Backgrounder

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# The Filibuster Protects the Rights of All Senators and the American People

*Brian Darling*

**Abstract:** *The filibuster in the U.S. Senate protects the rights of Senators to debate and amend legislation, thereby protecting the interest of the American people. The filibuster actually realizes the Founders' intent that the Senate slow the legislative process "to ensure due deliberation and inquiry" before passing a bill. Current efforts to limit the filibuster to expedite the legislative process are misguided. One of the problems causing the expansion of the use of the filibuster are the actions by Senate Majority Leaders to limit debate and block other Senators from offering any amendments to select bills during Senate floor debates. The Senate would be better served by ending the Senate Majority Leader's power to limit amendments and debate.*

The United States Senate has a long and storied tradition of extended debate. Yet in a misguided effort to make it easier for the majority to shut down debate, leaders from both major political parties have flirted with eliminating the Senate filibuster. This would be unwise. Any rule that makes it easier for Senate leaders to end debate and block the amendment process will lead to less transparency, rushed debate, and a diminution of Senators' rights to participate in the legislative process.

The filibuster is permitted by Rule 22 of the Senate Rules.[1] Traditionally, Senators have enjoyed the right to unlimited debate on legislation or a nomination unless the Senate votes to end debate. Rule 22 thus empowers ordinary Senators to make their voices

## Talking Points

- The U.S. Senate is a distinctive institution that has developed a tradition of extended debate and an open amendment process.
- Filibusters occur when one or more Senators slow consideration of a bill or nomination through extended debate.
- In a misguided effort to make it easier for the majority to end debate, leaders in both parties have floated the idea of eliminating the filibuster. This would be unwise.
- Senate Majority Leaders have repeatedly used the parliamentary tactic of filling the amendment tree to stifle the right of Senators to offer amendments on bills during debate. The filibuster is sometimes used to counter this tactic.
- Several Senators have proposed reforms of the filibuster that would result in less debate, diminish opportunities to offer amendments, and grant more power to the majority party.
- Senate Rule 22 is the constitutional rule that established the filibuster.

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heard and guarantees them the opportunity to offer amendments during Senate floor debates.

Yet early in 2011, some Senators—including Senators Jeff Merkley (D–OR), Tom Harkin (D–IA), and Tom Udall (D–NM)—are expected to propose changes to the filibuster rule that give the Senate Majority Leader unprecedented power and diminish the power of individual Senators.

However, chipping away at the filibuster rule will also further exclude the American people from the legislative process. As bills and nominations move hastily through the Senate, the American people will have less time to read and appreciate the implications of legislation, not to mention less time to communicate their views on controversial bills or nominees to their elected representatives. The filibuster serves to empower individual Members to participate in the process and for the American people to have their say.

This paper discusses how Senate Majority Leaders, especially Harry Reid (D–NV), have used filling the amendment tree to suffocate the heretofore sacrosanct Senate traditions of unfettered debate and a wide-open amendment process. This paper also reviews some of the filibuster reform ideas pending in the Senate and offers some recommendations.

## What Is a Filibuster?

A filibuster is a debate by one or more Senators intended to slow consideration of a bill or nomination. The filibuster had "become popular in the 1850s" and was used in the early days of the House and Senate to prevent votes on bills.[2] Rule 22 of the Senate codified the Senate tradition of extended debate on controversial measures and nominations into the Senate's official rules.

This tradition is important because it enables all Senators representing all 50 states to participate in every piece of legislation and nomination. If the Senate jettisons its tradition of extended debate, it will likely cease to be a deliberative body, and the majority party will have unfettered power to pass legislation and confirm nominees with little to no debate.

According to the Senate's official history, Thomas Jefferson and James Madison saw the Senate as "the great 'anchor' of the government" that would cool the passions of the House of Representatives. "George Washington is said to have told Jefferson that the framers had created the Senate to 'cool' House legislation just as a saucer was used to cool hot tea."[3]

Rule 22 helps to realize this intent by putting the question of ending debate to the whole Senate and requiring the agreement of three-fifths (60) of Senators to end debate. Rule 22 states in part:

> "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.[4]

When Rule 22 was adopted in 1917, the threshold to end debate was two-thirds, higher than today's three-fifths (60 Senators) requirement. While nuances in the application of the filibuster rule make it difficult for the layman to understand, the rule protects the simple notion that the Senate can end debate on a measure or nomination only when 60 or more Senators agree.

