Notes on the Application of Storable Votes for Senate Reform

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1 Senate Reform

We heard a lot of noise about the filibuster in the last year. On October, 27th, President Barack Obama told Jon Stewart that '[T]here are a couple of things that have changed in our politics that are going to have to be fixed. One is the way the filibuster operates(...). That makes it very difficult for us to move forward(...) and actually reduces compromise' . On the same day, Senate majority leader Harry Reid told Rachel Maddow, in response to why 60 votes were required for any bill to pass: 'This has to change.' Ezra Klein, from the Washington Post, says in a comment on Gregory Koger's Book 'Filibustering': 'The future of the filibuster is the most important issue in American politics'

The filibuster rule, which enables a minority of 40 to essentially block debate on a bill, is a way to protect minorities. Clearly, the 40 members-threshold is artificial. Moreover, there is a general agreement that the rule slows down the legislative process in an undesirable way. In Storable Votes, we actually have a rule that has the same goal as the filibuster, which is not artificial, and for which we have actual evidence that it leads to more efficient decisions in most cases.

The text is written to follow a certain logic. How awesome. So we want to reform the filibuster. The logical order of the presentation is:

- What is the filibuster? You're making a big deal about it
- Oh, nice. So why do we need to reform it?
- Wait. So we need to reform it. How comes nobody thought about it? Some other reforms must have been proposed. What are they?
- Ok. What's your idea?
- Hmm. How is it different(and better) than the reforms you mentioned
- Wow. Now I am convinced

2 What is the filibuster?

The term filibuster refers to the concept of endlessly delaying debate on an issue so that it is not brought to a vote. It should be clear that 'filibuster' is a word that does not refer to any specific rule. It is a concept.

After a bill is called up by a Senator for instance, the Senate debates about it and discusses amendments. Debate formally ends when no senator seeks to

be 'recognized'. Hence, some senators with time to waste and all the volumes of Harry Potter can actually block the debate forever, by talking endlessly. You might have seen this in Mr. Smith goes to the Senate.

You might also have seen Jim Bunning(R-Kentucky) repeatedly opposing - among others - a 30-day extension of unemployment benefits that Harry Reid(D-Nevada) brought to the floor for unanimous consent in February 2010.

More generally, there are a fair amount of techniques to filibuster a motion. As I mentioned, the Senate rules do not impose limits on debate, and do not impose restrictions on the relevance of what is talked about to the debate. Senators can also use so-called 'dilatory motions', i.e. motions that have priority over the filibustered motion to be voted upon. Indeed, different motions have different priorities according to Senate Rule XXII. Finally, senators can decide to declare they are absent, so that the quorum for a vote is not attained.

There is a procedure that a majority can use to break a filibuster, called 'cloture'. Cloture is a motion to end debate. It was introduced in 1917, where two-third of the present senators were required to pass cloture. The limit has been changed to 60 sworn-in senators in 1975. This is the 60-vote Senate that we cherish.

3 Why do we need to reform the filibuster?

I will start the explanation of why we should reform the filibuster by looking at more theoretical arguments. We will look at the main goals of the filibuster and what are the main arguments to defend its use. In a second section, I will look at more practical matters, using ... data.

3.1 What are the goals of the filibuster

If we want to reform the filibuster, the first thing to look at is how we can justify the filibuster. One striking fact is that the filibuster is not purposedly enshrined in the Senate rulebook, it is there *by default*. Previous to 1805, a 'previous question' motion, similar to an existing rule of the House, allowed a simple majority to end debate on a bill and put it for a vote. After a review of the rules mandated by Aaron Burr, the previous question motion was taken out of the rulebook, and this created the actual filibuster.

Hence, it is difficult to talk about the 'goals' of the filibuster, since it was not intentionally put in the rules to solve problems or make the Senate for efficient, or, as Senator-elect Rand Paul would put it, to make it the 'most deliberative' body in the world.

However, we can look at how the filibuster is defended today. I see, mainly, two lines:

- The filibuster improves debate. By blocking a bill from being put to the floor, filibustering allows more debate. This is argued by filibuster-specialist Gregory Koger:

> *In our polarized polity, it is easy to forget that legislators are more than voting machines with 'D' or 'R' stamped on their foreheads. In fact, a healthy legislature does more than vote. Its members talk, and propose alternatives, and acknowledge each other's views. In doing so they can improve legislation, represent their constituents, and explain their behavior to each other and to the nation.*

- The filibuster protects minorities: a majority has to make concessions to the opposition to pass a bill. A Time article from August 2010 explains that

  > *Republicans (...) insist[] that they are using the filibuster as a much-needed check on an ambitious Democratic majority*

  Likewise, the Hill quotes Mark Pryor(D-Arkansas), in July 2010

  > *[T]he cloture rule and the filibuster is important to protect the rights of the minority*

  Finally, Senator Tom Harkin(D-Iowa), a fierce opponent of the filibuster, said in his testimony to the Senate Rules Committee that

  > I agree whole heartedly with the vital need to ensure the minority a voice in the Senate so that the voices of all Americans are heard

Those two lines are hard to defend nowadays.

First, we can debate endlessly about whether filibuster improves debate. This relies on the assumption that more debate is better debate, which is not a given. Second, it is hard to reconcile this assumption with the fact that a lot of filibusters have been used on non-controversial issues. A December 2009 report by People for the American Way(a partisan group) shows, for instance, that more than half of the cloture votes resulted in more than 65 senators voting Yea in the 111th Congress(up to the end of 2009), including a 98-0 vote on H.R.3548, an extension of unemployment insurance. It is also hard to understand why filibuster would improve debate more today than in the past. However, the use of filibuster(and, symmetrically, invocation of cloture votes) is on a clear upward trend(I will provide data below). Tom Harkin, once again, argued in his September 2010 testimony

> The fact is the filibuster as currently used has nothing to do with ensuring debate or deliberation and everything to do with obstruction and delay.

The protection of minority issue is more defensible. RObert Byrd, talking about the filibuster in the Huffington Post in May 2010, argued that 'the Senate

has been the last fortress of minority rights'. However, the argument suffers weaknesses. The number 60 comes from the fact that it is three-fifths of the number of senators. Why is this threshold better than another? As I will mention above, some current proposed reforms are indeed arguing that the threshold should be modified, or played with. It is my view that the threshold is an arbitrary number that can be changed. Arguably, the voting rule that allow only voters above a certain age is also arbitrary. However, what makes this rule acceptable is that we do not have a better substitute. For the filibuster, we have a substitute. It is called: 'Storable Votes'. More on that later.

3.2 Some problems and some data

Some of the criticisms against the filibuster have been mentioned in the paragraph above. The filibuster is an unwritten rule and does not serve any direct purpose. Indirectly, if defends the minority. However, it does it in an arbitrary fashion. Probably, the greatest issue is that the minority has blocking power over *all* bills, whatever the issue. The minority can feel strongly or weakly about an issue, the majority can feel weakly or strongly about the same issue, it has no impact on the use of the filibuster, or at least on the possibility of using it. If the majority uses cloture, which is the counterpart of filibuster, or if it uses some arcane rule such as reconciliation(a procedure that limits debate to 20 hours and requires only simple majority for bills not affecting government revenues and not adding to the deficit), the minority feels disenfranchised. It increases the amount of debate, but not necessarily the quality of debate.

My criticisms above seem nice theoretical points, but do not provide actual facts. Here they are.

Barbara Sinclair, a political scientist at UCLA, mentioned at a committee hearing in July 2010 an interesting evolution in filibuster use. Before the 103rd Congress ending in 1995, 6% of the bills passed the House but not the Senate, and 5% passed the Senate but not the House. After the 103rd Congress, those numbers are respectively 1% and 20%. Filibuster is over-used relative to its trend, and slows debate.

HR3548, as mentioned above, was filibustered and then passed 98-0.

In March 2009, the Democrats were unable to pass a spending bill because the Minnesota Senate race had been vacant since the election(and remained vacant until the end of June), while Senator Al Franken could have provided the 60th vote needed by Harry Reid.

Although the more famous use of the filibuster is to delay bills, a sometimes less known fact is that senators can put anonymous holds on a president's executive-branch nominee and so use a filibustering tactic. For instance, President Barack Obama has the lowest confirmation rate for judicial nominees in the past 30 years. Iam Millhiser from the Center for American Progress showed that 42.8% of Obama's nominations had been confirmed before July, 30th 2010. The second lowest number post-Carter(included), is President George H. W. Bush with 79.3%. Likewise, an Alliance for Justice Report shows that

> [T]he rate at which his nominees have been confirmed is significantly lower than it was for his five predecessors in both aggregate numbers and in the percentage of nominees confirmed. (...) Whereas Presidents Bush I, Clinton, and Bush II had 66%, 57%, and 61% of their district court nominees confirmed, only 29% of President Obama's district court nominees have been confirmed. This statistic is even more remarkable given the fact that President Obama's four district court nominees who have been confirmed enjoyed votes of 99-0 (Viken), 100-0 (Lange), 96-0 (Berger), and 88-0 (Honeywell).

In this report, the inefficiency of those tactics is clear:

> In the first ten months of the Obama administration,(...)[o]nly five judges have been confirmed by the Senate, while 22 nominees remain pending and 97 vacancies remain open.

It is to note that those data tend to have a partisan flavor to it. However, I don't want to see this as a criticism of the Republican leadership and congressmen. They have rules that can help them, and I do not make any judgment of its use. It has served Republicans pretty well so far, and so, it seems to work. My point is that those rules are inefficient, and the point would be the same if the roles were reversed.

So as to make it clear that I do not want to add a partisan touch to my point, Jamelle Bouie of the American Prospect reports that

> Presidents Carter and Reagan had 91 percent of their [judicial] nominees confirmed in their first year. That number dropped to 65 percent for George H.W. Bush, 57 percent for Bill Clinton, and 44 percent for George W. Bush.

