Summary
Testimony of Norman J. Ornstein
Resident Scholar, American Enterprise Institute

Before the
Committee on Rules
U.S. Senate
May 19, 2010

Chairman Schumer, Ranking Member Bennett, members of the committee. I am pleased and honored to be invited to testify today on the filibuster today and its broader consequences for the Senate, other institutions, and the fabric of governance in America.

Let me note first that I am not among those who want to abolish Rule XXII or believe that procedures that protect minority viewpoints in the Senate are per se wrongheaded. I certainly join with scholars who have shown that unlimited debate in the Senate was in many ways a historical accident, not an objective of the Framers. The rules that followed the removal of the previous question motion, including those in place today, were neither preordained by the Framers of our Constitution, nor are they written in stone.

But I do believe that the Framers wanted the Senate to be a body quite distinct from the House of Representatives, and were deeply concerned about the potential tyranny of a majority. So a body built on a greater role for individuals, relying significantly on unanimous consent, and with the capacity for a minority of representatives with intense views about an issue of great national concern to retard action and force greater deliberation in the face of majority sentiment, fits that vision.

However, in too many ways, that vision of the Framers is being distorted today, at a substantial cost to the fabric of comity, the process of deliberative democracy and the vital business of governance in the country. This is true of the use of the filibuster as a pure tactic of delay and obstruction and not as a way for a minority to express its intense feelings about an important issue, and of the use of the filibuster's first cousin, the hold.

The sharp increase in cloture motions reflects the routinization of the filibuster, its use not as a tool of last resort for a minority that feels intensely about a major issue but as a weapon to delay and obstruct on nearly all matters, including routine and widely supported ones. It is fair to say that this has never happened before in the history of the Senate.

Where holds used to be employed sparingly, and served mainly to delay for a short time, days or weeks, a vote on a bill or nomination to enable a senator to be present

for the debate, or to muster the best arguments to use on the floor, holds now are frequently the equivalent of death sentences or long periods of torture for nominees. Where holds on nominations once reflected concerns of senators about the nominees, now they more frequently are hostage-taking devices.

The upshot has been that many key posts in government go unfilled for months, leaving headless key agencies and offices that need leadership. To be sure, leaders can transcend the holds by bringing up the nominations and overcoming the lack of unanimous consent. But that moves the nominations back into the time-consuming process of Rule XXII and other Senate procedures that mean days and weeks of precious floor time that simply can't be spared.

There is no panacea here. The problem is less the rules themselves and more the current culture. But the rules do play a part, and there are modest but important changes that deserve broad bipartisan support from those who want to see an appropriate balance in the Senate between minority concerns and majority governance, and want to see the Senate, and the broader government, functioning in the best interest of the country. I would be pleased to discuss some ideas for change if and as the committee desires

Testimony of Norman J. Ornstein
Resident Scholar, American Enterprise Institute

Before the
Committee on Rules
U.S. Senate
May 19, 2010

Chairman Schumer, Ranking Member Bennett, members of the committee. I am pleased and honored to be invited to testify today on the filibuster today and its broader consequences for the Senate, other institutions, and the fabric of governance in America.

Let me note first that I am not among those who want to abolish Rule XXII or believe that procedures that protect minority viewpoints in the Senate are per se wrongheaded. I certainly join with scholars who have shown that unlimited debate in the Senate was in many ways a historical accident, not an objective of the Framers. The rules that followed the removal of the previous question motion, including those in place today, were neither preordained by the Framers of our Constitution, nor are they written in stone.

But I do believe that the Framers wanted the Senate to be a body quite distinct from the House of Representatives, and were deeply concerned about the potential tyranny of a majority. So a body built on a greater role for individuals, relying significantly on unanimous consent, and with the capacity for a minority of representatives with intense views about an issue of great national concern to retard action and force greater deliberation in the face of majority sentiment, fits that vision.