Rule 19 recognizes Senators' right to debate:

1. U.S. Senate, Committee on Rules and Administration, "Rules of the Senate," Rule 22, at *http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome* (December 27, 2010).
2. U.S. Senate, "Filibuster and Cloture," at *http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm* (December 28, 2010).
3. U.S. Senate, "Senate Created," at *http://www.senate.gov/artandhistory/history/minute/Senate_Created.htm* (December 27, 2010).
4. U.S. Senate, "Rules of the Senate," Rule 22.

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, and no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.[5]

This rule allows a Senator to request recognition by the chair of the Senate to engage in extended debate. To start the process of ending debate, 16 Senators present a motion to invoke cloture or end debate. A Congressional Research Service report summarized the cloture process:

> Senate Rule XXII…known as the "cloture rule," enables Senators to end a filibuster on any debatable matter the Senate is considering. Sixteen Senators initiate this process by presenting a motion to end the debate. The Senate does not vote on this cloture motion until the second day of session after the motion is made. Then, for most matters, it requires the votes of at least three-fifths of all Senators (normally 60 votes) to invoke cloture….
>
> The primary effect of invoking cloture on a question is to impose a maximum of 30 additional hours for considering that question. This 30-hour period for consideration encompasses all time consumed by roll call votes, quorum calls, and other actions, as well as the time used for debate. During this 30-hour period, in general, no Senator may speak for more than one hour…. Under cloture, as well, the only amendments that Senators can offer are amendments that are germane and that were submitted in writing before the cloture vote took place.[6]

***Thomas Jefferson and James Madison saw the Senate as "the great 'anchor' of the government" that would cool the passions of the House of Representatives.***

A change in this procedure could dramatically change the legislative and nomination processes. If the Senate completely abolishes the filibuster, the Senate would likely become a smaller version of the House, effectively surrendering its unique constitutional role of cooling the hot tea coming from the House of Representatives.

## Origins of the Senate

The Senate is a distinctive institution of American politics and has developed a tradition of extended debate and a process of legislating that lends itself to numerous amendments. James Madison observed:

> In order to judge of the form to be given to [the Senate], it will be proper to take a view of the ends to be served by it. These were first to protect the people against their rulers: secondly to protect the people against the transient impressions into which they themselves might be led.[7]

The Senate is an institution that requires the participation of all 50 states through their 100 elected Senators. Senators representing those states cannot significantly participate and protect against "transient impressions" if they are prohibited from offering amendments and participating in extended debate.

5. *Ibid.*, Rule 19.
6. Richard S. Beth and Stanley Bach, "Filibusters and Cloture in the Senate," Congressional Research Service *Report for Congress*, March 28, 2003, at *http://www.senate.gov/reference/resources/pdf/RL30360.pdf* (December 27, 2010).
7. James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens, Ohio: Ohio University Press, 1984), p. 193, at *http://books.google.com* (December 28, 2010) (spelling modernized). See also Robert C. Byrd, *The Senate, 1789–1989: Addresses on the History of the United States Senate* (Washington, D.C.: Government Printing Office, 1991), p. xi, at *http://books.google.com* (December 28, 2010).

The U.S. Senate was created to be an institution far different from the House of Representatives. On July 16, 1787, the 55 Founding Fathers meeting in Philadelphia reached the "Great Compromise."[8] The Senate was created to give all states equal representation in one chamber of the legislative branch. This compromise was important to the creation of the U.S. system of government and sets up a system that is central to the bicameral nature of the legislative branch.

The House and Senate were set up differently so that the people would be represented in the House and the states would be represented in the Senate. They also envisioned the House of Representatives and Senate serving two distinct purposes. The House was to be the voice of the people, with U.S. Representatives elected every two years, while the Senate would represent the interests of the states with U.S. Senators elected every six years. James Madison explained these purposes in the *Federalist Papers*:

> The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress.[9]

Not surprisingly, each chamber has developed its own unique rules and traditions over the years. The Senate is a unique legislative body and many criticize the arcane rules and procedures for slowing down the legislative process. Yet these procedures and rules are exactly what the Founders wanted.

