

# Fixing the Filibuster: Restoring Real Democracy in the Senate

*The Honorable Tom Harkin\**

## I. INTRODUCTION

On Friday, February 5, 2010, a blizzard paralyzed Washington D.C. President Obama called the snowstorm “snowmageddon.”<sup>1</sup> Others called it a “snowpocalypse.” It snowed all weekend, dumping as much as thirty-six inches on the Nation’s Capitol. Several days later, an additional fourteen to twenty inches fell, with high gusting winds creating twelve-foot snow drifts. The entire city ground to a halt, with government offices and Congress closed.

That week, New York Times columnist Gail Collins surveyed the scene. She noted that “Washington was immobilized by snow on Friday. This is highly unusual. Normally, Washington is immobilized by Senators.”<sup>2</sup> Sadly, Ms. Collins got it right. The unprecedented abuse of Senate rules has overwhelmed the legislative process. As Norman Ornstein, a leading political scientist, wrote in a 2008 article entitled *Our Broken Senate*, “[t]he expanded use of formal rules on Capitol Hill is unprecedented and is bringing government to its knees.”<sup>3</sup>

The same week the blizzard closed the federal government, one Senator blocked confirmation of every single executive branch nominee.<sup>4</sup> Also in February, the minority required the Senate to “debate” for thirty hours the confirmation of a nominee to be Solicitor of Labor.<sup>5</sup> During that entire time, while the Senate was unable to conduct any other business, only one

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1. Jessica Gresko, *Snowmageddon Blizzard Batters Mid-Atlantic States; Nation’s Capital Buried Under Nearly 2 Feet*, BOSTON GLOBE, Feb. 7, 2010, at A3.

2. Gail Collins, *No Holds Barred*, N.Y. TIMES, Feb. 6, 2010, at A19.

3. Norman Ornstein, *Our Broken Senate*, THE AMERICAN, Mar. 2008, available at <http://www.american.com/archive/2008/march-april-magazine-contents/our-broken-senate>.

4. See Kate Phillips & Jeff Zeleny, THE CAUCUS; *Roadblock in the Senate*, N.Y. TIMES, Feb. 6, 2010 at A11 (describing one senator’s block of numerous confirmations facing the Senate).

5. Senate Rule XXII provides that three-fifths of the Senate (sixty votes) can vote to end debate—ending a filibuster. Once cloture is invoked, however, the rules provide for thirty hours of consideration post-cloture. See Standing Rules of the Senate, R. XXII (discussing the rules of cloture). This requirement is typically waived.

member briefly spoke against confirmation.<sup>6</sup> This past winter, one Senator insisted that a 767-page amendment be read out loud—preventing the Senate from conducting other business for hours.<sup>7</sup> In March, the minority even used arcane Senate rules to block routine committee proceedings unrelated to legislation pending on the Senate floor.<sup>8</sup>

Without question, however, the biggest cause of institutional sclerosis in the Senate is the abuse of the filibuster, which Senators have used in recent years at a level without precedent in the 221-year history of the legislative body. Simply stated, the filibuster enables a minority of Senators to prevent the majority from voting on a measure or nominee. Under Rule XXII of the Standing Rules of the Senate, the only way to “invoke cloture”—that is, terminate the filibuster—is by “a three-fifths affirmative vote of the Senators duly chosen and sworn,” or sixty votes if there are no vacancies in Senate membership.<sup>9</sup>

In the previous 110th Congress (2007–2008), the majority filed a record 139 motions to end filibusters.<sup>10</sup> Already in the current 111th Congress, from its convening in January 2009 through the 2010 August recess, there were 117 motions to end filibusters.<sup>11</sup> The contrast with the past is stark. For example, in a twenty-year period, from 1950 to 1969, there were only twenty filibusters in total.<sup>12</sup>

These are not just statistics. Each filibuster represents an effort by the minority to prevent the majority of the people’s representatives from debating legislation, voting on a bill, or giving a nominee an up-or-down

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6. 156 CONG. REC. S421 (daily ed. Mar. 24, 2010) (statement of Sen. Harkin) (noting in entire thirty hours of debate only one Senator spoke against Patricia Smith’s nomination).

