

BACKGROUND

No. 2696 | JUNE 4, 2012

Tyranny in the United States Senate

Brian Darling

Abstract

Senate Majority Leader Harry Reid has regularly used a procedural tactic called “filling the amendment tree” to restrict Senators’ right to debate and offer amendments. While previous Majority Leaders have occasionally used this tactic, Senator Reid has used this tactic often—more than all of his predecessors combined. This tactic, combined with another parliamentary maneuver and demonization of the filibuster, threatens to squelch dissent in the Senate and further constrict the national debate on important political issues. The Senate could better serve the American people by ending the use of this tactic.

The United States Senate is becoming less open and deliberative because Senators’ right to debate and offer amendments has been severely restricted. These changes in how the Senate operates and debates issues have occurred over a long period of time, but the restrictions have accelerated under Senate Majority Leader Harry Reid (D–NV). Since Reid became Majority Leader in the United States Senate, the majority party has tyrannically seized control of the agenda in the Senate in a manner not contemplated by the Founding Fathers. This abuse of power is an affront to Senate traditions and is chipping away at democracy.

Senator Reid has made a habit of using a procedural tactic called “filling the amendment tree” to block amendments to bills. He has employed this tactic more than 50 times during his more than five years as Majority Leader to prevent the minority party from forcing votes on politically charged amendments. He inherited this tactic from prior leaders, but he has used it more than all of his predecessors combined.

Reid has also used a parliamentary maneuver to block motions to suspend the rules after debate is completed, further constraining the

TALKING POINTS

- During the Senate’s long history, the body has traditionally allowed all Senators to participate in debate by extending debate and offering unlimited numbers of amendments.
- The Senate is becoming less open and deliberative because Senators’ right to offer amendments and filibuster has been restricted.
- The limiting of the rights of individual Senators and the minority party in the Senate has narrowed the issues put forth into the national discourse.
- The Founders envisioned the Senate as a slow and deliberative legislative body.
- Both Republican and Democratic leaders have used the tactic of “filling the amendment tree” to accelerate the consideration of bills and block consideration of amendments that the Majority Leader believes may threaten a preferred legislative or political outcome.
- The filibuster in the Senate protects the rights of Senators to debate and amend legislation, thereby protecting the interests of the American people.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2696>

Produced by the Government Studies Department

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

right of Members to offer amendments. Because of Reid's tactic of blocking amendments during debate, suspending the rules after debate had become the only safety valve for Senators to offer amendments. These two Reid parliamentary tactics have made most Senators irrelevant to the national debates facing Americans today.

Furthermore, Reid and his allies have demonized the filibuster. Many times the filibuster is a tool to extend debate and force the Majority Leader to allow a freer and open amendment process. There is nothing wrong with a Senator filibustering a bill or nomination; therefore, demonizing use of the filibuster is yet another means to squelch dissent.

Stripping Senators of the right to bring issues up for debate in the form of amendments has dramatically affected the national debate from entitlement reform to gun rights. If Senators are not allowed to offer amendments to bills, those issues are often never debated by the American people. When Members choose to filibuster bills to open legislation to a free amendment process, they are demonized by leadership and left-wing groups.

Senate Tradition

The Senate has traditionally allowed all Members to participate in debate. It had been almost a leaderless body in the sense that any Senator could take control of the agenda by offering an amendment and then forcing a debate on that amendment. The Senate's rules are liberal, and allow Senators to offer amendments, with limited exceptions, that have no relation to the underlying bill. The amendment

process traditionally allowed freedom in the Senate and a wide open debate on the issues of the day.

For example, in 2012, the Senate debated the Violence Against Women Act, reauthorization of the U.S. Postal Service, the "Buffett Rule," a congressional insider trading bill, a highway bill, a payroll tax holiday, and a resolution of disapproval on a debt limit increase. On many of these bills, Senate Majority Leader Harry Reid used a procedural tactic to severely limit amendments and debate.