***"[A] good law had better occasionally fail, rather than bad laws be multiplied with a heedless and mischievous frequency. Even reforms, to be safe, must, in general, be slow."***

In his 1833 treatise on the Constitution, Joseph Story, Supreme Court Justice and professor of law at Harvard Law School, argued that the Senate served an important purpose in representing the interests of the states:

> No system could be more admirably contrived to ensure due deliberation and inquiry, and just results in all matters of legislation. No law or resolution can be passed without the concurrence, first of a majority of the people, and then of a majority of the states. The interest, and passions, and prejudices of a district are thus checked by the influence of a whole state; the like interests, and passions, and prejudices of a state, or of a majority of the states, are met and controlled by the voice of the people of the nation.[10]

Story believed that the Senate was to be the body that represented the interests of a majority of the states. Just as the House was to control the majority of the states, the Senate was to control the passions and prejudices of the House.

Story did not believe that the slow progress of legislation in the Senate was a bad outcome. He argued that "a good law had better occasionally fail, rather than bad laws be multiplied with a heedless and mischievous frequency. Even reforms, to be safe, must, in general, be slow."[11] Story believed that the Senate "is well adopted to the exigencies of the nation; but that it is a most important and valuable part of the system, and the real balance-wheel, which adjusts, and regulates, its movements."[12]

8. U.S. Senate, "Senate Legislative Process," at *http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm* (December 27, 2010).
9. James Madison, *The Federalist* No. 39, at *http://thomas.loc.gov/home/histdox/fed_39.html* (December 27, 2010).
10. Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* (Boston: Hilliard, Gray, and Company, 1833), p. 254, at *http://books.google.com* (December 27, 2010).
11. *Ibid.*

He did not see the Senate as a smaller version of the House.

Justice Story noted the importance of setting Senate terms at six years as a "a real check, in order to guard the states from usurpations upon their authority, and the people from becoming the victims of violent paroxysms in legislation."[13] Story believed that the Senate was a more stable institution than the House and that this benefited the country in dealings with foreign nations. Story concluded that there needed to be an "enlightened permanency in the policy of government,"[14] not merely a "sense of justice, and disposition to act right."[15]

James Madison argued and Justice Story later concurred that the Senate served a unique purpose in the legislative construct embodied in the Constitution. Over the years, the filibuster in its many incarnations has developed into a procedure that protects the right of extended debate and "slow" consideration of proposed laws passed by the House. The writings of the Founders and Story affirm that the filibuster is consistent with the original intent and explicit text of the Constitution.

## The Amending Process in the Senate

The tradition of extended debate and an open amendment process has evolved over the years in the Senate. The current rules of procedure protect the right of individual Senators, regardless of party affiliation, to participate significantly in the legislative process through debate and the amendment process.

The Constitution empowers both the House and Senate to determine its own rules of proceedings.[16] Jefferson's book *A Manual of Parliamentary Practice for the Use of the Senate of the United States* was the first published rules of Senate proceedings and is early evidence of an open amendment process for Senators when considering legislation.

In this book, Jefferson argued for a free amendment process in the Senate:

> If an amendment be proposed inconsistent with one already agreed to, it is a fit ground for its rejection by the House; but not within the competence of the Speaker to suppress as if it were against order. For were he permitted to draw questions of consistence within the vortex of order, he might usurp a negative on important modifications, and suppress, instead of subverting, the legislative will.[17]

This early writing evidences one Founding Father's strong belief that a free amendment process should be respected. Jefferson wanted the Senate to allow even amendments inconsistent with legislation and for Senators to vote on these decisions.

