Executive Summary of Testimony and Written Statement by

Steven S. Smith

Today's Senate has reached a point in its procedural history that is qualitatively different than anything it has experienced before.

First, in the last two decades, the more vigorous exploitation of minority rights and the majority response have had a pervasive and negative effect on the Senate. A syndrome has emerged in which each party assumes that the other side will fully exploit its procedural options. Each side acts peremptorily to protect its interests.

Second, this syndrome materially harms the special role of the Senate in our political system as a policy incubator. The flexible, informal, and permeable decision-making process of the smaller upper house facilitated the exchange of ideas, encouraged the trial and error process of defining policy problems and solutions, and generated opportunities for participation that brought job satisfaction and incentives for interaction across party lines. The full exploitation of minority and majority procedural rights creates an obstruct-and-restrict syndrome that undermines that role.

Third, it is hard to reverse history. We can hope that partisan polarization and procedural warfare subside, but, once invented and exploited, procedural weapons continue to be used or threatened to be used. The syndrome does not cure itself; senators must address it.

My oral testimony is accompanied by an unusually long review of procedural developments in the Senate since 1960. The long review is intended to brief the Committee and your colleagues on formal and informal developments that generated today's practices. The central theme of the review is that the super-majority threshold of Rule XXII has a pervasive effect on the Senate's daily practices and senators' strategies. The review concludes with several lessons from that history.

Testimony of

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Thank you Mr. Chairman, Senator Bennett, and members of the Committee.

Today's Senate has reached a point in its procedural history that is qualitatively different than anything it has experienced before. This has material consequences for the role of the Senate in our political system as an incubator of policy ideas. Let me make three observations and leave the longer story for the report I submitted.

First, in the last two decades, the more vigorous exploitation of minority rights and the majority response have had a pervasive and negative effect on the Senate.

Here is what I see: In recent Congresses, with both Democratic and Republican minorities, very few major measures are untouched by minority efforts to delay or prevent action (see Figures 1 and 2 at the end of my oral testimony). More silence in response to requests for clearance, more frequent objections to majority party unanimous consent requests to structure debate and amendments (Figure 3), more holds extended to more minor measures and nominations, more delays in getting to the floor to offer amendments, and even an increase in the number of minority party UC requests to alter the agenda.

The minority's moves have motivated majority party leaders to leave nothing to chance. Beyond having a quick trigger in filing for cloture, majority leaders and bill managers of both parties have

- more frequently filled the amendment tree,
- more frequently used their own amendments to prevent other amendments from becoming the pending business (a tactic sometimes used in combination with cloture, after which the two-amendment limit applies),

- tightened unanimous consent agreements, including the use of 60-vote requirements for amendments;
- moved to non-conference mechanisms to avoid the debatable conference motions; and
- on some sensitive matters, such as appropriations bills, avoided floor action altogether by facilitating the creation of omnibus bills in conference.

The minority party has not remained idle. Minority counter-measures include more objections to UC requests and more resolutely resisting cloture on bills, if for no other reason that to object to majority manipulation of the amending process.

In this context, the procedural prerogatives intended to protect an open, deliberative process have generated, in practice, a complicated process that is often rigid and procedure-bound.

The best metaphor for this is a medical one. This is a syndrome--an obstruct-and-restrict syndrome--one in which well-justified procedural moves by the two parties accumulate and harm the institution.

Each party now begins with the working hypothesis that the other side will fully exploit its procedural options. Each side acts peremptorily to protect its interests. Bill after bill, the Senate works itself into the manipulation of the amendment process, rigid UCs, and, wherever possible, the use of debate-limited procedures. Many of the most important policy decisions are taken out of formal venues of committees, conferences, the floor and moved into party offices.

It can hardly be argued that the quality of deliberation has been improved by the full exploitation of procedural rights by the minority and majority.

Second, and regrettably, a special role of the Senate in our political system as an incubator of new policy ideas has been undermined.

