

EXECUTIVE SUMMARY OF STATEMENT ON FILIBUSTERS AND CLOTURE

**HEARING BEFORE THE SENATE COMMITTEE ON RULES AND ADMINISTRATION
APRIL 22, 2010**

STANLEY BACH

Mr. Chairman and Senators, my prepared statement and my oral testimony today will serve as reminders of changes in Senate rules and practices since the 1970s that relate to filibusters and cloture.

Between 1975 and 1986, the cloture rule, Rule XXII, was amended three times. First, in 1975, the requirement that the affirmative votes of two-thirds of the Senators present and voting (a quorum being present) was required to invoke cloture was changed to the affirmative vote of three-fifths of all Senators duly chosen and sworn, except that the two-thirds requirement was retained for invoking cloture on measures or motions to amend the Senate rules.

Second, in 1979, Rule XXII was amended to complement the rule's limit of one hour of debate per Senator on a question on which cloture had been invoked by adding a limit of a total of 100 hours of post-cloture consideration of that question. "Consideration" includes the time consumed by such matters as reading amendments and conducting votes and quorum calls as well as the time consumed by debate.

And third, in 1986, the cap of 100 hundred hours for post-cloture consideration was reduced to 30 hours.

In addition, there have been several relevant changes in Senate practices and precedents. One was the emergence of the post-cloture filibuster, to which the Senate responded by imposing the 100- and then 30-hour cap on post-cloture consideration. A second was the movement away from around-the-clock filibusters to a more accommodating schedule through such devices as dual tracking, so that a filibuster need not prevent the Senate from transacting other business. And a third was the set of precedents, set during the Senate's 1977 consideration of a major natural gas deregulation bill that enhanced the powers and discretion of the Presiding Officer when the Senate is proceeding under cloture.

Since the 1970s, there also has been an impressive increase in the number of cloture motions filed, the number of such motions to which the Senate agreed, the number of items of legislative and executive business provoking one or more cloture motions, and, by implication, an impressive increase in the number of filibusters begun or threatened. Motions to proceed have become more contentious more often, as has the practice of Senators placing holds on matters. Finally, there have been more objections in the Senate than in decades past to sending bills to conference with the House.

STATEMENT ON FILIBUSTERS AND CLOTURE

HEARING BEFORE THE SENATE COMMITTEE ON RULES AND ADMINISTRATION
MARCH 25, 2010

STANLEY BACH

Mr. Chairman and Senators, I was pleased and a bit surprised by your invitation to participate today in your hearing on filibusters and cloture in the Senate. For the record, I joined the Congressional Research Service in 1976; when I retired in 2002, I had been Senior Specialist in the Legislative Process for the preceding 14 years. In fairness, I must add that, since retiring, I have not immersed myself in the daily details of congressional life, certainly in comparison with how much they pre-occupied me before my retirement. I am pleased to report, Mr. Chairman, that there is life after Congress.

Let me first congratulate you, Mr. Chairman, for having scheduled this hearing. I needn't belabor the critical importance of filibusters and cloture to the Senate. Their importance is especially well understood by the Senators serving on this committee, so many of whose members now have or have had party leadership responsibilities for arranging the business of the Senate and bringing it to a timely resolution. Should there be any doubt, however, all one needs to do is to take note of all the newspaper and magazine articles that claim that some bill will require 60 votes for the Senate to pass it. That's not true, of course; it's merely a short-hand way of saying that it will require 60 votes for the Senate to have an opportunity to pass the bill by a simple majority vote. Such claims, however, do illustrate how what once was an unusual and extreme recourse to the right of extended debate has now become a routine aspect of daily Senate life.