However, in too many ways, that vision of the Framers is being distorted today, at a substantial cost to the fabric of comity, the process of deliberative democracy and the vital business of governance in the country. This is true of the use of the filibuster as a pure tactic of delay and obstruction and not as a way for a minority to express its intense feelings about an important issue, and of the use of the filibuster's first cousin, the hold.

On the changing use of the filibuster, I have appended to my testimony an article I wrote in 2008 for the magazine The American, with a chart showing the changes in cloture motions over the past three decades, including the dramatic spike in the 110th Congress. We are on course to break that record in the 111th. As I wrote then, "In the 1970s, the average number of cloture motions filed in a given month was less than two; it moved to around three a month in the 1990s." In the 110th and 111th—where there have been 92 cloture motions through the end of April—the average is more like two a *week.*

The sharp increase in cloture motions reflects the routinization of the filibuster, its use not as a tool of last resort for a minority that feels intensely about a major issue but as a weapon to delay and obstruct on nearly all matters, including routine and widely supported ones. It is fair to say that this has never happened before in the history of the Senate. No doubt, the increase in cloture motions reflects changes on the part of both parties, as the minority has moved to erect a filibuster bar for nearly everything and the majority has moved preemptively to invoke cloture at the start of the process.

But the fact is that the major change is minority strategy. Consider three examples from the 111th Congress. The first is H.R. 3548, the Worker, Home Ownership and Business Assistance Act of 2009 that moved to extend unemployment benefits in the face of the deep recession. There was no opposition in the Senate to this bill; it ultimately passed 98-0 in November 2009. But before that point it was subjected to filibusters both on the motion to proceed and on final passage. The first cloture motion was adopted 87-13; the second, 97-1. A bill that should have zipped through in a day or two at most took four weeks, including seven days of floor time, to make it through.

The second example is H.R. 627, the Credit Cardholders' Bill of Rights Act. This one ended up with only one cloture vote, after the filibuster on the motion to proceed was withdrawn. The cloture motion on passage sailed through 92-2, and the bill passed by a 90-5 vote. But again, the clog in the process caused by filibuster threats and the delays allowed by Rule XXII meant weeks of delay and seven days of floor time.

Third is the Fraud Enforcement Recovery Act; again cloture on the motion to proceed was withdrawn, but cloture had to be invoked on final passage. The cloture motion was 84-4, and final passage was 92-4. This time, six days of floor time.

The three bills above demonstrate vividly the new tactical approach to the filibuster. Twenty days of precious and limited floor time take up by non-controversial bills, with the lions' share of that time spent not debating the merits of the bills or working intensively to improve them via substantive amendments, but just trying to use up more floor time to make action or progress on other bills more cumbersome and difficult. Is this deliberate obstructionism? I will leave that interpretation to the words of former Republican Leader Trent Lott, who observed in the 110th Congress, "The strategy of being obstructionist can work or fail. For [former Senate Minority Leader] Tom Daschle, it failed. For Reid it succeeded, and so far it's working for us."

I accept Senator Lott's characterization that the tactic of obstructionism is not owned by either party; it has been employed by both parties when it suited their purpose. But the use of the tactic has expanded sharply and shows no signs of abating.

Unfortunately, it has also been employed increasingly as a tool against nominations, both to courts and executive branch positions. The most pointed example here is the nomination of Judge Barbara Milano Keenan to the U.S. Court of Appeals for the Fourth Circuit. There were no issues about Judge Keenan's qualifications or

nomination. But her confirmation in March of this year was subject to a filibuster—and a cloture motion that passed 99-0, followed by a similar 99-0 confirmation vote. In the case of Judge Keenan, her confirmation occurred a full 169 days after her nomination, and 124 days after the Judiciary Committee unanimously reported her nomination to the floor.

Judge Keenan's nomination took much longer on the floor than it should have. But here, as in hundreds of other nominations, the real villain has been the use and misuse of the hold. The hold, as you know, is simply a notice by a senator that he or she will deny unanimous consent if a bill or nomination is brought forward. Holds are nothing new, but the way in which they are employed has changed even more dramatically than cloture motions and filibusters per se.

