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## The Future of Limitless Debate: The Filibuster in the 113th Congress

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# THE FUTURE OF LIMITLESS DEBATE: THE FILIBUSTER IN THE 113TH CONGRESS

MARK KOGAN\*

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## INTRODUCTION

Human cloning, the caning of teen vandals, and the belief that aliens descend from space to abduct humans and livestock all hold something in common: they are more popular than Congress.<sup>1</sup> With the 112th Congress bottoming out at a record-low 9% approval rating, it is clear that Americans are deeply unsatisfied with the gridlock gripping Washington.<sup>2</sup> While it is popular, and even easy, to lambaste Republicans for blanket obstructionism and to condemn Democrats for failure to stand up to minority bullying, collective blame shifting will not breach the dam of a hyper-partisan Congress.<sup>3</sup> Instead, individuals hoping to get Congress moving again must look for small changes to procedure that will result in large outcomes in terms of party comity and legislative efficiency. Underlying the partisan gridlock has been the growing use and abuse of the filibuster, a Senate procedural anomaly that allows even a single senator to bring legislation to an indefinite halt.<sup>4</sup>

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\* J.D. *cum laude*, American University Washington College of Law, 2012. B.A. with Honors Stanford University, 2009. I would like to extend my heartfelt thanks to Professor William Yeomans, without whom my interest in Senate procedural rules would never have been born and this piece would have never come into existence.

<sup>1</sup> See Rosalind Helderman & Peyton Craighill, *Congress Less Popular Than, Well, So Many Things*, THE WASHINGTON POST, Dec. 2, 2011, [http://www.washingtonpost.com/lifestyle/style/whats-congress-less-popular-than-among-other-things-human-cloning/2011/08/09/gIQAzM26L\\_story.html](http://www.washingtonpost.com/lifestyle/style/whats-congress-less-popular-than-among-other-things-human-cloning/2011/08/09/gIQAzM26L_story.html); Lucy Madison, *Congressional Approval at All-Time Low of 9%, According to New CBS News/ New York Times Poll*, CBS NEWS, Dec. 2, 2011, [http://www.cbsnews.com/8301-503544\\_162-20125482-503544/congressional-approval-at-all-time-low-of-9-according-to-new-cbs-news-new-york-times-poll/?tag=cbsnewsMainColumnArea](http://www.cbsnews.com/8301-503544_162-20125482-503544/congressional-approval-at-all-time-low-of-9-according-to-new-cbs-news-new-york-times-poll/?tag=cbsnewsMainColumnArea) (showing that congressional approval ratings dropped into the single digits for the first time in the history of the CBS/New York Times poll).

<sup>2</sup> Madison, *supra* note 1.

<sup>3</sup> E.g., Ari Berman, *GOP Obstructionism Reaches New Heights*, THE NATION (June 1, 2011, 12:26 PM), <http://www.thenation.com/blog/161059/gop-obstructionism-reaches-new-heights>.

<sup>4</sup> See MARTIN GOLD, *SENATE PROCEDURE AND PRACTICE* 49 (2nd ed. 2008).

At the start of the 112th Congress, all returning Democratic senators signed a letter to Senate Majority Leader Harry Reid urging filibuster reform.<sup>5</sup> However, reforms failed to materialize and the obstructionism continued just as adamantly as before.<sup>6</sup> As the 113th Congress is elected and prepares to head to Washington in January 2013, it must look to directly address the threat of filibuster abuse or risk continued legislative obstructionism and political polarization.

This Article will examine the potential avenues for reform in the 113th Congress by exploring the efficacy of several options for filibuster reform and determine whether the incoming Congress would realistically enact them. Part II of this Article will look at the evolution of the filibuster as a tool for delay and obstruction in the Senate and examine the modern day problems of continued growth in filibuster threats and use. Parts III and IV will propose and examine calls for reform, both in the form of hard rule reform as well as soft compromises. Finally, Part V will present a determination and conclusion addressing the potential for legislative procedural reform that can be enacted in the immediate future.

## I. THE FILIBUSTER

### HISTORY AND EVOLUTION

Senate decorum and procedure are governed by the Senate Rules, a set of rules agreed upon at the beginning of each new Congress.<sup>7</sup> The filibuster came into existence more as an accidental effect of procedural rulemaking than through deliberate planning.<sup>8</sup> In 1789, the first Senate adopted rules allowing the Senate “to move the previous question” which would end debate on a particular issue and allow it to proceed to a vote.<sup>9</sup> Some senators argued that the rule was unnecessary and

<sup>5</sup> Dan Friedman, *Senate’s Returning Democrats Unanimously Favor Filibuster Reform*, NATIONAL JOURNAL (Nov. 30, 2011, 5:07 PM), <http://www.nationaljournal.com/congress/senate-s-returning-democrats-unanimously-favor-filibuster-reform-20101222>.

<sup>6</sup> Manu Raju, *Filibuster Reform Goes Bust*, POLITICO, Jan. 28, 2011, <http://www.politico.com/news/stories/0111/48325.html>.

<sup>7</sup> See STANDING RULES OF THE SENATE (2011); see also Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate to Restore Accountability and Reduce Gridlock*, 5 HARV. J.L. & PUB. POL’Y 115, 116-17 (2011) (discussing the process of establishing and amending the Senate Rules); U.S.CONST. art. I, § 5 (“Each House may determine the Rules of its Proceedings.”). These rules are most often carried over, leading to some contentions that the rules are “continuous” and not newly adopted. See *infra* Part IV.

