us to shun the partisanship in favor of bipartisanship. Yet, to this point, it is clear that has not been the case. This legislative logjam does not have to be inevitable; yet, what are the prospects for change in the future?

## VII. THE IMPENDING “FISCAL CLIFF”

As of the time of writing this piece, the Congress must still tackle what has been labeled the “fiscal cliff” by Chairman of the Federal Reserve Ben Bernanke.<sup>107</sup> As a result of political obfuscation over the past year, we will have at most thirty-six business days in the lame duck session to confront myriad challenges that require resolution by the end of the year. These include a potential \$500 billion increase in taxes nationwide, including an estimated average increase of \$2,000 for middle class families;<sup>108</sup> deep across-the-board spending cuts as part of the sequestration; extension of unemployment insurance; fixing Medicare reimbursement for doctors; a potential increase in the debt ceiling; and twelve individual appropriations bills that, as I write, have yet to be considered in the Senate.

We can no longer delay and defer; we can no longer engage in partisan battles and then fail to resolve the issues at hand. It is absolutely essential that the Senate be the Senate again. I have called on the Senate leadership on two occasions—in both April and July of 2012—to instruct the committees of jurisdiction to begin their work on these formidable challenges.<sup>109</sup> As I wrote in my July letter:

What is required is the opportunity to thoughtfully scrutinize the approaches—the pros and cons and benefits and drawbacks—so that we can have a reasoned discussion during lame duck, rather

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<sup>107</sup> See *Highlights: Bernanke’s Q&A Testimony to House Panel*, REUTERS, Feb. 29, 2012, <http://www.reuters.com/article/2012/02/29/us-usa-fed-bernanke-idUSTRE81S1DO20120229>; see also *Monetary Policy and the State of the Economy*, U.S. HOUSE COMM. ON FIN. SERVS. (Feb. 29, 2012), <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=281399>.

<sup>108</sup> ROBERTON WILLIAMS ET AL., URBAN INSTITUTE AND URBAN-BROOKINGS TAX POLICY CENTER, *TOPPLING OFF THE FISCAL CLIFF: WHOSE TAXES RISE AND HOW MUCH?* 1 (2012).

<sup>109</sup> Letter from Olympia Snowe, Republican Deputy Whip, U.S. Senate, to Harry Reid, Majority Leader, U.S. Senate (Apr. 26, 2012), available at [http://www.snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=032653ba-a579-44f1-8e33-486c0eb840a2&ContentType\\_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group\\_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=4&YearDisplay=2012](http://www.snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=032653ba-a579-44f1-8e33-486c0eb840a2&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=4&YearDisplay=2012); Letter from Olympia Snowe, Republican Deputy Whip, U.S. Senate, to Harry Reid, Majority Leader, U.S. Senate & Mitch McConnell, Minority Leader, U.S. Senate (July 19, 2012), available at [http://www.snowe.senate.gov/public/index.cfm/files/serve/?File\\_id=ef26ca1c-5b19-4107-82a4-af404d1baf18](http://www.snowe.senate.gov/public/index.cfm/files/serve/?File_id=ef26ca1c-5b19-4107-82a4-af404d1baf18).

than ending up with policies drafted behind closed doors by a select few that could also result in unintended consequences.<sup>110</sup>

Yet the only action to date has been a markup in the Senate Finance Committee, on which I serve, the day that the Senate began its five-week August recess.<sup>111</sup> We considered a number of tax provisions that either had already expired or are set to expire at the end of the year, and we made some important progress. Hopefully, we have begun to build a consensus on tax policy that will lead to greater bipartisanship in the future on long overdue comprehensive tax reform.

But the gravity of the situation is apparent in our economic indicators. Unemployment surpassed eight percent in February 2009, and remained above that level for forty-three straight months.<sup>112</sup> Economic growth remains subpar, due in large part to the pervasive uncertainty across the private sector. An August article in the *New York Times* lays bare the way business executives view the fiscal cliff. Titled *Fearing an Impasse in Congress, Industry Cuts Spending*, the article details how American manufacturers are holding back on hiring new employees and making new investments because of Congress's inaction on these far-reaching issues.<sup>113</sup>

One business executive quoted in the story says, "The fiscal cliff is the primary driver of uncertainty, and a person in my position is going to make a decision to postpone hiring and investments . . . . We don't have to get to the edge of the cliff before the damage is done."<sup>114</sup> The simple fact of the matter is, private sector businesses—the source of our nation's job growth—are making decisions in anticipation of the next calendar year, and many have been unable to proceed given the uncertain tax and financial landscape. By the time this article is published, we will know what the outcome of the lame duck session relative to these fiscal cliff issues; that said, we should have worked sooner to begin addressing these issues instead of waiting for the eleventh hour to arrive.

