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## Modifying the Filibuster: A Means to Foster Bipartisanship While Reining in its Most Egregious Abuses

Brian R.D. Hamm

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## NOTE

# MODIFYING THE FILIBUSTER: A MEANS TO FOSTER BIPARTISANSHIP WHILE REINING IN ITS MOST EGREGIOUS ABUSES

### I. INTRODUCTION

Over the past few years, a parliamentary maneuver in the U.S. Senate known as the filibuster has been the subject of considerable debate.<sup>1</sup> Defined as a “deliberate use of prolonged debate and procedural delaying tactics to block action supported by a majority of members,” the filibuster in its current form allows a minority of the Senate to block the body from considering a given matter unless three-fifths of the Senate votes for cloture on the filibuster.<sup>2</sup> Once a rarely used maneuver that put an enormous burden on the individuals choosing to use it, the filibuster has become easier to use, and increasingly commonplace.<sup>3</sup> The filibuster is now sometimes used even on completely noncontroversial matters that ultimately pass with little or no opposition.<sup>4</sup> With the

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1. See generally, e.g., *Examining the Filibuster: Hearings Before the S. Comm. on Rules and Admin.*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf> (compiling several hearings the U.S. Senate has held on the issue).

2. *Filibuster*, CQ ENCYCLOPEDIA OF AM. GOV'T, <http://www.cqpress.com/incontext/supremecourt/filibuster.htm> (last visited July 27, 2012); see also *Examining the Filibuster: History of the Filibuster 1789–2008: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 23 (2010) [hereinafter *History of the Filibuster*] (statement of Stanley I. Bach, Retired, Senior Specialist in the Legislative Process, Congressional Research Service), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf> (setting forth three-fifths of the Senators as the current cloture requirement); BLACK'S LAW DICTIONARY 322 (4th ed. 1968) (defining cloture as “[t]he procedure in deliberative assemblies whereby debate is closed”).

3. See *Examining the Filibuster: The Filibuster Today and Its Consequences: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 147 (2010) [hereinafter *The Filibuster Today and Its Consequences*] (statement of Hon. Walter Mondale, Dorsey and Whitney LLP), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf> (describing how filibustering has become easier); *Filibuster*, *supra* note 2 (describing several grueling filibusters of the past); see also *Senate Actions on Cloture Motions*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited July 27, 2012) (showing the increasing number of cloture motions over the years).

4. See, e.g., Andrew Clevenger, *Keenan Confirmed, But Why Via Cloture?*, CHARLESTON GAZETTE (Mar. 2, 2010, 5:04 PM), <http://blogs.wvgazette.com/watchdog/2010/03/02/keenan-confirmed-but-why-via-cloture/> (describing a filibuster against a judicial nominee who was ultimately confirmed 99-0).

increased frequency of the filibuster has come the increased use of the “hold,” a Senate practice which derives its power from the filibuster and allows an individual Senator to stop or delay the Senate from voting on an issue by the mere act of threatening to vote against cloture.<sup>5</sup>

Supporters of these practices argue that they are important to forging compromise and preventing partisan legislation from being enacted into law too quickly, and from keeping truly extreme appointees out of government positions.<sup>6</sup> Gregory Koger, a professor of political science at the University of Miami, supports the filibuster because it provides stability for the country by preventing radical policy shifts whenever a new party takes control of Congress.<sup>7</sup> Detractors argue that filibusters are often used inappropriately on what should be routine votes and make it too difficult to pass legislation.<sup>8</sup> Some even argue that “majority rules” should govern and favor reforms that would allow the Senate to pass legislation on a simple majority vote.<sup>9</sup>

This Note will discuss the filibuster’s history and usage, and make proposals for ways it should be modified. Part II will discuss the creation and development of the filibuster and by extension the hold. Part III will discuss the recent abuse of these practices and demonstrate a need for reform. Part IV will discuss some recent attempts at reform, that in some cases passed and in some cases failed, as well as other proposals for reform that have been proposed, but on which the Senate has not voted. Finally, Part V will advocate for future reforms that would place the onus of a filibuster more clearly on the minority party, reduce the threshold for cloture if the majority party can persuade members of the minority party to vote to invoke cloture, and reduce the ability of Senators to place holds on noncontroversial matters.