It is commonly known that Democrats used their filibuster -and holds- power to block a lot of President Bush's judicial nominees. Moreover, the discrepancy with Barack Obama's number comes in part from the fact that President Obama nominated far fewer candidates than the previous presidents(see the references mentioned above for more details.)

3.3 A closer look at the rise of the filibuster

I want to conclude this section by underlining once more the fact that filibuster and cloture are relatively new trend topics. The rise in the number of cloture votes has been well documented[graphs here]. This has been the case as cloture has been reformed regularly: Koger(2010) finds 7 major reforms between 1917 and the introduction of cloture, and 1986. The main reform was in 1975, where cloture started requiring three-fifths of all senators instead of two thirds of voting senators.

The main question is why. Koger(2010) lists 3 explanation:

- Oppenheimer(1985) argued that Senators' time became more valuable, and that their workload increased. This made filibuster threats credible. Binder et al.(2002) confirmed this finding, for instance showing that filibuster use increased in the last session of a Congress.
- Others argued that the polarization of Congress played a role. Indeed, Congress is increasingly polarized(e.g. Theriault(2004)). Binder et al.(2002) show that the majority party strength(a measure of the number of senators and the cohesion of the party) matters a lot
- Koger

4 What reforms are possible?

4.1 Filibuster is not completely constraining

It has to be said that a filibuster can be overcome. Theoretically, cloture is not 100% necessary. There are, in my understanding, two possibilities to overcome the filibuster: the reconciliation procedure or the 'constitutional' or 'nuclear' option, depending on whether you like it or not.

4.1.1 Reconciliation

Reconciliation is another parliamentary procedure that can be invoked to limit debating time. Initially, it was supposed to be used so that a minority cannot block important bills, such as the yearly budget: it was indeed created in the Balanced Budget Act of 1974. After having been implemented, senators figured out that they could bypass the filibuster through it. Senator Byrd proposed an amendment to restrict the use of the budget reconciliation rule to bills that directly impacts federal revenues.

See Keith(2008)

4.1.2 The constitutional option

The constitutional option is an interpretation of Senate rules that might provide a way to overcome the filibuster constraint. Then-Vice President Nixon gave an advisory opinion in 1957 based on the assertion that no Senate can constrain a future Senate to vote on its own rules by simple majority. In practice, a senator would make a point of order

See: Beth(2005), Gold and Gupta(2004)

4.1.3 Why do we care, then, about the filibuster?

My main problem with the two possibilities above is that they seem completely ad hoc, and that the fact that they have not been used often in the past show the reluctance to use them, because of the perceived trickiness. Reconciliation was a matter of debate in the last days of the debate over health-care reform.

The problem is that the reconciliation process is some sort of sausage machine where when a bill is put in, nobody knows what is going to go out. Nobody knew what parts of the bill could be passed through reconciliation. This is, in part, due to the vagueness of the Byrd rule

The criticism of the constitutional option is similar. This option is best known as nuclear. This is hardly a good sign of consensus on the practicability of the rule. It involves playing with the Senate rules again, which impacts the legitimacy of a body which already has had a low 20% approval rate in the year 2010.

4.2 Proposed reforms

All the issues brought by the use of filibusters could be acceptable if we had no other option. This is not the case. Several proposals have been written by different senators. They are all sensible, but still feature some drawbacks that I think my proposal is able to solve. I will discuss the options and their problems here.

4.2.1 Michael Bennet(D-Colorado)

In his Plan for Washington Reform, Senator Bennet proposes that after the third cloture vote, the threshold for a minority filibuster rises to 45 if it has not been able to attract someone across the aisle or if the majority has the support of 3 senators from the opposition. It also requires 41 senators to show up to actually block cloture, and ends the filibuster on the motion to proceed.

My main issue with this proposal is its continued arbitrariness in the thresholds. Moreover, from a practical point of view, Elizabeth Rybicki from the Congressional Research Service explained in a July 2010 Senate hearing that Senator Bennet's proposal was too vague. For instance, a majority leader can revise the list of his caucus at any time. This means that if Ben Nelson, decides not to vote with Democrats and provide the Republicans with some bipartisan filibuster, Harry Reid could submit a list without Nelson's name on it so that the filibuster is not bipartisan.

4.2.2 Frank Lautenberg(D-New Jersey)

In his 'Mr. Smith Bill', Senator Lautenberg argues that senators should actually filibuster by talking endlessly on the floor, as Mr. Smith does in the 1939 movie 'Mr Smith goes to the Senate'.

My main problem with this proposal is that it does not get rid of the filibuster at all, does not change its arbitrariness, and indeed makes it more controversial by forcing filibusters to be actually conducted. Once again, it is hard to imagine how the Senate could reinforce its credibility when senators start talking about the last episode of House M.D. on the floor just to block a measure.

4.2.3 Tom Harkin(D-Iowa)

Tom Harkin made a proposal in 1995 that featured, most importantly, a lowering of the threshold to invoke cloture from 57 on the first try to 54 on the second and 51 on the third, with a fixed number of days between each try so that more debate indeed occurs.

Gregory Koger points out that this might lead to more obstruction since the minority might found it better to block absolutely everything. Moreover, from a practical point of view, Harkin's proposal has already been rejected 19-76 in 1995.

4.2.4 Robert Byrd(D-West Virginia), Richard Durbin(D-Illinois), Walter Mondale(former Vice-President)

Those two senators would simply force senators to actually filibuster. The problem with this reform is immediate: if more than one senator wants to filibuster, they can just take round. Koger on this.

5 What do we propose?

The first thing that must be said is that we are not proposing a miracle solution. We cannot say for sure that the state of the world, or the United States, will improve for sure. We cannot prove perfectly that this is the right solution, or that it is even better. We cannot state that it is an improvement over other reforms or the status quo.

We are here to present an idea that seem to work quite well given the tests it has been submitted to. We think that, as the debate over Senate reform is likely to be more contentious in the next months, our mechanism could be an interesting element of debate.

5.1 Storable Votes: the principle

Under the name Storable Votes, we actually have two different mechanism. Let us first look at the one that gave the mechanism its name.

Assume that a committee has to vote each month on a binary issue(Yes/No). At the first vote, any eligible voter can choose either to vote, or to abstain. If he or she abstains, he or she will get 2 votes in the next periods. In some sense, the first vote has been 'saved', or 'stored'. For a given vote, the winning proposal is the one which received the simple majority of votes cast.

A similar system consists in giving to the voter, at the beginning of each voting session, a certain number of 'bonus votes'. I define a voting session as a period where successive binary votes are taken. One can think about it, for instance, as a session of Congress. Then, every voter has a guaranteed vote on each vote. In addition, he or she can cast his or her bonus votes however he or she wants. Once again, the winning proposal is the one which received the simple majority of votes cast.

The simple idea through which all the benefits of this mechanism are coming is not new. Indeed, the storable votes system is similar to the cumulative voting system. In cumulative voting, people have to choose among, say, 5 candidates in a district. They are given 5 votes. They can distribute the votes among the candidates as they want. You can see that a cohesive minority can have its members cast their 5 votes on the same candidate, while a disaggregated majority could spread its votes on the remaining 4. The latter mechanism was advocated, in particular, by Lani Guinier. Lani Guinier was nominated in April 1993 for Assistant Attorney General for Civil Rights by President Clinton. Cumulative voting would have allowed minorities in certain districts, provided they were numerous and cohesive enough, to elect representatives.

Storable votes feature the same idea, but in a different context. The system can be used on binary votes taken successively(e.g., a congressional session), or simultaneously(e.g. ballot propositions). Voters can express their relative intensity over different issues, instead of just saying that they are for or against.

As Robert Dahl asks, there is a philosophical question behind the process we are mentioning:

> *What if a minority prefers an alternative much more passionately than the majority prefers a contrary alternative? Does the majority principle still make sense?*

The question is, indeed, what is the right decision to take? Do we want to answer this question only by considering the number of each party, or should we also consider how intense they feel about the issue at stake?

5.2 What are the properties of Storable Votes?

5.2.1 Intuitive properties

Storable Votes have a number of desirable properties:

- they encourage voters to reveal their *intensity* of preferences truthfully;
- they treat every voter identically, and yet make it possible for a minority to win some of the time: the minority is not disenfranchised;
- they result in minority victories only when the minority cares intensely about the outcome of a decision while the majority does not, and thus when the cost of the defeat for the majority is small;
- the larger the difference in size between the two groups, the larger the discrepancy in the use of bonus votes must be for the minority to prevail;
- they are close enough to existing systems of popular referendums, where multiple proposals are submitted to voters at the same time, to be 'easily' implementable.

Storable Votes are not always superior, but they are superior with sufficient frequency and in a sufficiently systematic manner to justify, in my opinion, further studies to see its potential implementation in the policy arena.

5.2.2 Let's go in depth into the theory

I will now develop the properties of Storable Votes in more details, following the different research papers of Alessandra Casella, and her book. I will take the bonus vote approach, where voters are given a set of extra-votes to cast in addition to their regular single vote on each decision. Moreover, for simplicity, we will consider that we grant one bonus vote to every voter, and discuss the possible impact of giving multiple bonus votes.

Multiple questions arise.

- In a perfect simple setting, what are the intuitive impact of the bonus votes?
- What happens when preferences are correlated?
- What happens if one has the power to control the agenda, i.e. the set and the order of the bills brought to the floor?

Simplest setting: building the intuitions Consider the simplest setting you can think about. For instance, voters are not organized in parties and vote for themselves, the proposals are not linked(how I feel about one does not say how I feel about the other, relatively speaking), and the proposals on which we vote are decided by God, Stephen Hawking, or any other third party who has no specific interest in the outcomes.

