FILIBUSTER REFORM: CURBING ABUSE TO PREVENT MINORITY TYRANNY IN THE SENATE*

Senator Tom Harkin†

Thank you, Dean Revesz for that kind introduction. I also want to thank Michael Waldman, Executive Director of the Brennan Center, and Kelly Williams, who brought in food and wine from Iowa for the reception.

And I thank the Brennan Center for Justice for inviting me to give the 2010 Living Constitution Lecture. It is an honor to be here, and I am grateful.

My parents would be astonished to see their son delivering a "lecture" at New York University. My mom was an immigrant from Slovenia and had little formal schooling. My dad was a coal miner who left school after the sixth grade. Actually, Dad claimed to have finished eighth grade, but he was Irish and liked to boast!

But, enough with the humility! I am glad to be here, and glad to be among people who share, as I do, Justice Brennan's passion for ensuring that our society lives up to the principles of equality and liberty embodied in the Constitution.

Before I discuss the pressing need for filibuster reform in the United States Senate, I want to salute the Brennan Center's activism in the cause of improving access to quality civil legal services for all Americans. This issue is very personal to me. Before I was elected to Congress, I worked as a legal aid attorney in Iowa; and in the Senate I have fought for years to strengthen federal support for legal services. The Brennan Center has been an important ally in this effort, and I am very grateful for your work in this cause.

The Brennan Center invited me to discuss the United States Senate, and in particular my efforts to reform the use of the filibuster. Some may ask: why is a senator, admittedly not a constitutional

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scholar, addressing a somewhat arcane Senate procedure—to be precise Senate Rule XXII[1]—as part of an annual lecture examining the Constitution?

The fact is, when we discuss the "living Constitution," a conversation regarding this particular legislative procedure is both appropriate and timely.

Before the Bill of Rights and the Civil War Amendments—each containing vital protections for individual rights and liberties—the Founders enacted the Constitution to ensure that our citizens, through their democratically elected government, could effectively address problems facing the American people. As Justice Breyer wrote, "the Constitution . . . is a document that trusts people to solve those problems [of a community for] themselves. And it creates a *framework* for a government that will help them do so. That framework foresees democratically determined solutions, protective of the individual's basic liberties."[2]

However, the harsh reality today is that, in critical areas of public policy, our Congress is simply unable to respond effectively to the challenges that confront the United States today. Consider the major issues that the Senate has tried and failed to address: climate change and energy policy, labor law reform, and immigration reform, to name just a few.

And, more than one-hundred Obama nominees, eighty-five percent of whom were reported out of committee with overwhelming bipartisan support, are being prevented from even being considered by the full Senate. At this time in George W. Bush's presidency, only eight nominees were awaiting confirmation.

Quite frankly, the unprecedented abuse of Senate rules has simply overwhelmed the legislative process. As Norman Ornstein, a leading political scientist, wrote in a 2008 article titled "Our Broken Senate," "[t]he expanded use of formal rules on Capitol Hill is unprecedented and is bringing government to its knees."[3]

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1. STANDING RULES OF THE SENATE, 110th Congress, R. XXII.

2. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 134 (2005).

3. Norman Ornstein, *Our Broken Senate*, THE AM., Mar./Apr. 2008, at 74, 74, *available at* http://www.american.com/archive/2008/march-april-magazine-contents/our-broken-senate.

Let me give you just a few examples. In February, one senator blocked confirmation of every single executive branch nominee.[4] This past winter, one senator insisted that a 767-page amendment be read out loud and in its entirety—also preventing the Senate from conducting other business for many hours.[5] In March, the minority even used arcane Senate rules to block routine committee hearings.[6]

Let's be clear, these rules are not new, they have been around for a long time. What is new is the level of abuse. I have been in the Senate for a quarter century. Throughout my career, there have certainly been ideological differences and policy disagreements, but the leadership of the minority—sometimes Democrats and sometimes Republicans—while working to protect the broad interests of the minority, worked with the majority to make the system work. And, there have been moderates willing to compromise and interested in the act of governing—of turning a bill into a law.