7. See Jennifer Fermino, *DC Enters Blah-Blah Land*, N.Y. POST, Dec. 17, 2009, at 10 (describing the attempts of one senator to delay Senate business).

8. See 156 CONG. REC. S1953 (daily ed. March 10, 2010) (statement of Sen. Burr) (objecting to unanimous consent request). Under Senate Rules, when the Senate is in session, a Committee may not meet after the Senate has been in session for two hours or after 2:00 p.m. See Standing Rules of the Senate, R. XXVI, ¶ 5(a). This rule is regularly waived.

9. See Standing Rules of the Senate, S. R. XXII, ¶ 2.

10. See SENATE ACTION ON CLOTURE MOTIONS (2010), [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) [hereinafter SENATE REPORT]. Throughout this Essay, I refer to the number of filibusters by reference to the number of cloture motions filed. However, these numbers do not include filibusters that take place without any attempt at cloture or exist by mere threat. For example, under Senate practice, any Senator can object to a unanimous consent request that a bill or other measure reach the floor for consideration. To break the “hold,” the majority would have to file a cloture motion to end debate under Senate Rule XXII, which takes two days to ripen, the votes of sixty senators, and then thirty hours of post-cloture debate. Given the time involved, it is simply impossible for the majority to attempt to break all holds through the cloture process. As Professor Bruhl notes, “Today’s filibusters typically do not feature actual extended debate; rather, mere threats to use up the Senate’s valuable time are sufficient to block action.” Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1417 n.63 (2010).

11. SENATE REPORT, *supra* note 10.

12. *Id.*

vote. Under current rules, if forty-one senators do not like a bill and choose to filibuster, no matter how simple or noncontroversial, no matter that it may have the support of a majority of the House, a majority of the Senate, a majority of the American people, and the President, that bill or nominee is blocked from even coming before the Senate for a final vote.

In other words, thanks to the filibuster, even when a party has been resoundingly repudiated at the polls, that party retains the power to prevent the majority from governing and carrying out the agenda the public elected it to implement.

In this Essay, I discuss why I believe our government cannot continue to function effectively without reforming the Senate rules and why I have proposed a change to the Standing Rules of the Senate to modify the cloture procedure.<sup>13</sup> To be clear, the reforms I advocate are not about one party gaining an undue advantage.<sup>14</sup> It is about the Senate as an institution operating more fairly, effectively, and democratically. I have introduced this proposal this year as a member of the majority party. The proposal, however, is identical to one I first introduced in 1995, when I was a member of the minority party.<sup>15</sup>

## II. “THE MAJORITY SHOULD PREVAIL”

Before the Bill of Rights and the Civil War Amendments—each containing vital protections for individual rights and liberties—the Founders enacted the Constitution to ensure that our citizens, through their democratically elected government, could effectively address problems facing the American people. As Justice Breyer wrote, “[The Constitution] is a document that trusts people to solve the problems of a community for themselves. And it creates a framework for a government that will help them

13. S. Res. 416, 111th Cong. (introduced Feb. 11, 2010).

14. Some claim my reform effort stems from Senator Scott Brown’s election on January 19, 2010, which decreased the number of Democrats and independents caucusing with the Democrats in the Senate from sixty to fifty-nine. *See, e.g.*, Posting of Brian Darling to Redstate, Filibuster “Reform” On Senate Agenda [http://www.redstate.com/brian\\_d/2010/01/23/filibuster-reform-on-senate-agenda/](http://www.redstate.com/brian_d/2010/01/23/filibuster-reform-on-senate-agenda/) (Jan. 23, 2010, 05:00 EST) (stating “the ink is yet to dry on Senator-elect Scott Brown’s certification . . . and the left is readying a multi-pronged attack on the filibuster”). Nothing could be further from the truth. As noted, I first introduced filibuster reform legislation in 1995, when I was in the minority. Moreover, I had indicated my intent to introduce such legislation long before the Massachusetts election. *See, e.g.*, Stephanie Condon, *Harkin Takes Aim at Filibuster*, CBS NEWS, available at [http://www.cbsnews.com/8301-503544\\_162-5979331-503544.html](http://www.cbsnews.com/8301-503544_162-5979331-503544.html); Ezra Klein, *After Health Care, We Need Senate Reform*, WASH. POST, Dec. 27, 2009, at B1. In fact, I circulated a letter to my colleagues on January 4, 2010, stating my intent to introduce my proposal (letter on file with author). Finally, in my years in the Senate, the party in the majority has switched five times. It belies common sense to expect that Democrats will not find themselves in the minority again at some point.

