

**Prepared Comments by Senator Pat Roberts
Washington, DC
Examining the Filibuster
April 22, 2010**

Thank you, Mr. Chairman, for holding this hearing to examine the role of the Senate in the legislative process. I am currently in my third term as Senator, serving here for over thirteen years. Before this I served in the House of Representatives for eight terms, or sixteen years, as Congressman for Kansas' First District. As such, I have first-hand experience in both houses of Congress, their rules, and their respective Constitutional roles.

This hearing is about more than the filibuster, it is about the nature of the Senate and its function in the legislative process. It is clear that the founding fathers intended to create a system of checks and balances: the Legislative upon the Executive, the Judicial upon the Legislative, and even within the Congress, the Senate upon the House.

I served as a Congressman in both the majority and the minority. I can testify first hand, that the House is the institution for the will of the majority. However, I think it is useful to highlight some recent trends in House operations in order to distinguish the importance of the Senate.

From the 104th Congress to the 109th, a period of 12 years, the percentage of bills brought to the floor with open amendment rules ranged from 58 percent in the 104th to 19 percent in the 109th, with an average over the entire period of nearly 41 percent. By contrast, the number of bills with open amendment rules on the floor in the 110th Congress was 14 percent, and a paltry 1 percent as of March 19, 2010 in the current Congress, with an average of 7 and a half percent overall in three years and four months.

As the open amendment process atrophies in the House, the percentage of closed rules has soared. From the 104th Congress to the 109th, the percentage of bills brought to the floor with closed rules ranged from 14 percent in the 104th to 32 percent in the 109th, with an average over the period of 22 and a half percent. By contrast, the number of bills with closed rules on the floor in the 110th Congress was 36 percent, and an unprecedented 31 percent as of March 19, 2010 in the current Congress, with an average between the two of 33 and a half percent.

These numbers demonstrate the level of cooperation in the House has dropped precipitously. This is most striking because public opinion polls are overwhelmingly opposed to the legislation coming out of this Congress. In its most recent average of polling data from

different sources, Real Clear Politics shows that nearly 53 percent of Americans are opposed to the recently passed Health Care Reform bill, and only 40 percent, roughly, are in favor of it. We could discuss other controversial proposals the American people oppose like Cap & Trade, federal bailouts, or deficit spending, but it might be easier to sum it all up in a Real Clear Politics average of polls on whether Americans feel the country is headed in the right direction. The most recent, averaged poll show that 58 percent of Americans think we're on the wrong track, and only 37 percent, roughly, think we're on the right track. There is a clear disconnect between what the majority is pursuing and what the American people want.

To whom can the American people turn when the House majority runs roughshod over the minority party and public opinion? It is the Senate. The founding fathers had the foresight to create an institution that was based not on majority rule, but where each state regardless of size or population had two Senators to speak out on their behalf. It is that power to speak, the right to unlimited debate that is the hallmark of the Senate.

The 63rd Article from the Federalists Papers, attributed to James Madison, explains the necessity of the Senate as an institution that may "sometimes be necessary as a defense to the people... What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizen the hemlock on one day and statues on the next."

The filibuster is the essence of the Senate. It is not a tool of obstructionism or dysfunction. It is meant to foster greater consultation, consensus, and cooperation between the parties. It is a means for the minority to make its voice heard, and to contribute to the debate and amendment of legislation before the Senate. In this way, it is impossible to abuse the filibuster because it is an expression of the people against the majority's attempt to shut them out of the process.

Only in the House does majority take all, and as the numbers show, the majority appears to be taking more and more in the last few years. It is disheartening to see some members of the Senate, often new and unaccustomed to our culture of comity and compromise, attempt to rewrite the rules of this Chamber - to make it more like the House.

Cloture is an instrument to cut off debate when the majority is not interested in compromise. From the 107th to the 109th Congress there were an average of 57 cloture motions filed per Congress. In the 110th Congress alone there were 152. That is 152 instances of the majority seeking to cut off debate. It is a 267 percent increase over the average of the previous three Congresses. Of those 152 cloture motions, 97 were filed the moment the question was raised on the floor. That is, nearly 64 percent of cloture motions were filed before a debate was even allowed to take place. The average for the previous three Congresses was roughly 29 percent.