But, today, that is not the case. Some members of the minority party are so reflexively anti-government that in their mind, there can be no compromise. Rather than responsibly use the rules, they are willing to abuse Senate procedures in order to sabotage and grind the entire government to a halt. This is the case with just a handful of minority members—but that is enough. And, with the support or acquiescence of the caucus's leadership, they are able to prevent the Senate from acting. They are able to fulfill William F. Buckley's rather extreme description of a conservative as someone who stands "athwart history, yelling [s]top . . . ."[7]

In no area is this more pronounced than the abuse of the filibuster, which has been used in recent years at a frequency without precedent in the history of our country.

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4. *See* Corey Boles, *Sen. Shelby Blocks 70 Nominations*, WALL ST. J. (Feb. 5, 2010, 6:20 PM), http://online.wsj.com/article/SB10001424052748704533204575047673424154924.html (discussing Senator Richard Shelby's blanket "hold" on Senate confirmation of all nominees).

5. *See* Jennifer Fermino, *DC Enters Blah-Blah Land*, N.Y. POST, Dec. 17, 2009, at 10 (discussing how one senator effectively blocked the Senate from conducting business).

6. *See* 156 CONG. REC. S1953 (daily ed. March 10, 2010) (statement of Sen. Burr) (objecting to unanimous consent request). Although no Senate committee or sub-committee is permitted to meet after the Senate has been in session for two hours or after 2:00 PM, s*ee* STANDING RULES OF THE SENATE, R. XXVI, ¶ 5(a), this rule is regularly waived.

7. William F. Buckley, Jr., *Our Mission Statement*, NAT'L REV., (Nov. 19, 1955, 9:00 AM), http://www.nationalreview.com/articles/223549/our-mission-statement/william-f-buckley-jr.

Historically, the filibuster was an extraordinary tool used only in the rarest of instances. When many people think of the filibuster, they think of the climax of the classic film "Mr. Smith Goes to Washington." There, Jimmy Stewart's character singlehandedly uses a filibuster to stop a corrupt piece of legislation favored by special interests. The reality, however, is that in 1939, the year Frank Capra filmed "Mr. Smith Goes to Washington," there were zero filibusters in the Senate.[8]

For the entire nineteenth century, there were only twenty-three filibusters.[9] From 1917—when the Senate first adopted cloture rules for ending debate[10]—until 1969, there were fewer than fifty.[11] In other words, over a fifty-two-year period, there was an average of less than one filibuster a year. In contrast, during the last Congress, 2007–2008, the majority was obliged to file a record 139 motions to end filibusters.[12] Already in this Congress, since January 2009, there have been ninety-eight motions to end filibusters.[13]

Let me give you another comparison. According to one study, in the 1960s, just eight percent of major bills were filibustered.[14] Last Congress, seventy percent of major bills were targeted.[15]

The fact is in successive Congresses—and I must admit, neither party has clean hands—Democrats and Republicans—have ratcheted up the level of obstructionism to the point where sixty votes have become a de facto requirement to even bring up a bill for consideration. What was once a procedure used rarely and judiciously has become an almost daily procedure used routinely and recklessly.

The problem, however, goes beyond the sheer number of filibusters.

First, this once rare tactic is now used or threatened to be used on virtually every measure and nominee, even those that enjoy near-uni-

8. *See Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited June 7, 2010).

9. SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 11 (1997).

10. *See Senate Action on Cloture Motions*, *supra* note 8.

11. *See id*.

12. *Id*.

13. Since this address was given, the number of filibusters in the 111th Congress has risen. *See id.* (showing that as of October 2008, there have been 123 cloture motions filed in the 111th Congress).

