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Rules Committee Hearing Testimony As prepared for delivery

Mr. Chairman,

Thank you for holding this hearing. Filibuster reform is an issue that has received a great deal of attention recently.

Today's hearing, as well as future hearings, will allow us to take a rational and deliberative approach to reforming not just the filibuster, but other rules that are hampering this body.

Today is about looking at our past, but it also provides guidance for the future. Critics of reforming the filibuster argue that it will destroy the uniqueness of the Senate. They say it will turn the Senate into the House of Representatives.

But today we will hear that the filibuster rule has been amended over the years ... and this body not only survived the reforms, but was better for them.

We will hear from our witnesses about the creation of the cloture rule in 1917 ... and the history of its reforms over many decades. I'd like to focus on one part of that history.

In the 1940s and '50s, a civil rights debate was raging in the Senate. And a minority of senators opposed to the legislation were regularly using the filibuster as a weapon of obstruction. In 1953, a bipartisan group of senators decided they had had enough. Led by my predecessor ... New Mexico's Clinton Anderson ... they attempted to reform the filibuster.

Article I, section 5 of the Constitution states that "each House may determine the Rules of its Proceedings." As such, Anderson argued that any rule adopted by one Senate that prohibits a succeeding Senate from establishing its own rules is unconstitutional.

But this is precisely what Rule XXII does. Currently, we are operating under rules ... approved by a previous Senate ... that require an affirmative vote of two-thirds of senators to end a filibuster on any rules change.

Anderson's argument became known as the Constitutional Option.

On the first day of Congress in 1953, Anderson moved that the Senate immediately consider the adoption of rules for the Senate of the 83rd Congress.

His motion was tabled ... but he introduced it again at the beginning of the 85th Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice-President Nixon, who was presiding over the Senate.

Nixon understood the inquiry to address the basic question: "Do the rules of the Senate continue from one Congress to another?"

Noting that there had never been a direct ruling on this question from the Chair, Nixon stated that, quote, "any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying the majority of the Senate in a new Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional." End quote.

Despite Nixon's opinion, Anderson's motion again was tabled.

Anderson raised the Constitutional Option once more at the start of the 86th Congress, this time with the support of more than two dozen other Senators.

But to prevent Anderson's motion from receiving a vote, Majority Leader Johnson came forward with his own compromise.

He proposed changing Rule XXII to reduce the required vote for cloture to "two-thirds of the Senators present and voting."

As our witnesses will discuss, this was not the last change to the filibuster rule. Reform efforts have continued ... and occasionally succeeded ... since 1959.

The Constitutional Option has served as a catalyst for change.

As the junior senator from New Mexico, I have the honor of serving in Clinton Anderson's former seat. And I have the desire to continue his commitment to the Senate and his dedication to the principle that ... in each new Congress ... the Senate has the constitutional right to determine its own rules by a simple majority vote.

It is time again for reform.

There are many great traditions in this body that should be kept and respected, but stubbornly clinging to ineffective and unproductive procedures should not be one of them.

We should not limit our reform efforts to the filibuster, but look at all of the rules.

We can, and should, ensure that minority rights are protected and that the Senate remains a uniquely deliberative body.

But we must also ensure that it is a functional body, regardless of which party is in the majority.

Thank you again, Mr. Chairman.

Statement of U.S. Senator Robert C. Byrd
Senate Committee on Rules and Administration

“Examining the Filibuster:
History of the Filibuster 1789 – 2008.”

April 22, 2010

Mr. Chairman,

I have long revered the rules and precedents of this body, but I have also championed reforms when I thought them necessary. In 1975 as Senate Majority Whip, I sponsored changes to Rule XXII, reducing the threshold for cloture from two-thirds of Senators “present and voting,” to three-fifths of Senators “duly chosen and sworn.” In 1979 as Senate Majority Leader, I sponsored additional changes to clarify the intent of Rule XXII, and to eliminate post-cloture filibusters. In 1986 as Senate Minority Leader, I sponsored further changes, reducing post-cloture debate from 100 hours to 30 hours. In 2007, I authored a change to Rule XXVIII, to make it more difficult to include new matter that had not been debated in either house of Congress in a conference report, by requiring sixty votes.

I have tried to achieve these ends by working within the Senate rules. I am not for circumventing the rules, nor am I for changing the rules as an option of first resort. Having served in the Senate for more than fifty years, and served in both the majority and minority, I know that majorities change. Senators who advocate for rule changes today may have to live under those changes in the minority tomorrow. We should remain open to changes in the Senate rules, but not to the detriment of the institution’s character or purpose.