While the Constitution and the framers did not anticipate that the filibuster would become a tool of the Senate minority, they did anticipate that the Senate would have a special place in the American political system. The greater experience, method of selection, longer and staggered terms, and large constituencies encourage a broader perspective with a longer time horizon than in the House.

The constitutional features of the Senate were enhanced by the flexible, informal, and permeable decision-making process of the smaller upper house, which historically facilitated the exchange of ideas, encouraged the trial and error process of defining policy problems and solutions, and generated opportunities for participation that bring job satisfaction and incentives for interaction across party lines.

The obstruct-and-restrict syndrome undermines the Senate policy incubator. Full deployment of procedural weapons protects minority rights and promotes majority interests but harms the Senate. It breeds rigidity, reduces opportunities to explore and advocate new ideas, shrinks time horizons, and swallows up the most valuable resources of the institution: the time and creativity of senators.

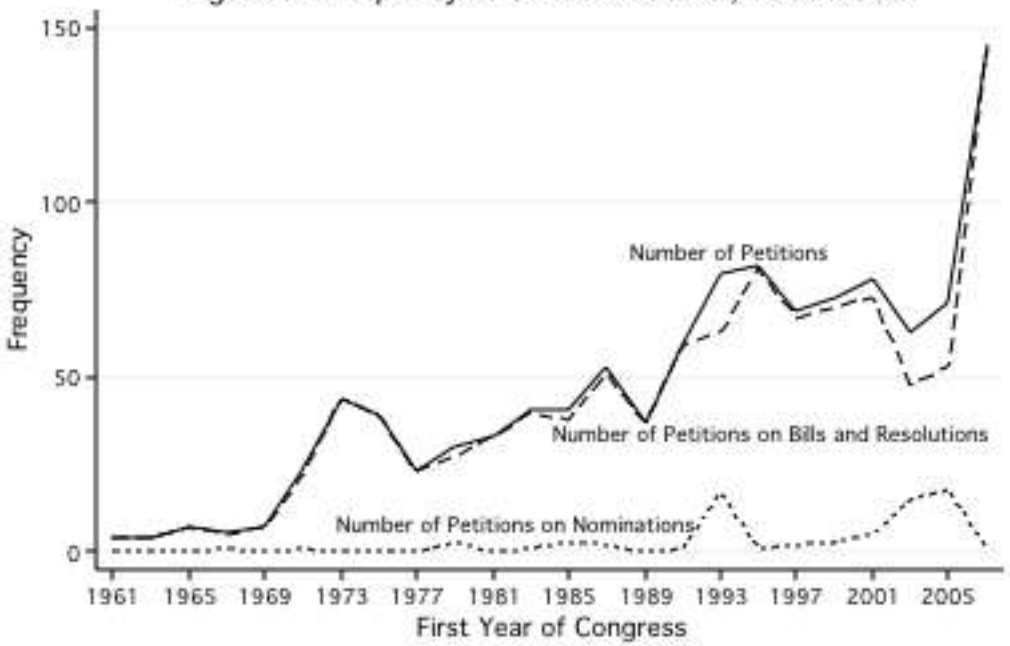
Third, it is hard to reverse history. We can hope that partisan polarization and procedural warfare subside, but, once invented and exploited, procedural weapons continue to be used. Wise leaders must anticipate and defend against the possible moves of the other party. So the syndrome does not cure itself; you must address it.

I would like to see several steps taken:

1. Generous debate limits should be established for the motion to proceed, for amendments, and for the motions required to go to conference.
2. Limiting debate on appropriations measures, perhaps under the Budget Act.
3. Limiting debate on matters considered under the Senate's "advice and consent" power—nominations and treaties—found on the executive calendar.
4. To protect the right to debate under these limits, you might establish a high threshold, a three-fifths majority, to further reduce time for debate.