14. Barbara Sinclair, Patterns and Dynamics of Congressional Change (2009) (on file with author).

15. *See id*., at table 2.

versal support. As Norm Ornstein wrote, "[t]he Senate has taken the term 'deliberative' to a new level, slowing not just contentious legislation but also bills that have overwhelming support."[16]

In this Congress, the Republican minority filibustered a motion to proceed to a bill to extend unemployment compensation. After grinding the Senate to a halt, from September 22 through November 4, the bill passed 98-0.[17] In other words, the minority filibustered a bill they fully intended to support just to keep the Senate from conducting other business. Likewise, for nearly eight months, the minority filibustered confirmation of Martha Johnson as Administrator of the General Services Administration, certainly a relatively non-controversial position; she was ultimately confirmed 96-0.[18] And, for nearly five months, the minority filibustered confirmation of Barbara Keenan to the Fourth Circuit Court of Appeals; she was ultimately confirmed 99-0.[19]

Second, the filibuster has also increasingly been used to prevent consideration of bills and nominees. Rather than serve to ensure the representation of minority views and to foster debate and deliberation, the filibuster increasingly has been used to assert the tyranny of minority views and to prevent debate and deliberation. It has been used to defeat bills and nominees without their ever receiving a discussion on the floor. In other words, because of the filibuster, the Senate—formerly renowned as the world's "greatest deliberative body"—cannot even debate important national issues.

I mentioned that there have already been nearly one-hundred filibusters in this Congress.[20] That is not a cold statistic. Each filibuster represents the minority's power to prevent the majority of the people's representatives from debating legislation, voting on a bill, or giving a nominee an up-or-down vote. Under current rules, if forty-one senators do not like a bill and choose to filibuster, no matter how simple or noncontroversial, no matter that it may have the support of a majority of the House, a majority of the Senate, a majority of the American people, and the president, that bill or nominee is blocked from even coming before the Senate for consideration.

In other words, because of the filibuster, even when a party has been resoundingly repudiated at the polls, that party retains the power

16. Ornstein, *supra* note 3.

17. *See* Worker, Homeownership, and Business Assistance Act of 2009, H.R. 3548, 111th Cong.; 155 CONG. REC. S11077–103 (daily ed. Nov. 4, 2009).

18. *See* 156 CONG. REC. S456–68, S505 (daily ed. Feb. 4, 2010) (confirming the Johnson nomination).

19. *See* 156 CONG. REC. S904–10 (daily ed. Mar. 2, 2010) (confirming the Keenan nomination).

20. *See supra* p. 3 and note 13.

to prevent the majority from governing and carrying out the agenda the public elected it to implement.

At issue is a principle at the very heart of representative democracy—majority rule. Alexander Hamilton, describing the underlying principle animating the Constitution, wrote that "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail."[21]

The Framers, to be sure, put in place important checks to temper pure majority rule. For example, there are Constitutional restraints to protect fundamental rights and liberties. The Framers, moreover, imposed structural requirements. For example, to become law, a bill must pass both houses of Congress and is subject to the president's veto power.

The Senate itself is a check on pure majority rule. As James Madison said, "The use of the Senate is to consist in its proceeding with more coolness, with more system and with more wisdom, than the popular branch."[22] To achieve this purpose, citizens from small states have the same representation in the Senate as citizens of large states. Further, senators are elected every six years.

These provisions in the Constitution are ample to protect minority rights and restrain pure majority rule. What is not necessary, what was never intended, is an extra-Constitutional empowerment of the minority through a requirement that a supermajority of senators be needed to enact legislation, or even to consider a bill.

Such a veto leads to domination by the minority. As former Republican leader Bill Frist noted, the filibuster "is nothing less than a formula for tyranny by the minority."[23]

In fact, the Constitution was framed and ratified to correct the glaring defects of the Articles of Confederation—which required a two-thirds supermajority to pass any law, and unanimous consent of all states to make any amendment. The experience under the Articles had been a dismal failure—and one that the Framers were determined to remedy under the new Constitution. It is not surprising that the

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21. THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (Yale Univ. Press 2009).

22. ROBERT CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 9 (2002).

23. Senator Bill Frist, Restoring Fairness and Dignity to the Judicial Confirmation Process in the United States Senate, Speech at The Heritage Foundation (June 28, 2005), *available at* http://www.heritage.org/Events/2005/06/Restoring-Fairness-to-the-Judicial-Confirmation-Process-in-the-United-States-Senate.