I'm sure that the members of this committee, and especially those who are attorneys, will recall the famous statement of Justice Oliver Wendell Holmes in *Northern Securities Co. vs. United States*, 193 U.S. 197 (1904), that "great cases, like hard cases, make bad law." Holmes went on to explain that "great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

There have been instances in which the Senate has changed its floor procedures in the heat of the moment and without the benefit of prior consideration by this committee. I have in mind, for example, what sometimes was called the "Hutchison precedent" affecting opportunities to legislate on general appropriations bills, and the so-called "FedEx precedent" affecting the matters that Senators could include in a conference report

without exceeding the scope of the differences submitted to conference. In both cases, as I recall, the Senate set these precedents by overturning rulings of the Chair on appeal. In both cases, the Senate later vitiated the effect of the precedents to restore, more or less, the status quo ante. And in both cases, I suspect, at least some of the Senators who voted to establish those precedents probably did not have in mind the longer-term consequences their decisions had for the Senate.

I understand that I can contribute best to the Committee's deliberations by providing some background and context on the history of the cloture rule and then on recent trends, practices, and precedents relating to filibusters. I do not for a moment believe that I have anything to say on these two subjects that is not already known to the members of this Committee. Nonetheless, I hope I can offer some reminders of the Senate's history and current practices that may assist the Committee in its deliberations.

DEVELOPMENT OF THE CLOTURE RULE

For more than a century, Mr. Chairman, the Senate operated without a cloture rule or any other rule of general applicability by which Senators could vote to end a debate.

Drawing on the practices of the British Parliament and the Continental Congress, the first rules that the Senate adopted, in 1789, did provide for a motion for the previous question. However, this should not be understood to be the same motion that the House uses regularly to end the debate on a measure and preclude further amendments to it. Instead, as this Committee's own *Senate Cloture Print* (S. Prt. 99-95; 99th Congress, 1st Session) from 1985, puts it, the motion "was used to avoid discussion of a delicate subject or one which might have injurious consequences" (p. 11). The effect of the Senate's previous question motion was to remove the pending measure from further floor consideration at that time, not to bring it to a vote. In any event, the motion was used only three times before it was dropped from the Standing Rules in 1806. (In this section of my statement, I draw heavily on the *Senate Cloture Print* for facts, but not for interpretations.)

During the course of the 19th Century, there were occasional calls for the Senate to adopt the previous question as we now know it. In 1841, Henry Clay made such a proposal. Not surprisingly, John Calhoun opposed it strenuously, and nothing came of it. In that year, the House first adopted its one-hour rule. Clay proposed the same for the Senate but, again, unsuccessfully. Stephen Douglas also proposed that the Senate institute the previous question motion in 1850, and other Senators made the same or related proposals in the 1860s and 1870s. In 1883, the Committee on Rules, a forerunner of this Committee, included the previous question as part of a general recodification of the Senate's rules, but the Senate struck that provision on the floor.

Certain motions were made non-debatable and, from time to time, debate limits were imposed temporarily, as on debate in secret session during the Civil War and on appropriations bills beginning in the 1870s. In 1870, the Senate agreed to its first rule for imposing a five-minute limit on debate during the call of the Calendar in the Morning Hour under Rule VIII (a procedure that the Senate no longer uses). Interestingly, the Senate appears to have decided in 1868 that the motion to proceed no longer would be

debatable. If so, that decision was relatively short-lived because, in 1881, the Senate adopted an order imposing a 15 minute time limit for debating any motion to proceed that was offered during the remainder of the session.

I recall encountering contentions that the right of unlimited debate was part of the Founders' conception of, or plan for, the Senate, and that it was understood to be an integral part of the Senate's procedures from the time it first met. This is by no means clear, however. Scholars have sought in vain for evidence to support such claims. In their book on *Politics or Principle? Filibustering in the United States Senate* (Brookings Institution Press, 1997), Sarah Binder and Steven Smith, two highly regarded students of the Congress, examined these claims and concluded instead (at p. 20) that "what is known about the framers' views on legislative procedure suggests quite the opposite, namely, that empowering a minority to veto the preferred policies of the majority would produce undesirable legislative outcomes. Neither the framers nor the early senators expected that filibusters would be invented for obstructive purposes or that more than a majority would be needed for the passage of measures...."