The Senate operates under 44 rules, which have been adopted by a two-thirds vote of the Senate.[18] Senate Rule 5 states that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Senate Rule 22 states that cloture to cut off debate is an "affirmative by three-fifths of the Senators duly chosen and sworn," except for "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."[19]

The Senate rules are clear, but not comprehensive. Rule 15 governs the amendment and motion process in the Senate.[20] The Senate's explicit rules are simple and have been interpreted by rulings of the President of the Senate over the years. The Pres-

12. *Ibid.*, p. 255.
13. *Ibid.*, p. 263.
14. *Ibid.*, p. 262.
15. *Ibid.*
16. U.S. Constitution, art. 1, § 5.
17. Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate of the United States* (1801; reprinted Washington, D.C.: Government Printing Office, 1993), p. 61.
18. U.S. Senate, "Rules of the Senate."
19. *Ibid.*, Rule 22.

ident of the Senate is the Vice President of the United States,[21] but when the Vice President is not present to preside, the Majority Leader appoints a Senator to preside over the Senate. Many times the chair, in consultation with the Senate Parliamentarian, interprets the rules and the Senate as a body can appeal that ruling or let it stand. Once established, a new precedent functions as if it were a rule of the Senate for purposes of conducting Senate business during debate, the consideration of amendments, and voting.

The Senate's amendment process has developed over decades of Senate practice. *Riddick's Senate Procedure* provides a history of Senate precedent and is considered the authoritative guide for Senators trying to apply the complex rules and precedents that govern the process of amending legislation.[22]

When a bill is brought before the Senate for consideration, Senators are traditionally allowed to make changes to the bill through the amendment process. An amendment is a proposal to change the text of some question pending before the Senate.[23] All bills are theoretically subject to the amendment process, but the Majority Leader has occasionally used a procedural trick—filling the amendment tree—to block amendments to bills.

There are generally three types of amendments: a motion to strike language from a bill, a motion to insert new language into a bill, and a motion to strike language and replace it with new language. These three types of amendments have been accepted during the history of the Senate and are part of Senate precedent and tradition.

Under the normal rules of procedure, only one amendment can be pending at a time. However, a Senate tradition has developed to allow multiple amendments to be pending at one time to save time and to allow the Senate to work on multiple amendments simultaneously. This tradition technically violates Senate rules and precedents, but the Senate frequently waives the rules by unanimous consent of all Senators. In other words, the Senate can operate in violation of the Senate's rules if no Senator objects.

The way this works is that the Majority Leader asks the consent of all Senators to waive the regular order of offering amendments to expedite the consideration of a bill. If no Senator objects, the Senate can consider multiple amendments at once. If a Senator objects, the Senate considers amendments under the regular rules of order.

The amendment process has been a treasured tradition in the Senate and is an important means for all 100 Senators to participate in the legislative process.

**Filling the Amendment Tree.** In recent decades, Senate Majority Leaders have repeatedly used the tactic of filling the amendment tree to stifle the right of other Senators to offer amendments to bills and to insulate legislation from an open-ended and unpredictable amendment process. This tactic runs contrary to Jefferson's original recommendations for the Senate. This abuse of Senate process has accelerated under Senator Reid's leadership, yet both Republican and Democratic leaders have used it to accelerate the consideration of bills and block the consideration of amendments that the Majority Leader believes may threaten a preferred legislative outcome.

Use of this tactic often proceeds as follows. The Senate Majority Leader moves to proceed to a bill. If the Senate proceeds to the measure, the Majority Leader offers a series of amendments to block consideration of all other amendments. The Majority Leader then submits a cloture petition, pursuant to Rule 22, to shut off debate on all amendments. This procedural ploy locks in the Majority Leader's amendments, usually in the form of an insignificant change in the bill's enactment date, and blocks

20. *Ibid.*, Rule 15.
21. U.S. Constitution, art. 1, §3, cl. 4.
22. Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* (Washington, D.C.: Government Printing Office, 1992), at *http://www.gpoaccess.gov/riddick/browse.html* (December 27, 2010).
23. *Ibid.*, p. 24.

other Senators from proposing amendments. This is a complicated Senate procedure, and the practice runs contrary to the original intent of the Founding Fathers.

***Senate Majority Leaders have repeatedly used the tactic of filling the amendment tree to stifle the right of other Senators to offer amendments to bills.***

The Senate's rules would seem to allow Senators to offer amendments after the Senate Majority Leader places a bill on the Senate floor. Senate Rule 19 states:

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer.[24]

The rule also allows Senators to request recognition then offer an amendment.