Let us consider first the impact of a bonus vote relative to the number of proposals. When the number of proposals increases, the impact of casting a bonus vote is stronger, since the bonus votes of the opponents are likely to be more dispersed. Likewise, the loss of influence on the proposals where one does not cast her bonus vote(s) is smaller. The theory actually shows that the number of proposals makes very little difference in the gain yielded by storable vote compared to majority voting.

Now, let us consider the impact of the committee size. Alessandra Casella shows that in a simple setting, a really small committee might be adversely affected by the change in the voting rule, but that as soon as the committee size is over 9 members, there are overall gains.

Another dimension of interest is the distribution of intensities over the possible proposals. With one bonus vote, the new voting rule will be all the more welfare enhancing as the proposal where the voter feels the strongest is really more salient for her than all the other proposals. Note that this is where multiple bonus votes could be interesting: if the distribution of intensities is such that 3 proposals are far more preferred than the others for everybody(the 3 proposals could be different for different voters), then it would be sensible to grant 3 bonus votes.

Testing those intuitions in the laboratory Hopefully, this initial discussion gave the intuitions. The mathematical theory behind it gives us the optimal behavior of voters, and justify the intuitions. However, we need to test them

in a real setting. Alessandra developed laboratory experiments with university undergraduates to look at how people were behaving and see if, even with less strategic players and a simple setting, the voting system would yield welfare gains.

She finds that the behavior of voters obviously does not fit perfectly the theory. People use more rules-of-thumb. However, people cast more votes on proposals where they feel the strongest. This seems logical, but this is extremely important. Indeed, it is this behavior that drives the interest of Storable Votes: people should represent the intensity of their preferences, so that we can make a decision based not only on the number of people in each party, but also how they feel about the issue. In the simulations and experiments, it is clear that as long as people play in such a manner, Storable Votes is robustly better than majority voting, in the sense that it picks the outcome that is felt with the highest *relative* intensity more often than in majority voting.

Experiments also validate the stylized intuitions we mentioned above:

- As the number of votes increases, Storable Votes yields better results than majority voting more often
- Increasing the number of proposals also yields more efficient outcomes
- For any number of voters, we observe gain from the change in the voting rule.

Do we really want the minority to win some of the time? For now, let us put aside the fact that making the minority win some of the time has moral, philosophical, and even political benefit since it enfranchises a group of people who would otherwise always be on the losing side of any issue. This is the 'equality' part of the problem, where storable votes is better equipped than majority voting

The problem here is the 'efficiency' issue. With out mechanism, we sometimes pick the side of the less numerous group. This will be more 'efficient' only if the minority wins on issues where it feels far stronger(in relative terms, i.e. relative to other issues), than the majority.

First of all, it has to be pointed out that because the majority is more numerous and can also cast bonus votes, it should be in position to overrule the minority if it is itself cohesive enough.

More generally, Alessandra looked at two polar cases: assume that we have two groups(call them D and R). Within this group, either intensities are not correlated at all(the fact that John Kerry cares relatively more about a foreign policy issue does not predict that Democrats care more about foreign policy issues), or they are perfectly correlated(the fact that Mitch McConnell cares relatively more about tax cuts proposals predicts that all Republicans care more about tax cuts). Real life is probably between in the 2. Alessandra shows that in those two polar cases, Storable Votes yield gains, and that those gains are extremely robust in the case of perfect correlation(i.e. strong party cohesion). Experimental data support those claims. Minorities win far more than in a

majority setting. The greater the cohesion, the higher the gain for the minority. Finally, there is no efficiency loss, since minorities only win when their preferences are really intense .

What is the impact of a biased agenda control? The simple setting had an agenda organized by a third-party. However, in the example we have in mind, the person with the agenda control is partisan, and in the majority. Obviously, this raises questions. Are we indeed protecting minorities when one party has the possibility to choose what is brought to a vote? Let us refer to the controller of the agenda as 'the chair'

There are two possible use of agenda control by the chair. First, consider that everybody knows what is going to be brought up to a vote(say: extension of Bush tax cuts, extension of unemployment insurance, extra-stimulus). Then, the only thing the chair can do is change the order. Theoretically at least, it means that he/she can only use his/her power as a communication device: the specific order in which bills are brought up may convey something about the relative intensity of his/her preference over the 3 issues.

Now, imagine that the chair can actually choose not only the order, but the content of the agenda. Now, he/she can choose the proposals about which he/she cares the most. Moreover, he/she has no uncertainty over the agenda, while the minority has.

In the first setting, numerical simulations show that there is basically no difference between an exogenous and an endogenous agenda. This result is robust to variation in the distribution of intensities, the number of voters, or the number of proposals.

The second setting is obviously more complicated, but also more relevant. Alessandra looked first at the result with only two members: a chair and a voter. THis sounds simplistic. However, if we look at the setting we have in mind, in the Senate, this is not absurd. Parties are usually cohesive and vote as one. In this setting, one can show that theoretically, the casting of the bonus votes is strategically simple: cast them where you feel the strongest.

5.3 Why is it good in the issue of the filibuster?

I want to come back now to the reasons why I think that Storable Votes should be an element of discussion when thinking about Senate reform, and in particular the reform of the filibuster.

The first element, which has to be stressed, is that Storable Votes maintain the principle of one person, one vote. I am underlining that for two reasons. First of all, some criticisms of Cumulative Voting have been about the fact that it is not democratic. The issue here is not to equate democracy and simple majority voting. Democracy is the concept that the will of the people should be represented. The voting system is the way through which we achieve this representation. Our voting system, as Cumulative voting, are not giving anybody more power than any other: people get the same voting power. On the positive side of this debate, it is to note that the cloture rule and the filibuster give

more power to the minority than to the majority. Congressmen are, actually, not equal, in the current system. At the extreme, anonymous holds give veto power to one congressman. Our system is completely egalitarian.

The second element is that our mechanism enfranchise the minority. The U.S. political institutions are such that it is quite costly to be in the minority. Here, we have a procedure where the minority is not always losing. Enfranchising the minority means less polarization. It also means that the minority should actually propose policies that they might like. The incentive to block legislation is smaller, in particular thanks to the fact that a preferred bill cannot be debated upon while the minority is blocking a majority-favored one. This enfranchisement, added to a smoother and less partisan legislative process, should also help to restore the dramatically low approval rating of Congress. We cannot stress enough that the minority sometimes wins when and only when it is cohesive. The majority can pass what it feels intense about. A correlated advantage of our measure is that it should be bipartisan. A minority party should see that they would benefit from the reform since they would actually be able to pass some of their agenda. A majority party should see a benefit in the limitation of obstruction, and the appearance of forcing the outcome when invoking cloture, reconciliation, or the 'nuclear option'.

The third element that I also emphasize earlier is that Storable Votes is not arbitrary. In the end, decisions are taken at the simple majority of votes cast. [Might be risky, because the number of bonus votes is arbitrary]

The fourth element is that, in practice, storable votes actually lead to better decision. This is somewhat linked to the possible victories of the minority. By taking into account not only the number of people on each side of an issue, but also their intensity, we argued that decisions were more efficient. Clearly, once again, this is probably a philosophical debate on what constitutes efficiency. However, if one is ready to accept that intensity actually matter in the choice of the optimal outcome, Storable Votes yield a simple mechanism that goes towards this goal.

The fifth element is that the mechanism has been tested. It works with students who are probably not really strategic. Simply casting bonus votes on salient proposals improves the final outcome. We think that strategical politicians should be even closer to the theoretical predictions of the model, which show that Storable Votes is indeed robustly better than majority voting.

5.4 How is it implementable

I hope that the discussion above has been convincing enough to show that our mechanism might be relevant, or at least interesting to think about in the context of Senate reform

It is clear that, for now, this mechanism in more a theoretical nicety than a easily implementable practical system. One purpose of this discussion is to actually attract political scientist and congress specialist to help us think about the actual implementation of the system in a legislature. We are not Congress specialists. We do not pretend that the system can eventually, be implemented.

We do not pretend that, if implemented, we are sure it will be better than the Congress we have now. We think it should be considered, and to be considered, it has to be adapted to the institution.

There are multiple questions:

- How many bonus votes do we allow?
- How long is a voting-session?
- What types of votes should be submitted to the Storable Votes system?

The number of bonus votes is probably a theoretical issue. However, the theoretical model and the simulations showed that allowing one bonus vote was a good start and yielded robust gains. Moreover, there is an obvious practical argument to make for a single bonus vote: it is easily understandable, and it does not seem arbitrary. Obviously, giving only one bonus vote means that the representation of relative intensity is quite raw. It is still less raw than a binary vote.

The voting session issue is, in my opinion, more straightforward. The Senate is renewed by a third every 2 years. If the voting session is longer than those 2 years, then we will actually break the rule of equality of voters. Therefore, the bonus vote should be renewed every two years. If the bonus vote has not been used after two years, it is cancelled and replace by a new bonus vote.

The issue of what votes are subject to the new rule is trickier.

Obviously, the reception would be tough. See what happened to Lani Guinier, and Pildes and Donoghue (1995)

6 When reform is possible?

Reform is possible, in theory, right now. Rule XXII explains that each House can set its own rules, and do so by simple majority. Hence, the Democrat majority, or a bipartisan group of senators(yes, it is included in the 'in theory'), could decide to change the filibuster rule.

In practice, a reform will usually look partisan, given the trajectory that the recent Congresses have taken.

Moreover, we do not know everything about storable votes. Having some small-scale initiative should help, starting in some state legislatures.

Obviously, we do not say that we have the miracle solution. However, Alessandra Casella built, explored and tested a mechanism that we think could be useful in the current debate.

