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January 2017 · Volume 46, Number 1

How and Why the Senate Must Reform the Filibuster

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U.S. House of Representatives



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The following is adapted from a speech delivered on January 11, 2017, at Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship in Washington, D.C., as part of the AWC Family Foundation Lecture Series.

The Senate prides itself as being the greatest deliberative body in the world. When Jefferson asked Washington why the Constitutional Convention created the Senate, Washington compared it to the hot tea Jefferson cooled in a saucer. "We pour legislation into the senatorial saucer to cool it."

The Founders designed the two houses of Congress to have different perspectives and temperaments. The House, representing smaller constituencies and constantly up for re-election, would reflect the hot passions of popular will. This is a vital component of representative government, but more is required in making good decisions. The Founders knew, as Benjamin Franklin put it, that "Passion governs, and she never governs wisely." The Senate, with longer terms and generally larger constituencies, was designed to temper passions with reason, which requires deliberation. A lot of deliberation.

Central to ensuring this deliberation is the unfettered freedom of debate accorded in the Senate. While the House rations time parsimoniously, often to just a single hour of debate even on major legislation, the Senate insists on giving all its members the widest possible latitude to hold a question up to every light.

A popular aphorism in the House of Representatives is, “The other party is the opposition; the Senate is the enemy.” As a member of the House myself, I find the Senate’s byzantine rules frustrating; but after all, frustrating House members is part of the Senate’s mission. Yes, the Senate is a pain, but where would we be without it?

On the other hand, deliberation is a means to an end, not an end in itself. It is a means to achieve wise and enlightened legislation with the consent of the people. And this is where the Senate is on the verge of dysfunction.

Over the last several congressional elections, and most conspicuously in the recent presidential election, the American people have sent a clear signal that they want a major change in public policy. It is the duty of Congress to respond. To do so, it needs to deliberate wisely and in good faith, with all sides participating and all voices heard. But then this deliberation must result in laws that accord with the people’s will.

Some in the new Congress have set a positive tone, but we have also heard reactionary elements vow to thwart the popular mandate. It is natural for the minority

to use every available means to try to change the majority’s mind or temper its fervor, and our system offers it many ways to do so. But that’s different from obstruction, which is why these vows by some senators are as disturbing as they are credible.

They are credible because the modern Senate filibuster has become a tool for the minority to block any meaningful legislation from being enacted or even considered. Given its record of abuse in recent years—by both parties—the Senate needs to repair its rules regarding the filibuster if it is to have any hope of performing its constitutional duty.

The parliamentary tactic of a minority thwarting the will of the majority by talking a bill to death is nothing new. The Roman Senate’s rules required business to conclude before sunset. Cato the

Younger discovered that he could block Julius Caesar’s initiatives by talking until dusk descended on the Senate chamber.

Caesar responded by throwing Cato in jail. Common parliamentary practice dealt with the tactic by allowing a motion to “order the previous question”—in other words, to close debate and vote—often requiring a two-thirds vote. This supermajority threshold to close debate is rooted in the principle that a significant minority should be able to extend debate. After all, a minority exists to convince the majority to its way of thinking and often identifies

Imprimis (im-pri-mis),
[Latin]: in the first place

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ISSN 0277-8432

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flaws in a proposal that a majority doesn't see in its rush to adopt. This is the fruit of deliberation and the essence of deliberative assemblies.

But this parliamentary principle assumes that there is an actual debate, that it is germane to the subject at hand, and that it is not conducted in a manifestly dilatory manner.

Within a few decades of the American Founding, senators rediscovered Cato's practice of killing a bill by killing time, and the Senate filibuster was born. Yet it was rarely used because of its natural limitations. A filibustering senator had to remain for the most part at his desk and on his feet. In 1908, for example, Robert La Follette of Wisconsin held the floor for 18 hours—speaking for long periods of time, and demanding dozens of quorum calls and roll-call votes—to stall a banking reform bill. The bill eventually passed, but not without significant consternation on both sides, due to the fact that until the filibustered matter was disposed of, the Senate could not move on to other business.

