

One page summary of the testimony of Robert Dove

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If the filibuster is swept away, what becomes of the Senate of the Founders, of Madison's "necessary fence" against the danger of an overzealous majority in the nation?

Defending the Filibuster

Robert B. Dove

Testimony before the Senate Committee on Rules and Administration

Introduction

- I. The recent headlines scream out: “Senate’s Abuse of Filibuster Rule Threatens Democracy”¹, “A Dangerous Dysfunction”², “Filibuster Abuse: Founding Fathers Didn’t Plan It This Way”³, “Filibuster, Gone Rogue: A Senate Rule That Cripples Our Democracy”⁴ and a Harvard Crimson op-ed cried, “Tyranny of the Minority”⁵.

The past year’s Republican filibuster of the health reform proposals of President Obama and the Congressional Democrats and the struggles to reach the 60-vote super-majority necessary to overcome this tactic have moved the filibuster and associated Senate parliamentary tactics to center stage. As has occurred from time to time in the Senate’s history, frustrated majorities and their constituencies, as well as observers in the academia, the media, and the Congress itself, have demanded the elimination of “unlimited debate” in the Senate.

It sometimes seems that one cannot explain or analyze the filibuster without mentioning three figures-- two Jeffersons and a Washington. Nearly all descriptions of the practice reference the probably apocryphal story of George Washington, explaining to Thomas Jefferson, just back from France, that the Senate was included in the federal design to serve the same function as the saucer into which he poured his hot coffee to cool.⁶

1 *Mercury News* (San Jose, CA) editorial “Senate’s Abuse of Filibuster Rule Threatens Democracy”, January 28, 2010

2 Paul Krugman, “A Dangerous Dysfunction”, New York Times op-ed, December 21, 2009

3 *Patriot-News* (Harrisburg, PA) editorial “Filibuster Abuse: Founding Fathers Didn’t Plan It This Way”, February 16, 2010

4 *Star-Ledger* (Newark, NJ) editorial ““Filibuster, Gone Rogue: A Senate Rule That Cripples Our Democracy””, January 10, 2010

5 Clay Dumas, *Harvard Crimson* (Cambridge, MA) op-ed “Tyranny of the Minority”, February 17, 2010

6 From its earliest known sources, the liquid is sometimes reported as tea., sometimes as coffee. According to Sen. Robert Byrd, the story’s first known appearance is in an 1871 letter from constitutional law professor Francis Lieber to Ohio Representative and later President James A. Garfield. [Congressional Record, April 24, 2006]. According to the Jefferson Encyclopedia on the Monticello website: “...To date, no evidence has surfaced that such a conversation actually took place. The earliest known appearance of this story is in *Harper’s New Monthly Magazine* in 1884 ... It was repeated by M.D. Conway in his *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph*, first published in 1888. Since then, the story has appeared many times in print, usually

The Senate's smaller size, longer terms, and state-wide constituencies all predispose the Senate to be a more moderate, measured body less impacted by the shifting winds of public opinion. The filibuster, although not created by the framers themselves, grew out of the independent precedents and procedures evident in the Senate from the outset, which themselves grew out of the Constitutional design for the Senate. For example, the very first Senate assured that its presiding officer (the Vice-President of the United States) would be a weak one, in clear contrast to the powers of the presiding office of the House of Representatives, the Speaker.

At least as often, when describing the filibuster and its history, commentators refer not to Thomas Jefferson, but to Jefferson Smith, the fictional senator played by the great Jimmy Stewart in his romantic portrayal of the filibuster in the 1939 film, "Mr. Smith Goes to Washington" (Senate Majority Leader Alben Barkley called it "silly and stupid," and asserted that it made the Senate look like "a bunch of crooks." According to the official Senate website, "Years later, producer Frank Capra alleged that several senators had actually tried to buy up the film to prevent its release."⁷

Even the most renown academic examination of the filibuster, the widely acclaimed landmark "Politics or Principle" written by Sarah Binder and Stephen Smith in 1997 ,couldn't get past the second sentence of Chapter One without invoking "Mr. Smith Goes to Washington."⁸ And, a mere six paragraphs later, Jefferson and Washington are cooling their favored beverage.⁹ Even Sen. Tom Harkin, in February 2010, introducing S. Res. 416, rules change aimed at squashing the filibuster, invoked Jimmy Stewart's character on the Senate floor only seven paragraphs into his speech.¹⁰ And, Washington and Jefferson, sipping their coffee from the saucer popped up a few short minutes later.