Congress

7 Conclusion

Obviously, a change is costly. Madison argued that status-quo should be protected because of the uncertainty inherent to any given change.

However, I strongly think that we reached the point where the overuse of filibusters, which was, once again, not purposely included in the Senate rulebook, changed the cost-benefit analysis to a given change in the voting process. Assume you are a founder(yes, I am an economist). What system would you choose? A system with a filibuster rule, or a system with Storable Votes?

Moreover, we do not advocate for an immediate change to a Storable Votes system. However, it is something to think about. It is now, we hope, one option that senators will consider in the debate about Senate reform

8 References

References

[1] Richard S Beth, Valerie Heitshusen, and Betsy Palmer. Filibusters and Cloture in the Senate. In *Congressional Research Service Report*, 2010.

[2] R.S. Beth. " Entrenchment" of Senate Procedure and the" nuclear Option" for Change: Possible Proceedings and Their Implications. In *Congressional Research Service Report*. Congressional Information Service, Library of Congress, 2005.

[3] S.A. Binder, E.D. Lawrence, and S.S. Smith. Tracking the Filibuster, 1917 to 1996. *American Politics Research*, 30(4):406, 2002.

[4] S.A. Binder, T.E. Mann, Molly Reynolds, and Brookings Institution. Governance Studies. *One Year Later: Is Congress Still the Broken Branch?: a Report on the 110th Congress*, volume 2. Brookings Institution, Governance Studies, 2008.

[5] Sarah A. Binder and Steven S. Smith. *Politics or principle?: filibustering in the United States Senate*. Brookings Institution Press, 1997.

[6] Emmet J. Bondurant. Written Testimony of Emmet J. Bondurant, Esq. In *Hearing: Examining the Filibuster: History of the Filibuster, 1789-2008*, pages 1–4, 2010.

[7] C.M. Davis. Invoking Cloture in the Senate. *Congressional Research Service Report*, pages 98–425, 2007.

[8] Robert B Dove. Enactment of a Law. *Secretary*, 1800.

[9] Martin Gold and Dimple Gupta. The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster. *Harvard Journal of Law and Public Policy*, 28(1), 2004.

[10] Robert Keith. The Budget Reconciliation Process: Timing of Legislative Action. In *Congressional Research Service Report*, 2008.

[11] Ezra Klein. The 50-Vote Senate, 2009.

[12] Ezra Klein. Welcome to SMALLVILLE, 2010.

[13] Gregory Koger. Notes on the Filibuster, 2009.

[14] Presiding Officer. Precedence of motions 1. pages 1–3, 2010.

[15] W.J. Oleszek. Cloture: Its Effect on Senate Proceedings. In *Congressional Research Service Report*. Congressional Research Service, Library of Congress, 2008.

[16] John V. Sullivan. How our laws are made. In *House of Representatives*, pages 1–65. US Government Printing Office, 2007.

[17] S.M. Theriault. The case of the vanishing moderates: party polarization in the modern Congress. In *annual meeting of the Midwest Political Science Association*, 2004.

[18] Gregory John Wawro and Eric Schickler. *Filibuster: obstruction and lawmaking in the U.S. Senate*. Princeton University Press, 2006.

08/01/2010

The filibuster allows 41 Senators to block a bill from coming to a vote by voting against motions to end debate (which need 60 votes to pass).

The filibuster may be business as usual in Washington today, but it wasn't always. Not long ago, the tactic was a rarity, considered a measure of extreme last resort for major pieces of legislation. In the 1969-70 session of Congress, the filibuster wasn't used a single time. In 1977-78, it was used only three times. But as the Senate has grown more partisan in recent years, the filibuster has become a tool for the minority to thwart the majority at every opportunity. After Democrats lost control of the Senate in 2001, they set a record with 34 filibuster attempts. Republicans outdid them in the last session of Congress with 61 filibusters. In the current Congress, Senate Republicans are already at 53 with five months left to go.

January might provide a rare window of opportunity: when the Senate reorganizes at the beginning of a new session of Congress, the rules can be changed with just a simple majority of 51 votes.

Republicans reject the charges, insisting that they are using the filibuster as a much-needed check on an ambitious Democratic majority, which has sought quick votes on 2,000-page bills no one has time to read. "[Senate majority leader Harry] Reid says he wants to be bipartisan, and then he runs to the floor and files for cloture before negotiations have even begun," says a senior GOP Senate aide. "They're trying to ram legislation through we're not here to rubber-stamp."

About 10 moderate and long-serving Democrats are particularly skeptical of the change. "I think as torturous as this place can be, the cloture rule and the filibuster is important to protect the rights of the minority," Senator

Mark Pryor, an Arkansas Democrat, told the Hill newspaper this week. "My inclination is no."

'The intent of both proposals is to make the Senate more like the Senate' By Dylan Matthews, 07/28/10

'Bennet's proposal is quite sweeping. It would eliminate anonymous holds, limit holds without bipartisan support to two days, and limit all holds to 30 days. It would require 41 senators to vote to uphold the filibuster, reversing the current requirement that 60 senators vote to stop it. That puts the onus of organizing support on those who are filibustering. It would also try to encourage bipartisanship by allowing 45 senators to kill a filibuster if the filibuster doesn't have at least three members of the other party signed onto it.'

Lautenberg's proposal is more modest(...) the bill would allow the Senate majority leader to call an immediate cloture vote as long as there is no discussion occurring on the Senate floor and the deadline for amendments has passed. This would force filibusters to actually be conducted on the floor

Neither Lautenberg nor Bennet wants to eliminate the filibuster entirely. "The Senate can and must defend the rights of individual or small groups of senators," Bennet insisted.

Koger also disputed the insistence of both Schumer and Tom Udall that the "constitutional option" of changing Senate rules by majority vote is only possible at the start of a Congress. Koger insisted that the Senate can stop its rules at any point and change them by a simple majority, and that given political considerations, this might be the only way the filibuster can ever be reformed.

Barbara Sinclair, a retired political scientist at UCLA, did not endorse either proposal, saying it was her job to present relevant data and senators' jobs to strike a balance between, in her words, "deliberation and decisiveness."(...) In her most vivid example of how the filibuster has slowed the legislative process to a halt, she compared the percentage of bills passed by one house of Congress but not the other before and since the 103rd Congress (1993-1995). Before, 6 percent of bills passed the House but not the Senate, and 5 percent passed the Senate and not the House. Since the 1990s, only 1 percent of bills have passed the Senate but not the House, and a whopping 20 percent have passed the House but not the Senate. The emergence of the Senate as the main legislative bottleneck, then, is a fairly recent phenomenon.

The most interesting witness, however, was Elizabeth Rybicki(...) All the same, Rybicki had a point to make, and a persuasive one: the Lautenberg and Bennet proposals are too vague. For example, Lautenberg's proposal works by allowing the majority leader to "move the question" on cloture. Rybicki noted that there is no such motion in the Senate rules. (...)Similarly, Bennet's bill seeks to regulate "holds," which are not a formal process in the Senate.(...) The most interesting ambiguities Rybicki identified had to do with Bennet's proposals to increase the cloture-blocking requirement to 45 if support for breaking cloture is sufficiently bipartisan, or if opposition to it is not. Bennet's proposal says this would occur after three "attempts" to invoke cloture. Does this mean that the majority leader could file four cloture motions on the same day, wait two

days, and then have them in a row, with the last requiring 45 votes to break? Or could the leader only file another motion after a vote has failed, in which case the earliest the requirement could rise would be nine days after the first filing?

What's more, the proposal determines whether a proposal is bipartisan by having the Majority Leader submit a list of members of his caucus to the Congressional Record, a list he can revise at any time. Let's say, then, that the current GOP, along with Ben Nelson, Mark Pryor and Mary Landrieu, decides to filibuster a bill. They would only have 44 votes, but they would have enough Democratic support to prevent the cloture-blocking requirement from rising to 45. Could Harry Reid submit a new caucus list to the Congressional Record, not including Nelson, Pryor, and Landrieu, see the requirement rise to 45, and break the filibuster? Under the current wording of the Bennet proposal, this seems to be possible. Far from encouraging bipartisanship, then, Bennet's proposal could in effect raise the cloture-breaking requirement to 45, with no additional wait, and no additional requirements.

Bennet's proposal

- Reform the Floor
- Eliminate anonymous holds
- Require holds to be bipartisan. If not, the hold expires in 2 days. Even bi-partisan holds expire in 30 days.
- Reform the filibuster in the Senate
- After 3rd failed cloture vote, the minority must find a member of the opposite party or the threshold raises to 45 votes.
- After the 3rd cloture vote, if the majority finds support from three members of the minority, it raises to 45 votes.
- End the filibuster for motion to proceed
- Require 41 Senators to show up to vote in order to block cloture, or else it's invoked

Lautenberg's proposal Filibusters should happen on Capitol Hill, not from the Capital Grille. If any of my colleagues feel strongly enough about a bill or nomination to stop all work in the Senate, they should have no problem standing on the Senate floor to explain their opposition to the American public. The American people want the Senate to get our economy back on track, not tie itself in knots with invisible filibusters that waste time and taxpayer resources.

Under current rules, Senators can filibuster and force the Senate to use up a week or more on a single nomination or bill, even if there is no debate occurring on the floor. Under the Lautenberg proposal, that time would be reduced significantly.

Republicans forced the majority to set a record of 112 cloture votes to break filibusters from 2007-2008 in the previous session of Congress. In this session of Congress, which started in 2009, the minority party has already forced 49 cloture votes.