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5. See Ezra Klein, *What Is a “Hold?”*, WASH. POST (Feb. 5, 2010, 10:37 AM), [http://voices.washingtonpost.com/ezra-klein/2010/02/what\\_is\\_a\\_hold.html](http://voices.washingtonpost.com/ezra-klein/2010/02/what_is_a_hold.html); Press Release, Michael F. Bennet, Filibuster Reform Key to Ending Needless Washington Dysfunction (July 28, 2010), <http://bennet.senate.gov/newsroom/press/release/?id=A178AF59-9635-46B5-A56E-65D189CA2671> [hereinafter Press Release, Bennet]; David Waldman, *So What’s Up with “Holds” in the Senate, Anyway?*, DAILY KOS (June 28, 2008, 11:20 AM), <http://www.dailykos.com/story/2008/06/28/542115/-So-whats-up-with-holds-in-the-Senate-anyway>.

6. See, e.g., *The Filibuster Today and Its Consequences*, *supra* note 3, at 143 (statement of Sen. Pat Roberts, Member, S. Comm. on Rules & Admin.); Editorial, *Filibuster a Radical: Obama Is Promoting an Abortion Extremist for Justice*, WASH. TIMES, Apr. 22, 2009, at A20.

7. Joan Indiana Rigdon, *Filibuster Reform?*, WASH. LAW., Sept. 2010, at 24, 26-27.

8. See, e.g., Press Release, Patrick Leahy, Senate Should Hold Up-Or-Down Votes on Noncontroversial Judicial Nominees (Mar. 2, 2010), [http://leahy.senate.gov/press/press\\_releases/release/?id=947918c9-d78a-4746-831b-f99c9a9a9bc0](http://leahy.senate.gov/press/press_releases/release/?id=947918c9-d78a-4746-831b-f99c9a9a9bc0) [hereinafter Press Release, Leahy] (chastising the usage of the filibuster on noncontroversial nominations); Ezra Klein, *The Myth of Bipartisanship*, AM. PROSPECT (Feb. 9, 2009), [http://prospect.org/cs/articles?article=the\\_myth\\_of\\_bipartisanship](http://prospect.org/cs/articles?article=the_myth_of_bipartisanship) (arguing that the filibuster thwarts “successful governance”).

9. See Klein, *supra* note 8.

## II. HISTORY OF THE FILIBUSTER AND THE HOLD

This Part will discuss the creation of the filibuster and the hold. The Senate took actions early in its history which inadvertently enabled the filibuster.<sup>10</sup> Since then, the filibuster has been used with increasing frequency and has been reformed in various ways.<sup>11</sup> In recent times, the filibuster has also enabled the hold, which can allow a single Senator to impede Senate business.<sup>12</sup>

### A. *Invention by Mistake: The Creation of the Filibuster*

The filibuster did not exist as part of the original Senate rules.<sup>13</sup> While some tactics to obstruct legislation were available when the Senate was first created, ultimately Senators at that time operated under a presumption that eventually legislation would be brought to the floor, and that a majority would be sufficient for passage.<sup>14</sup> The “previous question motion” in the early Senate allowed for a majority of Senators to vote that enough debate had taken place on a particular measure and that it was time to send the matter to the floor, where it could pass with a simple majority.<sup>15</sup> The filibuster was made possible in 1806 when Vice President Aaron Burr convinced the Senate to “get rid of the previous question motion” as part of an effort to make the Senate rules simpler.<sup>16</sup> This took away the Senate’s power to cut off debate by a vote of the majority of Senators.<sup>17</sup> Even so, filibusters were rarely used before the Civil War, as Senators continued to operate under the assumption that a majority vote could cut off debate.<sup>18</sup>

### B. *An Infrequent Speed Bump Becomes a Frequent Road Block: The Evolution of the Filibuster*

Senators began to use filibusters in the 1840s, beginning with a filibuster against 1841 legislation to create the Second Bank of the

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10. See *infra* Part II.A.

11. See *infra* Part II.B.

12. See *infra* Part II.C.

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

14. *Id.*

15. See *History of the Filibuster*, *supra* note 2, at 17 (statement of Sarah A. Binder, Department of Political Science, George Washington University); BINDER & SMITH, *supra* note 13, at 5.

16. *History of the Filibuster*, *supra* note 2, at 17 (statement of Sarah A. Binder, Department of Political Science, George Washington University) (internal quotation marks omitted).

17. *Id.*

18. *Id.* at 18.