However, according to *Riddick's Senate Procedure*, a precedent set in 1983 grants the Majority Leader priority recognition when multiple Senators request the recognition of the chair. In the event that several Senators seek recognition simultaneously, priority of recognition is accorded to the Majority Leader, the Minority Leader, and the majority manager, in that order.[25] This enables the Majority Leader to be recognized first and to continue to request recognition to offer additional amendments to block other amendments, thereby filling the amendment tree and blocking other Senators from offering amendments.

The Congressional Research Service describes this process as follows:

> Thus, while any Senator (or group of Senators acting in concert) might potentially "fill the amendment tree," the custom of granting the majority leader or designee priority recognition means that a determined majority leader will always be recognized before other Senators, and, as a result, the majority leader alone is guaranteed the ability to fill the amendment tree by being recognized in turn to offer amendments to a pending measure (and to their own amendments) until no more are in order.[26]

This allows the Majority Leader to hold the floor long enough to offer the series of amendments to block any opportunity for other Senators to amend a bill.

A classic example of filling the amendment tree occurred during consideration of the Omnibus Public Land Management Act of 2009. Senate Majority Leader Reid moved to proceed to the bill on January 9, 2009, and then offered a series of amendments to block consideration of changes to the bill.

Reid first offered an amendment to insert the following: "The provisions of this bill shall become effective 5 days after enactment."[27] This is called a first-degree amendment to the text of the bill. According to Senate rules and precedent, a first-degree amendment can be modified by a second-degree amendment. Senate rules do not permit third-degree amendments. In this case, Reid then offered a second-degree amendment: "In the amendment strike '5' and insert '4.'"[28]

Once the first-degree and second-degree amendments are in place, there is an opportunity for a motion to recommit a bill to committee and then

24. U.S. Senate, "Rules of the Senate," Rule 19.
25. Riddick and Frumin, *Riddick's Senate Procedure*, p. 1093.
26. Christopher M. Davis, "Filling the Amendment Tree in the Senate," Congressional Research Service *Report for Congress*, April 2, 2008.
27. *Congressional Record*, January 12, 2009, p. S299, at *http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2009_record&page=S299&position=all* (December 27, 2010).
28. *Ibid.*

for a first-degree amendment and a second-degree amendment to that motion to recommit. Accordingly, Reid made a motion to recommit the bill with instructions to the Energy and Natural Resources Committee to report back with "this title shall become effective 3 days after enactment of the bill."[29] He then followed with a first-degree amendment to the motion to recommit to modify the date to two days and a second-degree amendment to modify the date to one day.[30] These four amendments and the motion to recommit, which proposed no substantive changes to the bill, effectively blocked consideration of any other amendment. Many consider this tactic an abuse of process by the Majority Leader.

**Frequency of Filling the Amendment Tree.** Historically, Majority Leaders have used this tactic sparingly. According to a Senate Republican Policy Committee paper in April 2010, "Majority Leader Reid has used this technique to prevent the Senate from considering amendments 26 times, more than any other Majority Leader in history, the same number as the previous four Majority Leaders *combined*."[31] (See Chart 1). Senator John McCain (R–AZ) estimated that Reid had used this tactic 40 times as of September 21, 2010, more than all the other Majority Leaders preceding him.[32] Senator Reid used this tactic an estimated 44 times in four years.[33]

Reid is quoted as saying, "This isn't a new method that I dreamed up. Anytime there is an election there is not a leader who is dumb enough to put a bill on the floor that is subject to amendments."[34] While this may explain Reid's frequent use of this tactic, it does not justify it. In fact, it is contrary to the Senate's open process of allowing amendments, which allows Senators to participate in the legislative process.

## Sen. Reid Frequently Used Amendment Tree Tactic

Instances of Filling the Amendment Tree

| Majority Leader | Years as Leader | Instances |
|---|---|---|
| Harry Reid | 2007–present | 44 |
| Bill Frist | 2003–2007 | 12 |
| Trent Lott | 1996–2001 | 10 |
| Robert Dole | 1985–1987, 1995–1996 | 7 |
| Robert C. Byrd | 1977–1981 | 3 |
| George Mitchell | 1989–1995 | 3 |
| Tom Daschle | 2001–2003 | 1 |

**Source:** U.S. Senate, Republican Policy Committee, "Preserving Senate Rules: Guaranteeing All American Voices Are Heard," April 21, 2010, at *http://rpc.senate.gov/public/_files/042110ProtectingSenateRulesgn.pdf* (December 27, 2010), and *Congressional Record*, September 21, 2010, p. s7245.