<sup>8</sup> This paper will focus on the “modern” use of the filibuster. The scholarship surrounding the history of the filibuster is impressive in its breadth. See generally Josh Chafetz & Michael J. Gerhardt, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. 245 (2010) (examining the modern filibuster in comparison to past versions and uses of the filibuster); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187-93 (1997) (discussing the formational history of the filibuster in the 18th and 19th centuries); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004) (laying out the evolution of the filibuster from creation through the present).

<sup>9</sup> See GOLD, *supra* note 4, at 48 (stating the rules of the U.S. Senate).

pushed for its elimination.<sup>10</sup> In 1806, the Senate agreed and repealed the motion to move the previous question, thereby creating the potential for a filibuster to occur because there was no longer a mechanism that could formally end debate.<sup>11</sup> While the filibuster was rarely used in its infancy, several prominent senators of the early 19th century recognized the potential for problems and pushed to enact restrictions on debate.<sup>12</sup> Ultimately, their efforts failed to establish concrete rules.<sup>13</sup>

In 1917, the Senate adopted the first formalized restrictions on the filibuster in the form of a rule allowing senators to call for the cloture of debate.<sup>14</sup> This rule came in response to a successful filibuster by twelve senators that blocked President Woodrow Wilson's immensely popular efforts to arm merchant ships against German U-Boat attacks during World War I.<sup>15</sup> To prevent the future derailment of popular policy by unrestricted filibuster, the Senate invoked the precursor to the modern Senate Rule XXII, a cloture vote which could, with the assent of two-thirds of members, end debate and move a measure to a vote.<sup>16</sup>

#### A. THE FILIBUSTER TODAY: PRACTICE AND PROBLEMS

Rule XXII evolved a great deal throughout the 20th century, with shifting restrictions and vote requirements.<sup>17</sup> The modern version requires a three-fifths majority to invoke cloture, a process that itself takes several Senate business days to complete.<sup>18</sup> To bring a cloture motion, a senator must first find fifteen additional signatories and submit a motion to invoke cloture to the Presiding Officer of the Senate.<sup>19</sup> This motion then matures for a full calendar day before it is brought to a vote.<sup>20</sup> If the cloture motion wins a three-fifths majority — 60 senators — then cloture is invoked.<sup>21</sup> However, invoking cloture does not bring an immediate end to debate; the filibustering senator(s) are allowed thirty more hours of debate before they must cease, and only then is a

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<sup>10</sup> *Id.* at 49.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* (detailing plans proposed by multiple senators to either re-adopt the motion to move the previous question or adopt new, stricter time limits on debate).

<sup>13</sup> *Id.*

<sup>14</sup> *See Fisk, supra* note 8, at 196 (discussing the evolution of filibusters that caused the implementation of the cloture rule).

<sup>15</sup> *Id.* *See also* Thomas W. Ryley, *A LITTLE GROUP OF WILLFUL MEN* (1975) (telling the story of the opposition to President Wilson's proposal and the political drama that unfolded).

<sup>16</sup> *See* 55 CONG. REC. 45 (1917) (cataloguing the debate over implementation of Rule XXII).

<sup>17</sup> *See Fisk, supra* note 8, at 199-210 (discussing the evolution of the filibuster from 1930 to present, including decreases in vote totals required for cloture invocation and the implementation of the "two track" system which allowed to Senate to conduct other business during a filibuster); Gold, *supra* note 8, at 216-18 (describing the early filibusters of the last 19th century).

<sup>18</sup> *See* STANDING RULES OF THE SENATE, R. XXII (2) (2011).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

filibuster truly broken, allowing the measure to move along to its next procedural obligation.<sup>22</sup>

The exercise of a filibuster is relatively straightforward. At any point in time, a senator can invoke the long-standing Senate tradition of unlimited debate merely by choosing to exercise it. This effectively delays a measure until the filibuster has ended, either voluntarily or by the invocation of cloture.<sup>23</sup> A senator can engage in a filibuster on any particular motion, such as a motion to bring a bill up for debate or the motion to proceed to a vote, effectively allowing themselves multiple bites at the apple. This gives senators the opportunity to filibuster a piece of legislation several times in its path through the Senate, costing precious time and grinding progress to a halt.<sup>24</sup>

The filibuster, in its present form, is no longer “part of an age-old and inviolate Senate tradition of unlimited debate.”<sup>25</sup> Rather, it has been transformed into an “everyday partisan tool used simply to delay – or worse, as a minority veto.”<sup>26</sup> Filibuster threats have spiked exponentially over the last decade. The 110th Congress experienced a record 139 motions to invoke cloture filed.<sup>27</sup> This trend continued in the 111th Congress, with the filing of 136 motions to invoke cloture.<sup>28</sup> Unsurprisingly, no bill passed the 111th Congress without a full sixty-vote majority in the Senate.<sup>29</sup> Moreover, many bills that had full sixty-vote support failed to pass due to the scarcity of available floor time caused by the constant invocation of cloture.<sup>30</sup> The threat of filibusters has stayed constant in the 112th Congress, with eighty motions to invoke cloture filed through the end of March 2012, roughly halfway through the session.<sup>31</sup> As a comparison, only twenty cloture motions were filed between 1950 and 1969.<sup>32</sup>

In this era of entrenched partisanship, the filibuster has evolved into a tool of pure obstruction rather than nuanced dissent. As in times past, it appears that the filibuster is due for another round of reforms. The primary question now becomes – will these reforms be accomplished?