Even gridlocked and perhaps dysfunctional, as it frequently is, failing to overcome the extreme partisan political polarization which plagues it today, the Senate, nonetheless, remains unique among the world's legislatures.

prefaced by the phrase, "the story goes..." or something similar. There is no definitive proof that this story is not true. However, one possible indication that it is apocryphal is the fact that, to all appearances, Jefferson was not against the idea of a bicameral legislature. He wrote to the Marquis de Lafayette in 1789, "...for good legislation two houses are necessary..." [http://wiki.monticello.org/mediawiki/index.php/Senatorial_Saucer#_note-2]

7 U.S. Senate Website

8 Politics Or Principle: Filibustering in the United States Senate, Sarah A. Binder & Steven S. Smith, Brookings Institution Press, p. 1

9 Politics Or Principle: Filibustering in the United States Senate, Sarah A. Binder & Steven S. Smith, Brookings Institution Press, p. 4

10 Senator Tom Harkin, Congressional Record, February 11, 2010, pg. S571

Famed 19th Century British Prime Minister William Ewart Gladstone is often cited by those seeking to describe the nature of the U.S. Senate. He called the body “the most remarkable of all the inventions of modern politics.”

The Senate, which represents not only the people of the United States, but it's fifty sovereign states, is most clearly characterized by two features, the right of its members to unlimited debate and the right to offer amendments practically without limit.

While few outside of the Senate itself would still label it the “world's greatest deliberative body”, it remains a symbol of respect for the rights of the minority in a democratic system of government. In the Senate, no minority can be silenced for long. The views of a minority, even a minority of one, can be heard in the Senate, and can, at the very least, have its legislative proposal raised and voted upon. Most importantly, the majority in the Senate is not handed the “keys to the bulldozer”.

Carl Marcy, who then served as Sen. J. William Fullbright's Chief of Staff on the Senate Foreign Relations Committee (he served in that post for 18 years), in a commentary written for the republication in 1968 of Lindsay Rogers' 1926 classic “*The American Senate*”, put it this way: “The institution of the Senate changes, and yet it remains the same. It is the institution nearest to the pure democracy that was found in the town meetings of New England. The Senate is on occasion exasperating, petty, or mean, but, on other occasions, great. It is indeed the culminating institution in the democratic form of government which Winston Churchill described as 'the worst form of government except all those other forms that have been tried.' Members of the Senate cherish their rights and prerogatives. They feel, as Gibbon wrote in the “*History of the Decline and Fall of the Roman Empire*”, that the 'principles of a free constitution are irrevocably lost when the legislative power is nominated by the executive.’”¹¹

In the Preface to “*The American Senate*”, Rogers argues the key link between the Senate's super-majority requirements and the separation of powers: “The Senate is the only American institution so organized and articulated as to exert any supervision over the executive, and this function would be impossible were the rules to provide for closure [cloture]...” He goes on: “My view then, shortly stated is this: The undemocratic, usurping Senate is the indispensable check and balance in the American system, and only complete freedom of debate permits it to play this role... Adopt closure [cloture] in the Senate, and the character of the American government will be profoundly changed.”¹²

Now, let's remind ourselves where the right to unlimited debate-- the practice and the use or abuse of that right which has come to be called “filibuster” comes from. Although this is sometimes misunderstood or misstated, the right of unlimited debate in the Senate is not contained in the Constitution, neither is any prescription for cloture, or the ending of debate. The Constitution does, however, in Article I Section 5, state that, “Each house may

11 The American Senate, Lindsay Rogers. Commentary by Carl Marcy, p. lxxix

12 The American Senate, Lindsay Rogers. 1926. Pp. viii-ix

determine the rules of its proceedings...”

Senate Rule XIX states: “When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent...”

This rule combined with the absence in the Senate rules of a “previous question motion” (that is a motion to end debate and vote on the matter before the body in normal parliamentary procedure) means that Senators have the right of unlimited debate.

Actually, the Senate's original rules did contain a motion for the previous question. The 1789 rules stated “The previous question being moved and seconded , the question for the chair shall be: 'Shall the main question now be put?' and if the nays prevail, the main question shall not be put.”¹³ The rule, seldom used, was eliminated in 1806, at the suggestion of outgoing Senate President Aaron Burr.¹⁴

From that point on the perceived “unlimited debate” of the Senate became a fact and along with it the possibility of the use of that right for purposes of obstruction.

Walter Oleszek in his excellent book on procedure, “*Congressional Procedures and the Policy Process*” quotes Sen. Orville Platt (R-CT) speaking on the Senate floor in 1893: “There are just two ways under our rules by which a vote can be obtained. One is by getting unanimous consent-- the consent of each senator-- to take a vote at a certain time. Next comes what is sometimes known as the process of 'sitting it out', that is for the friends of a bill to remain in continuous session until the opponents of it are so physically exhausted that they can not struggle any longer.”¹⁵

In 1917, the Senate adopted Rule XXII which for the first time provided for a process known as “cloture”. This process created a way in which debate in the Senate could be brought to an end. The rule required a two-thirds vote to end debate. Each senator “post-cloture” would be allowed to speak for up to one hour. Over the next 46 years, the Senate managed to invoke cloture on only five occasions.¹⁶

In 1975, as part of a compromise, the number of votes required to invoke cloture was reduced from 2/3 of senators voting to 3/5 of all senators. This is the famed 60 vote super-majority required to end debate in the current Senate. As part of the compromise, however, the 2/3 threshold for ending debate was retained for changes in the Senate rules. This difference very significantly raises the bar for changing rules in the Senate.