Where holds used to be employed sparingly, and served mainly to delay for a short time, days or weeks, a vote on a bill or nomination to enable a senator to be present for the debate, or to muster the best arguments to use on the floor, holds now are frequently the equivalent of death sentences or long periods of torture for nominees. Where holds on nominations once reflected concerns of senators about the nominees, now they more frequently are hostage-taking devices.

One problem, as you know well, is that many holds are anonymous, leaving both the nominee twisting in the wind and the public unaware of who or why the delay is occurring. This practice was theoretically changed three years ago, but the pledge to end anonymous holds has never come close to being implemented. It is both wrong and cowardly for senators to cling to anonymity. But it is also wrong and shameful to manipulate the lives of those who are willing to make the sacrifices to come into public service, and to sacrifice quality governance for narrow and self-serving ends.

It is difficult to quantify exactly how many holds on executive and judicial nominees are actually in place at any one time. But there are at present around a hundred nominations for executive and judicial positions on hold while awaiting confirmation votes, many of them having been waiting for many months.

Imagine you live in California and are offered, and accept, an attractive position in the private sector on the East Coast. You can plan your career and family change, and probably time your move to coincide with the end of the school year, selling your house and finding a new one in time for your family to get acclimated to the new schools. If you as an individual decide to accept the call for public service, to a position requiring Senate confirmation, you have no such luck. You can inform your employer that you are leaving—but not know for months or maybe a year or more when you will be going, leaving everyone in limbo. You cannot tell when you can or should move to Washington. You may be able to stay in your job in the interim, but end up having to recuse yourself from some decisions, and have your employer and colleagues look at you in a different way since you will probably be leaving them sometime in the foreseeable future. The uncertainty is excruciating for nominees and their families, a human cost that is often just ignored by senators who put holds on nominees they don't know, may not even oppose and are exploiting for other political purposes.

To be sure, leaders can transcend the holds by bringing up the nominations and overcoming the lack of unanimous consent. But that moves the nominations back into the time-consuming process of Rule XXII and other Senate procedures that mean days and weeks of precious floor time that simply can't be spared.

The upshot has been that many key posts in government, like the chief operating officer of the executive branch (the head of the General Services Administration,) individuals on the front lines of protecting our homeland security like the head of the Transportation Safety Administration, members of the National Transportation Safety Board, key officials whose jobs deal with issues like the oil spill and the international financial architecture, have seen their posts go unfilled for months, leaving headless key agencies and offices that need leadership. Whether you are a small-government conservative or a big-government liberal, enforcing the laws, running the agencies, protecting Americans against terrorist threats and natural disasters, are all necessary—and the current misuse of holds damages the country's ability to do all those things and more.

There is no panacea here. The problem is less the rules themselves and more the current culture. But the rules do play a part, and there are modest but important changes that deserve broad bipartisan support from those who want to see an appropriate balance in the Senate between minority concerns and majority governance, and want to see the Senate, and the broader government, functioning in the best interest of the country. I would be pleased to discuss some ideas for change if and as the committee desires.

Norman J. Ornstein is a resident scholar at the American Enterprise Institute for Public Policy Research. He also serves as an election analyst for CBS News and writes a weekly column called "Congress Inside Out" for *Roll Call* newspaper. He has written for the *New York Times, Washington Post, Wall Street Journal, Foreign Affairs,* and other major publications, and regularly appears on television programs like *The NewsHour with Jim Lehrer, Nightline,* and *Charlie Rose.* At the 30th Anniversary party for The NewsHour, he was recognized as the most frequent guest over the thirty years.