Founders expressly rejected the idea that more than a majority would be needed for most decisions.

In fact, the Framers were very clear about circumstances where a supermajority is required. There were only five: ratification of a treaty, override of a veto, votes of impeachment, passage of a Constitutional amendment, and the expulsion of a member.

Seems clear, to those who worship at the shrine of "original intent," that if the Framers wanted a supermajority for moving legislation, they would have done so.

But, a supermajority requirement for all legislation and nominees would, as Alexander Hamilton explained, mean that a small minority could "destroy the energy of government."[24] Government would be, in Hamilton's words, subject to the "caprice, or artifices of an insignificant, turbulent, or corrupt junto."[25] I would not call the Republican minority in the Senate a "turbulent or corrupt junta," but Hamilton's point is well taken.

At this point, I do want to digress for a moment and discuss the current Republican minority. Much of the fault lies with the minority leader. In the past, Republican leaders have had to deal with extremists in their ranks who wanted to block everything—Jesse Helms is a good example. But, leaders, including Bob Dole, Trent Lott, and Bill Frist, while giving members like Helms a long leash, at some point said "enough!" They made clear that the senator was acting outside the goalposts and that it would not be tolerated. What is different, today, is that the minority leader is not willing to constrain the most extreme elements within his caucus.

James Madison also rejected a requirement of supermajority rule to pass legislation. He said "[i]t would be no longer the majority that would rule: the power would be transferred to the minority."[26]

Unfortunately, because of the filibuster, Madison's warning has become the everyday reality of the Senate. And, because of the reckless use of the filibuster, our government's ability to legislate and address problems is severely jeopardized.

That is why I have introduced legislation to amend the Standing Rules of the Senate to permit a decreasing majority of senators to in-

24. THE FEDERALIST NO. 22, *supra* note 21, at 110 (Alexander Hamilton).
25. *Id.*
26. THE FEDERALIST NO. 58, at 299 (James Madison) (Yale Univ. Press 2009).

voke cloture on a given matter.[27] On the first cloture vote, sixty votes would be needed to end debate. If the motion does not get sixty votes, a senator can file another cloture motion and two days later have another vote; that vote would require fifty-seven votes to end debate. If cloture is not obtained, a senator can file another cloture motion and wait two more days; in that vote, fifty-four votes would be required to end debate. If cloture is still not obtained, a senator could file one more cloture motion, wait two more days, and—at that point—just fifty-one votes would be needed to move to the merits of the bill.

Under my proposal, a determined minority could slow down any bill for as much as eight days. Senators would have ample time to make their arguments and attempt to persuade the public and a majority of their colleagues. This protects the rights of the minority to full and vigorous debate and deliberation, maintaining the very best features of the United States Senate.

As Senator George Hoar noted in 1897, the Constitution's Framers designed the Senate to be a deliberative forum in which "the sober second thought of the people might find expression."[28]

I also believe my proposal would encourage a more robust spirit of compromise. Right now, there is no incentive for the minority to compromise; they know they have the power to block legislation. But, if they know that at the end of the day a bill is subject to majority vote, they will be more willing to come to the table and negotiate seriously. Likewise, the majority will have an incentive to compromise because they will want to save time, not have to go through numerous cloture votes and thirty hours of debate post-cloture.

At the same time, this reform would end the current tyranny of the minority, and it would restore a basic and essential principle of representative democracy—majority rule in a legislative body. At the end of ample debate, the majority should be allowed to act; there would be an up-or-down vote on legislation or a nominee. As Henry Cabot Lodge stated, "[t]o vote without debating is perilous, but to debate and never vote is imbecile."[29]

And, there is nothing radical about the proposal I have introduced. The filibuster is not in the Constitution. Until 1806, the Senate had a rule that allowed any senator to make a motion "for the previous

27. *See* S. Res. 416, 111th Cong. (2010).