Chart 1 • B 2505 heritage.org

Furthermore, use of this tactic motivates Senators of the minority party to filibuster because that is the only defense against the Majority Leader's filling of the amendment tree. For example, during consideration of the defense authorization bill on September 21, 2010, Senators used a filibuster to protect their right to offer amendments. On the previous day, Senator Olympia Snowe (R–ME) criticized Senator Reid's announced intention of blocking all amendments to the bill except for three:

> First and foremost, the Senate should have the ability to

29. *Ibid.*
30. *Ibid.*
31. U.S. Senate, Republican Policy Committee, "Preserving Senate Rules: Guaranteeing All American Voices Are Heard," April 21, 2010, at *http://rpc.senate.gov/public/_files/042110ProtectingSenateRulesgn.pdf* (December 27, 2010) (original emphasis).
32. *Congressional Record*, September 21, 2010, p. s7245.
33. Author's estimate based on discussion with congressional staff member, December 21, 2010, and a review of *Congressional Record*.
34. Arthur Delaney, "Reid Says Unemployment Vote Coming This Tuesday," *The Huffington Post*, July 14, 2010, at *http://www.huffingtonpost.com/2010/07/14/huffpost-hill---july-14th_n_646752.html* (December 27, 2010).

> debate more than the three amendments the Majority Leader is allowing, especially as this bill is the largest discretionary authorization measure that Congress considers, that the bill describes the policies and programs that provide resources and direction to the nearly 2.4 million men and women of the military—active, reserve and civilians, including the courageous Americans serving in Iraq and Afghanistan, and that two of the three amendments don't even relate to the military. It is therefore imperative that Senate deliberations on the defense bill be conducted without limitations and in a manner that allows for the consideration of all related amendments that Senators may wish to offer.[35]

Senator Snowe and other Members subsequently banded together to vote against commencing debate on the bill because they knew that they would not be allowed to offer any amendments on the measure. Regrettably, such situations were much too common in the 111th Congress.

## Filibuster Reform Proposals

Several Senators have proposed reforming or eliminating the filibuster in the Senate based on different rationales.

**The Merkley Resolution.** In testimony before the Senate Rules Committee, Senator Merkley argued for eliminating filibusters on motions to proceed to a bill and on amendments to bills. Merkley also argued for a revised filibuster rule for nominations that would force 10 filibustering Senators to file a motion with the Senate to block a simple majority vote and for requiring filibustering Senators to debate in order to continue a filibuster:

> The purpose for reforming the Senate procedures is to improve the Senate as a deliberative legislative body. While this can be approached from many angles, at the heart of the Senate's dysfunction is the abuse of the filibuster. Indeed, the Senate's original commitment to full and open debate has been transformed into an attack designed to paralyze and obstruct the Senate's ability to function as a legislative body.[36]

The problem with this proposal is that it would take power away from backbench Senators and give it in to the Senate leadership. Merkley also misses the point by blaming the wrong Senators and the wrong tactic. He accuses filibustering Senators of trying to shut down debate when they are defending their right to debate and to offer amendments against the Majority Leader, who is stifling debate by filling the amendment tree.

***If the Senate narrows or eliminates the filibuster, the Majority Leader will have even less incentive to allow debate and amendments.***

If the Senate narrows or eliminates the filibuster, the Majority Leader will have even less incentive to allow debate and amendments. In addition, the Merkley reforms would lead to more partisanship because the party in power could ram legislation and nominations through the Senate with less effort. Senator Merkley's well-intentioned proposal to fix many of the perceived problems with the Senate fall short of effective reform that would allow the Senate to function properly and enable all 100 Senators to actively participate in the legislative process.

**The Charge of Unconstitutionality.** On September 22, 2010, Senator Udall of New Mexico testified before the Senate's Rules Committee, arguing that the filibuster is unconstitutional:

> I believe that the requirement in Rule XXII for two-thirds to vote to end debate on a rules change is unconstitutional, is contrary to the Framers' intent, and violates the

35. Press release, "Snowe Statement on Defense Authorization Bill," Office of Senator Olympia Snowe, September 20, 2010, at *http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=30e57fa9-802a-23ad-44bb-fd00d7661b5c* (December 27, 2010).
36. Jeff Merkley, "Thoughts on the Reform of Senate Procedures," U.S. Senate, November 16, 2010, at *http://voices.washingtonpost.com/plum-line/Senate%20Procedures%20Reform%20Memo.pdf* (December 27, 2010).