United States.<sup>19</sup> Senator Henry Clay (R-KY) then sought to revive the previous question motion as a means for overcoming the filibuster and closing off debate.<sup>20</sup> Faced with opposition in both the Democratic and Whig parties, Senator Clay backed down from this proposal.<sup>21</sup> As time progressed, the Civil War and Reconstruction Eras saw increasingly frequent filibusters used on civil rights issues.<sup>22</sup> The only way to overcome filibusters at that time was with unanimous consent, and as such, these early filibusters were very difficult to overcome.<sup>23</sup> Additional attempts to end filibusters by reinstituting the previous question motion remained unsuccessful.<sup>24</sup>

Eventually, during World War I, public outrage caused the Senate to enact a cloture rule proposed by President Woodrow Wilson.<sup>25</sup> When Congress attempted to authorize defense funding in response to unrestricted submarine warfare, a group of isolationist Senators filibustered the funding and prevented it from passing.<sup>26</sup> The public reacted immediately and negatively to this development, and President Wilson famously decried that, “[a] little group of willful men . . . have rendered the great government of the United States helpless and contemptible.”<sup>27</sup> President Wilson then called a special session of Congress to address the issue of filibusters.<sup>28</sup> The party caucuses ultimately endorsed a compromise solution creating a cloture rule.<sup>29</sup> According to the rule, a filibuster could be overcome if “two-thirds of all senators present and voting” voted in favor of cloture.<sup>30</sup>

“[C]loture was first invoked in 1919 on the Treaty of Versailles.”<sup>31</sup> However, cloture votes remained rare—there were only sixteen cloture votes between 1927 and 1962, most of which involved civil rights issues, and very few of which were successful.<sup>32</sup> At the same time, however, Senators who engaged in filibusters had an incredible burden to go through because they had to continually talk; Senator Strom Thurmond (R-SC) famously spoke for over twenty-four hours with rare

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19. MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 49 (2d ed. 2008).

20. *Id.*

21. *Id.* at 50.

22. *Filibuster*, *supra* note 2.

23. *Id.*

24. GOLD, *supra* note 19, at 50.

25. *Filibuster*, *supra* note 2.

26. *See* GOLD, *supra* note 19, at 51.

27. GOLD, *supra* note 19, at 51; *Filibuster*, *supra* note 2.

28. GOLD, *supra* note 19, at 51.

29. *Id.* at 52.

30. *Id.*

31. *Id.*

32. *Id.* at 52-53; *Filibuster*, *supra* note 2.

respite in a filibuster against civil rights legislation.<sup>33</sup> The 1939 film *Mr. Smith Goes to Washington*,<sup>34</sup> where a Senator continues to speak nonstop in opposition to a Senate action,<sup>35</sup> popularized the image of this kind of filibuster, and the film has since become part of the dialogue when filibusters are discussed (this Note refers to this approach as a “Mr. Smith-style” filibuster).<sup>36</sup>

The civil rights filibusters prompted efforts to make it easier to invoke cloture.<sup>37</sup> Eventually, in the 1970s, the cloture rule was reduced from “two-thirds of the Senators present and voting” to sixty votes.<sup>38</sup>

At the same time, “two-tracking” was created.<sup>39</sup> Two-tracking, also known as double-tracking, allows the Senate to temporarily set aside a filibustered matter and move on to other business.<sup>40</sup> This reform made it easier to complete the backlog of Senate business in the event of a filibuster, as filibusters no longer brought the Senate to a halt the way they once had.<sup>41</sup> But this reform also had a downside, as much of the onus on the minority to sustain a filibuster was removed.<sup>42</sup> Since the 1970s reforms, filibusters have become increasingly common.<sup>43</sup>

33. *Filibuster*, *supra* note 2.

34. *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939).

35. *See generally id.*

36. *See, e.g.,* Scott Shane, *Henry Clay Hated It. So Does Bill Frist*, N.Y. TIMES, Nov. 21, 2004, § 4, at 5 (“When Jimmy Stewart filibustered in ‘Mr. Smith Goes to Washington,’ audiences cheered. It’s been downhill ever since.”); Derek Wallbank, *Democrats to Use Mondale Strategy in Filibuster-Reform Attempt*, MINNPOST (Jan. 4, 2011), [http://www.minnpost.com/derekwallbank/2011/01/04/24556/democrats\\_to\\_use\\_mondale\\_strategy\\_in\\_filibuster-reform\\_attempt](http://www.minnpost.com/derekwallbank/2011/01/04/24556/democrats_to_use_mondale_strategy_in_filibuster-reform_attempt) (describing a filibuster reform proposal as “hav[ing] the filibustering Senator], as Jimmy Stewart did in that memorable scene from ‘Mr. Smith Goes to Washington,’ stand on the floor and talk until they exhaust themselves”); *see also Filibuster*, ICONIC PHOTOS (Nov. 6, 2009, 8:34 AM), <https://iconicphotos.wordpress.com/tag/mr-smith-goes-to-washington/>.