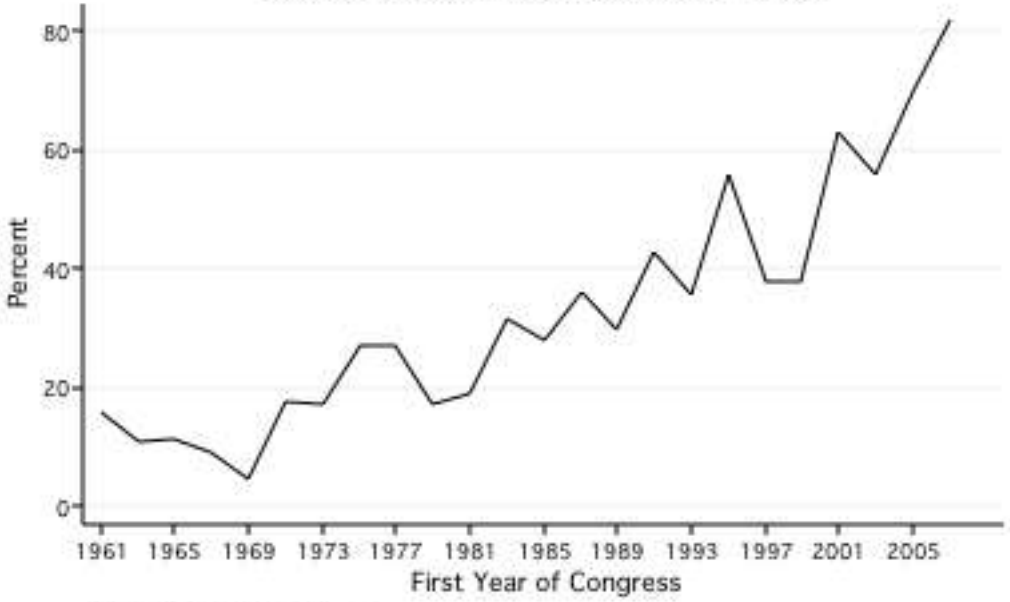
These are not easy steps to take. I believe they will strengthen the Senate.

Figure 1. Frequency of Cloture Petitions, 1961-2008.



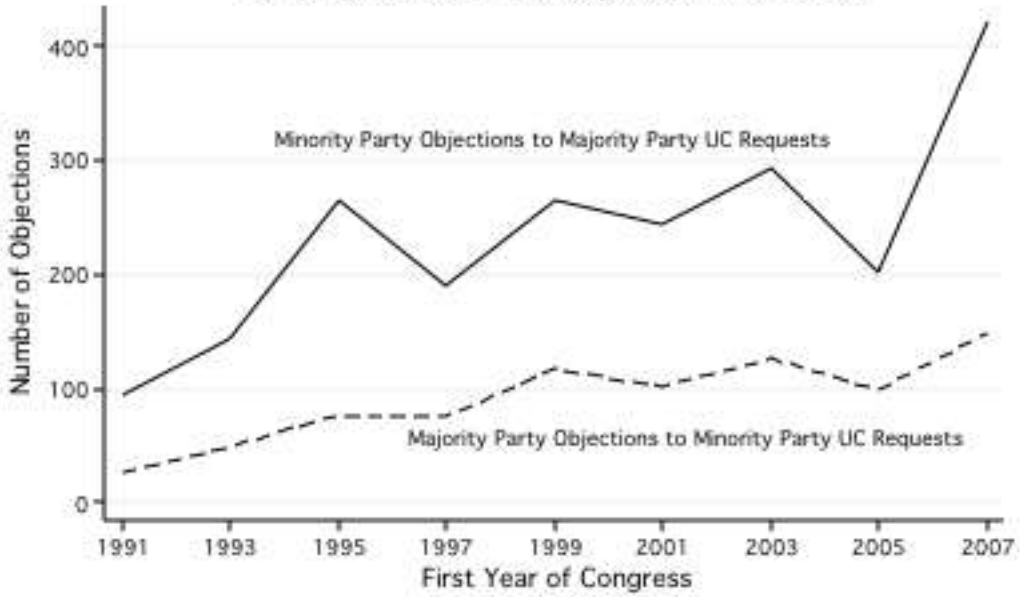
Source: U.S. Senate, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm

Figure 2. Percent of Key-Vote Measures Subject to Cloture Petitions, 1961-2008.