He serves as senior counselor to the Continuity of Government Commission, working to ensure that our institutions of government can be maintained in the event of a terrorist attack on Washington; his efforts in this area are recounted in a profile of him in the June 2003 *Atlantic Monthly.* His campaign finance working group of scholars and practitioners helped shape the major law, known as McCain/Feingold, which reformed the campaign financing system. *Legal Times* referred to him as "a principal drafter of the law" and his role in its design and enactment was profiled in the February 2004 issue of *Washington Lawyer.* He has been part of a working group on the next generation of campaign finance reform, which issued a report in 2010 called “Reform in an Age of Networked Campaigns.” He has also co-directed a multi-year effort, called the Transition to Governing Project, to create a better climate for governing in the era of the permanent campaign, and is co-director of the AEI/Brookings Election Reform Project.

He spent six years as a member of the Board of Directors of the Public Broadcasting Service (PBS) and is currently on the boards of the Campaign Legal Center, the Washington Tennis and Education Foundation, the Center for U.S. Global Engagement and the U.S. Capitol Historical Society, and of UCB, a biopharmaceutical company based in Belgium. He was elected as a fellow of the American Academy of Arts and Sciences in 2004. He was the recipient in 2006 of the American Political Science Association’s Goodnow Award for distinguished service to the profession. Ornstein has a B.A. (Magna cum Laude) from the University of Minnesota and M.A. and Ph.D. from the University of Michigan. His alma mater, the University of Minnesota, gave him an honorary Doctor of Laws degree in 2007.

His many books include *The Permanent Campaign and Its Future; Intensive Care: How Congress Shapes Health Policy,* both with Thomas E. Mann; and *Debt and Taxes: How America Got Into Its Budget Mess and What to Do About It,* with John H. Makin. *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track,* co-authored by Thomas E. Mann, was published in August 2006 by Oxford University Press, with an updated edition in August 2008. It was picked both by The Washington Post and the St. Louis Post-Dispatch as one of the best books of 2006.

Our Broken Senate

By Norman Ornstein From the March/April 2008 Issue

Filed under: Government & Politics

The expanded use of formal rules on Capitol Hill is unprecedented and is bringing government to its knees.

The slaughter last April of 32 people at Virginia Tech University by a mentally disturbed student using a variety of guns he had purchased brought about an unusual, quick consensus in the political arena: guns should not be in the hands of people who are mentally ill.

Representative Carolyn McCarthy (D-NY), whose husband was shot and killed on a commuter train by a deranged individual, quickly drafted a bill to provide grants to states to put more information into the National Instant Criminal Background Check System of those individuals with criminal backgrounds and found by courts to pose a danger because of mental illness. The National Rifle Association endorsed the bill, as did the Brady Campaign to Prevent Gun Violence. It passed the House unanimously in June, and seemed to be cruising toward enactment—a rare moment of cooperation not just between gun-oriented groups but across party lines in Congress.

Then came Senator Tom Coburn (R) of Oklahoma. Coburn put a hold on the bill by objecting to a unanimous consent agreement to bring it up in the Senate. For months after its passage by the House, the legislation remained in limbo until finally limping to enactment at the end of the year—not a shining example of how government can work but instead a casualty of the way the Senate operates.

Ah, the U.S. Senate—the world's greatest deliberative body. The chamber designed to be, as George Washington famously described it to Thomas Jefferson, "the saucer into which we pour legislation to cool" the hot tea from the cup of the House of Representatives. It is a body set up to make it difficult to enact laws, with a tradition of unlimited debate and a deference to the intense feelings of the minority over the more casual will of the majority.

As George Washington knew from the get-go, the slow pace and individualist nature of the Senate would drive the more action-oriented House of Representatives batty. And it has, regularly and consistently. One of the most battle-tested anecdotes, which I first heard in the 1970s from former Representative Al Swift (D-WA), is about the freshman House member who refers to a member of the other party as "the enemy." A more senior colleague says, "No, he is just a part of the opposition. The Senate is the enemy."