Not having examined the historical record with equal care, I can't endorse or contradict their conclusion. However, they have made me skeptical of claims that unlimited debate was woven into the intended fabric of the Senate. On the other hand, it does not necessarily follow that, before the Civil War at least, most Senators did not think of extended if not unlimited debate as a natural characteristic of the Senate. The membership and the workload of the Senate then were much smaller, so the Senate could afford to endure longer debates on bills that everyone recognized to be of true national importance. Although, as I have mentioned, there were some proposals to amend the Senate's rules to limit debate, I suspect that there were many long debates that were not then thought to be filibusters, even though that is what we would be very likely to call debates of the same length today.

When I was a boy, I learned about the Hayne-Webster debates, not the Hayne or Webster filibusters. Yet Senators such as Webster sometimes would give speeches that lasted for hours on end and then would be resumed on the following day. Think back if you will to legislation such as the Missouri Compromise of 1820 and the Kansas-Nebraska Act of 1854. Can anyone doubt that bills of comparable importance would be filibustered in the contemporary Senate? In his *Disquisition on Government*, John Calhoun propounded a theory of concurrent majorities to defend the proposition that no legislation detrimental to slavery should be imposed on the Southern states. But I don't recall that a pillar of his position was the right of Senators to filibuster by debate. Instead, it may be that most Senators, most of the time, simply accepted long debates as being part of the Senate's way of doing business.

Whatever the truth of the matter, during the closing years of the 19th Century, Senators became more concerned about the use of procedural tactics to delay or prevent the final disposition of matters, especially by what we now would call filibusters, so they began to agitate for rules changes to prevent filibusters or mitigate their effects. In 1890, Senator Aldrich made what probably was the first proposal for a cloture rule, and other Senators followed suit in 1893. All their proposals were for imposing cloture by simple

majority vote. The Senate did not adopt any of these proposals. In fact, Aldrich's 1890 resolution may have been the first proposal to check filibusters that succumbed to a filibuster.

In 1915, the Committee on Rules reported a resolution for cloture by a vote of two-thirds of the Senators present and voting. It was much the same proposal that the Senate adopted two years later, following the famous, or infamous, and successful filibuster on the Armed Ship Bill that led President Wilson to call on the Senate to amend its rules. The effect of the 1917 cloture rule was restricted in that it applied only to the pending measure; cloture could not be invoked on nominations or on motions to proceed to legislation. However, the exact form of the new rule probably made little difference because, as I shall document later in my statement, the Senate did not attempt to invoke it very often at all during the next four or five decades.

The 1917 rule remained unchanged until 1949, when it was amended to permit cloture to be invoked on a pending motion or other matter, not only on a pending measure. The effect was to make it possible the Senate to invoke cloture on nominations as well as on motions to proceed. However, cloture was not permitted on propositions to change the Senate's rules, including, of course, the cloture rule. At the same time, the majority needed to invoke cloture was raised from two-thirds of the Senators present and voting to two-thirds of the entire Senate. Ten years later, the latter change in Rule XXII was revoked while, for the first time, cloture was permitted on amendments to the Senate's rules. (The Senate also added what is now paragraph 2 of Rule V, which states that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.")

Then, beginning in 1975, came the series of three amendments to the cloture rule with which Senators and contemporary observers of the Senate are most likely to be familiar.

First, in 1975, the majority required for invoking cloture was changed from two-thirds of the Senators present and voting to three-fifths of the Senators duly chosen and sworn. This change has made it easier to invoke cloture by reducing the required majority from a maximum of 67 (assuming all Senators vote and there are no vacancies in the Senate) to a minimum of 60 (again assuming there are no Senate vacancies). Under the revised rule, if a Senator fails to vote on a cloture motion, that has the same effect as if the Senator votes against cloture. As part of the compromise that allowed the Senate to make this change in Rule XXII, the previous requirement – two-thirds of the Senators present and voting – was retained for “any measure or motion to amend the Senate rules.” The purpose and effect was to ensure that Senators would not find it easier to invoke cloture on proposals to amend Rule XXII in order to make it still easier to invoke cloture in the future. (It is worth noting that, as I understand it, the two-thirds requirement applies only to formal amendments to the Senate's standing rules, and not to either free-standing Senate resolutions or to bills and other resolutions that include one or more provisions that qualify as rule-making provisions.)