15. S. amend. 1 to S. Res. 14, 104th Cong. (1995).

do so. That framework foresees democratically determined solutions, protective of the individual's basic liberties."<sup>16</sup>

However, the harsh reality is that, in critical areas of public policy, our Congress is simply unable to respond effectively to the challenges that confront the United States today. Consider the major issues that the Senate has tried and failed to address: climate change and energy policy, labor-law reform, and immigration reform, to name just a few.

At issue is a principle basic to representative democracy—majority rule. Indeed, Alexander Hamilton, describing the underlying principle animating the Constitution, wrote that “the fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”<sup>17</sup>

The Framers, to be sure, put in place important checks to temper pure majority rule. For example, there are Constitutional restraints to protect fundamental rights. The Framers, moreover, imposed structural requirements to restrain what Edmund Randolph referred to as “the turbulence and follies of democracy.”<sup>18</sup> For example, to become law, a bill must pass two houses of Congress and is subject to the President's veto power.

It was partially in that spirit that the United States Senate was created. As James Madison noted, among other reasons, the Senate exists “to protect the people against the transient impressions into which they themselves might lead.”<sup>19</sup> “The use of the Senate,” Madison said, “is to consist in its proceeding with more coolness, with more system, and with more wisdom, than the popular branch.” It should be, he said, “an anchor against popular fluctuations.”<sup>20</sup>

To achieve this purpose, citizens from small states have the same representation in the Senate as citizens of large states. The Senate, moreover, is smaller than the House, making it more difficult, Madison noted, “to yield to the impulse of sudden and violent passions.”<sup>21</sup> Further, Senators are elected every six years, a term “sufficient to insure their independency.”<sup>22</sup> And, elections for Senators occur every two years for only a third of the Senate.<sup>23</sup>

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16. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 134 (2005).

17. *THE FEDERALIST NO. 22*, at 109 (Alexander Hamilton) (Yale Univ. Press 2009).

18. ROBERT CARO, *MASTER OF THE SENATE* 8 (2002).

19. *Id.* at 9.

20. *Id.*

21. *Id.*

22. *Id.* at 10.

23. As one author noted, “[i]t is therefore literally not possible for the voters ever to get at anything approaching a majority of the members of the Institution at any one time.” CARO, *supra* note 18, at 10.

These important characteristics are ample to protect minority rights and restrain pure majority rule. What is not necessary, and was never intended, is additional empowerment of the minority through a requirement that a supermajority of legislators be needed to enact legislation. Such a veto leads to domination by the minority, which is just as oppressive as domination by the majority.

Two former Senate leaders have expressed this point well. As former Democratic leader Tom Daschle stated, “[t]he Founders debated the idea of requiring more than a majority to approve legislation. They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock.”<sup>24</sup> As former Republican leader Bill Frist noted, the filibuster “is nothing less than a formula for tyranny by the minority.”<sup>25</sup>

In fact, the Constitution was framed and ratified as a result of the defects of the Articles of Confederation—which required a supermajority requirement to conduct any business. As one author has noted, “[i]n urging ratification of the Constitution in the Federalist Papers, both James Madison and Alexander Hamilton made clear that the experiment with supermajorities under the Articles of Confederation had been a dismal one and one that they did not intend to repeat it under the new Constitution.”<sup>26</sup>