The filibuster is a powerful tool, and it ought to be invoked only in the most extraordinary circumstances. Senators, to a degree, have abused their right to debate, objecting to routine business and exhausting the patience of their colleagues. But before we get all steamed up, demanding radical changes to the Senate rules, let's read the rules and make sure we understand what we are talking about.

In recent months, we have seen measures introduced in the U.S. Senate – one to gradually reduce the threshold for cloture to a simple majority, and another to require the Senate to adopt its rules anew at the beginning of each Congress. There is also the procedural gambit advocated by some, to have the Vice President assume the chair, and to have a majority codify his ruling to do away with the filibuster. These are not new proposals, and the arguments for them are as old as the cloture rule.

It does not take much imagination to decry long-winded speeches and obstruction and advocate for changes to the rules. It does take time and experience to understand the rules and how they bolster the historical significance of the Senate.

I oppose cloture by a simple majority, because I believe it would immediately destroy the uniqueness of this institution. In the hands of a tyrannical majority and leadership, that kind of emasculation of the cloture rule would mean that minority rights would cease to exist in the U.S. Senate.

The U.S. Senate is not the U.S. House of Representatives, and was never intended to function like the House. The Senate is a forum of the states, where regardless of size or population all states have an equal voice. One must also realize that a majority of states may not actually represent a majority of opinion in the country. In the Senate, states like West Virginia are equal to states like California, Texas, and New York. Yet, without the protection of unlimited debate, small states like West Virginia might be trampled underfoot.

Take away the right of unlimited speech by the representatives of the people, and one tampers with the fundamental checks and balances forged by the framers.

I hope Senators will take a moment to recall why the devices of extended debate and amendments are so important to our freedoms. The Senate is the only place in government where the rights of a numerical minority are so protected. Majorities change with elections. A minority can be right, and minority views can certainly improve legislation. As U.S. Senator George Hoar explained in his 1897 article, "Has the Senate Degenerated?", the Constitution's Framers intentionally designed the Senate to be a deliberative forum in which "the sober second thought of the people might find expression."

During my tenure in Congress, I have witnessed bitter fights over Vietnam and McCarthyism. In the decades before that, I remember Senators denouncing the New Deal as socialism and communism. Bitter partisan periods in our history are nothing new.

If something seems wrong with the Senate from time to time, we, the members, might try looking in the mirror. Additional efforts toward civility and patience, and accommodation on both sides, may do us more lasting good than any actual change in the rules. There is no challenge we must confront that dwarfs the challenges our predecessors faced. If they found a way forward without damaging the Senate's ultimate purpose, I am confident that we can too.

If the Senate rules are being abused, it does not necessarily follow that the solution is to change the rules. Senators are obliged to exercise their best judgment when invoking their right to extended debate. They also should be obliged to actually filibuster, that is go to the Floor and talk, instead of finding less strenuous ways to accomplish the same end. If the rules are abused, and Senators exhaust the patience of their colleagues, such actions can invite draconian measures. But those measures themselves can, in the long run, be as detrimental to the role of the institution and to the rights of the American people as the abuse of the rules.

Extended deliberation and debate – when employed judiciously – protect every Senator, and the interests of their constituency, and are essential to the protection of the liberties of a free people.

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U.S. Senator Charles E. Schumer (D-NY), Chairman of the Senate Rules Committee, delivered the following remarks Thursday to open the panel's first hearing on whether the Senate's filibuster rules should be reformed.

Statement of Chairman Charles E. Schumer
Senate Rules Committee
Hearing on "Examining the History of the Senate Filibuster 1789-2008"
April 22, 2010

The Rules Committee shall come to order. Good Morning. I would like to thank my friend, Ranking Member Bennett, and my other colleagues present for participating in this hearing. I especially want to thank our Rules Committee colleague, Senator Byrd, who could not be here today, for his interest in our hearing and for the statement he is submitting for the record.

This is the first in a series of hearings by the Rules Committee to examine the filibuster, a topic that we hear a lot about from our constituents, from our colleagues, and in the press. That's because filibusters and cloture motions have escalated in recent years to unprecedented levels.

In the first half of the 20th century, filibusters and filibuster threats were relatively rare events. From the 1920s through the 1950s, an average of about ten cloture motions were filed *per decade*. That number almost tripled to 28 during the 1960s, the era of controversial civil rights legislation. But after that things really started to take off – a total of 358 cloture motions were filed in the 1990s, and from 2001 through 2009, there were 435 cloture motions filed.