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at R. XIX (“No Senator shall interrupt another Senator in debate without his consent.”).

<sup>24</sup> See RICHARD BETH & STANLEY BACH, CONG. RESEARCH SERV. RL 30360, FILIBUSTERS AND CLOTURE IN THE SENATE 20 (2003) (showing that a typical cloture invocation takes 15 calendar days to realize).

<sup>25</sup> See Fisk, *supra* note 8, at 185 (explaining the function of the modern filibuster).

<sup>26</sup> See Udall, *supra* note 7, at 118 (providing the opinion of the one hundred current senators).

<sup>27</sup> *Id.* at 121.

<sup>28</sup> Brian Beutler, *111th Senate Breaks a Filibuster Record*, TALKING POINTS MEMO (Nov. 30, 2011, 5:00 PM), <http://tpmdc.talkingpointsmemo.com/2010/12/111th-senate-breaks-one-filibuster-record.php>.

<sup>29</sup> Jonathan Bernstein, *Six Key Filibuster Facts for the 112th Congress*, THE NEW REPUBLIC (Nov. 30, 2011, 5:06 PM), <http://www.tnr.com/blog/jonathan-cohn/80760/six-key-filibuster-facts-the-112th-congress>.

<sup>30</sup> *Id.*

<sup>31</sup> UNITED STATES SENATE, CLOTURE MOTIONS – 112<sup>th</sup> CONGRESS, (Jan. 5, 2011–March 30, 2012), available at [http://www.senate.gov/pagelayout/reference/cloture\\_motions/112.shtml](http://www.senate.gov/pagelayout/reference/cloture_motions/112.shtml).

<sup>32</sup> See Tom Harkin, *Fixing the Filibuster: Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 68 (2010).

## II. HARD REFORMS

The filibuster is uniquely positioned within a body of rules that are both completely flexible yet stubbornly tenacious.<sup>33</sup> While the filibuster has undergone a number of changes over the years, both Republicans and Democrats have vigorously defended its existence.<sup>34</sup> Therefore, the filibuster is unlikely to go away in its entirety. As such, proposals for reform must be pragmatic, both in their effect on filibuster abuse and their likelihood of being enacted in the current political climate. This Article will now examine three possibilities for hard rule reform, and several options for soft reform, to determine their potential for enactment and efficacy in fixing the rampant filibuster abuse of the last decade.

### A. THE “NUCLEAR” OPTION

The “nuclear” option is as extreme as it sounds, effectively ending the existence of the filibuster by a simple majority vote at the beginning of a new Congress.<sup>35</sup> This option refers to the procedure by which a simple majority is able to change the rules before the rules are “re-enacted” at the beginning of a new Congress.<sup>36</sup> Such an approach would circumvent the filibuster because no rules technically exist until the Senate re-enacts the old rules.<sup>37</sup> This rule change would not necessarily eliminate the filibuster. The exercise of the “nuclear option” could

<sup>33</sup> See U.S.CONST. art. I, § 5 (giving full control over procedural rules to the respective houses of Congress); see also *STANDING RULES OF THE SENATE*, R.V (2011) (“The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”).

<sup>34</sup> See Fisk, *supra* note 8 at 185-209 (describing the evolution of the filibuster from 1790 to present); compare Manu Raju, *McConnell Defends the Filibuster*, POLITICO (Dec. 1, 2011, 12:14 PM), <http://www.politico.com/news/stories/0810/40694.html> (quoting current Senate Minority Leader Mitch McConnell as supporting the use of the filibuster to protect minority rights), with Jesse Holland, *Reid Defends Filibusters Over Judicial Nominees*, ATHENS BANNER-HERALD, Apr. 10, 2005, [http://onlineathens.com/stories/041005/new\\_20050410070.shtml](http://onlineathens.com/stories/041005/new_20050410070.shtml) (quoting then Senate Minority Leader Harry Reid defending the use of the filibuster to uniformly block 10 Republican judicial nominees).

<sup>35</sup> See William Safire, *Nuclear Options*, N.Y. TIMES, March 20, 2005, available at [http://www.nytimes.com/2005/03/20/magazine/20ONLANGUAGE.html?\\_r=1](http://www.nytimes.com/2005/03/20/magazine/20ONLANGUAGE.html?_r=1) (describing the origin of the term “nuclear option” in March 2003). Proponents of the approach often refer to it as the “constitutional option.” See generally Gold, *supra* note 8.

<sup>36</sup> The “nuclear” option can legally be invoked at any point and is not limited exclusively to the beginning of a new Congress. See Gold, *supra* note 8, at 260-62 (giving an example of how the nuclear option can be invoked during a session of the Senate). For purposes of this paper, the focus of an invocation of the nuclear option will be limited to the beginning of a new Congress as that is the most likely time such a measure could see enactment due to the political and partisan implications of exercising the nuclear option mid-session. See, e.g., *id.* at 260-69 (giving examples of procedural fights similar to the invocation of the nuclear option but never quite reaching full implementation).