Reforming the Senate 1: Reviewing the Options

By Gregory Koger, 03/12/10

Reform proposals can have similar but distinct goals. Reformers might be trying to:

- Institute majority rule in the Senate. That is, a system in which a simple majority can (usually) set the agenda and pass legislation without delay or bargaining.
- Make it easier to end a filibuster on a given bill, e.g. by reducing the number of opportunities to filibuster a given bill or changing Rule 22 to a) lower the threshold for cloture b) shorten the delay between filing cloture and a cloture vote, c) reduce the amount of debate/amending after cloture is invoked.
- generally reduce (but not eradicate) the number of filibusters and holds. Such reforms would make the Senate more efficient and/or reduce the influence of individual senators (e.g. Richard Shelby or Jim Bunning) by making it more difficult or costly to filibuster.
- generally make the Senate more efficient or productive without directly limiting obstruction.

Now lets review the proposals.

1. Tom Harkin: lower threshold for cloture Harkins proposal would lower the threshold for cloture on a particular motion/amendment/bill from 60/100 on the first attempt to 57, 54, and 51 on each successive attempt, with a full two-day wait in between each attempt. This proposal came up for a vote in 1995 (when it was cosponsored by, ahem, Joe Lieberman) and was rejected 19-76 (R 0-53, D 19-23). Evaluation. Some maxims to live by:
   - i before e except after c
   - never get involved in a land war in Asia
   - ask yourself: what happens if I win?

   If Harkin wins, the new rule would likely lead to MORE obstruction. (...) If the rule was adopted, the likely response of the minority party (or other organized factions) would be to obstruct EVERYTHING, thereby forcing (multiple) cloture votes on routine motions and trivial bills.
2. Michael Bennet (D-CO)
   - Eliminate anonymous holds

- Require holds to be bipartisan. If not, the hold expires in 2 days. Even bipartisan holds expire in 30 days.
- After 3rd failed cloture vote, the minority must find a member of the opposite party or the threshold raises to 45 votes.
- After the 3rd cloture vote, if the majority finds support from three members of the minority, it raises to 45 votes.
- End the filibuster for motion to proceed
- Require 41 Senators to show up to vote in order to block cloture, or else it's invoked

Ending the filibuster for the motion to proceed (an agenda-setting that requires a simple majority but is usually vulnerable to a separate filibuster) is a proposal dating back to (at least) 1979(...). The logic is that it is absurd to allow multiple filibusters against a given bill(...). More subtly, if a bill gets to the floor, senators may develop the expectation that it will pass and/or have a chance to amend it into a form that can garner 60+ votes, so if the motion to proceed is immune from obstruction the Senate would be more likely to act on major bills without losing the benefits of requiring a supermajority to bring the bill to a final vote.

Requiring 41+ votes AGAINST cloture to extend debate is an intriguing idea.(...) Krasno and Robinson downplay the implications of this proposal since attendance is generally high for cloture votes. However, if the rule was adopted the majority could make a habit of filing for cloture on Thursday or Friday and keeping the Senate open on Saturday and Sunday, so that obstructionists would have to stay in D.C. to vote against cloture. For today's 'Tuesday to Thursday' Senate (on a busy week) this would be a real change(...). If this reform was combined with Krasno and Robinson's proposal to shorten the time between filing a cloture petition and voting on cloture (to five minutes, an hour, four hours), it would compel obstructionists to actually endure some inconvenience.

3. Force senators to ACTUALLY filibusterproposed by multiple sources, including senators Byrd (D-WV) and Richard Durbin (D-IL).

   Remember, there is no Senate rule that grants the minority a 41-vote veto. The current right to block legislation and nominations evolved out of senators' rights to speak as long as they like, and to force votes on procedural motions and questions; now senators simply skip this time-wasting process and simply concede each other's ability to filibuster

Well, How Did We Get Here? The Rise of the 60-Vote Senate
By Gregory Koger, 08/25/09

in its current form, the Senate filibuster represents a major innovation on the legislative process laid out in the U.S. Constitution. This point is made elegantly in Keith Krehbiels 1998 book Pivotal Politics. Krehbiel puts the filibuster on par with the Presidential veto as the major brake points in the legislative process.

The odd thing about this setup is that one veto power is explicitly provided in the U.S. Constitution, while the other is not even explicitly granted in the rules of the Senate. One veto has been wielded (true, with some evolution) since 1789, while the other has only become institutionalized over the last 50 years. This is the puzzle of todays post: why has the Senate filibuster become a central feature of U.S. lawmaking?

Filibustering has skyrocketed from an annual average of 3.2 filibusters during 19511960 to 16.5 between 1981 and 2004

filibustering became an everyday event because senators began responding to obstruction by attempting cloture rather than attrition, i.e. waiting for filibustering senators to become exhausted.(...)This change in tactics decreased the costs for obstruction

it FEELS like theres a relationship between partisanship and filibustering. When the media reports that there is a filibuster in the Senate, it is almost always framed as minority party obstruction. And, Sarah Binder and Steven Smith (1997) demonstrated that voting on cloture has become more partisan since the 1950s. Part of this perception is due to a selection process: majority party members do filibuster in the form of placing holds on bills and nominations, but these tend to lead to backroom negotiations, or they are low-level conflicts that arent newsworthy enough to make the lead.

After health-care reform, Senate reform

The government can function if the minority party has either the incentive to make the majority fail or the power to make the majority fail. It cannot function if it has both.

In decades past, the parties did not feel they had both. Cooperation was the Senate's custom, if not its rule. But in the 1990s, Newt Gingrich, then the minority whip of the House, and Bob Dole, then the minority leader of the Senate, realized they did have both. A strategy of relentless obstruction brought then-president Bill Clinton to his knees(...).

both parties have followed Gingrich's playbook ever since. According to UCLA political scientist Barbara Sinclair, about 8 percent of major bills faced a filibuster in the 1960s. This decade, that jumped to 70 percent.

Jeff Merkley, a freshman Democratic Senator from Oregon and former speaker of Oregon's House of Representatives, spoke to this issue in an interview last week. "When you use the word filibuster," he said, "most of us in America envision it as the ability to speak at length and even delay progress by taking hours. I count myself among those Americans." He sighed. "But it's not a filibuster anymore. It's a supermajority requirement. And when that becomes commonly used, it's a recipe for paralysis."

This isn't just a Democratic concern, though Democrats, being in the majority, are the ones raising it now. In 2005, Senate majority leader Bill Frist nearly shut the chamber down over the Democratic habit of filibustering George W. Bush's judicial nominees. "This filibuster is nothing less than a formula for tyranny by the minority," he said at the time.

The democracy behind Senate rules By Jonathan Bernstein, 06/02/10 I'll start with a favorite Hannah Arendt quotation, from "On Revolution":

We commonly equate and confound majority rule with majority decision. The latter, however, is a technical device. ... In America, at any rate [the Constitution was] framed with the express and conscious intention to prevent, as far as humanly possible, the procedures of majority decisions from generating into the "elective despotism" of majority rule.

Democracy, Arendt is saying, is rule of the people – not rule of the majority. All of the people.

We can also describe a situation in which the correct democratic solution should probably be that the minority wins: when an intense minority is opposed by an indifferent majority

The logic behind Senate rules

Senate majority leaders, both as individuals and as the leaders of their party, have always been far weaker than speakers; the committee system has always been weaker in the Senate than in the House. Senators talk a lot about "protecting the rights" of each individual senator, and they really mean it.

Thus the filibuster, which protects both individual senators and small groups of senators; thus the hold, in which single senators can gain individual bargaining power by holding a bill or nomination hostage; thus the rules allowing non-germane amendments and free access of any senator to the floor to offer such amendments. Thus, in the modern Senate, complex unanimous consent agreements on procedure, while the modern House uses procedures drafted by the majority party in the highly partisan Rules Committee.

What's happened is that rules and norms intended to protect individual senators and minority groups of senators have been, essentially, hijacked by one particular minority group, the minority party.

How many senators does it take...

By Sarah Binder, 01/29/08 With increasing frequency, congressional observers refer to the "sixty-vote" Senate. Lacking a rule that would allow a simple majority to vote to end debate and bring the chamber to a vote, the Senate instead relies on its Rule 22 – otherwise known as the cloture rule – to end debate. If 60 senators – three-fifths of the chamber – vote to invoke cloture, the chamber moves to a vote on the underlying amendment, motion, or bill.

I've been curious about reports that cloture voting is at an all-time high in the Senate. So I ginned up the simple graph below that shows the average number of cloture motions filed per month, reaching back to 1973

Our dysfunctional Senate With the rise of the 60-vote Senate, and with even larger supermajorities needed to process fairly routine nominations, it's not surprising that a lot of people – including quite a few frustrated Democratic Senators – have been calling for reform.

Notes on the filibuster

as Greg writes in his book, breaking filibusters isn't impossible: It just takes time, procedural commitment and, though he doesn't say this, a sufficiently large majority. Sufficiently large majorities, however, are willing to expend time and play procedural hardball on their top issues. In those cases, the filibuster modifies the legislation – maybe it makes it worse and maybe it makes it better, but it doesn't kill it off entirely. It's smaller bills with less commit-

ment where filibusters and holds simply keep anything from happening at all: everything from nominations to regulatory changes to the everyday upkeep of the government.

And then there's the universe of legislation that never really gets attempted because the filibuster slows things down such that there's no time and little appetite for new fights

The filibuster has become a de facto 60-vote requirement, which wasn't the intention, and reconciliation is increasingly used for all manner of bills, including the Bush tax cuts and the health-care reform law, which also wasn't the procedure's original intention. Both situations lead to worse and more awkward legislation.

Finally, a lot of the defenses of the filibuster seem to be, well, idealistic. They talk about the preservation of debate, though anyone who's ever watched the Senate make its way through these bills knows that we're not seeing a high-minded effort at persuasion take place on the floor. They talk about the protection of minority involvement, and the incentives for bipartisanship. The problem, they say, isn't the system, but that it's being abused.