Second, in 1979, the rule was amended primarily to impose a one-hundred hour cap on post-cloture consideration of the measure or matter on which cloture had been invoked. Before and since, Rule XXII has stated that, under cloture, no Senator may speak for more than one hour on the measure or matter being considered. That one-hour limit applied to debate but not to time consumed by other proceedings, especially quorum calls and rollcall votes and the time required to read amendments. Thereafter, Senators took increasing advantage of this distinction between “debate” and “consideration” to engage in what became known as post-cloture filibusters. The 1979 rules change was designed to control post-cloture delay by imposing the one-hundred hour limitation on all post-cloture proceedings.

Then third, in 1986, at the same time the Senate authorized television coverage of its floor sessions, the cap on post-cloture consideration was reduced from one hundred to thirty hours. What I remember most vividly about that change in Rule XXII, Mr. Chairman, was how little debate there was on it and how little controversy it engendered – especially in comparison with the intense controversy that arose in 1975, both over the merits of amending the cloture rule and over the strategy advanced for securing a vote on the proposed amendments. I suppose that, by 1986, Senators who envisioned themselves participating in filibusters concluded that thirty hours of time for post-cloture consideration was sufficient for their needs. As it was amended in 1986 and as it presently stands, Rule XXII is internally contradictory in that it allows a maximum of one hour per Senator for debate under cloture, but it also provides for a maximum of only thirty hours for post-cloture consideration, including debate, for all Senators. However, the Senate has been able to live comfortably with this inconsistency because the Senate has not often consumed all the time available under the post-cloture cap on consideration, whether it was the original one hundred hours or the current limit of thirty hours. (In fact, I don’t believe that the full 30 hours had ever been consumed by the time I retired from CRS in 2002. I’m advised that it has happened on occasion since then.)

From time to time since 1986, there have been calls for making further change in Rule XXII, either directly or indirectly. What was most important was what the Senate did not do in 2003, in response to majority frustration at the difficulties it was experiencing in securing Senate floor votes to confirm some of the President’s judicial nominations. What became known as the “nuclear option” was a strategy to change the Senate’s established precedents regarding debate on nominations by creating a new precedent that would have precluded or foreshortened future filibusters on judicial confirmations. Whatever the merits of the claims and counter-claims may have been, wiser heads prevailed, and the Senate avoided opening the door to making other changes in the Senate’s procedures effectively by simple majority vote and without having to invoke Rule XXII.

CHANGES IN SENATE PRACTICE AND PRECEDENT

The changes in Rule XXII that I’ve summarized were of obvious importance. But of equal or even greater importance, I believe, have been several changes in the Senate’s practices and precedents. In fact, it becomes difficult to know whether changes in practice provoked the changes in the rule and precedents, or whether the changes in Rule XXII and the precedents for interpreting and applying it in turn created incentives for subsequent

changes in practice. I believe there has been a strong interactive effect in which changing practices have stimulated changes in the rule and in Senate precedents which in turn have stimulated additional changes in practices, and so on.

Filibusters once were matters of considerable drama, not only because of their relative rarity, but because they sometimes involved round-the-clock sessions, with media reports of Senators sleeping on cots near the Chamber and tempers becoming ragged as day turned into night and, worse yet, night turned back into day. Although “Mr. Smith Comes to Washington” is hardly an accurate depiction of the Senate in session, certainly some of the civil rights filibusters of the 1960s were very different from the much more routinized and much less inconvenient filibusters of today.

One reason for that change was the development of the practice of scheduling the Senate’s business along several tracks. No longer did the filibuster on one bill necessarily delay Senate action on everything else. Instead, the Senate typically has agreed, explicitly or implicitly, in recent decades to limit the effect of a filibuster to the measure or matter in question, while allowing other, less contentious business to be conducted during other times of the day or week. That development made filibustering less demanding on all Senators. That was the good news. The bad news was that the same development may have made Senators more willing to filibuster because doing so demanded less of their time and energy, imposed fewer demands on their colleagues, and interfered less with the ability of the Senate to conduct other business.