<sup>37</sup> See Udall, *supra* note 7, at 130-32 (describing the procedure and legal justification in carrying out reform under the nuclear option); see generally Gold, *supra* note 8 (explaining the exercise of the nuclear option and noting that while the “nuclear” option can also be exercised at any point during a Senate session, pursuing that course of action engages a more complex set of procedures that would result in the same outcome).

implement *any* reform, as it would merely give power to the majority to dictate new rules. This proposal is contentious for two reasons. First, its use would likely result in unilateral, single-party changes to long-standing Senate procedure. Second, there is still great disagreement amongst both scholars and senators over the option's legality.

Individual senators stand for election on a rolling basis, meaning that, with the exception of special elections and vacancies, only one-third of the Senate is ever up for election at a given time.<sup>38</sup> Thus, many argue that the Senate is a "continuing body" that is never truly "new" due to the automatic retention of two-thirds of its members every election cycle.<sup>39</sup> Combining this "continuing body" theory with the language of Senate Rule V, which states that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules,"<sup>40</sup> creates the argument that any proposed change to the filibuster rules could itself be filibustered because the filibuster is still inherent in the "continued" rules.<sup>41</sup>

Many proponents of the nuclear option disagree with the "continuing body" theory on the grounds that the binding nature of the theory is unconstitutional entrenchment.<sup>42</sup> Opponents of the "continuing body" theory, among them Senator Tom Udall (D-NM), argue that the language of the Constitution makes clear that the rules can be changed by a simple majority.<sup>43</sup> Senator Udall points to the language of Article I, Section 5 of the Constitution as evidence that the explicit language pre-empts any argument that a super-majority is required to change the Senate Rules.<sup>44</sup> Article I, Section 5 states that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly

<sup>38</sup> In 2012, twenty-two Democrats (six retiring), ten Republicans (three retiring), and two Independents (one retiring) are up for re-election as of April 2012. The senators up for re-election are Sen. Brown (D-OH), Sen. Manchin (D-WV), Sen. Cantwell (D-WA), Sen. Cardin (D-MD), Sen. Carper (D-DE), Sen. Casey (D-PA), Sen. Feinstein (D-CA), Sen. Gillibrand (D-NY), Sen. Klobuchar (D-MN), Sen. McCaskill (D-MO), Sen. Menendez (D-NJ), Sen. Nelson (D-FL), Sen. Stabenow (D-MI), Sen. Tester, (D-MT), Sen. Whitehouse (D-RI), Sen. Brown (R-MA), Sen. Barrasso (R-WY), Sen. Corker (R-TN), Sen. Heller (R-NV), Sen. Hatch (R-UT), Sen. Lugar (R-IN), Sen. Wicker (R-MI), Sen. Sanders (I-VT). The senators that are retiring in 2012 are Sen. Akaka (D-HI), Sen. Bingaman (D-NM), Sen. Conrad (D-ND), Sen. Kohl (D-WI), Sen. Nelson (D-NE), Sen. Webb (D-VA), Sen. Hutchison (R-TX), Sen. Kyl (R-AZ), Sen. Snowe (R-ME), and Sen. Lieberman (I-CT).

<sup>39</sup> See Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401, 1404-06 (2010) (describing the "continuing" nature of the Senate's election timing and discussing the legal implications).

<sup>40</sup> STANDING RULES OF THE SENATE, R.V (2011).

<sup>41</sup> See Udall, *supra* note 7 at 125-26 (explaining the problems of entrenchment caused by this interpretation of the rules).

<sup>42</sup> See, e.g., Udall, *supra* note 7; Bruhl, *supra* note 39; Orrin Hatch, *Crisis Mode: A Fair and Constitutional Option to Beat the Filibuster Game*, NATIONAL REVIEW ONLINE (Dec 1, 2011, 6:18 PM), <http://old.national-review.com/comment/hatch200501120729.asp> (arguing that the "continuing body" language was only added in 1959 and therefore could not be considered binding on all past and future Congresses).

<sup>43</sup> See Udall, *supra* note 7 at 127-28.

<sup>44</sup> *Id.*

Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>45</sup> Senator Udall contends that because expulsion explicitly requires a two-thirds majority, while the rules are simply to be “determined,” one cannot impute anything more than a simple majority requirement onto the creation and adjustment of the Senate rules.<sup>46</sup> To hold otherwise, argues Senator Udall, is to effectively allow one Congress to bind all future Congresses to a new way in which to amend the rules, contrary to the express language of the Constitution.<sup>47</sup>

The Supreme Court, to the extent it has addressed the issue, seemingly agrees with Senator Udall.<sup>48</sup> In determining whether a Congress can bind future Congresses, the Supreme Court has stated that “each subsequent legislature has equal power to legislate upon the same subject,”<sup>49</sup> and that “[e]very succeeding legislature possesses the same jurisdiction and power . . . as its predecessors. The latter [must] have the same power of repeal and modification which the former had of enactment, neither more nor less.”<sup>50</sup> Numerous legal scholars have cast their voices in support of the aged, but unchallenged Supreme Court precedent.<sup>51</sup> Many have testified to Congress that to allow rule changes seeking to address the filibuster to be filibustered is unconstitutional entrenchment of the first order.<sup>52</sup>

However, even assuming *arguendo* that the Senate could change the rules and eliminate the filibuster by a simple majority vote, the likelihood of such an action is low. As much as they may decry it, senators from both major parties understand that the threat of filibuster and obstruction is one of the few powers possessed by the minority to oppose the legislative agenda of the majority.<sup>53</sup> Eliminating or handicapping the filibuster would be pleasant for the party in power only as long as it retains power. However, as soon as the power balance shifts, the legislative agenda will shift with it, likely undoing much of the opposing party’s legislative accomplishments and emboldening a par-

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<sup>45</sup> U.S. CONST. art. I, § 5.