One Faction Among Many.

By Jamelle Bouie, 09/08/10

President Obama has the lowest judicial confirmation rate of any president in the last 30 years, and for a long time, key executive-branch agencies were pitifully understaffed.

Enough with the misleading words about Congress

By Elizabeth Drew, 09/07/10

In the 1970s, Majority Leader Mike Mansfield realized that the real punishment was not to the small band of all-night speakers but to the majority party, which had to keep a quorum (51 members) on hand, sleeping on the famous cots near the Senate floor, lest the person conducting the filibuster suddenly make a motion to adjourn the Senate, thus defeating the purpose of keeping them talking. Historian Ritchie says, "The all-night filibuster wore down the majority much faster than it did the minority." Majority leaders haven't used the tactic since.

To gauge how many filibusters there have been, many commentators equate the number of cloture votes (requiring 60 votes) with the number of filibusters, but Ritchie says the two cannot be easily equated: "We honestly don't always know when a filibuster is taking place because we honestly don't always know what they are. It can be any move to prevent the majority from bringing legislation to a vote." In other words, it can be objecting to a unanimous consent agreement; requiring that a long bill or amendment be read (usually waived, but this was used during the health care bill debate),voting against a cloture motion or other parliamentary maneuvers to hold up a bill. Ritchie says, "It depends on who is defining."

The more junior members, frustrated with the system, assert that Senate rules can be changed at the outset of a new Congress by majority vote, as rules can be in the House, but the Senate has never accepted that. Yet, one of the young Senate rebels told me recently that they have already ruled out trying to

end the filibuster rule (still urged by some commentators) because they respect the view expressed by several of their elders, including Dodd, to beware of the time that they're in the minority

But there could be efforts to limit the number of times or circumstances in which the filibuster could be used.

The Reid-McConnell Senate: Is It Really Such a Mess?

By Jill Lawrence, 08/2010

It's an impressive record, but it has not been treated that way. Part of the reason is that the journey has been ugly. McConnell and his crew are on track to match their 2007-08 record of forcing 139 cloture votes to end filibusters, while Democrats are taking the usual steps – compromises, cajoling, cringe-worthy deals – to forge onward. Every move by each side is dissected 24/7 by countless armchair analysts on blogs, talk radio and cable TV.

The Senate also suffers from its high-profile failures, especially in contrast with the House. House rules make it far easier for the majority to prevail, and the Democrats – with a 77-vote edge – have been moving at a breakneck pace. Speaker Nancy Pelosi's office lists 345 bills that as of July 9 had passed the House but not the Senate. This week she's calling all 435 House members back from recess to vote on a Senate bill giving strapped states money to help them pay for Medicaid and avoid laying off 300,000 teachers, police officers and firefighters. The House passed a similar bill last December, in plenty of time for school districts to make plans. The Senate finally passed its version Thursday.

— **Others**:

Jonathan Bernstein: On the larger issue, however, I think Darling is generally correct: while the minority uses Senate rules to force supermajority votes, the majority party uses those same rules to manipulate votes as they see fit.

I think generally the notion is sound and consistent with the composition of the Senate that the Senate should empower both relatively narrow interests and large minorities at the expense of simple party majorities.

Written Testimony of Emmet J. Bondurant, Esq. Member, Common Cause National Governing Board(04/22/10): The Senates previous question rule was invoked ten times during that seventeen-year period, from 1789 until 1806, that the rule remained in effect.iv The previous question rule was, however, eliminated in 1806, apparently at the suggestion of former Vice President Aaron Burr.

Sen. Evan Bayh: 'We've got good people trapped in a dysfunctional system'

One of the difficulties in having this conversation is convincing people that this is different than it was 20 years ago, 40 years ago, 50 years ago. People have this sense from high school civics that we built the Senate to be slow, which is to some degree true, but not this true, and

No one ever built the filibuster rule. It just kind of was created.

Aaron Burr.

Was Aaron Burr responsible?

Aaron Burr said you guys should get rid of the motion on the proceeding question, just because it's redundant. They did that, and 30 years later someone recognized that they had just created the filibuster.

Huh.

In his farewell speech after he shot Alexander Hamilton, he said, "You guys are a great body, but your rulebook is messy, you just got to clean it up, here are some suggestions." Next term they did exactly what he told them to do. Then a couple of decades later somebody said, "My God, wait, we can just stop them from moving from the previous question." And once you had that power, nobody could change it, because the minority never wanted to.

How the filibuster was invented

"We all know the Constitution says the House and Senate can make their own rules," explains Binder. "So in 1789, each chamber draws up their own set of rules. And both sets of rules have a previous question motion, which is the motion that the House uses to cut off debate by majority vote."

The "previous question motion" refers to the motion asking whether the body should move to a vote. It's called "previous question" because the language is generally something along the lines of "shall we now move to the main question?"

"In 1805, Aaron Burr has just killed Alexander Hamilton. He comes back to the Senate and gives his farewell address. Burr basically says that you are a great body. You are conscientious and wise, you do not give in to the whims of passion. But your rules are a mess. And he goes through the rulebook pointing out duplicates and things that are unclear."

"Among his suggestions was to drop the previous question motion. And they pretty much just take Burr's advice. And once it's gone, it takes some time for leaders to realize that they can't cut off debate anymore. But the striking part to me was that we say the Senate developed the filibuster to protect minorities and the right to debate. That's hogwash! It's a mistake. Believe me, I would've loved to find the smoking gun where the Senate decides to create a deliberative body. But it takes years before anyone figures out that the filibuster has just been created."

The Filibuster and Its Consequences I also know that current Senate Rules provide the means to break a filibuster. I employed them in 1977 to end the post-cloture filibuster of natural gas deregulation legislation. This was the roughest filibuster I have experienced during my fifty-plus years in the Senate, and it produced the most-bitter feelings..Yet some important new precedents were established in dealing with post-cloture obstruction. In 1987, I successfully used Rules 7 and 8 to make a non-debatable motion to proceed during the morning hour. No leader has attempted this technique since, but this procedure could be and should be used.

Where Are the Judicial Nominations?

Primer: Judicial Nominees and the Senate Filibuster

Q: What's the general process for nominating and confirming such nominees?

While nominees only need a simple majority (51 votes) to win confirmation, the opposition can extend debate on a nominee and force a cloture vote (a vote to end debate). Cloture requires 60 votes (three-fifths of the Senate). Currently, Republicans hold 55 seats in the Senate. So unless the GOP can convince five

Democrats to vote for cloture, for all intents and purposes, the nomination is defeated because it cannot be brought to a formal confirmation vote.

Q: How many of President Bush's nominees have been kept waiting? How many have been confirmed?

The president's nominees to the district court level of the federal system have not been blocked. The conflict has come at the next level, the appeals court level, which is the intermediary step between trial courts and the U.S. Supreme Court. President Bush has had 57 nominees for the U.S. Court of Appeals. Five never received hearings. Of the 52 who did, 42 have been confirmed, but 10 were blocked by Democrats' use of the filibuster to prevent a floor vote. Three of these nominees subsequently withdrew from consideration, but seven others have returned for renomination in the current Congress.

Many Americans are familiar with the hours-long filibuster of Sen. Jefferson Smith in Frank Capra's film Mr. Smith Goes to Washington, but there have been some famous filibusters in the real-life Senate as well. During the 1930s, Sen. Huey P. Long effectively used the filibuster against bills that he thought favored the rich over the poor. The Louisiana senator frustrated his colleagues while entertaining spectators with his recitations of Shakespeare and his reading of recipes for 'pot-likkers.' Long once held the Senate floor for 15 hours. The record for the longest individual speech goes to South Carolina's J. Strom Thurmond, who filibustered for 24 hours and 18 minutes against the Civil Rights Act of 1957.

Nuclear Option

In U.S. politics, the nuclear option allows the United States Senate to reinterpret a procedural rule by invoking the constitutional requirement that the will of the majority be effective. This option allows a simple majority to override precedent and end a filibuster or other delaying tactic. In contrast, the cloture rule requires a supermajority of 60 votes (out of 100) to end a filibuster. The new interpretation becomes effective, both for the immediate circumstance and as a precedent, if it is upheld by a majority vote. Although it is not provided for in the formal rules of the Senate, the nuclear option is the subject of a 1957 parliamentary opinion by Vice President Richard Nixon and was endorsed by the Senate in a series of votes in 1975, some of which were reconsidered shortly thereafter. Senator Trent Lott (R-Miss.) first called the option "nuclear" in March 2003. Proponents since have referred to it as the constitutional option. The maneuver was brought to prominence in 2005 when then-Majority Leader Bill Frist (Republican of Tennessee) threatened its use to end Democratic-led filibusters of judicial nominees submitted by President George W. Bush. In response to this threat, Democrats threatened to shut down the Senate and prevent consideration of all routine and legislative Senate business. The ultimate confrontation was prevented by the Gang of 14, a group of seven Democratic and seven Republican Senators, all of whom agreed to oppose the nuclear option and oppose filibusters of judicial nominees, except in extraordinary circumstances.

How to end the filibuster with 51 votes

The constitutional option gets its name from Article I, Section V of the Constitution, which states that "Each House may determine the Rules of its

Proceedings." In order to fulfill this constitutional order, the Senate must be able to, well, determine its rules. A filibuster, technically, is a way to stop the Senate from determining something by refusing to allow it to move to a vote. Because stopping the Senate from considering its own rules would be unconstitutional, the chair can rule against the filibuster, and the Senate could then move to change its rules on a majority vote.