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<sup>110</sup> Letter from Olympia Snowe, Republican Deputy Whip, U.S. Senate, to Harry Reid, Majority Leader, U.S. Senate & Mitch McConnell, Minority Leader, U.S. Senate (July 19, 2012), available at [http://www.snowe.senate.gov/public/index.cfm/files/serve?File\\_id=ef26ca1c-5b19-4107-82a4-af404d1baf18](http://www.snowe.senate.gov/public/index.cfm/files/serve?File_id=ef26ca1c-5b19-4107-82a4-af404d1baf18).

<sup>111</sup> See *Open Executive Session to Consider The Family and Business Tax Cut Certainty Act of 2012*, U.S. SENATE COMM. ON FIN. (Aug. 2, 2012), <http://www.finance.senate.gov/hearings/hearing/?id=c36e29ca-5056-a032-5260-7997a539f948> (video of markup and link to several related documents); see also Press Release, Olympia Snowe, U.S. Senator, Snowe Statement on Senate Finance Committee Tax Extender Markup (Aug. 2, 2012), [http://www.snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=89c59f3b-efba-408b-8b1a-897f5d8009fd&ContentType\\_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group\\_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=8&YearDisplay=2012](http://www.snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=89c59f3b-efba-408b-8b1a-897f5d8009fd&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=8&YearDisplay=2012).

<sup>112</sup> *Labor Force Statistics from the Current Population Survey*, *supra* note 20.

<sup>113</sup> Nelson D. Schwarz, *Fearing an Impasse in Congress, Industry Cuts Spending*, N.Y. TIMES, Aug. 6, 2012, at A1.

<sup>114</sup> *Id.*

## VIII. CONCLUSION

As I have said previously, I regrettably do not believe that the partisanship and polarization of recent years will recede in the near term. Charles Mahtesian and Jim VandeHei in a May 2012 article for the Capitol Hill newspaper *Politico* posed a question: “Think Congress is a big, dysfunction, polarized mess?”<sup>115</sup> They quickly answer their own question: “Just wait: It’s going to get worse.”<sup>116</sup> Chances are, whoever wins control of the Senate in November is bound to have the slimmest of majorities—even closer than the present 53-47 control of the Democrats.<sup>117</sup>

Gerald Seib of the *Wall Street Journal* has noted that the polarization across the country is also unlikely to subside. The *Journal*, in conjunction with NBC News, prepared a “county-by-county analysis of political attitudes based on results from all polling done this year.”<sup>118</sup> The results are stunning. “In the most politically competitive counties—the country’s swing counties—the race for control of Congress now appears dead even,” he wrote, with roughly equal numbers of people preferring Republicans as Democrats.<sup>119</sup>

“More striking,” he continues, “is the way Republican counties have grown more red and Democratic counties more blue.”<sup>120</sup> Those in Democratic counties prefer a Congress controlled by the Democrats by a 13-point margin, a wider gap than in polling prior to the 2006 midterm elections, when the party regained control of the House and the Senate.<sup>121</sup> In Republican counties, it’s a 15-point margin in their favor—also wider than the gap in 2010, which featured a major realignment in the House.<sup>122</sup>

These figures, combined with both other polling and the 2012 election results,<sup>123</sup> indicate that polarization among the electorate remains high. Indeed, it is no wonder, then, that it seems that we live in a time when many of our nation’s elected officials value partisanship and ideology more than service to the American people. We live in a time when the campaigning never stops and the governing all too frequently never begins; public disenchant-

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<sup>115</sup> Charles Mahtesian & Jim VandeHei, *Congress: It’s Going to Get Worse*, POLITICO (May, 2, 2012), <http://www.politico.com/news/stories/0412/75771.html>.

<sup>116</sup> *Id.*

<sup>117</sup> This figure includes Senators Joseph Lieberman (I-CT) and Bernie Sanders (I-VT) in the majority, as they have chosen to caucus with the Democrats.

<sup>118</sup> Gerald F. Seib, *No Sign of Voter Polarization Waning*, WALL ST. J., July 10, 2012, at A4.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., *Partisan Polarization Surges in Bush, Obama Years*, PEW RESEARCH CTR. (June 4, 2012), <http://pewresearch.org/pubs/2277/republicans-democrats-partisanship-partisan-divide-polarization-social-safety-net-environmental-protection-government-regulation-independents>.

ment with politics runs high; and issues and outcomes are “spun” by spin doctors.

But the enduring fact is, we are a great nation with resilient citizens who have overcome the most powerful trials of the 20th century. What our success in the future will require from its political leaders is cooperation, not confrontation; civility, not hostility; vision, not division. It will require a thorough and adequate review of how we consider legislation, including exploring potential changes to the filibuster, use of cloture, and ways to more consistently ensure the open amendment process that has been a hallmark and strength of the United States Senate. It will require a change in behavior, as members put partisanship aside for the good of the country—something that I strongly believe must be rewarded at the ballot box if it is to occur. And it will require the restoration of confidence in our nation’s leaders and our institutions. That confidence, I believe, will only be secured by evidence of a new and lasting bipartisanship among our leaders.