28. George F. Hoar, *Has the Senate Degenerated?*, 23 FORUM 129, 141 (1897).

29. Henry Cabot Lodge & William M. Stewart, *The Struggle in the Senate II: Obstruction in the Senate*, 157 N. AM. REV. 513, 527 (1893).

question."[30] This motion goes back to the British Parliament and permitted a simple majority to stop debate on the pending issue and bring an immediate vote.

Further, there is nothing sacrosanct about requiring sixty votes to end debate. Article I, Section 5, Clause 2 of the Constitution—the Rules of Proceedings Clause—specifies that "[e]ach House may determine the rules of its proceedings."[31] Using this authority, the Senate has adopted rules and laws that forbid the filibuster in numerous circumstances. For example, the Senate has limited the filibuster with respect to the budget, war powers, and international trade acts.[32]

Similarly, my legislation, far from being an unprecedented and radical change, stands squarely within a tradition of updating Senate rules as appropriate to foster an effective, smoothly operating government. For example, beginning in 1917, the Senate has passed four significant amendments, the latest in 1975, to its standing rules to limit the filibuster.[33]

It is long past time for the Senate to again use its authority to restore its ability to govern effectively and democratically and for the majority of the Senate to exercise its constitutional right.

I have introduced my proposal, this year, as a member of the majority party. The proposal, however, is one I first introduced in 1995, when I was a member of the minority party. Thus, to use a legal term, I come with clean hands. So I want to be clear that the reforms I advocate are not about one party gaining an undue advantage. It is about the Senate as an institution operating more fairly, effectively and democratically.

Even though I was in the minority in 1995, I introduced this legislation then because I saw the beginnings of an arms race, where each side would simply escalate the use of the filibuster. You filibustered twenty of our bills, we are going to filibuster forty of yours, and so on. And, should the Democrats find themselves in the minority, I would

30. 1 ANNALS OF CONG. 20–21 (1789) (Joseph Gales ed., 1834) (adopting "rules for conducting business in the Senate" including Rule IX, allowing a motion for the previous question); 15 ANNALS OF CONG. 201–04 (1806) (Joseph Gales ed., 1852) (adopting new Senate rules that did not allow for a motion on the previous question). *See generally* SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 33–39 (1997).

31. U.S. CONST. art. I, § 5, cl. 2.

32. *See* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform,* 27 HARV. J.L. & PUB. POL'Y 181, 212–14 (2003).

33. *See* CHRISTOPHER M. DAVIS & BETSY PALMER, CONG. RESEARCH SERV., RL 32149, PROPOSALS TO AMEND THE SENATE CLOTURE RULE 1–2 (2003) (discussing amendments adopted in 1917, 1949, 1959, and 1975).

not be surprised if there is a further ratcheting up. It is time for this arms race to end.

Justice William Brennan eloquently wrote that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[34]

The Founders adopted the Constitution to enable the American people, through their elected representatives, to govern. As Chief Justice Marshall made clear in *McCulloch v. Maryland*, any enduring Constitution is designed to, and must be able to, "be adapted to the various crises of human affairs."[35]

Unfortunately, I do not see how we can effectively govern a twenty-first century superpower when a minority of just forty-one senators, potentially representing less than fifteen percent of the population, can dictate action—or inaction—to the majority of the Senate and the majority of the American people. This is not democratic. Certainly, it is not the kind of representative democracy envisioned and intended by the Constitution.

Now, I could go on. But I want to leave some time for questions and dialogue. These remarks are billed as a lecture. You know, I always had a special place in my heart for professors who let class out early.

And I'm reminded of an old story about Hubert Humphrey, who was famous for his humaneness—and also his long-windedness. One time, he was asked to make brief remarks to a group of farmers. He spoke for five minutes. Then he went on for ten minutes, twenty minutes, thirty minutes. Finally, after forty-five minutes he stopped. He apologized for speaking so long. But, as Hubert put it: "The longer I talked, the more I liked what I heard!"

So again, friends, thank you for inviting me to speak this afternoon. And thank you for the tremendous work you are doing here at the Brennan Center.

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34. William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985).

35. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).