In many of these circumstances, Members other than Reid offered amendments, but Majority Leader Reid "filled the tree" on some of those bills and then allowed only certain amendments after a lengthy debate. In this way, Reid became a gatekeeper on the amendment process. The tactic allowed Reid to veto any issue that he did not want debated, stifling the process and deterring many Senators from fully participating in debate.

Over the past few years, the Senate has changed from a body with all 100 Senators participating to a body that is tightly controlled by the Senate Majority Leader. This development is disturbing because it has restricted the rights of Senators—Democrats, Republicans, and Independents—to participate fully in the deliberative process. If the Senate does not change back to a body that respects dissent and the rights of the individual Senator, the nation will be less participatory and less democratic.

Senators have lost their right to participate in the national debate on many issues. Both Republican and Democratic leaders have used this

strong-arm tactic, but Reid has used it as a normal course of business on almost every bill that comes before the Senate. This development is bad for democracy.

The Senate is known for two long-standing traditions: the right to extended debate and the right of all Members to offer amendments to bills pending on the Senate floor. Both traditions are under attack. If these two long-standing traditions are not restored in this or the next Congress, regardless of which party controls the Senate, they will likely be lost forever.

Senate Majority Leader Reid and future Majority Leaders should abandon this tyranny of process in the Senate. Abandoning the tactic would allow the Senate to take up more issues and contribute more to American discourse. Regardless of which party controls the Senate, Senators would be wise to abandon the tactic or to pass a rule empowering individual Members to raise a point of order against any future Majority Leader who tries to employ it.

This educational paper discusses the history of the Senate and provides some historical support for the idea that the Senate should revert back to a body that allows a free amendment process. A United States Senate that tolerates the use of the filibuster by individual Members as a means to extend debate and allow amendments is the vibrant Senate as envisioned by the Founders.

Background of the Senate's Rules

The Founders envisioned the Senate as a slow and deliberative legislative body. Not surprisingly,

the Senate developed traditions that reflect these characteristics, such as extended debate and an open amendment process.

The Senate is composed of two Senators from each state and is a smaller body than the U.S. House of Representatives. The two chambers of the federal legislature are structured differently because the Founding Fathers wanted each legislative chamber to represent different interests. This idea was memorialized by the “Great Compromise” of July 16, 1787.¹ This negotiated agreement apportioned seats in the House among the states by population and provided for direct election by the people. In contrast, it created a Senate composed of two Senators from each state indirectly elected by the state legislatures.

The 17th Amendment to the Constitution changed the Senate’s composition from two Members appointed by state legislators to two Members elected by the people of a state. That changed how Senators were elected, but did not change the idea that Senators are elected to represent the interests of the state.

Today, the House of Representatives is a large body with strict rules. When a bill comes to the floor of the House, it is subject to a rule that sets the parameters for debate and amendments. House Members must receive the consent of their respective leaderships to speak. They must also obtain prior consent to offer amendments pursuant to a vote of the House Committee on Rules. With 435 Members, it makes

sense to have strict rules on debate and amendments.

The Senate has standing rules that run from Congress to Congress, and these rules allow Members to offer amendments and engage in debate. A long-standing Senate tradition allows Senators to extend debate by using a filibuster. A Senator filibusters by speaking at length on the Senate floor to slow down the legislative process. While existing Senate procedures allow Senators to terminate a filibuster, this right to take the floor until other Members shut down debate with a vote has no counterpart in the House.

Because of the nature of the House, the Founders wanted the Senate to be more deliberative than the House. George Washington is said to have told Thomas Jefferson that the Framers created the Senate to “cool” House legislation just as a saucer was used to cool hot tea.² One of the ways the Senate can cool the passions of the House is to allow extended debate and a vibrant amending process.

The Senate’s long and storied tradition of allowing amendments on legislation is under attack by the sitting Majority Leader. Senate Majority Leaders including Robert J. Dole (R-KS), Robert C. Byrd (D-WV), George J. Mitchell (D-ME), Trent Lott (R-MS), Thomas A. Daschle (D-SD), William H. Frist (R-TN), and Harry M. Reid (D-NV) have employed with increasing frequency a parliamentary tactic called “filling the amendment tree” to block amendments to bills. This

tactic involves the Senate Majority Leader using his privilege of being recognized first to offer amendment after amendment to block all other amendments to a bill.