The filibuster is fundamentally different today because of two changes to Senate rules—changes that explain the body's current inability to act. The first occurred in 1917 in response to a filibuster of something called the Armed Ship Bill. The Senate adopted a cloture rule setting the threshold for ending debate at two-thirds of those present and voting, later changed to three-fifths of the whole Senate. Even then, this change was in keeping with common parliamentary practice. And even after its passage, the filibuster's physically demanding nature meant that it was seldom employed. There were only 58 filibusters in the next 52 years—barely one per year.

But beginning in 1970, the number of filibusters exploded by a magnitude of 36-fold. There have been 1,700 in the 46 years since then. Why? Because in 1970, Senate Majority Leader Mike Mansfield instituted a "two-track" system that allowed the Senate, by unanimous

consent or the approval of the minority leader, to bypass a filibustered bill and go on to another. This relieved a filibustering senator of the job of having to talk through the night and it relieved his colleagues of their frustration.

The filibuster thus entered the couch-potato world of virtual reality, where an actual speech is no longer required to block a vote. Today the mere threat of a filibuster suffices to kill a bill as the Senate shrugs and goes on to other business. The filibuster has been stripped of all the unpleasantness that discouraged its use and encouraged compromise and resolution.

Whereas the filibuster prior to 1970 was designed to ensure debate, after adoption of the two-track system it mutated into a procedure that prevents debate. As a result, the greatest deliberative body in the world now has difficulty deliberating on anything of importance.

During the last session of Congress, the House sent hundreds of bills to the Senate, including appropriations bills required to fund the government. Instead of amending those bills and sending them back to the House, the Senate seized up—not for lack of majority will, but because of minority recalcitrance and the post-1970 filibuster.

This represents three serious dangers to constitutional government.

First, the legislative branch cannot function if one house proves unable to act on major legislation, and the atrophy of the legislative branch drives a corresponding hypertrophy of the executive branch. It is perhaps the single greatest reason for the rise of the imperial executive in recent decades. President Obama's constant refrain, "If Congress fails to act I will," is poisonous to a constitutional republic—but it is inevitable if the legislature wastes away. Nature abhors a vacuum, and the modern Senate filibuster has created one at the heart of our Constitution.

Second, because the American people hold the sovereign authority in our country but delegate sovereign power to their elected representatives, they have every reason to lose faith in their government if their broad sentiments expressed in elections are not translated into law. This is why the belief that “my vote doesn’t matter”—a belief suicidal to a democratic republic—is increasingly heard expressed in our country today.

Third, the ability of the minority to cause gridlock in the legislative branch undermines the authority of the Constitution itself. Implicit in the design of Congress is its power to act on most matters by majority vote. Extraordinary majorities are reserved only for extraordinary matters such as treaties, constitutional amendments, impeachments, expulsions, and veto overrides. The practical effect of the modern filibuster is to replace the constitutional benchmark of majority rule with an artificial threshold of three-fifths.

A central concept in maintaining the balance of powers is the assumption that the members of each branch of government will jealously and aggressively defend their prerogatives against the others. So why do senators allow their body to be paralyzed?

Many argue that the current 60-vote cloture threshold is necessary to prevent one party from running amok; that the requirement for an extraordinary majority assures bipartisanship and compromise. They rightly warn that if legislation is to stand the test of time, it must have a certain degree of bi-partisan consensus that the cloture rule facilitates. Yet when one looks at the Senate today, it’s hard to find much collegiality or compromise, both of which require the give-and-take of good-faith deliberation. Nor is compromise possible if the matter to be compromised can’t be considered. If the minority can block an initiative by a mere threat to filibuster, it has no incentive to pursue compromise.

Republican defenders of the modern filibuster note that the greatest growth of government occurs when Democrats hold both the White House and Congress. The current rules, they argue, are an essential brake for the minority to use at such times. But unfortunately, these rules have proven even more effective at blocking legislation that shrinks government. The result is a ratcheting effect that locks in every government expansion, even those that prove disastrous.