<sup>46</sup> See Udall, *supra* note 7, at 127.

<sup>47</sup> *Id.*

<sup>48</sup> See Udall, *supra* note 7, at 128 (summarizing Supreme Court cases addressing the issue of legislative entrenchment); see also *Connecticut Mut. Life Ins. Co. v. Sprately*, 172 U.S. 602 (1899) (stating that a legislature must retain the right to update its laws and cannot be bound by the acts of past legislatures); *Newton v. Mahonin Cnty. Comm’rs*, 100 U.S. 548 (1879) (holding that a legislative act that “permanently established” a new position could not be read as permanent as it would unconstitutionally bind future legislatures).

<sup>49</sup> *Connecticut Mut. Life Ins. Co.*, 172 U.S. at 621.

<sup>50</sup> *Newton*, 100 U.S. at 559.

<sup>51</sup> See *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 108th Cong. 31-33 (2003).

<sup>52</sup> See *id.*

<sup>53</sup> See Mimi Marziani, *FILIBUSTER ABUSE 5-7* (Brennan Center for Justice 2010) (explaining how the modern filibuster creates a sixty vote Senate).

tisan agenda devoid of compromise. Considering the unprecedented partisanship and obstructionism exhibited by recent Congresses, coupled with the heightened party rancor during this election year, it is possible that if the Senate shifts party control in 2012, the Republicans would invoke the nuclear option to change the filibuster.<sup>54</sup>

It is unlikely that the Republicans would seek complete elimination, especially if President Obama were to win re-election, but it would be reasonable to expect them to change the filibuster and limit its effectiveness. Full-fledged elimination of the filibuster would be disastrous, as it would catalyze the partisan vitriol that has been building over the last decade by enabling one side to slam through its legislative agenda in an effort to entrench as much legislation as possible before losing control. This “alternate domination of one faction over another, sharpened by the spirit of revenge” is an evil that was warned against as far back as George Washington’s farewell address.<sup>55</sup>

For example, if Republicans retake the Senate in the 2012 election and succeed in a nuclear elimination of the filibuster, they could undo the entirety of the Patient Protection and Affordable Care Act,<sup>56</sup> at a tremendous cost to the federal and state governments.<sup>57</sup> Realistically, one could expect Democrats to re-enact similar legislation when they next return to power, and repeat this back and forth *ad nauseum*. The harmful effects of such a schizophrenic policy are obvious. The increased fusion between the legislative bodies would nullify the checking purpose of the Senate espoused by the nation’s founders and allow for the entirety of the legislative branch to work in political unison, with no restraint on the implementation of single-party agendas.<sup>58</sup> The resulting volatility in legislation would cause tremendous upheaval every time party power in Washington shifts and would lead great economic loss as government agencies would need to implement and then undo programs.

The aforementioned reasons make the nuclear option the least likely solution to come to fruition. Although the filibuster is abhorred for its political obstructionism, it is understood to be a necessary pro-

<sup>54</sup> See Udall, *supra* note 7, at 116.

<sup>55</sup> George Washington, *Farewell Address* (1796) (warning against the use of political factions to enact revenge against political opponents following elections).

<sup>56</sup> Pub. L. 111-148, 124 Stat. 119 (2010)

<sup>57</sup> See David Herszenhorn, *In Battle Over Health Law, Math Cuts Both Ways*, N.Y. TIMES, Jan. 7, 2011, available at <http://www.nytimes.com/2011/01/08/health/policy/08cong.html> (citing the cost of repeal to be \$230 billion); see also *House Republicans Vote to Overturn ObamaCare in Symbolic Vote*, FOX NEWS, Dec. 1, 2011, available at <http://www.foxnews.com/politics/2011/01/19/house-poised-vote-health-law-repeal>.

<sup>58</sup> See THE FEDERALIST NO. 62 (James Madison) (calling the structure of the Senate an “advantage” due to its ability to act as an “impediment” against “improper acts of legislation” and noting that it would counteract the “impulse of sudden and violent passions,” and the “seduc[tion] by factious leaders into intemperate and pernicious resolutions”).

tection of minority interests within the procedural rules of the Senate. The problem is inherent in the way that the filibuster is used, not necessarily in the mechanism itself.<sup>59</sup> Therefore, a more pragmatic approach would be to target the effectiveness or potential uses of the filibuster, potentially through reform that is more limited, or through leadership compromises. Eliminating or unilaterally reforming the filibuster in one fell swoop will cause political bedlam, as the system would overcorrect repeatedly in an effort to adjust to a procedural system with a newly limited ability to truly slow the pace of legislation. Although it may someday disappear, the filibuster should make a phased exit, agreed to by both parties, in order to allow the political system to adjust to its gradual passing.