In recent decades, Senate Majority Leaders have repeatedly used this tactic to stifle debate on bills and to insulate legislation from an open-ended and unpredictable amendment process.³ The use of this tactic has accelerated under the leadership of current Senate Majority Leader Harry Reid.

Filling the Amendment Tree

When the Senate considers legislation, Members can stand up, request recognition from the Chair of the Senate, and then send an amendment to the desk. This process can happen over and over again until Members offer no further amendments to a pending bill. The Senate Majority Leader can stop this process by filling the amendment tree.

The Majority Leader fills the amendment tree 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 other Senators from proposing further, substantive

1. U.S. Senate, “Senate Legislative Process,” chap. 1, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (accessed May 21, 2012).

2. U.S. Senate, “Senate Created,” http://www.senate.gov/artandhistory/history/minute/Senate_Created.htm (accessed December 27, 2010).

3. Brian Darling, “The Filibuster Protects the Rights of All Senators and the American People,” Heritage Foundation *Backgrounder* No. 2505, January 3, 2011, <http://www.heritage.org/research/reports/2011/01/the-filibuster-protects-the-rights-of-all-senators-and-the-american-people>.

amendments. This has complicated Senate procedure, and the practice runs contrary to the original intent of the Founding Fathers.

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.⁴

That Senator, after recognition by the Chair, can offer an amendment to a bill. A Senate precedent grants the Majority Leader priority recognition when there is a dispute over who is to be recognized first.⁵ This precedent allows the Majority Leader to offer amendment after amendment to block out amendment proposals from all other Members.

Both Republican and Democratic leaders have used the tactic to accelerate the consideration of bills and block the consideration of amendments that the Majority Leader believed could threaten a preferred legislative (or political) outcome.⁶ This trend strengthens the power of the Majority Leader to control the

legislative process by reducing the power of individual Members to offer amendments.

According to the Congressional Research Service, the first recorded use of this tactic was on April 30, 1985, when then Senate Majority Leader Bob Dole filled the tree on S. Con Res. 32.⁷ According to Mike Hammond, general counsel to the Senate Steering Committee from 1978 to 1989, Senate Majority Leader Robert C. Byrd tried unsuccessfully to block amendments to an appropriations measure that contained the Grove City bill in 1984.

The Grove City bill provided for defunding an institution rather than the just the offending department of the institution when there was a violation of four civil rights statutes. This legislation was in response to the Supreme Court decision on *Grove City v. Bell*, which held that aid to educational programs did not constitute aid to an institution as a whole.⁸ The legislation overturning the Grove City case was made part of an appropriations bill in 1985. Other Senators offered amendments to the bill after Byrd failed to fill up the whole amendment tree with amendments.

Three key amendments—on tuition tax credits, gun rights, and a ban on courts excluding prayer from public schools—were used to extract the Grove City language from the

appropriations bill. After Grove City, Majority Leaders used the tactic to block all amendments.⁹

Since 1985, Majority Leaders have used the tactic sparingly—between zero and four times in all but one of the preceding 10 Congresses. (See Chart 1.) However, since 2005, use of the tactic has exploded, first under former Majority Leader Frist (nine times in the 109th Congress), but most dramatically under current Majority Leader Reid.

According to the data from the Congressional Research Service and the Senate Republican Policy Committee¹⁰ updated with information from conversations with Senate staff, Majority Leaders have used the tactic of filling the tree as shown in Chart 1. Updated figures indicate that this tactic has been used 58 times as of April 2, 2012. Senator Reid has abused this tactic more than any other Majority Leader in Senate history.¹¹

Post-Cloture Amendments

In December 2009, Senators found a way to circumvent Reid's use of this tactic: making a motion to suspend the rules after debate was completed for the purposes of offering amendments. However, on October 6, 2011, Senate Majority Leader Reid used a parliamentary tactic to block the right of Members to offer amendments on bills by

4. U.S. Senate, Committee on Rules and Administration, "Rules of the Senate," <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (accessed May 23, 2012).

5. Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* (Washington, DC: Government Printing Office, 1992), p. 1093.

6. *Ibid.*

7. Christopher M. Davis, memo to Senate Republican Steering Committee, October 17, 2011.

8. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), http://www.oyez.org/cases/1980-1989/1983/1983_82_792 (accessed May 21, 2012).

9. Author's discussion with Mike Hammond, April 20, 2012.

10. U.S. Senate, Republican Policy Committee, "Preserving Senate Rules: Guaranteeing All American Voices Are Heard," April 21, 2010, http://rpc.senate.gov/public/_files/O42110ProtectingSenateRulesgn.pdf (accessed December 27, 2010).

11. Conversations with Senate staff, and Davis, memo.

CHART 1

Sen. Reid Frequently Used Amendment Tree Tactic

INSTANCES OF FILLING THE AMENDMENT TREE

Majority Leader	Years as Leader	Instances
Harry Reid	2007–April 2, 2012	58
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

Sources: Christopher M. Davis, memo to Senate Republican Steering Committee, October 17, 2011, and calculations by Heritage Foundation analysts based on consultations with U.S. Senate staff.

B 2696  heritage.org

suspending the rules. This is a dangerous development and all Senators should be disturbed at the trend of the Majority Leader tyrannically chipping away at the rights and traditions of the Senate.

In late 2009, Senator Jim DeMint (R-SC) found a way under the Senate's rules to offer amendments when Majority Leader Reid blocked amendments by filling the tree. On December 23, 2009, Senator DeMint moved to suspend the rules on the Service Members Home Ownership Tax Act of 2009 to consider an Amendment 3297.

Mr. President, I move to suspend the provisions of rule XXII, including germaneness requirements, for the purpose of proposing and considering my amendment No. 3297, and I ask for the yeas and nays.¹²

Senate Rule 22, the cloture rule, states that after debate is ended by a three-fifths vote of Senators, the measure, legislation, or nomination shall be the unfinished business of the Senate.¹³ The DeMint amendment was not consistent with the provisions of Rule 22, therefore

offering the amendment was not in compliance with that rule. However, another rule allows for suspension of the rules of the Senate.¹⁴ This was DeMint's only means to offer an amendment.

DeMint submitted a notice in writing of his intent to offer Amendment No. 3297, therefore he was allowed to suspend Rule 22 by using Rule 5 to offer the amendment. After DeMint first used the tactic on December 23, 2009, Senators routinely used this practice of suspending the rules to offer amendments when the amendment tree was filled by Senate Majority Leader Reid.

This complicated practice was a routine procedure in the Senate from late 2009 until October 2011.

On October 6, 2011, Senate Majority Leader Reid used a parliamentary tactic to abolish this practice. Senate Minority Leader Mitch McConnell had promised to offer the President's draft American Jobs Act, as submitted to Congress, as an amendment to the Currency Exchange Rate Oversight Reform Bill (S. 1619). Reid had filled the amendment tree on that bill, leaving the DeMint procedure as the only means for McConnell to offer the American Jobs Act after debate had ended.

12. *Congressional Record*, December 23, 2009, S13833.

13. "Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate." U.S. Senate, "Rules of the Senate," Rule 22(2).

14. "No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules." U.S. Senate, "Rules of the Senate," Rule 5(2).

Reid raised a point of order against all motions to suspend the rules after cloture is invoked and argued that such motions were “dilatatory.” Reid called up a suspension of the rules amendment number 760 filed by Senator Tom Coburn (R-OK), one of seven amendments to suspend that had been filed, then moved to suspend Rule 22.¹⁵ Reid then made a point of order that the suspension was a “dilatatory motion” under Rule 22. Rule 22 states, “No dilatatory motion, or dilatatory amendment, or amendment not germane shall be in order.”¹⁶ Merriam-Webster defines the word dilatatory as “tending or having the intent to cause delay.”¹⁷ Riddick’s rules of Senate procedure

give some examples of dilatatory actions by Members.¹⁸

Reid argued that the Coburn amendment was dilatatory.¹⁹ Reid had created a straw man, because the theoretical possibility of unlimited motions to suspend had not happened; therefore, his argument was not valid. As Senator McConnell pointed out on the Senate floor, Reid had already agreed to consideration of seven amendments.²⁰ McConnell argued that the Reid practice of filling the tree was forcing Members of the minority party to offer motions to suspend the rules to force consideration of amendments.