In this context, let me touch in passing on calls for the Senate to revert to the good old days (or the bad old days, depending on your point of view), and for the leadership to keep the Senate in session around the clock in order to exhaust filibustering Senators. Suffice it to say that the burden falls on a bill’s supporters to make a quorum; otherwise, its opponents need only suggest the absence of a quorum and either force 51 or more of the bill’s supporters to drag themselves to the floor at 3:00 a.m., or whenever the quorum call take place, or force the Senate to adjourn until the time already fixed for its next sitting.

In short, it’s probably fair to say that the Senate’s more accommodative scheduling practices have made it easier for the body to cope with the rising number of filibusters and filibuster threats, while at the same time reducing the costs incurred by Senators engaging in the filibusters or threatening them. With more legislation to consider than the floor schedule can easily accommodate, there is a natural tendency for the majority party leadership to give priority to bills that will impose limited and more or less predictable demands on the Senate’s time. Reasonable as that practice may be, it also seems likely that it has increased the potency of filibuster threats. And, of course, these threats can take the form of holds, which I believe are likely to persist in one form or another, regardless of whatever formal procedural requirements or barriers the Senate tries to impose on them.

Many observers believe that it was no coincidence that the years following the 1975 change in Rule XXII – the amendment that reduced the requirement for cloture (in most cases) from two-thirds of the Senators present and voting to three-fifths of the Senators

duly chosen and sworn – also witnessed a larger number of post-cloture filibusters. Senators more often adopted tactics such as demanding that long amendments be read and insisting on rollcall votes and frequent quorum calls in order to extend the length of time that a measure or matter remained before the Senate even after the Senate had invoked cloture on it. It certainly is reasonable to infer that Senators who opposed making it easier to invoke cloture reacted to the 1975 rules change by taking advantage of tactics that made the cloture procedure less effective in bringing measures or matters to final votes on the Senate floor.

The 1979 rules change that imposed the one-hundred hour cap on post-cloture consideration was an obvious response to the effectiveness of post-cloture filibustering. The Committee also will bear in mind the precedents that the Senate had set two years earlier, during a highly contentious filibuster of a natural gas deregulation bill. During the course of that filibuster, the Senate set a series of precedents that limited the effectiveness of post-cloture filibusters by increasing the powers and discretion of the Presiding Officer when the Senate is proceeding under cloture. Perhaps the most important of these decisions required the Presiding Officer to take the initiative under cloture to rule out of order, or even decline to entertain, amendments that were out of order on their face – for example, amendments that were non-germane or dilatory – without Senators first having made point of orders to that effect from the floor. The Presiding Officer also was empowered to rule other matters out of order as dilatory. It has rarely, if ever, been necessary since then for a Presiding Officer to invoke such precedents, but they did – and do – limit the ways in which Senators can consume valuable time after the Senate has voted for cloture.

Perhaps another reaction to reducing the majority required for cloture and limiting opportunities for post-cloture delay was an increase in filibusters on motions to proceed, a subject to which I'll return. As the Committee fully understands, Senators can, under most circumstances, filibuster the motion to proceed to the consideration of a bill, and it may be necessary to invoke the cloture procedure with respect to that motion, even before the Senate actually takes up the bill which then is subject to a second and separate filibuster. And even more recently, of course, we have seen a new inclination to filibuster, or threaten to filibuster, what previously had been the once-routine motions required for the Senate to send a bill to conference with the House.

FREQUENCY OF FILIBUSTERS AND CLOTURE VOTES

The most important trend and change in practice has been the recent marked increases in the number of cloture motions filed and the number of cloture votes. That having been said, I should immediately emphasize that data on cloture motions and votes are, at best, an imprecise surrogate for data on the numbers of filibusters.