37. *Filibuster*, *supra* note 2.

38. *The Filibuster Today and Its Consequences*, *supra* note 3, at 137-38 (statement of Sen. Charles E. Schumer, Chairman, S. Comm. on Rules & Admin.).

39. *Id.* at 147 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

40. *See* Christopher Brauchli, *Filibusters Could Be Fun*, HUFFINGTON POST (Jan. 6, 2010, 11:59 AM), [http://www.huffingtonpost.com/christopher-brauchli/filibusters-could-be-fun\\_b\\_412394.html](http://www.huffingtonpost.com/christopher-brauchli/filibusters-could-be-fun_b_412394.html) (“Under the two track rule more than one bill can be pending on the floor of the Senate as unfinished business. Thus, if a filibuster of a given bill is threatened, the senate pretends that the filibuster is taking place but continues working on other legislation.”); *Filibuster*, *supra* note 2 (“If the first cloture vote failed, more were taken. Meanwhile, leaders often shelved the disputed bill temporarily, with members’ unanimous consent, so that the Senate could turn to other matters. That tactic . . . [was] known as double-tracking.”).

41. *See The Filibuster Today and Its Consequences*, *supra* note 3, at 147 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

42. *See id.*

43. *See, e.g.,* ALLIANCE FOR JUST., *FILIBUSTERS, SECRET HOLDS, AND OBSTRUCTION OF JUDICIAL NOMINEES 1* (2010), *available at* <http://www.afj.org/judicial-selection/afj-report-filibusters-of-judicial-nominations.pdf> (demonstrating an increase in filibusters on judicial nominations, specifically); *BINDER & SMITH*, *supra* note 13, at 10, fig.1-1; *Senate Actions on*

One specific area where filibustering has become more frequent is on the issue of judicial nominations.<sup>44</sup> In the 1960s, the filibuster was successfully used to deny Supreme Court Associate Justice Abe Fortas the position of Chief Justice.<sup>45</sup> During President Bill Clinton's administration, some Senate Republicans voted to filibuster the judicial nominations of H. Lee Sarokin,<sup>46</sup> Richard Paez,<sup>47</sup> and Marsha Berzon.<sup>48</sup> These filibusters did not ultimately derail these nominations, as cloture was successfully invoked on all three nominations.<sup>49</sup> Despite these Republicans' failure to prevent cloture from being invoked on these nominees, President Clinton nevertheless faced considerable difficulties in getting many of his judicial nominations confirmed as a result of parliamentary maneuvers.<sup>50</sup>

During George W. Bush's presidency, Senate Democrats revived the tactic of judicial filibustering, and by 2005, successfully filibustered ten of his judicial nominations.<sup>51</sup> In January 2005, President Bush re-

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*Cloture Motions*, *supra* note 3 (showing an increasing number of cloture motions in more recent Congresses).

44. See, e.g., Kenneth Jost, *Supreme Court's Future*, 15 C.Q. RESEARCHER 79, 85 (2005); Charles Babington, *Filibuster Precedent? Democrats Point to '68 and Fortas*, WASH. POST, Mar. 18, 2005, at A3.

45. Babington, *supra* note 44, at A3.

46. See 140 CONG. REC. 27481-82 (1994); Helen Dewar, *Mitchell Vows to Extend Senate Session to End GOP Filibusters*, WASH. POST, Oct. 4, 1994, at A4 (explaining that Majority Leader George Mitchell scheduled a vote on ending the filibuster of then-U.S. District Court Judge Sarokin's nomination to the U.S. Court of Appeals for the Third Circuit, and that "some Republicans have complained that [Judge Sarokin] is a liberal activist").

47. See 146 CONG. REC. 2224-25 (2000); *On the Cloture Motion (Cloture Motion RE: Nom. of Richard Paez to Be U.S. Circuit Judge)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=106&session=2&vote=00037](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00037) (last visited July 27, 2012) [hereinafter *Paez Cloture Motion*] (setting forth the fourteen Republicans voting against the end of debate on March 8, 2000).