### B. THE “ONE-BITE” REFORM

A less extreme version of hard filibuster rule reform would leave the filibuster intact while limiting its uses. The proposal would allow only a single filibuster per bill, removing the ability of senators to take “multiple bites at the delay apple.”<sup>60</sup> Currently, a bill making its way through the Senate can be filibustered multiple times on procedural grounds before coming to a vote.<sup>61</sup> In order for a bill to come up for debate on the floor, the Senate must vote on a motion to proceed, which can be filibustered.<sup>62</sup> If cloture is invoked, then the bill transitions to the floor for debate.<sup>63</sup> The Senate must then agree to end debate and move to a vote.<sup>64</sup> This too can be filibustered, requiring an entirely new cloture procedure.<sup>65</sup> To compound this procedural inefficiency, senators can propose and then filibuster amendments to a bill, further dragging out their efforts to delay.<sup>66</sup>

The “one bite at the apple” proposal would transform the filibuster from a repetitive and obstructionist tool to a one-time effort at stopping a bill the old-fashioned way, by endless debate carried out in person. Today, the mere threat of filibuster is enough to derail legislation due to the multitude of ways in which a senator can indefinitely delay a bill’s progress, costing precious floor time.<sup>67</sup> The “one bite” reform

<sup>59</sup> See, e.g., Marziani, *supra* note 53, at 1-10 (describing the problems caused by filibuster misuse and abuse).

<sup>60</sup> Norman Ornstein, *Time to Reassess Filibuster to Keep Senate Functioning*, ROLL CALL, Dec. 1, 2011, <http://www.aei.org/article/politics-and-public-opinion/legislative/time-to-reassess-filibuster-to-keep-senate-functioning>.

<sup>61</sup> See *supra* notes 17-24 and accompanying text.

<sup>62</sup> *Id.*

<sup>63</sup> See STANDING RULES OF THE SENATE, R. XXII (2).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 34 (2010).

<sup>67</sup> See Ornstein, *supra* note 60.

would decrease the potential for obstructionism in Congress without eliminating the filibuster's original purpose by limiting any senator's ability to indefinitely stall a bill through the use of multiple filibusters.<sup>68</sup>

Although this reform appears sensible on its face, it may encounter a great deal of opposition due to its severe curtailment of the modern filibuster's primary purpose of pure obstruction.<sup>69</sup> While this would be beneficial for the state of American politics, the reform will likely result in a large fight intended to prevent enactment. Thus, it is more likely that this reform would come from a split Congress than a Congress with a single party holding dominance. Moreover, the parties would likely agree to do a phased enactment of the limited filibuster, which would slowly decrease the number of filibusters per bill over time to allow senators to see how the reform changes the political climate. Alternatively, they may set a future date for full enactment to give both parties plenty of forewarning.

Even with this reform in place, the minority party could still wield the threat of filibuster offensively to obstruct the majority's legislative agenda because even a single filibuster on a bill could cost weeks of time.<sup>70</sup> If the minority were to continue to threaten to filibuster every single bill and nomination, then the current level of obstructionism may hold constant. However, if the majority leadership were to call the minority's bluff and force it to actually follow-through on its filibuster threats, the consistency of obstruction would likely decrease, as the minority party would be unlikely to expend the political will and capital to fight every bill and nomination publicly and on the record. The "one-bite" reform would allow the majority to force filibusters because of the guarantee that there could only be one filibuster per bill. By forcing filibusters to actually occur, the majority party would compel the minority party to choose what issues are worth engaging in a true filibuster for.<sup>71</sup> Ideally, this would result in a gradual de-escalation of the filibuster's use as a tool of obstruction while retaining the opportunity for the minority to prove a political point or stop a bill if it deemed it absolutely necessary. Limiting filibusters to one-per-bill would chop wholesale obstructionism at the knees and return the filibuster to its role as a focused exercise of dissent rather than a politically convenient tool for obstruction.

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<sup>68</sup> See Fisk, *supra* note 8, at 185-90 (describing the early usage of the filibuster).

<sup>69</sup> See Marziani, *supra* note 53, at 1-10 (giving examples of the filibuster's use for obstruction and not to foster greater debate).

<sup>70</sup> See BETH, *supra* note 23, at 20 (noting that the average cloture motion takes 15 calendar days to realize).

<sup>71</sup> See Ornstein, *supra* note 60 ("If a minority feels intensely enough about some things, its Members should be sleeping on cots in hallways and disrupting their schedules and lives to make its point.").

### C. DIMINISHING RETURNS

The final and perhaps most pragmatic of the proposals is a filibuster system based on diminishing returns. This proposal mirrors the one submitted by Senator Tom Harkin (D-IA) in the 110th Congress.<sup>72</sup> Under Harkin's proposal, senators would still be allowed to engage in filibusters at will, but the process of invoking cloture would be transformed.<sup>73</sup> The first cloture motion on a bill would still require the sixty-vote super-majority.<sup>74</sup> However, if the majority were to fail to get sixty votes, debate would be allowed to continue for two more days, at which point a second cloture motion could be brought to a vote.<sup>75</sup> This second motion would require only fifty-seven votes to end debate.<sup>76</sup> This process would be repeatable until a fourth and final cloture vote would require only fifty-one votes.<sup>77</sup>

While this proposal would still allow for a bill to be delayed tremendously and for general obstructionism to continue to stifle the majority of Senate business, it would address the issue of what has effectively become the "minority veto," which enables the minority party to prevent the passage of legislation favored by up to fifty-nine members of the Senate.<sup>78</sup> Allowing the majority party to force an issue until cloture is sure to be invoked mitigates the potential for the minority party to indefinitely stall a popular piece of legislation while retaining its ability to win the votes of members in the majority through reasoned debate.