Moreover, we need to consider the times the majority brought a bill to the floor and used a parliamentary tactic called “filling the tree” to prevent the minority from offering amendments. From the 99th through the 109th Congress, a period of 22 years, the majority filled the tree a total of 36 times, averaging a little over 3 times per Congress. This contrasts sharply with the 110th through the present Congress, a period of roughly 3 years and four months, in which the majority filled the tree 26 times, with an average of 13 times per Congress, an increase of over 430 percent.

We could go on with other instruments that have been used by the majority to circumvent regular order, stifle the minority, and force unwanted legislation upon the people. They include abuse of the reconciliation process, bypassing committee through the use of Rule XIV, and the use of amendments between the Houses (also known as “ping-pong”) instead of conference committees to resolve differences in legislation. Perhaps, Mr. Chairman, we can explore these in subsequent hearings on this topic.

The filibuster, the right of unlimited debate, is synonymous with the Senate. It is what the founders intended, and whoa to any member of the majority in this body who thinks it expeditious to change Rule XXII. No majority remains forever, and advocates of radical proposals should heed the words of my friend, and member of this committee, Senator Murray, who in April 2005 stood on the Senate floor and said, “We had an election last year... but that does not mean half the country lost its voice. That does not mean tens of millions of Americans will have no say in our democracy.”

Or perhaps the words of another member of this committee, Senator Durbin, who in April 2005 took the floor and said, “It is best when in doubt to stick with the traditions of the Senate. It is best when in doubt to stick with the filibuster, which requires compromise, requires bipartisanship, and moves us to a point where we can and must work together.”

Or perhaps, we should listen to the words of the late, great lion of the Senate, Senator Kennedy, who in May 2005 said, “The Senate’s rules have allowed the minority to make itself heard as long as necessary to stimulate debate and compromise, and even to prevent actions that would undermine the balance of powers, or that a minority of Senators strongly oppose on principle... In short, neither the Constitution, nor Senate Rules, nor Senate precedents, nor American history, provide any justification for selectively nullifying the use of the filibuster.”

Mr. Chairman, rather than pursue rule changes that undermine the Senate and the intentions of the founding fathers, and rather than painting the minority as obstructionists, perhaps we could try returning to the tradition of comity and compromise that earned this institution’s renowned reputation for being the greatest deliberative body in the world.

Thank you.

McConnell Remarks on the Filibuster

U.S. Senate Republican Leader Mitch McConnell made the following remarks (as prepared) at the Rules Committee Hearing on Examining the Filibuster: History of the Filibuster 1789 – 2008 on Thursday:

“I appreciate you allowing me to make a few observations at the outset before I need to return to the Senate floor.

“We all read the newspapers and I think understand what these series of hearings are about. Some Members of the Democratic Conference would like to eliminate the Senate’s long-standing tradition of the freedom to debate and amend legislation. This, in turn, would eliminate the requirement that controversial legislation achieve more than just bare majority support in the Senate.

“It probably comes as no great surprise that I am not in favor of such a proposal. I never have been, including when I served in the Majority.

“The reason is best described by one of our Senate colleagues, who once wisely said the following:

‘Let us clearly understand one thing. The Constitution’s Framers never intended for the Senate to function like the House of Representatives. . . .

‘The Senate . . . [was] intended to take the long view and to be able to resist, if need be, the passions of the often intemperate House. Few, if any, upper chambers in the history of the western world have possessed the Senate’s absolute right to unlimited debate and to amend or block legislation passed by a lower House. . . .

‘I have said that as long as the Senate retains the power to amend and the power of unlimited debate, the liberties of the people will remain secure.’”

“That was Senator Byrd. He delivered those remarks in 1997. He was right then. And he was right again when he reaffirmed his belief in those principles this year. Here’s what he wrote in a “Dear Colleague” letter:

‘I believe that efforts to change or reinterpret the rules in order to facilitate expeditious action by a simple majority . . . are grossly misguided. . . .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. . . . Extended deliberation and debate . . . are essential to the protection of the liberties of a free people.’”