Reid made the motion to suspend, then argued that “the motion to

suspend is a dilatatory motion under rule 22.” Senator Mark Begich (D-AK) was presiding in the chair and held that the point of order was not sustained. This means that there was no precedent to rule that motions to suspend were dilatatory under Rule 22. Reid then appealed the ruling of the chair. The final vote was 48 yeas and 51 nays.²¹ This vote set a new precedent that motions to suspend the rules are not in order after cloture pursuant to Rule 22.

This precedent and the Reid tactic of filling the amendment tree has effectively locked out the minority party from offering amendments. Reid could cease the practice of filling the tree, and he did not fill the

15. *Congressional Record*, October 6, 2011, S6315.

16. Reid’s actions seem to undercut his assertion that the Coburn motion was dilatatory. Reid himself called up the Coburn Amendment; therefore, it is hard to argue that Coburn was being dilatatory and delaying the work of the Senate.

17. Webster’s Third New International Dictionary, Unabridged (2002), s.v. “dilatatory,” <http://unabridged.merriam-webster.com> (accessed May 24, 2012).

18. On February 5, 1987, the Senate decided that a quorum call that delayed a vote on the motion to approve the Journal when a quorum had been established was dilatatory and therefore out of order. Later that year, the Senate voted on appeal (and overturned the Chair in so doing) that a point of order was in order during a roll call vote on or subsumed by a vote on a motion to approve the Journal. The point of order contended that repeated requests by Senators to be excused from voting on any such vote were dilatatory. The Chair then held that such repeated requests by Senators to be excused from voting on such a vote when obviously done to delay the announcement of the vote on the motion to approve the Journal were out of order as dilatatory. Riddick and Frumin, *Riddick’s Senate Procedure*, pp. 800-801.

19. “Now, since the Senate amended rule XXII in 1979, cloture has been a process to bring Senate consideration to a close. The fundamental nature of cloture is to make consideration of the pending measure finite. The terms of rule XXII provide that the question is this, and I quote: It is the sense of the Senate that the debate shall be brought to a close. Indeed, late this morning, the Republican leader stated, and I also quote what my friend the Republican leader said: If 60 Senators are in favor of bringing a matter to a conclusion, it will be brought to conclusion. That’s just what happened a few minutes ago. So I repeat, that is what the Republican leader said. Now, notwithstanding the clear nature of the cloture rule to provide for finite consideration of a measure, a practice has begun in this Congress that has undermined the cloture rule. The practice has risen of Senators filing multiple motions to suspend the rules for the consideration of further amendments. So on this measure, the Republican Senators have filed nine motions to suspend the rules to consider further amendments. But the same logic that allows for nine such motions could lead to the consideration of 99 such amendments. The logical extension of allowing for the consideration of further amendments, notwithstanding cloture, leads to a consideration of a potentially unending series of amendments. The logical extension of this practice is to lead to a potentially endless vote-arama at the end of cloture.” *Congressional Record*, October 6, 2011, p. S6314.

20. “If I may make a brief observation. Listening carefully to the majority leader, he is suggesting the specter of filibustering by amendment when, in fact, we had already agreed to seven. Having agreed to seven, it strikes me as very difficult to argue that we are establishing some precedent for filibustering by amendment because he and I had agreed to seven. The only place this ran aground was the majority leader trying to pick all seven of the minority’s amendments. So what we have is that no amendments have been considered other than those of a technical nature offered by the majority leader in order to fill up the tree. That was prior to cloture. So what is about to happen is that the majority is trying to set a new precedent on how the Senate operates. For the record, my preference would have been to consider amendments on both sides under a regular process, which we could have done earlier this week. Instead, we have been locked out, and in a few moments the rules of the Senate will be effectively changed to lock out the minority party even more.” *Congressional Record*, October 6, 2011, p. S6315.