48. 146 CONG. REC. 2224 (2000); Chris Bowers, *Right Wing Power Grab: Frist Voted to Continue a Filibuster Against a Judicial Nominee*, MY DIRECT DEMOCRACY (Apr. 19, 2005, 8:27 AM), <http://mydd.com/2005/4/19/right-wing-power-grab-frist-voted-to-continue-a-filibuster-against-a-judicial-nominee> ("On March 8, 2000, thirteen Senators, all of whom were Republicans, attempted to filibuster Marsha Berzon for U.S. Circuit judge.").

49. See Helen Dewar, *Senate GOP Tactics Threaten Lobbying, Education, Environment Bills*, WASH. POST, Oct. 5, 1994, at A4; *On the Cloture Motion (Cloture Motion RE: Nom. of Marsha L. Berzon to Be U.S. Circuit Judge)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=106&session=2&vote=00036](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00036) (last visited July 27, 2012) (demonstrating that the cloture motion on the Berzon nomination was agreed to); *Paez Cloture Motion*, *supra* note 47 (demonstrating that the cloture motion on the Paez nomination was agreed to).

50. See generally Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001) (detailing the various methods of obstruction that were deployed against President Clinton's judicial nominees, ultimately concluding that "[t]he legacy of the Clinton years is that the confirmation process can no longer be seen as routine but a matter of intense partisan and ideological concern for all court levels").

51. Jost, *supra* note 44, at 85.

nominated many of the filibustered nominees, a move which irked many Democrats.<sup>52</sup> Controversy over judicial filibustering came to a climax in 2005, when Senate Republicans prepared to hold a vote to amend the Senate rules to ban the use of the filibuster on judicial nominations,<sup>53</sup> with Senate Majority Leader Bill Frist (R-TN) having previously described the filibuster as “nothing less than a formula for tyranny by the minority.”<sup>54</sup> The controversy was diffused when an agreement was reached between a group of seven Republican and seven Democratic Senators to reserve the use of filibustering against judicial nominations only for “extraordinary circumstances.”<sup>55</sup> Signatories of the document pledged to vote for cloture on the pending nominations of Janice Rogers Brown, Priscilla Owen, and William Pryor, but made no such commitment to vote for cloture on the pending nominations of William Myers and Henry Saad.<sup>56</sup> Years later, under President Barack Obama, Senate Republicans, along with Democratic Senator Benjamin Nelson, successfully used the filibuster to derail the nomination of Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit.<sup>57</sup> A similar filibuster against Judge David Hamilton ultimately failed, and he was confirmed to the U.S. Court of Appeals for the Seventh Circuit.<sup>58</sup> The filibuster now seems an entrenched tactic for blocking judicial nominations.<sup>59</sup>

### C. *Mr. President, I Object!: The Creation of the Hold*

The filibuster also empowers the practice of the so-called Senate “hold.”<sup>60</sup> A hold can allow even a single Senator to block the Senate from considering a given issue.<sup>61</sup> A Senator exercises a hold by

52. *See id.* at 86.

53. *See id.*; Carl Hulse, *Filibuster Fight Nears Showdown*, N.Y. TIMES, May 8, 2005, at 1.

54. Shane, *supra* note 36, § 4, at 5 (internal quotation marks omitted); *Portrait Unveiling Ceremony for Former Senate Majority Leader Bill Frist (R-TN)*, C-SPAN (Mar. 3, 2011, 11:54 AM), <http://www.c-span.org/Events/Portrait-Unveiling-Ceremony-for-Former-Senate-Majority-Leader-Bill-Frist-R-TN/10737419973/> (demonstrating that Senator Frist was a Republican Senator from Tennessee).

55. *See* Memorandum of Understanding on Judicial Nominations from U.S. Senate (May 23, 2005) [hereinafter Memorandum of Understanding], available at <http://www.cspan.org/pdf/senate/compromise.pdf>; *Judicial Vacancies*, A.B.A. (Dec. 10, 2010), [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/judicial\\_vacancies.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies.html).

56. Memorandum of Understanding, *supra* note 55.

57. Abby Phillip, *Goodwin Liu Withdraws Nomination*, POLITICO (May 25, 2011, 7:04 PM), <http://www.politico.com/news/stories/0511/55724.html>; Meredith Shiner, *Senate GOP Filibusters Liu*, POLITICO (May 19, 2011, 2:41 PM), <http://www.politico.com/news/stories/0511/55320.html>.

58. *See* Press Release, Leahy, *supra* note 8.