This approach would not prevent the minority from filibustering any and all measures proposed by the majority party. Rather, it would create a realistic opportunity for the majority to push through legislation that it believes truly felt merits passage, albeit at the high cost of Senate floor time. With the current Senate standard seeming to require sixty votes for passage of *any* legislation, this reform would allow for more proactive legislating by providing a method by which to prevent a single individual from effectively vetoing a piece of legislation that has overwhelming majority support.<sup>79</sup>

Moreover, this reform is likely to be seen as the most practical option to implement as it retains the filibuster's traditional purpose of being used as a debate tool intended to convince the opposing party, or the American people, that a particular piece of legislation is ill-informed

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<sup>72</sup> See S. Res. 416, 110th Cong. (2010); see also Harkin, *supra* note 32, at 76-78.

<sup>73</sup> See Harkin, *supra* note 32, at 76-78.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See Udall, *supra* note 7, at 123-24; Harkin, *supra* note 32, at 76-77.

<sup>78</sup> See Marziani, *supra* note 53, at 7 (quoting several Congressmen lamenting the power of the "minority veto" and explaining the effect it has on representative democracy).

<sup>79</sup> See *id.* at 6-7; Bernstein, *supra* note 29.

or misguided.<sup>80</sup> Because the reform retains the ability to obstruct and stifle even very popular bills for an extended period, it requires neither side to unilaterally disarm. Implementation of this type of reform is unlikely to happen when a single party holds fifty-five or more seats. As with the “one-bite” reform,<sup>81</sup> a split Senate would be required to put this sort of reform into play because it would guarantee that neither side would be able to use it to great advantage in the reform’s maiden Congress.

Adoption of a system of diminishing returns on a filibuster will do nothing to address the issues of a congressional minority focused exclusively on obstruction.<sup>82</sup> However, it will be a step in the right direction in terms of allowing a strong majority to pass legislation it deems a priority while simultaneously showing that reforming the filibuster does not eliminate the minority protections that are considered so sacrosanct. This reform may be a first-step in addressing the issue of the filibuster, with the next logical extension being the implementation of a “one-bite” theory to further mitigate the modern filibuster’s capacity for wholesale obstruction.<sup>83</sup>

### III. SOFT REFORM AND HANDSHAKE COMPROMISE

Reforming the Senate Rules is unquestionably difficult and contentious, and thus it comes as no surprise that the filibuster has only been reformed a handful of times since its inception.<sup>84</sup> The more direct alternative to engaging in a fight over the rules is compromise and coordination between majority and minority leadership in the Senate.<sup>85</sup> These “handshake agreements” allow senators to avoid fighting over rules while still engaging in pragmatic compromises that seek to make the upper chamber more efficient.

At the start of the 112th Congress, Senate Majority Leader Harry Reid and Senate Minority Leader Mitch McConnell came to an agreement to avoid engaging in hard filibuster rules reform. Instead, they

<sup>80</sup> See, e.g., Fisk, *supra* note 8, at 188-89 (describing the early use of the filibuster to protect civil rights and prevent a tyranny of the majority by describing the impacts of a law through filibuster); Gold, *supra* note 8, at 216-18 (describing the reasoning and use of the early filibusters to engage in protest debates and to force compromise).

<sup>81</sup> See *supra* notes 57, 63, 65-67 and accompanying text.

<sup>82</sup> See Manu Raju, *McConnell Doubles Down on President Obama*, POLITICO, Dec. 1, 2010, <http://www.politico.com/news/stories/1110/44688.html> (quoting Senate Minority Leader Mitch McConnell as saying that his number one priority is “to deny President Obama a second term in office”).

<sup>83</sup> See *supra* notes 57, 63, 65-67 and accompanying text.

<sup>84</sup> See Gold, *supra* note 8, at 217-47 (discussing the history of rule reforms); Fisk, *supra* note 8, at 185-209 (going into detail about the battles that led to filibuster abuse and reform).

<sup>85</sup> See, e.g., Michael O’Brien, *Reid, McConnell swear off changes to filibuster*, THE HILL, Jan. 27, 2011, <http://thehill.com/blogs/blog-briefing-room/news/140713-reid-mcconnell-swear-off-changes-to-filibuster> (describing an agreement between Senate Majority Leader Harry Reid and Senate Minority Leader Mitch McConnell to avoid filibuster reform by adopting an informal set of rule changes).