One obvious solution to the filibuster is to require a simple majority to close debate, as the House has done for centuries. But this defeats one of the chief purposes of the Senate: a significant minority ought to be heard over the objections of a majority. So how can this purpose be preserved, while restoring the Senate’s ability to legislate?

First, the Senate should get rid of the two-track system that allows it to bypass a filibustered bill and reinstitute the pre-1970 requirement that filibusters hold the floor. The fact that the number of filibusters exploded after the two-track system was introduced speaks for itself. Once the Senate removed all the fuss and bother of the filibuster, filibusters became common. Yes, this means the Senate would have to deal with a filibuster before moving on to other matters—but it is precisely this inconvenience that made it such a rare event and built pressure on both sides to resolve an impasse.

Second, the Senate should restore the parliamentary principle that debate must be germane to the pending piece of legislation. The Senate may pride itself on colorful tales of Huey Long reading Cajun recipes on the Senate floor. But how does this practice fulfill the role of the Senate as a deliberative body? Time on the Senate floor is a critical and limited public resource. Tolerating irrelevant speeches squanders that resource and makes

a mockery of the Senate. Senate rules already require germane debate during the first three hours of a legislative day—but not after that! Go figure.

Third, make the “motion to proceed” undebatable, or at least subject to a majority vote. This incidental motion is itself now subject to filibuster, which prevents the Senate from even getting to actual bills. Great debates should be had on great matters—but not great debates on whether to debate.

Fourth, limit senators to two speeches on a question. Under current Senate rules, a single senator can make two speeches on every motion every legislative day.

Fifth, after a certain period of debate has elapsed—during which filibustering can occur—allow a majority to set a limit for individual speeches on a pending question to something like two hours. A senator who can’t get to the heart of a matter in two hours isn’t trying very hard.

Some senators have argued that the Senate can repair itself within its current rules. The majority leader could decline to sidetrack filibustered bills, force a debate until the minority is exhausted, and hold the Senate in session to avoid resetting the two-speech per day limit. But experience has shown that in a battle of wills, a determined minority will prevail. The surer course is to restore the original parliamentary principles of debate to Senate rules.

There are two ways to implement these reforms. One is to follow the precedent established by Senate Democrats in 2013 when they lowered the cloture threshold to a majority for non-Supreme Court presidential nominees: ignore the rules as they are written, declare a new and fictitious interpretation, and impose that interpretation by overturning the parliamentary ruling of the chair. This “nuclear option” might be effective, but it is highly corrosive to the parliamentary procedure required for a well-functioning legislature. Pretending that a rule says something different than it does is a shortcut to anarchy.

The other way is to invoke what reformers over the years have called the “constitutional option.” Article I, Section 5 of the Constitution grants each house the power to establish its own rules. Senate tradition holds that, by virtue of its staggered terms, it is a continuing body and therefore its rules continue in full force from session to session until amended. Those rules require a two-thirds vote for cloture on a change to the rules, creating the paradox that the very provision that needs reform prevents reform.

This doctrine of the Senate as a continuing body, however, is belied by the fact that all pending motions at the close of one Congress do not extend into the next. It also runs afoul of the bedrock principle that one Congress may not bind the next. A strong case can be made that until the Senate adopts rules to govern its two-year session, it is operating solely on precedent. It retains its constitutional authority to adopt new rules by a simple majority vote for the current session unfettered by hindrances imposed by a previous one.

The choice of whether the Senate majority restores its constitutional role in lawmaking is its own to make, to live with, and to answer for. In making that choice, it needs to consider whether its current rules of debate advance or obstruct its role as a deliberative body with the responsibility of passing reasonable laws that comport with the public will.

Of historic moments like these, Shakespeare’s Brutus said, “There is a tide in the affairs of men, which, taken at the flood, leads on to fortune; Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat, and we must take the current when it serves or lose our ventures.”

Voters elected Republican majorities in both houses of Congress and they expect action. They’ll get it from the President and from the House. But in order for the Senate to rise to this occasion, it must reform its rules. ■