“Now, why are some in Senator Byrd’s own party proposing to disregard his counsel? The most disingenuous thing I have heard is that the Senate’s rules must be changed so ‘the democratic process’ will work.

“I submit that the effort to change the rules is not about democracy. It is not about doing what a majority of the American people want. It is about power.

“If it were truly about doing what a majority of Americans wanted, the Democratic Majority in the Senate would not have muscled through a health spending bill that a majority of Americans opposed—and opposed by wide margins. When that bill finally passed the Senate, 39% of Americans favored it, while 59% opposed it, according to CNN. Other surveys had similar results.

“No, what this is about is power. It is about a political party—or a faction of a political party—that is frustrated that it cannot do whatever it wants, whenever it wants, precisely the way it wants to do it. That’s what this is about.

“Rather than throw out 200 years of Senate tradition and practice, and throw away the very principles of which Senator Byrd has reminded us, I’d like to suggest a less radical and more productive solution to those who would like the Senate to function differently.

“First, at the risk of sounding like Yogi Berra, the virtue of a supermajority requirement for legislation is that a bill that passes enjoys supermajority support—which helps ensure that most Americans will support it. When the Democratic Majority has reached out to the Minority—which does not mean trying to pick off a few Republicans—we have had success. I hope we can have another one with financial regulatory reform and in other areas. But that requires the Majority to meet us in the middle.

“My second suggestion is not to run the Senate floor like the House. The Senate’s tradition of freedom to amend has been a lot less free over the last few years.

“Since assuming control of the Senate, the Democratic majority has been engaging in what my friend the Majority Leader once called a “very bad practice.” And according to CRS, it has been engaging in it to an unprecedented extent. What I am talking about is the Majority repeatedly blocking senators in the Minority from offering amendments by filling the so-called “amendment tree.”

“All Majority Leaders do it. But this Majority has done it to an unprecedented extent. Senator Frist did it 12 times in four years. By contrast, Senator Reid has done it more than twice as often—26 times—in a little over three years. In fact, the current Majority has blocked the Minority from offering amendments almost as often as the last five Majority Leaders *combined*.

“Now, if the Democratic Majority wants to generate inflated cloture vote numbers for political purposes, well, then go ahead and keep treating Minority senators as if they were serving in the House. But if you truly do not like all the cloture votes, then let your colleagues in the Minority offer some amendments.

“True, there may be some votes you would rather not cast, but that’s nothing new. What is new is the unprecedented extent to which the Majority is avoiding having to vote on amendments. As my good friend the Majority Whip likes to say: “If you don’t like fighting fires, then don’t become a fireman. And if you don’t like casting tough votes, then don’t run for the U.S. Senate.”

“Finally, some of the testimony states that one’s view of the filibuster depends on where one sits. It’s true that I opposed filibustering judicial nominees when I was in the Majority. But I opposed doing so when I was in the Minority too, and I opposed doing so regardless of who was in the White House.

“During the Clinton Administration, I put my votes where my mouth was and repeatedly voted with my Democratic colleagues to advance a nominee—to invoke cloture—when a Minority of those in my party would not consent to do so, even though I opposed the nominee and later voted against him or her.

“Not surprisingly, I was also against my Democratic colleagues not giving President Bush’s judicial nominees an up or down vote. In short, I was against expanding the use of the filibuster into an area in which it traditionally had not been used. One can agree with that view or not. But it’s one thing to disagree with *expanding* the use of the filibuster into a non-traditional area, regardless of who is the President and who is in the Minority. It’s another thing to be *for expanding* it into judicial nominations when one is in the Minority, but to turn around and urge its elimination *altogether* when one is in the Majority.

“When it comes to preserving the right to extended debate on legislation, Republicans have been consistent. On January 5, 1995, after having just been voted into the Congressional Majority for the first time in 40 years, Senate Republicans walked onto the Senate floor to cast their first vote. It was on Senator Harkin’s proposal to sequentially reduce the cloture requirement to a simple majority.