59. *See supra* text accompanying notes 44-58.

60. *See* Waldman, *supra* note 5.

61. *See id.*



informing his or her respective party leader that he or she intends to object to bringing an issue to the floor of the Senate for consideration.<sup>62</sup> A Senator who objects to a unanimous consent motion to bring an issue to the floor usually is giving an implied threat that he or she will filibuster.<sup>63</sup> Senate Majority Leaders can, and have, forced a vote on the issue in spite of this threat.<sup>64</sup> However, if the Senator placing the hold does in fact filibuster—even if no additional Senators support the filibuster—the process can still force the Senate to spend substantial amounts of time debating the issue, as Senate rules allow up to thirty hours of debate once a cloture motion is invoked.<sup>65</sup> Holds are frequently used on confirmation votes for various nominations made by the President.<sup>66</sup>

Like the contemporary filibuster, holds became increasingly frequent in the late 1970s.<sup>67</sup> This trend was furthered as lobbyists and other influential parties outside of the Senate itself became familiar with the practice and urged Senators to use the hold to further their own pet issues.<sup>68</sup> In 1981, Majority Leader Howard Baker (R-TN) treated holds as binding, but grew frustrated with the practice and eventually decided not to treat them as binding.<sup>69</sup> However, his recantation had only a limited effect, as the hold was still made effective by the parliamentary maneuvers Senators could deploy if their holds were not honored.<sup>70</sup> At that time, holds were also strengthened by their anonymity—in many cases the identity of the Senator placing the hold did not need to be disclosed.<sup>71</sup> Liberal Democratic Senator Howard Metzenbaum became especially fond of using the hold.<sup>72</sup> His usage of the tactic became so pervasive that Republican Majority Leaders in the 1980s frequently screened matters with him in advance, instead of using the Democratic

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62. WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 31685, PROPOSALS TO REFORM “HOLDS” IN THE SENATE 1 (2007).

63. Waldman, *supra* note 5.

64. See STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 111 (1989).

65. See Waldman, *supra* note 5.

66. See, e.g., Aaron Blake, *Sen. Gillibrand Wants McHugh Hold Lifted*, HILL (Aug. 13, 2009, 8:39 AM), <http://thehill.com/homenews/senate/54611-sen-gillibrand-wants-mchugh-hold-lifted> (discussing a hold placed on the nomination of John McHugh to be the Secretary of the Army); Wallbank, *supra* note 36 (describing a blanket hold a Senator placed on several nominations).

67. SMITH, *supra* note 64, at 110; see also sources cited *supra* note 43.

68. See SMITH, *supra* note 64, at 110-11.

69. *Id.* at 111-12; Baker, *Howard Henry, Jr., (1925 - )*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=b000063> (last visited July 27, 2012) (demonstrating Senator Baker’s party and state).

70. See SMITH, *supra* note 64, at 112.

71. *Id.*

72. See *id.* at 113.

leadership as a liaison.<sup>73</sup> Democrats also gave him special treatment, giving him a check-off box for clearing measures for floor action alongside the check-off boxes for the Democratic leader and ranking committee member.<sup>74</sup> In addition to being used to block or impede the issue at hand, holds also became a tool to extract concession on entirely unrelated issues.<sup>75</sup> The hold remains in practice to this day; recent examples include a 2010 hold on the continuation of unemployment benefits<sup>76</sup> and holds on a plethora of nominations made by the President.<sup>77</sup>

### III. PROBLEMS WITH THE CURRENT SYSTEM

This Part will discuss the current problems with the filibuster and hold. It has become increasingly easy for Senators to filibuster,<sup>78</sup> which has led to the increased use of filibusters and holds for reasons entirely unrelated to the substantive issue being debated,<sup>79</sup> and even for reasons filibustering Senators have been unable to articulate.<sup>80</sup> Increasing polarization between the Democratic and Republican parties has exacerbated the problem by making it harder to overcome a filibuster.<sup>81</sup> One of the most notable adverse consequences of the increasing use of the filibuster is the current crisis of judicial vacancies.<sup>82</sup>

#### A. Laidback Obstructionism:

##### *The Onus Is on the Majority to Overcome the Filibuster*

Prior to the 1970s reforms, if Senators wanted to filibuster, they faced a heavy burden because they had to continually hold the floor.<sup>83</sup> The 1970s reforms lifted much of that onus and placed it on the majority,<sup>84</sup> forcing Senators in the majority to sometimes endure great

73. *Id.*

74. *Id.*

75. *Id.* at 110-11.