There is no objective standard to identify a filibuster. In that sense, a filibuster is somewhat like pornography; we may have trouble setting out criteria for making a positive identification, but we think we know one when we see one. How much debate has to take place before we are justified in concluding that a filibuster is taking place or has taken place? For the Senate to devote a week to debating a major tax bill would seem both

reasonable and responsible. For the Senate to devote as much time to debating a bill to re-name a Federal office building would strike most of us as satisfactory evidence of a filibuster.

Certainly the number of cloture votes in a Congress is not equal to the number of filibusters. One reason is that devices such as holds, which are implicit threats to filibuster, cannot give rise to cloture motions because a motion or measure has to be under consideration by the Senate before cloture can be filed, and the very purpose and effect of a successful hold is to prevent the matter in question from being called up or made subject to a motion to proceed. Yet, as every Senator here today knows so well, the threat of a filibuster can be every bit as effective as a filibuster itself in affecting the Senate's floor agenda and inducing substantive changes in legislation. This makes it impossible to do more than guesstimate the impact of filibustering on the Senate. So much of that impact takes the form of adjustments and accommodations that floor leaders, committee chairmen, and other Senators make when confronted with the threat or the fear of a filibuster that has not yet taken place and that may never take place.

Another and equally obvious and serious problem for the student of the Senate is that there has not been one cloture motion for each filibuster. Some filibusters have not provoked a single cloture motion; other filibusters have been the subject of multiple cloture votes. Some cloture motions have been filed before there was any real evidence that a filibuster was in progress or on the Senate's doorstep. There even have been cases in which cloture has been filed primarily in the hope of triggering the germaneness requirement on amendments that applies under cloture, and not for the purpose of limiting further debate. Yet even with these reservations, the frequency of cloture motions and cloture votes is the best and really the only surrogate for the frequency of filibusters, however defective a surrogate it may be.

So the Committee may be interested in the following decade-by-decade data that Richard Beth, my friend and former colleague at CRS, has made available to me to include in this statement:

	<u>Number of Cloture Motions</u>	
	<u>Filed</u>	<u>Agreed to</u>
67 th -71 st Congresses, 1921-1931	11	3
72 nd -76 th Congresses, 1931-1940	4	0
77 th -81 st Congresses, 1941-1950	12	2
82 nd -86 th Congresses, 1951-1960	2	0
87 th -91 st Congresses, 1961-1970	28	4
92 nd -96 th Congresses, 1971-1980	166	43
97 th -101 st Congresses, 1981-1990	207	54
102 nd -106 th Congresses, 1991-2000	358	92
107 th -111 th Congress (1 st sess.), 2001-2009	435	175

These data speak for themselves, loudly and eloquently. Nonetheless, allow me to belabor the obvious.

According to this Committee's own invaluable print on the *Senate Cloture Rule*, the first cloture vote, and the first time cloture was invoked, occurred in 1919, two years after the cloture rule first was adopted. Interestingly enough, that first vote concerned the Treaty of Versailles, an item of executive business. During the next four decades – in the 1920s, 1930s, 1940s, and 1950s – Senators filed a combined total of 29 cloture motions, considerably less than one each year on average. During the same period, there were only 22 cloture votes. By contrast, during the 1960s, there were roughly as many cloture motions (28) and votes (26) as during the previous four decades combined. All but a handful of those votes in the 1960s dealt with civil rights legislation; one of the few exceptions was an unsuccessful attempt to invoke cloture on the nomination of Associate Justice Abe Fortas to become Chief Justice.

Then the numbers of cloture motions exploded so dramatically that the change has to be described as qualitative, not merely quantitative. The number of cloture motions almost sextupled during the 1970s compared with the 1960s. That number increased again in the 1980s, and then jumped once more, this time by more than 170 percent, between the 1980s and the 1990s. Compare, for example, the 96th Congress of 1979-1980 and the 110th Congress of 2007-2008, both of which concluded in presidential elections. The 96th Congress witnessed 33 cloture motions filed, of which 10 were agreed to; in the 110th Congress, 145 motions were filed, of which the Senate agreed to 61. During the latter Congress, the Senate approved almost twice as many cloture motions as had even been filed during the earlier Congress.