“Even though it was in our short term legislative interest to support Senator Harkin, all Republicans—every one—voted against his proposal. So did the current vice-President, the current Senate Majority Leader, and not surprisingly, the current Senate President Pro Tempore. That was the right position in 1995. It is the right position today. In sum, the Founders purposefully crafted the Senate to be a deliberate, thoughtful body. A supermajority requirement to cut off the right to debate ensures that wise purpose. Eliminating it is a bad idea.

“I thank the Chairman for letting me speak, and I look forward to learning about the results of this hearing.”

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Senator Robert F. Bennett
Opening Statement
Senate Rules Committee Hearing
April 22, 2010

Thank you Mr. Chairman.

While we were preparing for this hearing my staff came across a report put together by an organization called the Democratic Study Group - an organization of Democrats who served in the House of Representatives.

The report is titled "A Look at the Senate Filibuster."

The first page has a large graph on it that is meant to demonstrate that "The Use of the Senate Filibuster Has Exploded in Recent Years."

It goes on to lament the burdens imposed by the filibuster describing its use as "epidemic" and "undemocratic."

It then lists a number of bills passed by the Democratic majority in the House that were either "blocked or watered down" because of the "obstruction" made possible by the filibuster.

Now these are all arguments that we have been hearing a lot of recently but the most interesting thing about this report is the date on it.

This report was released in June 1994.

And since this hearing is supposed to give us a historical perspective let's look back at the history of those times for a moment.

In June 1994 the Democrats had 258 Members in the House.

They had 57 Senators.

And there was a Democrat in the White House.

Then, as now, the only impediment to total domination of the policy process by the Democrats was the Senate Rules that give the minority a voice.

Then, as now, some Democrats were frustrated by this impediment and wanted to remove it so there would be no restraint on their ability to move their agenda.

What happened next?

The Senate did not change its rules but there was an election that Fall.

In that election, the Democrats lost 54 seats in the House and their majority for the first time in 40 years.

They lost 9 seats in the Senate, and their majority in this body.

Now as we sit here in the Spring of 2010 we have to ask ourselves - will our colleagues in the majority learn from that history or will they be doomed to repeat it?

I can appreciate the frustrations of the current majority.

I understand why they would want to be able to move their agenda without having to make any compromises or work with the minority at all.

But our system does not work that way.

Governing in a democracy is hard. It's meant to be that way.

If the Founding Fathers wanted governing to be easy they wouldn't have set up the system they did.

They would have given us a King or Dictator instead of three branches of government and a bi-cameral legislature.

The whole purpose of this division of power, this creation of checks and balances, was to ensure that no single branch, no single force, no single majority, could unilaterally impose its will on the country.

Yes, they provided for elections so the government would reflect the will of the people but they also feared the "tyranny of the majority" that could ensue if a temporary majority were able to impose its will without check or balance.

To impose these checks and balances they divided power amongst three separate branches of government and then divided the legislative branch into two separate houses.

I understand these divisions of power can make it hard to move an agenda and that it would be easier if we just eliminated these checks and balances.

It would be easier but it would also be wrong.

And it would be an abandonment of the principles that have served this body and this country well for over 200 years.

I have served in this body in both the majority and the minority.

When I was in the majority, I had to work with Members of the minority. I couldn't get everything I wanted and it took me a lot longer to get compromises than I would have liked.

When, as now, I have served in the minority, Members of the majority have had to work with me.

While I may have been frustrated by this necessity when I was in the majority, I am grateful for it now that I am in the minority.

I expect my colleagues who are now frustrated may one day be grateful – from my perspective I hope they feel grateful very soon.

The American people want us to get things done but they also want us to work together.

They do not want one party – either party – to be able to do whatever it wants without restraint and without any check or balance.

In this body, the minority has a voice.

The filibuster ensures that voice, and the millions of citizens we represent, will be heard.

I would encourage my colleagues in the majority to listen to that voice, instead of trying to silence it.

If they don't listen they may discover that citizens have other means of making themselves heard and come November, history may be repeating itself.