One caveat: Many people, including Udall himself, believe this has to happen at the beginning of a new Congress. If it doesn't happen at the beginning of a new Congress, then Congress is considered to have acquiesced to the previous Congress's rules, and a filibuster against further rule changes wouldn't interrupt the constitutional right to determine the rules.

Martin Gold recounted Nixon's argument in a 2004 article for the Harvard Law Review: "Nixon reasoned that because no Senate could deny a future Senate the ability to exercise a constitutional right, and because Rule XXII, paragraph three [the filibuster] "in practice" prevented a majority of Senators from adopting new rules, Rule XXII, paragraph three, was unconstitutional," at least when it came to blocking consideration of new rules. Byrd was even pithier: "This Congress is not obliged to be bound by the dead hand of the past," he said.

A reconciliation primer

The very short version is that the budget reconciliation process – which limits debate and thus defuses the filibuster – was created in the Balanced Budget Act of 1974. It was later modified by the Byrd rule, which confined it to provisions that directly affect federal spending. That constraint is what makes reconciliation complicated

Political scientist Joshua Tucker looked at the 19 times reconciliation was used between 1981 and 2005, and found that 14 of them were Republican initiatives. If you extend that analysis out to 2008, then 16 of 21 reconciliation bills were Republican.

First, reconciliation has been used for major legislation almost constantly, particularly on health-care reform. An NPR analysis concluded that "over the past three decades, the number of major health financing measures that were not passed via budget reconciliation can be counted on one hand."

In fact, if you named a recent legislative accomplishment at random, you'd probably find it went through reconciliation. Both Bush tax cuts, at a total cost of $1.8 trillion, used the reconciliation process. So did welfare reform, and the Balanced Budget Acta of 1995 and 1997. The Children's Health Insurance Program was created in reconciliation, and so too was COBRA. The law stating that hospitals who take Medicare and Medicaid money have to see all patients who walk into their emergency room was also passed in reconciliation, as was the 1983 tax increase that reversed many of the Kemp-Roth tax cuts.

Second, Democrats are not proposing to create the health-care reform bill in reconciliation. Rather, they're using the process for a much more limited purpose: passing the 11 pages of modifications that President Obama proposed to reconcile the House and Senate bills with each other. This is not a particularly ambitious use of the reconciliation process, and it's certainly not unprecedented.

Republicans are arguing otherwise, of course, but the record belies their rhetoric.

Health Care No Stranger To Reconciliation Process

But health care and reconciliation actually have a lengthy history. "In fact, the way in which virtually all of health reform, with very, very limited exceptions, has happened over the past 30 years has been the reconciliation process," says Sara Rosenbaum, who chairs the Department of Health Policy at George Washington University.

The 50-Vote Senate

The reconciliation process, by contrast, limits debate to 20 hours and bypasses the filibuster altogether. It was instituted to ensure that minority obstruction couldn't block important business like passing a budget or reducing the deficit.(...)Rather than being used to reconcile the budget or reduce the deficit, it was being used to short-circuit the filibuster If you want to know why we do not today have a 50-vote Senate, the Byrd rule is the reason. The Byrd rule imposes a set of sharp constraints on the reconciliation process, limiting what is considered appropriate for reconciliation. The basic theory of the Byrd rule is that any legislation considered under the budget reconciliation process should principally affect federal revenues. A tax cut, for instance, can be considered under the reconciliation process. A new federal holiday cannot. But between those two examples sit crucial ambiguities.

The Byrd rule states that legislation is unfit for reconciliation if it "produce[s] changes in outlays or revenue which are merely incidental to the non-budgetary components of the provision." I asked Jim Horney, a budget expert at the Center for Budget and Policy Priorities, how you define "merely incidental." And what, exactly, is a "provision"?

9 Glossary

Motion - A motion is a formal proposal that a procedural action be taken: for example, a motion to consider a measure, to amend a bill, to lay a bill on the table, to recess, to adjourn, etc.). Usually a motion is offered by a Member when s/he is formally recognized by the chair. The circumstances in which various motions may be offered depend on House and Senate rules. For example, a motion to adjourn or to lay a measure on the table is not permitted in the Committee of the Whole, only in the full House. Normally a motion becomes operative when the House or Senate agrees to it by vote or by unanimous consent. However, by previous agreement, the House or Senate may decide in advance (by unanimous consent in the House or Senate, or by adoption of a special rule in the House) that a motion will automatically take effect at a certain stage of the proceedings.

Dilatory tactics - Dilatory tactics are procedural moves used to prevent or delay action on the floor of either house of Congress or in committee. Examples are a Member speaking indefinitely, as Senate rules permit, offering numerous motions and amendments, demanding quorum calls and recorded votes re-

peatedly, making constant parliamentary inquiries, and making points of order without cause. Senate rules allow the liberal use of dilatory tactics (especially filibusters), while House rules discourage them, allowing the Speaker to decide whether a motion is dilatory. The Speaker of the House may not prevent a Member from exercising his or her constitutional right to demand a rollcall vote on a question the House has been considering.

bills - A bill is the most common form of legislation; it proposes to create a new act or to amend or repeal existing law. Bills may be either public or private. They have a prefix of "H.R." when introduced in the House, or "S." when introduced in the Senate, followed by a number assigned sequentially as bills are introduced during a two-year Congress. Most legislative proposals are in the form of bills, and may deal with either domestic or foreign issues. Authorizations (establishing federal programs and agencies) and appropriations (actually providing the money for these programs and agencies) are both in the form of bills. A bill becomes law when passed with identical language by both houses of Congress and signed by the President, when passed over his veto, of if the President fails to sign it within 10 days after receiving it while Congress is in session.

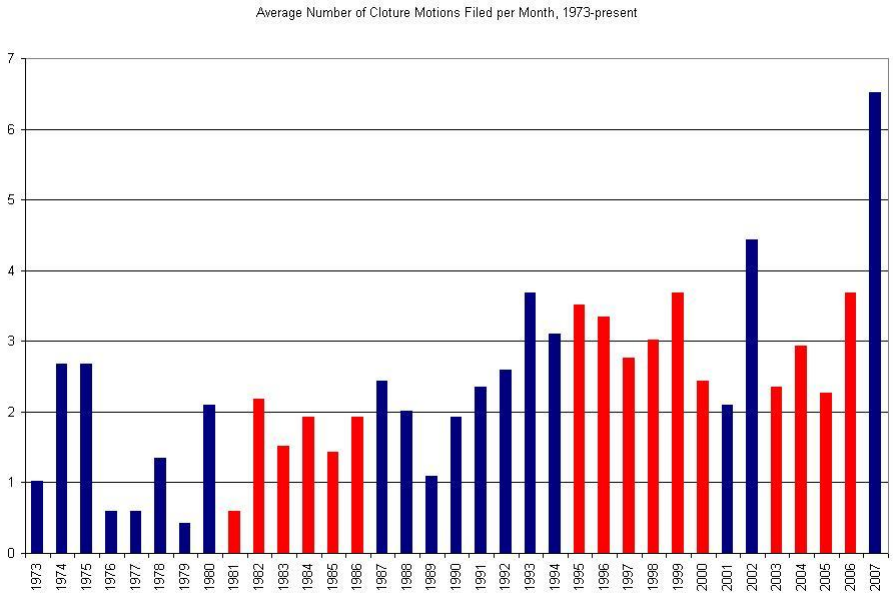
germane - On the subject of the pending bill or other business; a strict standard of relevance.

recognize - The Chair permits a Senator to speak by recognizing him or her; the Senator then "has the floor." When time is controlled, a Senator must have time yielded to him or her before he or she can be recognized.

filibuster - Informal term for any attempt to block or delay Senate action on a bill or other matter by debating it at length, by offering numerous procedural motions, or by any other delaying or obstructive actions.

cloture - The only procedure by which the Senate can vote to place a time limit on consideration of a bill or other matter, and thereby overcome a filibuster. Under the cloture rule (Rule XXII), the Senate may limit consideration of a pending matter to 30 additional hours, but only by vote of three-fifths of the full Senate, normally 60 votes.

motion to proceed to consider - A motion, usually offered by the Majority Leader to bring a bill or other measure up for consideration. The usual way of bringing a measure to the floor when unanimous consent to do so cannot be obtained. For legislative business, the motion is debatable under most circumstances, and therefore may be subject to filibuster.


Average Number of Cloture Motions Filed per Month, 1973-present
0
1
2
3
4
5
6
7
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
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1991
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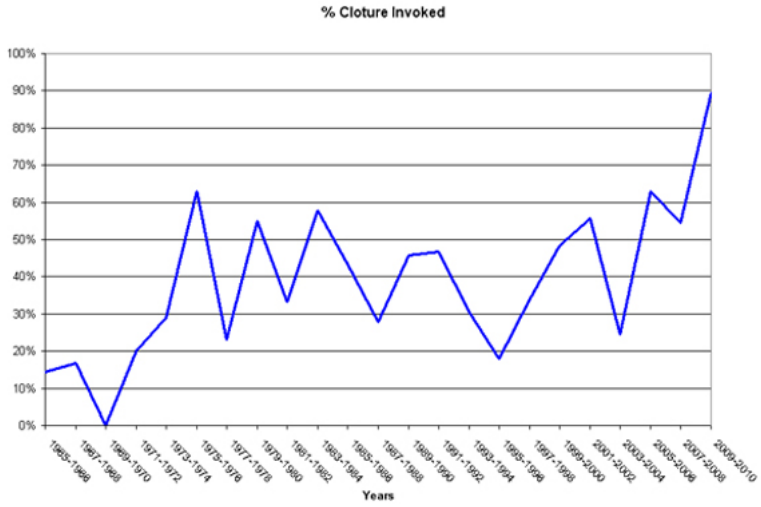
2006
2007