76. See Nancy Cordes, *Lone Senator Blocks Jobless Benefits*, CBS (Mar. 2, 2010, 11:11 AM), <http://www.cbsnews.com/stories/2010/03/01/eveningnews/main6256808.shtml?tag=contentMain;contentBody>.

77. See sources cited *supra* note 66.

78. See *infra* Part III.A.

79. See *infra* Part III.B.

80. See *infra* Part III.C.

81. See *infra* Part III.D.

82. See *infra* Part III.E.

83. See *Filibuster*, *supra* note 2.

84. See IRA SHAPIRO, *THE LAST GREAT SENATE: COURAGE AND STATESMANSHIP IN TIMES OF CRISIS* 231 (2012) (explaining that the 1970s reforms created the sixty-vote threshold); Derek Wallbank, *Franken Introduces Reverse-Cloture Rule to Shift Filibuster Burden to Minority Party*, MINNPOST (Jan. 6, 2011), <http://www.minnpost.com/dc-dispatches/2011/01/franken-introduces->

personal hardship to appear in the Senate and vote for cloture even though the bill had clear majority support.<sup>85</sup> In February 2009, Senator Sherrod Brown (D-OH) had to be flown from Ohio, where he was attending a wake for his recently-deceased mother, to Washington, D.C. to provide the critical sixtieth vote on an economic stimulus bill, only to then be flown back to Ohio to attend his late mother's funeral.<sup>86</sup> In addition to the personal inconvenience to Senator Brown, the Senate had to delay the vote by several hours in order to accommodate him.<sup>87</sup> In December 2009, Senator Robert Byrd (D-WV), at that point in deteriorating health and facing mobility difficulties, had to be constantly wheeled into the Senate, sometimes late at night or during frigid weather, to cast the sixtieth vote on various motions relating to the passage of a major health care reform bill.<sup>88</sup>

By contrast, the minority does not even need to appear in the Senate to block a bill through the filibuster; the onus is on the majority to invoke cloture, not on the minority to prevent it from being invoked.<sup>89</sup> In September 2011, thirty-three Senators, just less than a third of the body's members,<sup>90</sup> were able to stop the passage of a hurricane-relief bill by voting against cloture even though a bipartisan majority of Senators voted for cloture.<sup>91</sup> The filibuster was only overcome when additional Senators returned to the Senate to vote in favor of the legislation.<sup>92</sup> Similarly, in February 2010, thirty-three Senators defeated a cloture motion on the confirmation of Craig Becker to the National Labor Relations Board ("NLRB").<sup>93</sup> President Obama later bypassed the

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reverse-cloture-rule-shift-filibuster-burden-minority-party (explaining how the sixty-vote threshold puts the onus of a filibuster on the majority).

85. See, e.g., Paul Kane, *From Sen. Byrd, a Spirited "Aye"*, WASH. POST, Dec. 23, 2009, at A1; *White House Provides Plane to Senator for Key Stimulus Vote*, CNN (Feb. 13, 2009), [http://articles.cnn.com/2009-02-13/politics/brown.stimulus.vote.flight\\_1\\_white-house-stimulus-plan-billion-economic-stimulus-package?\\_s=PM:POLITICS](http://articles.cnn.com/2009-02-13/politics/brown.stimulus.vote.flight_1_white-house-stimulus-plan-billion-economic-stimulus-package?_s=PM:POLITICS); see also SHAPIRO, *supra* note 84, at 231.

86. *White House Provides Plane to Senator for Key Stimulus Vote*, *supra* note 85.

87. See *id.*

88. See Kane, *supra* note 85, at A6.

89. See Press Release, Bennet, *supra* note 5; *Rules of the Senate: Precedence of Motions*, U.S. SENATE COMMITTEE ON RULES & ADMIN., <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (last visited July 27, 2012) (requiring three-fifths of the Senate to vote for cloture to invoke it).

90. See *Senators of the 112th Congress*, U.S. SENATE, [http://www.senate.gov/general/contact\\_information/senators\\_cfm.cfm](http://www.senate.gov/general/contact_information/senators_cfm.cfm) (last visited July 27, 2012) (noting that there are 100 Senators in the U.S. Senate).

91. See Horace Boothroyd III, *Breaking: Senate Passes Disaster Aid Past Republican Filibuster Hurdle*, DAILY KOS (Sept. 13, 2011, 3:22 PM), <http://www.dailykos.com/story/2011/09/13/1016611/-Breaking:-Senate-Passes-Disaster-Aid-Past-Republican-Filibuster-Hurdle>.