It is not surprising, therefore, that the Framers were very clear about the limited circumstances where a supermajority is required. There are only five: ratification of a treaty, override of a veto, votes of impeachment, passage of a Constitutional amendment, and the expulsion of a member. What they never intended, however, was that a supermajority would be needed to enact virtually any piece of legislation, whether momentous or mundane. In fact, the Founders specifically rejected the idea that more than a majority would be needed for most decisions. As Alexander Hamilton explained, a supermajority requirement would have meant that “the majority in order that something may be done, must conform to the views of the minority; and thus . . . the smaller numbers will overrule the greater.”<sup>27</sup> Hamilton noted that “[i]n its real operation,” a supermajority requirement would be used to “destroy the energy of government” and subject the decisions of the majority in Congress to “the . . . caprice or artifices of an insignificant, turbulent, or

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24. 141 CONG. REC. S1736-02 (daily ed. Jan. 30, 1995) (statement of Sen. Daschle).

25. Sen. Bill Frist, Restoring Fairness and Dignity to the Judicial Confirmation Process in the United States Senate, Speech at Heritage Foundation, June 28, 2005, *available at* <http://www.heritage.org/Events/2005/06/Restoring-Fairness-to-the-Judicial-Confirmation-Process-in-the-United-States-Senate>.

26. SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 5 (1997).

27. THE FEDERALIST NO. 22, *supra* note 17, at 111 (Alexander Hamilton).

corrupt junto.”<sup>28</sup> I would not call the current minority in the Senate a “turbulent or corrupt junto,” but Hamilton’s point is well taken.

Indeed, as James Madison noted in rejecting a requirement of supermajority rule to pass legislation: “[i]t would no longer be the majority that would rule, the power would be transferred to the minority.”<sup>29</sup>

Unfortunately, because of the filibuster, Madison’s warning has become the everyday reality of the Senate.

### III. UNPRECEDENTED LEVEL OF OBSTRUCTION

Historically, the filibuster was an extraordinary tool used only in the rarest of instances. When many people think of the filibuster, they think of the climax of the classic film “Mr. Smith Goes to Washington,” when Jimmy Stewart’s character singlehandedly uses a filibuster to stop a corrupt piece of legislation favored by special interests.<sup>30</sup> The reality is, however, that in 1939, the year Frank Capra filmed “Mr. Smith Goes to Washington,” there were zero filibusters in the Senate.<sup>31</sup>

In fact, for the entire nineteenth century, there were only twenty-three filibusters.<sup>32</sup> From 1917—when the Senate first adopted cloture rules—until 1969, there were fewer than fifty.<sup>33</sup> According to one study, in the 1960s, just eight percent of major bills were filibustered.<sup>34</sup>

Yet, in the last forty years, the use of the filibuster has metastasized. Successive Congresses have ratcheted up the level of obstructionism to the point where sixty votes have become a *de facto* requirement to pass any legislation, routine amendments to legislation or even to bring up a bill for consideration. What was once a procedure used rarely and judiciously has become an almost daily procedure used routinely and recklessly.

During the 97th Congress (1981–1982), there were thirty-one filibusters.<sup>35</sup> To give you an idea of how remarkable that level of obstruction seemed at the time, Senator Dale Bumpers said then that “[u]nless we recognize that things are out of control and procedures have to be changed, . . . we’ll never be an effective legislative body again.”<sup>36</sup> In the 99th Congress (1985–1986), the use of forty filibusters led former Senator Thomas Eagleton to remark that

28. *Id.* at 110.

29. THE FEDERALIST NO. 58, *supra* note 17, at 299 (James Madison).

30. MR. SMITH GOES TO WASHINGTON (Columbia Pictures Corp. 1939).

31. *See* SENATE REPORT, *supra* note 10.