> longstanding common law principle that one legislature cannot bind its successors.[37]

The Senator is mistaken. The Senate's rule is constitutional under Article I, Section 5 of the Constitution: "Each house may determine the rules of its proceedings." The Senate has passed many rules, points of order, and budgetary temporary points of order that require a supermajority to proceed on legislation. Under the Constitution, it can change its rules, and no provision in the Constitution gives another body the authority to strike down the filibuster or any other Senate rule.

Nevertheless, Senator Udall submitted a resolution to "correct" this alleged mistake:

> Whereas it is a longstanding common law principle, upheld in Supreme Court decisions such as United States v. Ballin, that one legislature cannot bind subsequent legislatures.
>
> Whereas advisory rulings by Vice Presidents Nixon, Humphrey, and Rockefeller, sitting as the President of the Senate, have stated that a Senate at the beginning of a Congress is not bound by the cloture requirement imposed by a previous Senate and may end debate on a proposal to adopt or amend the Standing Rules of the Senate by a majority vote; and,
>
> Whereas the provision in rule XXII that requires a two-thirds vote of Senators present and voting to limit debate on a measure or motion to amend the Senate Rules is unconstitutional because its effect is to deny a majority of the Senate of each new Congress from proceeding to a vote to determine its own rules.[38]

However, this resolution merely expresses Senator Udall's opinion and has no legal weight because the Senate has not passed it. It flies in the face of the explicit language in the Constitution and rules of the Senate. According to the Constitution, the Senate is empowered to make its own rules, and under its rules, the Senate is a continuing body. Supreme Court precedent is immaterial to the Senate's rules and this debate because the Supreme Court has not ruled on the Senate filibuster.

***To argue that all supermajority thresholds for votes are unconstitutional is inconsistent with a common understanding of the Constitution.***

For example, the congressional budget process has been in law for years. These points of order govern congressional consideration of budget and fiscal policy, and according to the Congressional Research Service, they are constitutional:

> In the Senate, most points of order under the Budget Act may be waived by a vote of at least three-fifths of all Senators duly chosen and sworn (60 votes if there are no vacancies)…. The three-fifths waiver requirement was first established for some points of order under the Balanced Budget and Emergency Deficit Control Act of 1985. Beginning with the Balanced Budget Act of 1997, this super-majority threshold was applied to several additional points of order on a temporary basis. These points of order are identified in Section 904(c)(2), and the three-fifths requirement is currently scheduled to expire September 30, 2017.[39]

In the Senate, if a Senator wants to deviate from the strict rules of the Senate, he or she must first move to suspend the rules of the Senate, which requires approval of a two-thirds majority of all Senators. This is also constitutional. Thus, to argue that all supermajority thresholds for votes are unconstitutional is inconsistent with a common understanding of the Constitution.

37. Tom Udall, testimony before the Committee on Rules and Administration, U.S. Senate, September 22, 2010, p. 4, at *http://rules.senate.gov/public/?a=Files.Serve&File_id=3d7204ce-2025-43eb-bc12-fe1e8794610e* (December 27, 2010).
38. S. Res. 619, 111th Cong., 2nd Sess.
39. James V. Saturno, "Points of Order in the Congressional Budget Process," Congressional Research Service *Report for Congress*, December 1, 2010, p. 6, at *http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2%404RLC%3E%0A* (December 30, 2010).