Soon after the stunning 1994 election in which Republicans swept into majorities in both houses and ushered in what became known as the Gingrich Revolution, I wrote the following in my Roll Call column:

“Forget the relationship between Speaker Newt Gingrich (GA) and President Clinton. The most interesting relationship in Washington for the next two years will be that between Speaker Gingrich and Senate Majority Leader Bob Dole (KS)…. Gingrich has a vision, an agenda, and a timetable. His risk-taking, combative, and radical approach worked, and has generated a large group of Gingrich progeny in the House—combative, confrontational, sharply ideological conservatives in a hurry.

“The Senate is very different. When an ebullient Gingrich was outlining his blitzkrieg approach to governance the day after the election, Dole’s reaction was more along the lines of, ‘Been there. Done that. Slow down.’

“The fact is that the Senate remains an institution of 100 individualists, all prima donnas, all with their own independent power bases. Filibusters, holds, and threats of filibusters are a way of life in the Senate.... [It] simply doesn’t provide any hope of regular 51-vote majorities for a tough, pure, and hard-line conservative policy approach….

“In many ways, the frustrations of modern governance in Washington—the arrogance, independence, parochialism—could be called ‘The Curse of the Senate.’ The curse has now been transferred from Speaker Foley and the Democrats to Speaker Gingrich and the Republicans. We’ll see if Newt has any better antidote.”

He didn’t. Newt saw nearly all his initiatives, including much of the Contract with America, disappear in the Senate Bermuda Triangle. Gingrich’s problems with Dole and his Senate were both predictable and par for the course. But the Senate today is showing signs of getting even more difficult to deal with. The Senate has taken the term “deliberative” to a new level, slowing not just contentious legislation but also bills that have overwhelming support.

The Virginia Tech bill is a dramatic example, but it is far from the only one. A bill to require senators to file their campaign finance reports electronically—something done for years by members of the House, presidential candidates, and nearly every legislative body out there—has been the victim of revolving holds for months on end. A widely supported ethics and lobbying reform bill was pushed back several times and nearly derailed by a hold placed by Senator Jim DeMint (RSC). A bill to repeal President Bush’s executive order allowing presidents to shield their papers from public view for decades after they leave office has been held up by Senator Jim Bunning (R-KY)—who stepped in after a months-long hold on the bill by Coburn was finally lifted in September.

To be sure, Coburn and DeMint do not fundamentally represent a new kind of lawmaker. The role of skunk at the garden party is time-honored, with the title carried over the years by both Democrats and Republicans. James Allen (D) of Alabama, Jesse Helms (R) of North Carolina, and Howard Metzenbaum (D) of Ohio all were proud to be the skunks at one point or another over the past 30 years.