32. BINDER & SMITH, *supra* note 26, at 11.

33. SENATE REPORT, *supra* note 10.

34. BARBARA SINCLAIR, PATTERNS AND DYNAMICS OF CONGRESSIONAL CHANGE (2009) (on file with author).

35. SENATE REPORT, *supra* note 10.

36. BINDER & SMITH, *supra* note 26, at 19.

[T]he Senate is now in a state of incipient anarchy. The filibuster, once used, by and large, as an occasional exercise in civil rights matters, has now become a routine frolic in almost all matters. Whereas our rules were devised to guarantee full and free debate, they now guarantee unbridled chaos.<sup>37</sup>

By the 103rd Congress (1993–1994), the number of filibusters had doubled to eighty, leading Senator Charles Mathias to declare that “[t]he filibuster has become an epidemic.”<sup>38</sup>

These levels of use—described as a “state of incipient anarchy, “unbridled chaos” and “an epidemic”—pale in comparison to the abuse of the filibuster today. In the 110th Congress (2007–2008) there were an astonishing 139 motions to end filibusters.<sup>39</sup> In the current 111th Congress, through the August recess, there were already 117.<sup>40</sup> In 2009 alone, there were sixty-seven filibusters.<sup>41</sup> In just one year, the minority tripled the number of filibusters that occurred in the entire period between 1950 and 1969. Whereas forty years ago fewer than ten percent of major bills were subject to a filibuster, in the last Congress, seventy percent of major bills were targeted.<sup>42</sup>

The problem, however, goes beyond the sheer number of filibusters. In fact, proponents of the filibuster have zealously guarded its use based on the purported need to ensure thorough debate. Yet, the current use of the filibuster has little to do with deliberation and everything to do with obstruction and delay.

Indeed, in his *Iowa Law Review* article, Professor Bruhl notes that “We now have a ‘sixty-vote Senate’ when it comes to almost any mildly controversial measure.”<sup>43</sup> In fact, however, the problem is much worse. This once rare tactic is now used or threatened to be used on virtually every measure and nominee, even those that enjoy near-universal support. As Norm Ornstein wrote, “[t]he Senate has taken the term ‘deliberative’ to a new level, slowing not just contentious legislation but also bills that have overwhelming support.”<sup>44</sup> Several examples demonstrate this practice:

37. *Id.* at 83; SENATE REPORT, *supra* note 10.

38. BINDER & SMITH, *supra* note 26, at 6; SENATE REPORT, *supra* note 10.

39. SENATE REPORT, *supra* note 10.

40. *Id.*

41. *Id.*

42. See SINCLAIR, *supra* note 34, at table 2. According to another study, “[o]f ninety major laws enacted between the 1975 cloture reform and 1994, only ten passed with fewer than three-fifths voting in favor. Of these ten, five were budget bills” that could not be filibustered. GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 27 (2006).

43. Bruhl, *supra* note 10, at 1417.

44. Norman Ornstein, *Our Broken Senate*, THE AMERICAN, March 2008, available at <http://www.american.com/archive/2008/march-april-magazine-contents/our-broken-senate>.

- The minority filibustered a motion to proceed to legislation to restore integrity to our elections and ensure corporations do not unduly influence our democracy.<sup>45</sup>
- The minority filibustered a motion to proceed to a bill to extend unemployment compensation. After grinding the Senate to a halt for days, the bill passed 98–0. In other words, the minority filibustered a bill they fully intended to support.<sup>46</sup>
- For nearly eight months, the minority filibustered confirmation of Martha Johnson as Administrator of the General Services Administration. She was ultimately confirmed 96–0.<sup>47</sup>
- For nearly five months, the minority filibustered confirmation of Barbara Keenan to the Fourth Circuit Court of Appeals. She was ultimately confirmed 99–0.<sup>48</sup>
- The minority filibustered the Credit Card Holders Bill of Rights. That bill passed 90–5.<sup>49</sup>
- The minority filibustered the Fraud Enforcement and Recovery Act. That bill passed 92–4.<sup>50</sup>
- The minority filibustered a motion to proceed to the Defense Appropriations bill. The bill passed 88–10.<sup>51</sup>

Second, the filibuster has increasingly been used to prevent consideration of bills and nominees. Rather than serve to ensure the representation of minority views and foster deliberation (the main reason for the filibuster, according to its defenders) the filibuster has increasingly been used to defeat bills and nominees without them ever receiving a discussion on the floor. In other words, because of the filibuster, the Senate—formerly renowned as the world’s “greatest deliberative body”—often cannot even debate national issues.