The Framers intended the Senate, as opposed to the House, to be a continuing body. As the Senate Web site explains:

> To foster values such as deliberation, reflection, continuity, and stability in the Senate, the framers made several important decisions. First, they set the senatorial term of office at six years even though the duration of a Congress is two years. The Senate, in brief, was to be a "continuing body" with one-third of its membership up for election at any one time.…
>
> Second, to be a senator, individuals had to meet different qualifications compared to service in the House of Representatives. To hold office, senators have to be at least 30 years of age and nine years a citizen; House members are to be 25 years and seven years a citizen. Senators, in brief, were to be more seasoned and experienced than representatives.
>
> Finally, the indirect election of senators by state legislatures would serve to check precipitous decisions which might emanate from the directly elected House and buttress the states' role as a counterweight to the national government.[40]

**Progressively Lowering the Filibuster Threshold.** Senator Harkin introduced a resolution to lower the filibuster threshold after each successive cloture vote:

> On the first cloture vote, 60 votes would be needed to end debate. If one did not get 60 votes, one could file another cloture motion and 2 days later have another vote. That vote would require 57 votes to end debate. If cloture was not obtained, one could file another cloture motion and wait 2 more days. In that vote, one would need 54 votes to end debate. If one did not get that, one could file one more cloture motion, wait 2 more days, and 51 votes would be needed to move to the merits of the bill.[41]

**The "Nuclear Option."** Opponents of the filibuster argue that the Senate is not a continuing body, and they will try to change the Senate's rules with a simple majority vote in the new Congress. This would open up the doors to a plethora of new rules changes adopted with a simple majority vote.

During his farewell speech on November 30, 2010, Senator Chris Dodd (D–CT) pleaded with junior Members of the Senate to reject the idea of filibuster reform:

> I have heard some people suggest that the Senate as we know it simply can't function in such a highly charged political environment, that we should change Senate rules to make it more efficient, more responsive to the public mood, more like the House of Representatives, where the majority can essentially bend the minority to its will.
>
> I appreciate the frustration many have with the slow pace of the legislative progress. And I certainly share some of my colleagues' anger with the repetitive use and abuse of the filibuster. Thus, I can understand the temptation to change the rules that make the Senate so unique—and, simultaneously, so frustrating.
>
> But whether such a temptation is motivated by a noble desire to speed up the legislative process, or by pure political expedience, I believe such changes would be unwise.[42]

Senator Dodd counseled Members to treat each other with "respect and civility." Dodd argued that it would be prudent for Members to act like "statesman" to overcome party differences to work together.[43]

40. U.S. Senate, "Senate Legislative Process" (paragraph breaks added).
41. Press release, "Harkin Resolution Restores Senate Tradition; Reduces Filibuster Threat That Has Mired Chamber in Gridlock," Office of Senator Tom Harkin, February 11, 2010, at *http://harkin.senate.gov/press/release.cfm?i=322201* (December 27, 2010), and S. Res. 416, 111th Cong., 2nd Sess.
42. Chris Dodd, "Valedictory Address to the Senate," November 30, 2010, p. 4, at *http://dodd.senate.gov/multimedia/2010/SenatorDoddValedictoryAddress.pdf* (December 27, 2010).

Senator Dodd is correct and his solution to the problem of filibusters and filling the tree seems much more reasonable than allowing a simple majority to change the rules of the Senate.

## Better Options

Unquestionably, individual Senators have used the filibuster to leverage their power to offer amendments and to extend debate. In recent years, this has primarily been used as a tactic to counter the Majority Leaders' tactic of filling the amendment tree. Even when it has been used to thwart the passage of legislation, negotiation between the warring parties is a better way to resolve these issues. Negotiation may water down many of the legislative proposals of the majority, but it is consistent with the Founding Fathers' intent that the Senate should be a slowing and moderating force in the legislative process.

The Majority Leader should cease using the tactic of blocking all amendments to bills. Then, the Majority Leader and Minority Leader might be able to come to a bipartisan agreement to work together on more issues.

If the Senate is to consider rules changes in the new Congress, Members should contemplate a new rule stating, "It shall not be in order for the Majority Leader to be recognized to offer more than one consecutive amendment." That would seem to be a simple solution to preserving the right of both parties to participate in the process.

## Conclusion

The United States Senate has a long and storied tradition of extended debate that should be preserved. The filibuster is a constitutional rule established by Rule 22, and it enables all Senators to participate in the legislative process. The Senate would be unwise to change this rule because it may lead to further partisanship and a diminution of the rights of individual Senators.

*—**Brian Darling** is Director of Government Relations at The Heritage Foundation.*

43. *Ibid.*, pp. 6 and 8.