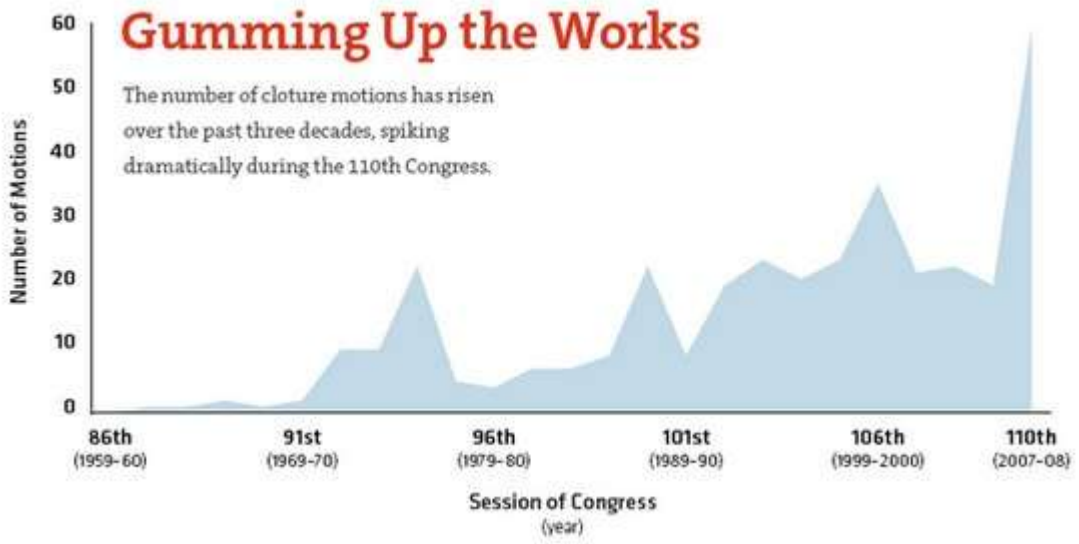
So what is different now? For one thing, everybody is an obstructionist in today’s Senate, thanks to the dramatically expanded and different role of the hold. What is a hold? It is an informal procedure—nowhere mentioned in Senate rules—where an individual senator notifies the body’s leaders that he or she will hold up a bill or nomination by denying unanimous consent to allow it to move forward. The hold was originally employed simply as a courtesy—a way to delay action for a week or two if a lawmaker had a scheduling conflict or needed time to muster arguments for debate. But over the past 30 years, it has morphed into a process where any individual can block something or someone indefinitely or permanently—and often anonymously. Now, at any given time, there are dozens of holds on nominees for executive positions and judgeships, and on bills. Of course, bills can be brought up even if there is not unanimous consent, but to do so is cumbersome and often requires 60, rather than 50, votes to proceed.

Tom Coburn is the undisputed hold champion in the Senate, with at least 80 bills and nominations in limbo because of his actions. His closest rival in the field is fellow Republican Jim DeMint. But these days, all senators use holds. Where in the past, holds were targeted at bills or nominees senators strongly opposed, nowadays they are routinely employed against bills or people the senator has nothing against, but wants to take as hostages for leverage on something utterly unrelated to the hold itself. In 2003, 212 Air Force promotions were halted by an anonymous hold, which (we learned months later) was an effort by Senator Larry Craig (R) of Idaho to force the Defense Department to station four new C-130 cargo planes in his state. And even Coburn has found the tables turned on him: a Coburn bill cosponsored with Senator Barack

Obama (D-IL) that “would create a single website with access to information on nearly all recipients of federal funding”—a way for watchdog groups to track pork and seamy relationships between lawmakers and earmark recipients—was held up for a long time by a bipartisan duo of old Senate bulls, Robert Byrd (D-WV) and Ted Stevens (R-AK), before public attention to the blockage forced action and enabled the bill to be made into law.

The contemporary practice of hold-as-hostage and hold-as-bill-or-nominee-killer has been building for several decades and reflects larger changes in the Senate and society. The always individual-oriented Senate has become even more indulgent of the demands of each of its 100 egotists. Even though some members may rail against the injustice of an individual single-handedly stopping a bill in its tracks, they do not want to end a practice that they themselves want to keep in the arsenal.

The big story of the 110th Senate, though, is not the explosion of individual use of an unwritten practice, but the sharply expanded use of the formal rules as a partisan political tactic to delay and block action by the majority. Consider the filibuster. It has a long history, going back to the early days of the Republic. Unlimited debate became a core feature of the Senate in the first decade of the 19th century, when the Senate abandoned a rule to move the previous question—which allows a majority to stop debate and move to a vote on any issue. From that point on, any senator could take to the floor and hold it as long as he could stay there. That tradition lasted until 1917, when a filibuster over efforts to rearm America in preparation for the World War led to a backlash and a new rule allowing cloture—stopping the debate—if two-thirds of senators voting agreed. (That rule stayed in effect until the 1970s, when the number was reduced to 60 senators.)