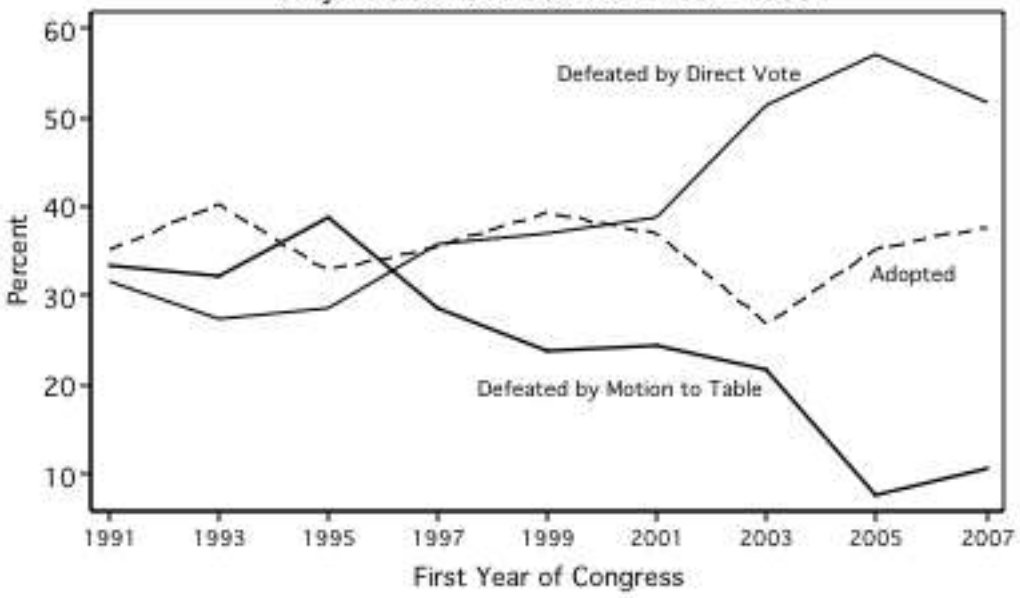
Source: CQ Almanac, annual editions.

Figure 3. Objections to Unanimous Consent (UC) Requests by Party of Author and Objector, 1991-2008.



Source: Congressional Record.

Figure 4. Disposition of Senate Floor Amendments Subject to a Recorded Vote 1991-2008.



Source: Senate vote record.

Biography

Steven S. Smith is Professor of Political Science, Kate M. Gregg Distinguished Professor of Social Science, and Director of the Murray Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis. Previously, he served on the faculty of the University of Minnesota, Northwestern University, and George Washington University, and was a Senior Fellow at the Brookings Institution. He chaired the Legislative Studies Section of the American Political Science Association and has served on the editorial boards of the *American Journal of Political Science*, *The Journal of Politics*, *Legislative Studies Quarterly*, and other journals. His books are:

- *The American Congress* (Cambridge University Press, 2006, 2009; Houghton Mifflin, 1995, 1999, 2003)
- *The American Congress Reader* (Cambridge University Press, 2009)
- *Committees in Congress* (CQ Press, 1984, 1990, 1997), with C.J. Deering
- *Call to Order: Floor Politics in the House and Senate* (Brookings, 1989)
- *Managing Uncertainty in the House of Representatives: Adaptation and Innovation in Special Rules* (Brookings, 1988), with S. Bach
- *Politics or Principle: Filibustering in the United States Senate* (Brookings, 1997), with S. Binder
- *The Politics of Institutional Choice: The Formation of the Russian State Duma* (Princeton University Press, 2001), with T. Remington
- *The Principles and Practice of American Politics* (CQ Press, 2000, 2004, 2007, 2009), with S. Kernell, edited volume
- *Party Influence in Congress* (Cambridge University Press, 2007)
- *Reforming the Presidential Nomination Process* (Brookings, 2009), with M. Springer
- *Steering the Senate: The Development of Party Leadership in the U.S. Senate*, with G. Gamm (Cambridge University Press, forthcoming)