In light of these data, I do not see how we can fail to conclude that the Senate is a different place today than it was when William White wrote of the Senate as the "Citadel" and when Lyndon Johnson as Majority Leader doled out the "Johnson treatment." At one time, filibusters generally were reserved for matters of obvious national importance, and cloture motions usually were filed only after an extended period of debate already had taken place. During the 1960s, filibusters attracted national attention, not only because of the importance of the issues involved, but also because filibusters were fairly unusual happenings. Today, by stark contrast, filibusters and cloture votes have become almost a routine part of the Senate's floor procedures. In the Senate today, filibusters and cloture motions have become almost trivialized.

Furthermore, we also have witnessed cloture motions being filed sooner than in decades past. There even have been instances in which a cloture motion has been filed as soon as the Standing Rules permitted—that is, immediately after the measure or matter in question was laid before the Senate for consideration. The argument in defense of that practice is that, in each such instance, there was no doubt that a filibuster was about to begin, so there was no point in having the Senate devote hours or days to demonstrating that fact before testing the will of the Senate by a cloture vote. Not surprisingly, on the other hand, opponents of such cloture motions have disclaimed any intention to filibuster and have asked how other Senators possibly could know their intentions before debate even began.

As I mentioned earlier, I recall that there have been instances (though I cannot cite specific examples today) in which cloture was filed not primarily to end debate, but largely in order to impose a germaneness requirement on amendments. In fact, most Senators on this Committee will be aware of proposals to allow the Senate to impose a germaneness requirement by, I believe, a three-fifths vote without also imposing the debate limitations under cloture, to apply either to any bill or only to general appropriations bills.

In addition to looking at trends in the numbers of cloture motions filed and the number of times cloture has been invoked, we also can ask a related question: how many distinct items of Senate business have involved one or more cloture votes? An item of business is a bill, resolution, treaty, or nomination. The same item of business may give rise to cloture motions on, for example, a motion to proceed, an amendment, the vote on final passage, a conference report, or other procedural actions. So following is a decade-by-decade breakdown, also compiled by Dr. Beth of CRS, of the number of items of business that resulted in one more cloture motions being filed:

Items of Legislative and Executive
Business Provoking One or More
Cloture Motions

67 th -71 st Congresses, 1921-1931	9
72 nd -76 th Congresses, 1931-1940	3
77 th -81 st Congresses, 1941-1950	11
82 nd -86 th Congresses, 1951-1960	2
87 th -91 st Congresses, 1961-1970	16
92 nd -96 th Congresses, 1971-1980	67
97 th -101 st Congresses, 1981-1990	91
102 nd -106 th Congresses, 1991-2000	174
107 th -111 th Congress (1 st sess.), 2001-2009	223

Again we see a sharp increase from the 1960s to the 1970s, and then still further increases during the three decades that have followed. Of the almost 600 items of business that elicited one or more cloture motions between 1921 and 2009, almost exactly two-thirds of them arose since 1991. While it remains untrue that it requires 60 votes to get anything done in the Senate, it is becoming less and less untrue. And, perhaps ironically, I understand that, in an innovation that largely post-dates my time on Capitol Hill, the Senate sometimes has transformed this short-hand mischaracterization into the truth by entering into unanimous consent agreements requiring 60 votes for the Senate to take certain actions that otherwise would have required only a simple majority. In other words, in these cases, the Senate has accepted the vote threshold required to invoke cloture without all the other procedures, requirements, and prohibitions that come with the cloture procedure.

Notwithstanding the limitations of using data on cloture motions and votes to measure the frequency of filibusters, the data I have presented above document a

remarkable change in how the Senate has done its business—or perhaps more to the point, in the lengths to which the Senate has had to go as it has attempted to do its business.

Finally, Mr. Chairman, let me comment briefly on motions to proceed. As I already have reminded the Committee, these motions have not always been subject to cloture motions. Furthermore, even after it became possible to invoke cloture on a motion to proceed, it rarely was necessary to do so. That has been changing. Majority Leaders of both parties have had to rely more on motions to proceed, which Senators have been increasingly willing to filibuster, or make credible threats to filibuster, because it has become more difficult to bring up major bills by unanimous consent. In turn, this combination of developments has increased the importance of holds and led to efforts to reform, regulate, or end the practice.