Indeed, through abuse of the filibuster, the minority has blocked the Senate from even considering (let alone acting on) many measures

45. Democracy is Strengthened by Casting Light on Spending in Elections Act, S. 3628, 111th Cong. (2010); 156 CONG. REC. S6285 (daily ed. July 27, 2010) (motion to proceed to bill failed after receiving fifty-seven votes)

46. Worker, Homeownership, and Business Assistance Act of 2009, H.R. 3548, 111th Cong.; 155 CONG. REC. S11099 (daily ed. Nov. 4, 2009).

47. See 156 CONG. REC. S468-03 (daily ed. Feb. 4, 2010) (confirming the Johnson nomination).

48. See 156 CONG. REC. S936-01 (daily ed. Mar. 2, 2010) (confirming the Keenan nomination).

49. Credit Card Accountability Responsibility and Disclosure Act of 2009, H.R. 627, 111th Cong.; 155 CONG. REC. S5573 (daily ed. May 19, 2009).

50. Fraud Enforcement and Recovery Act, S. 286, 111th Cong. (2009); 155 CONG. REC. S4776-7 (daily ed. Apr. 28, 2009).

51. Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. (as passed by Senate, Dec. 19, 2009); 155 CONG. REC. S13476 (daily ed. Dec. 19, 2009).

supported by a majority of Senators. Several examples from the 110th Congress demonstrate this practice:

- The minority filibustered a motion to proceed to legislation to ensure that women are guaranteed equal pay for equal work.<sup>52</sup>
- The minority filibustered a motion to proceed to legislation to protect the labor rights of American workers.<sup>53</sup>
- The minority filibustered a motion to proceed to legislation to provide fair prescription drug prices to Medicare beneficiaries.<sup>54</sup>
- The minority filibustered a motion to proceed to legislation to give residents of the District of Columbia a voting representative in Congress.<sup>55</sup>

In all of these cases, and many others, the minority blocked the Senate from even bringing up for debate and deliberation issues of urgent importance to the American people. There is absolutely no reason to filibuster a motion to proceed except as a means of delay and obstruction. If a Senator does not like a piece of legislation, he or she has the opportunity to offer amendments to try to improve the measure. But Senators cannot do that if the Senate is prevented from even considering and debating a bill.

Unfortunately, one of the most striking features of the extraordinary abuse of the filibuster is how quickly it has become accepted that any legislation needs sixty votes to pass the Senate. As one author wrote, “all the players understand that in the absence of a sixty-vote coalition, legislation will fail to pass.”<sup>56</sup> So taken for granted is this remarkable notion, newspapers and pundits regularly pronounce that sixty votes are “needed to pass the bill,” even though just fifty-one votes are in fact needed.

So accepted is this “fact” that after the most recent Senate election in Massachusetts, in which Scott Brown was elected to fill the seat vacated by the death of Senator Edward Kennedy, the media regularly talked about Democrats going from a twenty-seat majority to an eighteen-seat majority as though they had lost their majority status. A Philadelphia Metro newspaper

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52. Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong.; 154 CONG. REC. S3288 (daily ed. Apr. 23, 2008) (motion to proceed to bill failed after receiving fifty-six votes).

53. Employee Free Choice Act of 2007, H.R. 800; 110th Cong.; 153 CONG. REC. S8398 (daily ed. June 26, 2007) (motion to proceed failed after receiving fifty-one votes).

54. Medicare Prescription Drug Price Negotiation Act of 2007; S. 3, 110th Cong.; 153 CONG. REC. S4634 (daily ed. Apr. 18, 2007) (motion to proceed failed after receiving fifty-five votes).

55. District of Columbia House Voting Rights Act of 2007, S. 1257, 110th Cong.; 153 CONG. REC. S11631 (daily ed. Sept. 18, 2007) (motion to proceed to bill failed after receiving fifty-seven votes).