relied on a number of smaller changes such as the elimination of “secret holds,” the reduction of nominated positions requiring Senate approval, and an agreement that Republicans “limit their filibusters of motions to begin debate.”<sup>86</sup> These sorts of agreements go a long way towards creating comity between the parties. However, some see them as kicking the can down the road.<sup>87</sup> Senator Udall took to the floor to speak out against the compromise, arguing that if “we hadn’t utilized our rights under the Constitution, if we hadn’t pushed this very hard and said we are trying to round up fifty-one senators that will stand up with us and say we want change in this institution,” there would not have even been a discussion about addressing filibuster abuse, much less the potential for true reform.<sup>88</sup> Pundits noted that the agreement between Senators Reid and McConnell to bench talk of filibuster reform ensures that “the minority is not on notice that further abuse of the filibuster (and associated stalling tactics) could lead to more significant reforms.”<sup>89</sup> This certainly seems to have been the takeaway from the agreement, as Republicans have continued their obstruction unabated. They have matched the record-breaking paces of the 110th and 111th Congresses, with roughly half of cloture motions submitted to break filibuster threats made on motions to proceed, despite the agreement with Senator Reid.<sup>90</sup>

This is not to suggest that agreements among leadership are useless. Quite to the contrary, the agreement between Senators Reid and McConnell showed that when facing down the threat of a unilateral engagement of the nuclear option to reform the filibuster, both sides could come to the table to address the issue. The future of the current agreement still remains to be seen. The agreement is non-binding, and, were Senator McConnell and the Republicans to retake the Senate decisively in the 2012 election, nothing would stop them from reneging on the agreement and going nuclear on eliminating the filibuster as soon as the Democrats are in the minority. However, putting this doomsday hypothetical aside, the agreement between the two parties demonstrates that there is potential for testing out harder rule reforms through non-binding agreements between leadership.

For example, if the 113th Senate turns out evenly split, Senators Reid and McConnell, or their successors, could agree that their parties would work to limit filibuster threats to one per bill, effectively enact-

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<sup>86</sup> *Id.*

<sup>87</sup> See Greg Sargent, *Did Reid and McConnell just doom future filibuster reform?*, WASH. POST, Jan. 27, 2011, available at [http://voices.washingtonpost.com/plum-line/2011/01/did\\_reid\\_and\\_mcconnell\\_just\\_do.html](http://voices.washingtonpost.com/plum-line/2011/01/did_reid_and_mcconnell_just_do.html).

<sup>88</sup> *Id.*

<sup>89</sup> Ezra Klein, *Reid and McConnell agree: There will be no reform of the filibuster*, WASH. POST, Jan. 27, 2011, available at [http://voices.washingtonpost.com/ezra-klein/2011/01/reid\\_and\\_mcconnell\\_agree\\_there.html](http://voices.washingtonpost.com/ezra-klein/2011/01/reid_and_mcconnell_agree_there.html).

<sup>90</sup> See UNITED STATES SENATE, CLOTURE MOTIONS – 112<sup>th</sup> CONGRESS (2012), available at [http://www.senate.gov/pagelayout/reference/cloture\\_motions/112.shtml](http://www.senate.gov/pagelayout/reference/cloture_motions/112.shtml); O’Brien, *supra* note 81.

ing the “one bite” reform discussed above.<sup>91</sup> This would allow the parties to test out the efficacy of such a reform without formalizing it in the rules. Moreover, if one party felt that it was being treated unfairly, the non-binding agreement would allow them an easy out. Similarly, the non-binding nature of the agreement allows any single senator to throw a wrench in the works by refusing to play by the informal agreements made amongst party leadership. Whether there are any consequences to breaking these “handshake agreements” will remain to be seen in the remainder of the 112th Congress and the beginning of the 113th Congress. Should the agreements be successful and potentially lead to a decrease in the number of cloture motions needing to be invoked, perhaps the parties will be more willing to experiment with further reforms to help deescalate the partisanship in Washington.

### CONCLUSION

Claiming that there is a single fix-all for our ever-dysfunctional Congress is unrealistic. The elected representatives who make up Congress represent a diverse and partisan populace that adamantly promotes and defends often diametrically opposite ideas of good governance. That said, implementing reforms, whether through formal reform or informal agreements that would force Congress to do its job by eliminating the availability of procedural gimmicks would go a long way toward restoring some faith in our legislative branch.

As the 113th Congress prepares to make its inaugural trip to Washington, one of the first questions facing the new Senate will be whether, and how, to take up the question of reforming the atmosphere and procedures in Congress’ most deliberative body. After examining three recently proposed hard rule reforms to amend the Senate’s filibuster procedures, as well as soft reforms such as compromise and leadership agreements, it seems clear that it is unlikely under the current leadership, save for an egregious breach of the current handshake agreement. If the agreement should fail and hard rule changes do become the chosen format for reform, they will need to be gradual and will likely require an effectively split Senate for enactment.

Neither party wants to unilaterally disarm by giving up the ability to filibuster, so non-nuclear reforms must take the form of restrictions on the filibuster’s use and create opportunities to overcome even the most adamant of filibuster efforts. For the foregoing reasons, both the “one-bite” and “diminishing returns” reforms discussed above are the most feasible for implementation by a Congress in the near future. Ultimately, it may take the Republicans returning to power and experiencing the wholesale obstruction they are currently visiting upon the

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<sup>91</sup> See *supra* notes 57, 63, 65-67 and accompanying text.

Democrats to come to an appreciation for the need to reform the filibuster rules. If and when both parties come around to understanding that blanket obstructionism is no way to govern, they will find several options that will neutralize abuses intended to obstruct while still retaining the opportunity for the minority party to make their impassioned dissent known.