From its earliest incarnation, the filibuster was generally reserved for issues of great national importance, employed by one or more senators who were passionate enough about something that they would bring the entire body to a halt. The civil rights issue fit this pattern exactly: Southern senators led lengthy filibusters on voting rights and civil rights bills during the 1950s and 1960s, effectively killing them all until President Lyndon Johnson was able to overcome the procedural hurdle in 1965. In each case, the drama was palpable as the Senate moved to round-the-clock sessions—aides wheeling cots into the antechambers—to try to break the filibuster.

But after the 1965 Voting Rights Act, the filibuster began to change as Senate leaders tried to make their colleagues’ lives easier and move the agenda along; no longer would there be days or weeks of round-the-clock sessions, but instead simple votes periodically on cloture motions to get to the number to break the log-jam, while other business carried on as usual.

As so often happens, the unintended consequences of a well-intentioned move took over; instead of expediting business, the change in practice meant an increase in filibusters because it became so much easier to raise the bar to 60 or more, with no 12- or 24-hour marathon speeches required.

Still, formal filibuster actions—meaning actual cloture motions to shut off debate—remained relatively rare. Often, Senate leaders would either find ways to accommodate objections or quietly shelve bills or nominations that would have trouble getting to 60. In the 1970s, the average number of cloture motions filed in a given month was less than two; it moved to around three a month in the 1990s. This Congress, we are on track for two or more a week. The number of cloture motions filed in 1993, the first year of the Clinton presidency, was 20. It was 21 in 1995, the first year of the newly Republican Senate. As of the end of the first session of the 110th Congress, there were 60 cloture motions, nearing an all-time record.

What makes this Congress different? The most interesting change is GOP strategy. Republican Senate leader Mitch McConnell (KY) has threatened filibuster on a wide range of issues, in part to force Majority Leader Harry Reid (D-NV) to negotiate with his party and in part just to gum up the works. Republicans have invoked filibusters or used other delaying tactics on controversial issues like Medicare prescription drugs, the war in Iraq, and domestic surveillance—and on non-controversial issues like ethics reform and electronic campaign disclosure.

To be sure, Majority Leader Reid has been more confrontational than accommodating, frequently trying to short-circuit this process by invoking cloture at the start. But Republicans have been able to derail the process repeatedly by denying unanimous consent to move forward and by requiring cloture. To supersede the tactics on even a consensus measure, Reid often has to go through three separate cloture battles, each one allowing a lot of debate, including 30 hours of it even after cloture is invoked.

Is this obstructionism? Yes, according to none other than Senate authority Trent Lott (R-MS), the former minority whip. Lott told Roll Call last year, “The strategy of being obstructionist can work or fail. For [former Senate Minority Leader Tom] Daschle, it failed. For Reid it succeeded, and so far it’s working for us.”

It has been working so well that, before he resigned, Senator Lott was having second thoughts, and called for a return to the Gang of 14—the bipartisan coalition that kept the Senate from blowing up its rules to confirm President Bush’s judicial nominees—to find some accommodation between the parties to move more vital legislation along.

Can anything be done to create a little more efficiency in the Senate without altering its basic character? The first big step would be to go back to the future—to return at least on occasion to real filibusters, bringing the place to a halt and going round the clock to break the deadlock. This would deter the casual use of delaying tactics and dramatize the problem. It should be accompanied by a much more rigorous Senate schedule, ideally five full days a week in session for three consecutive weeks, with one week off to attend to constituent needs.

There are also a few rule changes that would help. Eliminating the opportunity to filibuster on the motion to proceed to debate would remove one of the three separate bites at the apple on every bill, while keeping the essence of the filibuster and cloture intact. Moving from requiring unanimous consent to do almost anything in the Senate to a slightly higher threshold (say, requiring five objections to stop something instead of just one) would dilute the power of one crank to bring the whole institution to a halt. Making all holds public, something pushed for several years by Senators Charles Grassley (R-IA) and Ron Wyden (D-OR), would make a small difference. But the problems here are less the rules and more the culture. And that is not going to change anytime soon.

Norman Ornstein is a resident scholar at the American Enterprise Institute.

Illustrations by John Weber.