56. WAWRO & SCHICKLER, *supra* note 42, at 27.

headline asked “How will Dems recover after losing majority?”<sup>57</sup> CNN reported: “Brown’s election tips balance of power to GOP.”<sup>58</sup> The New York Times reported that “Brown’s Senate win has cost [Democrats] their razor-thin advantage.”<sup>59</sup> One paper, *The Village Voice*, even wrote satirically, “Scott Brown Wins Mass. Race, Giving GOP 41-59 Majority in the Senate.”<sup>60</sup>

When the rules are abused to the point where a majority of eighteen seats is now treated as the equivalent of being in the minority, it is time to change the rules. The sad reality is that today, because of the reckless use of the filibuster, our government’s ability to legislate and address problems is severely jeopardized.

Proponents of the filibuster regularly quote the oft told story of George Washington’s description of the Senate to Thomas Jefferson. Jefferson had returned from France and was breakfasting with Washington. Jefferson asked Washington why he agreed to have a Senate. “Why,” asked Washington, “did you just pour that coffee into your saucer before drinking it?” “To cool it,” Jefferson said; “my throat is not made of brass.” “Even so,” said Washington, “we pour our legislation into the Senatorial saucer to cool it.”<sup>61</sup>

As James Fallows recently noted, however, the abuse of the filibuster has converted the Senate from the “saucer” George Washington intended, in which scalding ideas from the more passionate House of Representatives might cool into a “deep freeze and a dead weight.”<sup>62</sup>

*“TO VOTE WITHOUT DEBATING IS PERILOUS, BUT TO DEBATE  
AND NEVER VOTE IS IMBECILE.”*

That is why I have introduced legislation to amend the Standing Rules of the Senate to permit a decreasing majority of Senators to invoke cloture on a given matter. On the first cloture vote, sixty votes would be needed to end debate. If the motion does not get sixty votes, a Senator can file another cloture motion and two days later have another vote; that vote would require fifty-seven votes to end debate. If cloture is not obtained, a Senator can file another cloture motion and wait two more days; in that vote, fifty-four votes would be required to end debate. If cloture is still not obtained, a Senator

57. Posting of Eric Lach to TPM Livewire, Media Fail: Reports Say Brown Win in MA Cost Dems Their Majority (It Didn’t), <http://tpmlivewire.talkingpointsmemo.com/2010/01/media-fail-reports-say-dems-lost-their-majority-tuesday-night.php> (Jan. 22, 2010, 11:42 EST).

58. *Id.*

59. *Id.*

60. Posting of Roy Edroscio to Village Voice, Scott Brown Wins Mass. Race, Giving GOP 41-59 Majority in the Senate, [http://blogs.villagevoice.com/runninscared/archives/2010/01/scott\\_brown\\_win.php](http://blogs.villagevoice.com/runninscared/archives/2010/01/scott_brown_win.php) (Jan. 20, 2010, 12:44 EST).

61. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (1911).

62. James Fallows, *How America Can Rise Again*, ATLANTIC MAG., Jan. 2010, available at <http://www.theatlantic.com/magazine/archive/2010/01/how-america-can-rise-again/7839/>.

could file one more cloture motion, wait two more days, and—at that point—just fifty-one votes would be needed to move to the merits of the bill.

Under my proposal, a determined minority could slow down any bill for as much as eight days. Senators would have ample time to make their arguments and attempt to persuade the public and a majority of their colleagues. This protects the rights of the minority to full and vigorous debate and deliberation, maintaining the very best features of the United States Senate. As Senator George Hoar noted in 1897, the Constitution's Framers designed the Senate to be a deliberative forum in which "the sober second thought of the people might find expression."<sup>63</sup> Senator Royal Copeland likewise noted, in 1926, the Senate "was intended to be a deliberative body where the expenditure of time and the exchange of views should determine judgment in any pending matter."<sup>64</sup>

My proposal would also encourage a more robust spirit of compromise. Right now, there is no incentive for the minority to compromise; members in the minority know they have the power to block legislation. But, if they know that at the end of the day, a bill is subject to majority vote, they will be more willing to come to the table and negotiate seriously. Likewise, the majority will have an incentive to compromise because they will want to save time, not have to go through numerous cloture votes and 30 hours of debate post-cloture.