Clearly, the filibuster has changed over the years. Not only is it used a lot more now, but the threat of filibusters has become an almost-daily fact of life in the Senate, influencing how we handle virtually everything debated on the Senate floor.

The filibuster used to be the exception to the rule. In today's Senate, it's becoming a straitjacket.

So, especially during the last decade, there's been a lot of interest, and concern, and frustration from both parties about where we are headed in terms of getting things done in the Senate. There are many people saying we need to change the rules to make it easier to get cloture or to handle Senate business more efficiently. Four such resolutions have been introduced in this Congress, including one by our Rules Committee colleague, Senator Tom Udall, which we will hear about at a future hearing. Others say we shouldn't change the rules.

As Chairman of the Rules Committee, I intend to take a thoughtful, thorough approach to this topic. Since I joined the Senate in 1999, I have seen the use of the filibuster continue to increase under both Republican and Democratic majorities, so it's not just one party doing it. And in 2005, we had a near-crisis over the so-called "nuclear" or "constitutional" option – a crisis that ended when a bipartisan group of Senators came together to find a middle ground.

The truth is, both parties have had a love-hate relationship with the filibuster depending on if you are in the majority or the minority at the time. But this is not healthy for the Senate as an institution.

The last Rules Committee Hearing on the filibuster was on June 5, 2003, under then-Chairman Trent Lott. The topic was a proposal by Majority Leader Frist to change the Standing Rules of the Senate to allow a simple majority of 51 votes to end debate on judicial nominees.

In reflecting on the substance of that hearing, it is clear that our statements about whether or not to change the cloture rule usually coincided with whether we were in the Majority or the Minority. I was a member of this committee in 2003, as were many of my colleagues here, both Republican and Democrat. Not surprisingly, the words we spoke then might not reflect how we feel today, when our Majority and Minority roles are reversed. I am sure my colleagues could quote me opposing filibuster reform, just as I could quote them in favor of such reform. But that is not the point of these hearings.

The fact is that all of us, on both sides of the aisle, struggle with the same questions. What does the Constitution say about ending debate, or allowing unlimited debate, in the Senate? What does it say about how Senate rules can be changed? What are the rights of the Minority? What are the rights of the Majority? When does respect for the rights of other Members of this body become a disregard for the needs of the majority of Americans to have us act?

We all know that those of us in the Minority in one Congress will be in the Majority in another, and vice versa. What we seek is a path toward civility, deliberation, and consensus that eventually, at the proper time, leads to the best decisions we can make collectively for our country.

Only by carefully exploring these issues can we answer the question: Should we change the Senate rules? And if so, how and when?

Knowing the history of debate in the Senate and the efforts to limit it is the first step. So we are starting our series of hearings today with an examination of the history of the filibuster from 1789 to 2008.

We will start at the beginning. What does the Constitution say about the Senate? Since there was no procedural rule to cut off debate for most of the 19th century –how did that affect decision making in the Senate? What eventually prompted adoption of the cloture rule in 1917 that for the first time in Senate history allowed Senators, by a 2/3 supermajority, to vote to end debate?

Our witnesses will describe how the cloture rule and the filibuster were used during the 20th century, in the debates on civil rights, and the push for filibuster reform in the 1970s that lowered the threshold for cloture to 60 votes.

Finally, we will hear about the modern era of the Senate, including the impact of filibusters and cloture motions in every decade since the 1970s, as the use of the filibuster escalated drastically. Our historical overview will end in 2008, before the start of the current Congress.

Today's hearing will establish a common understanding for our future hearings and discussions. I hope that it informs Members of this Committee, the Senate, and the public at large about the development of the filibuster and efforts of the Senate over more than two centuries to manage it and deal with its consequences.

In our next hearing, we will look at the filibuster in the this Congress, examining issues such as whether it is more difficult for the Senate to complete its regular business now than in previous eras and the impact of the filibuster on other branches of government. In subsequent hearings, we will hear about proposals for changes in Senate rules related to the filibuster and consider what kinds of changes, if any, are needed.

I hope all of us on this Committee will come to these hearings with an open mind, willing to consider the ideas and suggestions presented to us.

I look forward to listening to our witnesses who have come to share their knowledge and experience with us. And now I'll turn to Ranking Member Bennett for his opening statement.