10 Graphs


% Cloture Invoked
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
1965-1966
1967-1968
1969-1970
1971-1972
1973-1974
1975-1976
1977-1978
1979-1980
1981-1982
1983-1984
1985-1986
1987-1988
1989-1990
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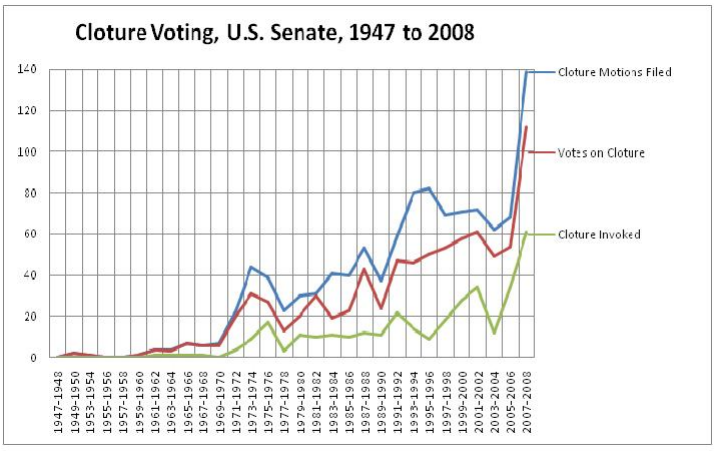
2001-2002
2003-2004
2005-2006
2007-2008
2009-2010
Years


Cloture Voting, U.S. Senate, 1947 to 2008
140
120
100
80
60
40
20
0
Cloture Motions Filed
Votes on Cloture
Cloture Invoked
1947-1948
1949-1950
1951-1952
1953-1954
1955-1956
1957-1958
1959-1960
1961-1962
1963-1964
1965-1966
1967-1968
1969-1970
1971-1972
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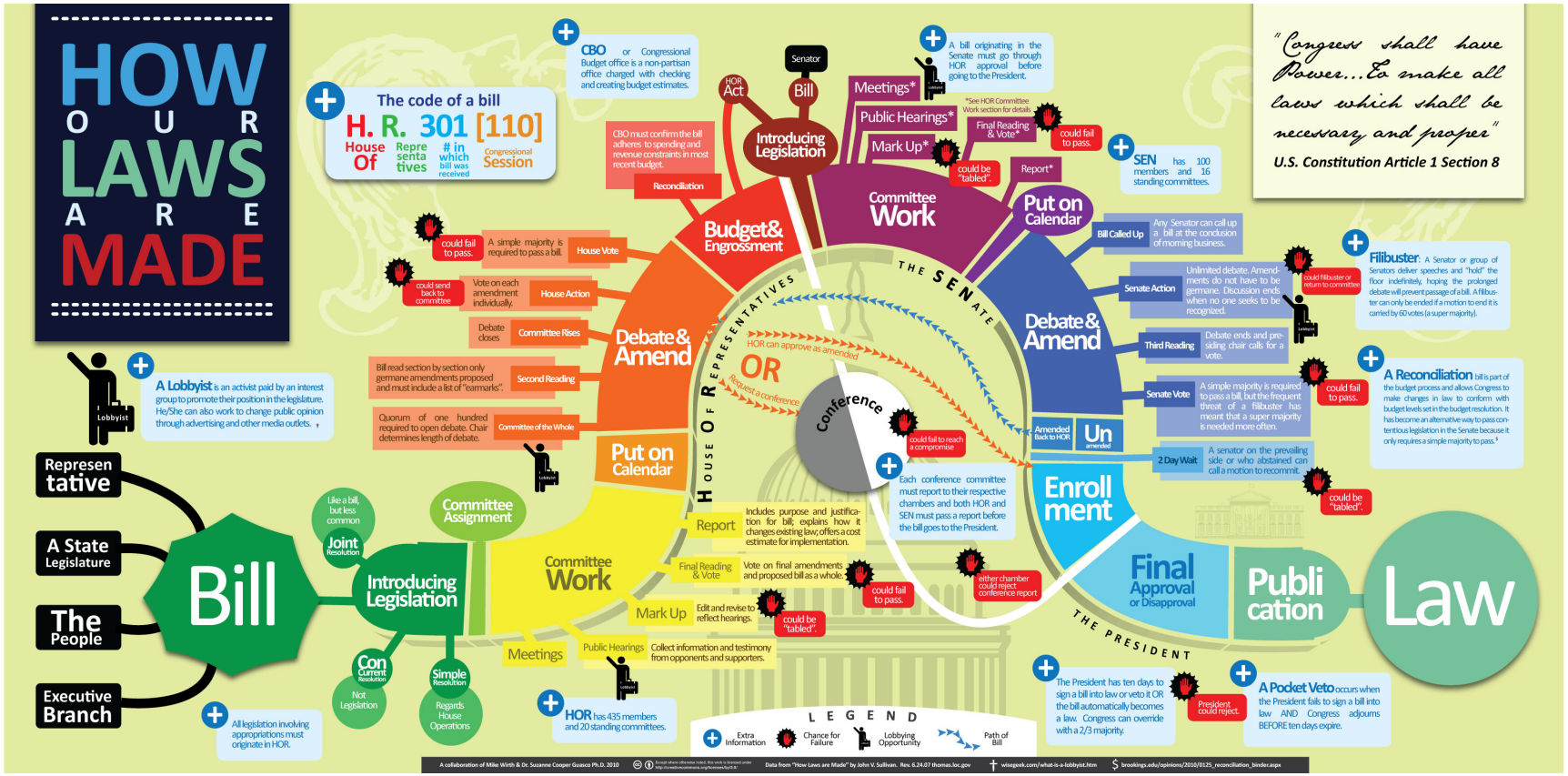
2001-2002
2003-2004
2005-2006
2007-2008


HOW OUR LAWS ARE MADE
"Congress shall have Power...To make all laws which shall be necessary and proper"
U.S. Constitution Article 1 Section 8
The code of a bill
H. R. 301 [110]
House Of
Representatives
in which bill was received
Congressional Session
CBO or Congressional Budget office is a non-partisan office charged with checking and creating budget estimates.
CBO must confirm the bill adheres to spending and revenue constraints in most recent budget.
Reconciliation
Senator
Bill
HOR Act
Introducing Legislation
Budget& Engrossment
Committee Work
Put on Calendar
Debate & Amend
A bill originating in the Senate must go through HOR approval before going to the President.
Meetings*
Public Hearings*
Mark Up*
Final Reading & Vote*
Report*
*See HOR Committee Work section for details
could fail to pass.
could be "tabled".
SEN has 100 members and 16 standing committees.
Bill Called Up
Any Senator can call up a bill at the conclusion of morning business.
Senate Action
Unlimited debate. Amendments do not have to be germane. Discussion ends when no one seeks to be recognized.
could filibuster or return to committee
Filibuster: A Senator or group of Senators deliver speeches and "hold" the floor indefinitely, hoping the prolonged debate will prevent passage of a bill. A filibuster can only be ended if a motion to end it is carried by 60 votes (a super majority).
Third Reading
Debate ends and presiding chair calls for a vote.
Senate Vote
A simple majority is required to pass a bill, but the frequent threat of a filibuster has meant that a super majority is needed more often.
could fail to pass.
A Reconciliation bill is part of the budget process and allows Congress to make changes in law to conform with budget levels set in the budget resolution. It has become an alternative way to pass contentious legislation in the Senate because it only requires a simple majority to pass.
Amended Back to HOR
Un amended
2 Day Wait
A senator on the prevailing side or who abstained can call a motion to recommit.
could be "tabled".
THE SENATE
HOUSE OF REPRESENTATIVES
HOR can approve as amended
OR
Request a conference
Conference
could fail to reach a compromise
Each conference committee must report to their respective chambers and both HOR and SEN must pass a report before the bill goes to the President.
either chamber could reject conference report
Enrollment
Final Approval or Disapproval
Publication
Law
THE PRESIDENT
The President has ten days to sign a bill into law or veto it OR the bill automatically becomes a law. Congress can override with a 2/3 majority.
President could reject.
A Pocket Veto occurs when the President fails to sign a bill into law AND Congress adjourns BEFORE ten days expire.
Lobbyist
A Lobbyist is an activist paid by an interest group to promote their position in the legislature. He/She can also work to change public opinion through advertising and other media outlets.
Representative
A State Legislature
The People
Executive Branch
Bill
All legislation involving appropriations must originate in HOR.
Introducing Legislation
Like a bill, but less common
Joint Resolution
Committee Assignment
Committee Work
Report
Includes purpose and justification for bill; explains how it changes existing law; offers a cost estimate for implementation.
Final Reading & Vote
Vote on final amendments and proposed bill as a whole.
could fail to pass.
Mark Up
Edit and revise to reflect hearings.
could be "tabled".
Meetings
Public Hearings
Collect information and testimony from opponents and supporters.
HOR has 435 members and 20 standing committees.
Con Current Resolution
Not Legislation
Simple Resolution
Regards House Operations
could fail to pass.
A simple majority is required to pass a bill.
House Vote
could send back to committee
Vote on each amendment individually.
House Action
Debate closes
Committee Rises
Bill read section by section only germane amendments proposed and must include a list of "earmarks".
Second Reading
Quorum of one hundred required to open debate. Chair determines length of debate.
Committee of the Whole
LEGEND
Extra Information
Chance for Failure
Lobbying Opportunity
Path of Bill
A collaboration of Mike Wirth & Dr. Suzanne Cooper Guasco Ph.D. 2010
Data from "How Laws are Made" by John V. Sullivan. Rev. 6.24.07 thomas.loc.gov
wisegeek.com/what-is-a-lobbyist.htm
brookings.edu/opinions/2010/0125_reconciliation_binder.aspx