13 Senate Procedure and Practice, 2nd edition. Martin B. Gold, pp. 48

14 “A Critique of the Senate Filibuster”, Roy Ulrich, Huffington Post, May 2, 2009

15 Sen. Orville Platt, Congressional Record, September 21, 1893, pg. 1636

16 U.S. Senate Website

Majorities are frequently frustrated by the pace of the Senate and the difficulty of enacting the majorities agenda. With that frustration sometimes comes a demand to destroy the filibuster. The forces on the attack against the filibuster and in its defense have a way of switching sides as the majority power shifts. That is not to say that there are not principled adherents on both sides. However, just the recent examples of 2005-2006 when in the face of Democratic filibusters of ten of President Bush's federal circuit court nominees, most Republicans were prepared to eliminate the filibuster in order to get their way and confirm the nominations. Most Democrats opposed that effort and rose to defend the filibuster. Fast-forward to 2009-2010 and a series of Republican filibusters against the major elements of President Obama's legislative agenda. Now, the voices demanding an end to filibusters are on the Democratic side of the aisle, and there are no takers among the Republicans. They are defending the right to unlimited debate and amendment.

The filibuster has been used by both parties. Vice-President Joseph Biden, a long-time member of the Senate, has observed, “Most people would agree that the United States Senate has never acted as consistently as they have to require a supermajority, that is 60 votes, to get anything done. That's a fundamental shift. I was there for 36 years. I don't ever recall it being abused and used as much as it has now.”¹⁷ The question is whether the solution to addressing that use or abuse is by tearing down 200 years of Senate history and tradition and throwing the protections of the minority and the underlying principles of checks and balances and separation of powers away in the process.

It has become the fashion in academia and the public media, as well, to view the filibuster as strictly a tactic of obstruction and as an affront to the sacrosanct majority rule. Nearly forgotten or simply dismissed is the role which extended debate has played in the moderating role of the Senate as “saucer” intended by the framers in requiring minority participation and the protection of the Senate's role as a counterweight to an otherwise unchecked executive.

If the filibuster is swept away, what becomes of the Senate of the Founders, of Madison's “necessary fence” against the danger of an overzealous majority in the nation?

Madison wrote in Federalist #51 (some think it was Hamilton) that “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt a primary control on the government; but experience has taught mankind the necessity of auxiliary precautions...”¹⁸

Detractors like Sen. Harkin will argue, as he did in the Senate on February 11, 2010,

17 Vice President Joseph Biden, Face the Nation, February 14, 2010

18 James Madison, Federalist #51. February 6, 1788

“James Madison would be appalled by the current abuse of the filibuster to impose minority rule. Proponents of the filibuster regularly quote the oft told story of George Washington's description to Thomas Jefferson.” [There it is again.] “...At issue is a fundamental principle of our democracy-- rule of the majority in a legislative body. As Alexander Hamilton noted in the Federalist Papers, 'The fundamental maxim of republican government... requires that the sense of the majority should prevail.’”¹⁹

But, the founders established a series of Madison's “auxiliary precautions” as checks and balances many of which do not strictly adhere to majority rule precepts. They feared unfettered majorities. For example, the Connecticut Compromise, itself, set up a Senate which disproportionately represents the smaller states without regard to “one man- one vote ideals” and the electoral college created in the Constitution does not even assure that a minority cannot elect the President of the United States as they did in 2000. (No matter how Florida is counted, no one denies that Al Gore received more votes in the nation than George Bush).

Lindsay Rogers in “*The American Senate*” expresses it well, “It is worthwhile stressing these intentions of the framers, for one must understand clearly the nature of the system they desired in order to appreciate the present-day importance of the Senate. This importance is quite different from that contemplated by the architects of the Constitution, but its results, nevertheless, from their arrangements to prevent 'an unjust combination of the majority'.”²⁰

Even for the nation's media, their attitudes about the filibuster tend to be situational, but in our view the *New York Times* got it right in March 29, 2005 editorial opposing the so-called “nuclear option” (in fairness, we'll later quote them in opposition to the filibuster): “Senators need only to look at the House to see what politics looks like when the only law is to win at any cost. The Senate, of all places, should be sensitive to the fact that this large and diverse country has never believed in government by an unrestrained majority rule.”²¹

19 Senator Tom Harkin, Congressional Record, February 11, 2010, pg. S571

20 *The American Senate*, Lindsay Rogers.1926. p. 16

21 *New York Times* editorial “Walking in the Opposition's Shoes”, March 29, 2005

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