At the same time, this reform would ensure that the basic principle of representative democracy—majority rule in a legislative body—is restored in our republic. At the end of ample debate, the majority would be allowed to act—there would be an up-or-down vote on legislation or a nominee. As Henry Cabot Lodge stated, "[t]o vote without debating is perilous, but to debate and never vote is imbecile."<sup>65</sup> Finally, there is nothing radical about the proposal I have introduced. The filibuster is not in the Constitution. The early Senates, until 1806, had a rule that allowed any senator to make a motion "for the previous question." This motion goes back to the British Parliament and permitted a simple majority to stop debate on the pending issue and bring an immediate vote.<sup>66</sup>

Further, there is nothing sacrosanct about requiring sixty votes to end debate. Article I, Section 5, Clause 2 of the Constitution—the Rules of Proceedings Clause—specifies that "[e]ach House may determine the rules of its proceedings." Using this authority, the Senate has adopted rules and laws that forbid the filibuster in numerous circumstances. For example, the

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63. Sen. George Hoar, *Has the Senate Degenerated?*, 23 FORUM 129, 141 (1897).

64. BINDER & SMITH, *supra* note 26, at 29.

65. *Id.* at 100.

66. *Id.* at 35–37.

Senate has limited the filibuster with respect to the budget, war powers, and international trade acts.<sup>67</sup>

Similarly, my legislation, far from being an unprecedented and radical change, stands squarely within a tradition of updating Senate rules as appropriate to foster a smoothly operating government. For example, beginning in 1917, the Senate has passed four significant amendments to its Standing Rules to limit the filibuster.<sup>68</sup>

The last significant rule change was in 1975, when the Senate lowered the number of votes necessary for cloture from a maximum of 67 to 60. At that times, senators on both sides of the issue recognized that a majority of Senators, under the Constitution, had the power to change Senate rules. In 1975, Senator Robert Byrd, a master of Senate rules and, I should add, an opponent of filibuster reform, said at the time “at any time that 51 Senators are determined to change the rule and have a friendly presiding officer, and if the leadership [of the Senate] joins them, that rule can be changed and Senators can be faced with majority cloture.”<sup>69</sup>

The fact is, today, only two members of the Senate—Senators Inouye and Leahy—were in the Senate in 1975 and voted on the current version of Rule 22. Yet, as Professor Bruhl notes, the filibuster has become entrenched against change.<sup>70</sup> It is long past time for the Senate to again use its authority to restore its ability to govern effectively and democratically.

#### IV. CONCLUSION

Chief Justice John Marshall once wrote that any enduring Constitution must be able to “adapt[] to the various crises of human affairs.”<sup>71</sup> He was entirely correct.

Yet, because of the filibuster, our democratic institutions are increasingly unable to respond effectively to the challenges that confront the United States today. The fact is, I do not see how we can effectively govern a 21st century superpower when a minority of just forty-one senators can dictate action—or inaction—not just to the majority of senators but to a majority of the American people. This is not democratic. Certainly, it is not

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67. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 212–14 (2003) (listing over twenty-five statutes that limit the use of the filibuster).

68. In 1917, it provided that two-thirds of the Senate present and voting could invoke cloture on pending legislation; in 1949, it required two-thirds of the entire Senate to invoke cloture, but expanded the ability to invoke cloture to treaties, nominations and motions to proceed; in 1959 it lowered the cloture requirement to two-thirds of Senators present and voting; and in 1975 it lowered the cloture requirement to three-fifths of the Senate.

69. United States Senate, Committee on Rules and Administration, *Examining the Filibuster: The Filibuster Today and Its Consequences*, May 19, 2010, at 19–20 available at [http://rules.senate.gov/public/?a=Files.Serve&File\\_id=0fa4c4cf-71e6-424f-8174-2bf40784fe28](http://rules.senate.gov/public/?a=Files.Serve&File_id=0fa4c4cf-71e6-424f-8174-2bf40784fe28).

70. Bruhl, *supra* note 10, at 1401.

71. *McColloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

the kind of representative democracy envisioned and intended by our Founders.

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