Dr. Beth has provided me with data on cloture motions filed on motions to proceed for the 13 Congresses beginning with the 98th (1983-1984) and carrying through the end of the 110th (2007-2008). During 24 of those 26 years, cloture motions were filed each year on an average of about eight motions to proceed each year. Is that a lot or a little? Well, during the last of the 13 Congresses, the 110th, the same average jumped to more than 30 per year. As investment advisors always are quick to point out, past performance is no guarantee of future results. Even so, if this recent development is an indication of what the future holds, it would seem to raise legitimate questions about why any Senator would wish to take on the burden of the Majority Leadership!

CONCLUDING OBSERVATIONS

Bicameralism as we know it in the United States tends to slow down the legislative process. The rules of the Senate tend to slow it down even more by preventing the majority party from working its will at a time of its choosing. In that sense, it might be said that filibustering makes the Senate, and the Congress, less efficient than it otherwise might be. But that argument is too simple because it equates efficiency with speed, and it's the easiest thing in the world to make mistakes quickly. No, a legislative body that produces policy decisions that have been developed and scrutinized with care, and that attempt to reflect the varied and sometimes complex preferences and interests of our society, is more likely to merit being called efficient.

I think there's a lot to be said for a bicameral legislature in which somewhat different decision-making rules are associated with each house. The House of Representatives is unquestionably a majority-rule institution. Especially in this period of high intra-party agreement and high inter-party polarization, the majority party usually can work its will (although it's not always easy, as this week's health care reform votes attest). The result can be that there's not much need for the majority to compromise with the minority, and not much incentive for the minority to work with the majority if the alternative is an effective campaign issue that the minority hopes it can use to become the new majority.

Why do Senators filibuster? If their purpose and intent is to exercise a minority veto, then defending recent practice becomes, in my view, an uphill climb. If, on the other

hand, the objective of filibustering, or threatening to filibuster, is to give the majority an incentive to take better account of policy interests and preferences that otherwise would be insufficiently reflected in new legislation, then filibustering becomes much easier for me to justify. So as the members of this Committee ask themselves whether the Senate needs to change its rules or practices, I think a useful starting point is to ask whether the usual purpose of filibusters is more balanced legislation or no legislation at all.

Thank you, Mr. Chairman, for affording me this opportunity to testify today. I will be pleased to contribute to the Committee's work in whatever ways I can.

STANLEY BACH joined the Congressional Research Service (CRS) of the U.S. Library of Congress in 1976. From 1988 until his retirement in May 2002, he was Senior Specialist in the Legislative Process, concentrating on the legislative procedures by which the House and Senate conduct their legislative business, and becoming familiar with many other aspects of congressional operations.

Dr. Bach received his B.A. from the University of Chicago in 1966 and his Ph.D. in political science from Yale University in 1971. Before joining CRS, he taught at the university level, held various staff positions in the Congress, and served as a consultant to the National Academy of Sciences, and a Congressional Fellow of the American Political Science Association. While at CRS, he was an active participant in legislative training programs for congressional staff. Especially since 1990, Dr. Bach has been actively involved in parliamentary development and legislative strengthening programs. In all, he has lectured or consulted in 35 nations for agencies of the U.S. government, and others such as the International Republican Institute, the Ford Foundation, and the United Nations Development Program. During 2003-2004, he was Senior Consultant for Legislative Programs at the National Democratic Institute for International Affairs. His most recent activities include consultations in Jordan and Kyrgyzstan; his 2005 paper on rules of procedure for national assemblies was used in Iraq.

In 2002-2003, Dr. Bach had an opportunity to study the Australian Parliament as a Fulbright Senior Scholar, a Visiting Fellow at the Research School of Social Sciences at the Australian National University, and a Fellow at the Australian Senate, where he wrote *Platypus and Parliament: The Australian Senate in Theory and Practice*, published by the Senate.

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