21. One irony in the voting is that Senator Mark Begich (D-AK) was the Senator presiding who made the ruling that offering motions to suspend the rules pursuant to Rule 22 was in order, yet he voted to overturn his own ruling.

tree on subsequent legislation, yet this precedent grants even more power to the Senate Majority Leader to block amendments from other Members.

Clearly, Senate Majority Leader Reid wanted to avoid a vote on the President's American Jobs Act. Some in the media have even termed the tactic the "nuclear option"—a term that has typically referred to the majority party setting a precedent that abolishes the filibuster. That may be next for Reid.

The Filibuster

Many on the left have demonized the filibuster. Senate rules provide a mechanism for Senators to extend debate, and there is nothing inherently wrong with a filibuster.

The filibuster in the U.S. Senate protects the rights of Senators to debate and amend legislation, thereby protecting the interests 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. Among the problems provoking expanded use of the filibuster are 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.²²

Senators have often used the filibuster to fight against the

strong-arm tactics of Reid. A study of this year shows that many of these filibusters were provoked by the Majority Leader's act of filling up the amendment tree:

- On February 15, 2012, Senator Reid filled the tree and blocked all amendments on Moving Ahead for Progress in the 21st Century (S. 1813), a bill to reauthorize federal highway and highway safety construction programs.²³ After negotiation, Senators were allowed to offer some amendments.
- On March 15, 2012, Senator Reid filled the tree and blocked all amendments to the Jumpstart Our Business Startups Act (H.R. 3606).²⁴ Cloture was not invoked on two of the amendments on March 20, 2012. Of course, some will count this as two filibusters, but this was an example of Senators blocking consideration to allow amendments. The bill passed, yet Members were not allowed an opportunity to offer unlimited amendments.
- On March 20, 2012, after much debate between the House and the Senate, the Senate resumed consideration of the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act; S. 2038), a bill to prohibit Members of Congress and congressional employees from using nonpublic information derived from their official positions for personal benefit. Senator Reid filled the tree and blocked all amendments on a "message

from the House" with respect to the bill.²⁵ The amendment process was restricted.

Senator Reid routinely files cloture on nominations before debate commences on these nominations. Out of 16 floor votes on nominees, the only cloture vote this year was a vote on February 13, 2012, on the nomination of Adalberto Jose Jordan of Florida to be U.S. Circuit Judge. Many times the Senate has set a 60-vote threshold to confirm a judge, yet this is not a filibuster in the traditional sense.

Conclusion

Senate Majority Leaders from both parties have abused the rules to block amendments. However, Senator Reid has used the tactic of filling the amendment tree more than all of his predecessors combined. Reid has further inhibited the right of Members to offer amendments by removing the right to suspend the rules after cloture to offer amendments.

One possible solution is for the Senate to adopt a point of order against the Majority Leader that would prevent him from filling the tree. A simple new rule might read as follows:

It shall not be in order for the Majority Leader to use his right of first recognition to fill up the amendment tree.

Another possible solution is for the Majority Leader to cease using the tactic. Either resolution would

22. Darling, "The Filibuster Protects the Rights of All Senators and the American People."

23. *Congressional Record*, February 15, 2012, p. S686.

24. *Congressional Record*, March 15, 2012, pp. S1693-S1694.

25. *Congressional Record*, March 20, 2012, pp. S1839-S1840.

solve one of the obstructions in the Senate to conducting business without the more frequent use of the filibuster.

The Senate practice of filling the amendment tree has diminished the rights of all Senators. Until the practice is ended, the American people should expect the minority party to employ even more filibusters and other tactics to participate in the legislative process.

—**Brian Darling** is Senior Fellow for Government Studies at The Heritage Foundation.