92. See *id.*

93. See Kevin Bogardus, *Labor Pick Is Voted Down in the Senate*, HILL (Feb. 9, 2011, 10:23 PM), <http://thehill.com/homenews/senate/80481-labor-pick-is-voted-down-in-the-senate>.

confirmation process and appointed Mr. Becker to the position via a recess appointment.<sup>94</sup> The ability to successfully filibuster with so little burden on the minority stands in stark contrast to the previous form of filibuster, when the filibustering Senator had to continually hold the floor.<sup>95</sup>

*B. How Is This Relevant?:*

*Filibusters and Holds Are Used for Inappropriate Reasons*

Another problem with the current system is that filibusters and holds are used on noncontroversial issues wholly unrelated to the issue at hand.<sup>96</sup> While Senator Strom Thurmond's filibustering of the Civil Rights Act is abhorrent by modern standards, his statement that the bill was unconstitutional and that it constituted "cruel and unusual punishment," and the grueling marathon session he endured to perform it, demonstrate that this was a strongly held belief relevant to the legislation being discussed.<sup>97</sup> Not every filibuster prior to the pre-1970s reform was based on a similar level of conviction; some were instead based upon purely political concerns.<sup>98</sup> Nevertheless, because the 1970s reforms made filibustering easier, they allowed for more frequent filibusters on noncontroversial issues<sup>99</sup> and holds placed on noncontroversial nominations.<sup>100</sup>

In 2009, for instance, Senators Pat Roberts (R-KS) and Sam Brownback (R-KS) placed a hold on the nomination of then-Representative John McHugh (R-NY) to be the Secretary of the Army.<sup>101</sup> This was not because they had any particular misgivings about Representative McHugh, who was in fact a fellow Republican, but because they were concerned that President Obama was planning on transferring inmates from Guantanamo Bay to detention facilities in

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94. See Press Release, The White House: Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Admin. Positions (Mar. 27, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

95. See *supra* text accompanying notes 33-36.

96. See *infra* text accompanying notes 99-112.

97. See generally *Thurmond Holds Record for Senate Filibustering*, FOX NEWS (June 27, 2003), <http://www.foxnews.com/story/0,2933,90552,00.html> (internal quotation marks omitted).

98. See BINDER & SMITH, *supra* note 13, at 83-92 (arguing that while partisan filibusters have certainly increased over the years, they are not an entirely new development).

99. See *The Filibuster Today and Its Consequences*, *supra* note 3, at 147 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP); Press Release, Leahy, *supra* note 8 (discussing the filibusters of noncontroversial judicial nominees).

100. See *infra* text accompanying notes 101-07.

101. *The Filibuster Today and Its Consequences*, *supra* note 3, at 164-65 (statement of Sen. Pat Roberts, Member, S. Comm. on Rules & Admin.); Blake, *supra* note 66.

Kansas, and they wanted assurances that this would not happen.<sup>102</sup> Senator Roberts even implied that he preferred handling the issue of transferring Guantanamo inmates to Kansas by placing a hold on Representative McHugh, as opposed to introducing an amendment blocking the transfer, because he thought he might lose the vote on such a measure.<sup>103</sup> Senator Roberts claims he lifted the hold after he “got what [he] needed,” information he could not disclose on the grounds of confidentiality.<sup>104</sup>

Another modern Senate hold that drew controversy was a “blanket hold” that Senator Richard Shelby (R-AL) placed on all of President Obama’s pending nominations at that time.<sup>105</sup> Senator Shelby placed this hold not because he had any particular objections to the actual nominees, but because he was upset that the Government Accountability Office had halted a contract for a refueling tanker that would have been built in Senator Shelby’s home state.<sup>106</sup> Under fire from his colleagues and from even conservative pundits, Senator Shelby eventually relented and lifted the hold.<sup>107</sup>

Similar to holds on nominees used to extract concessions on unrelated matters, filibusters have been used on noncontroversial nominations for the apparent reason of using up debate time.<sup>108</sup> A particularly noteworthy example of this practice took place during the nomination of Barbara Keenan for the U.S. Court of Appeals for the Fourth Circuit.<sup>109</sup> A Senator used an anonymous hold to block her from a roll call vote, forcing a vote of cloture.<sup>110</sup> When the vote was held, however, she was confirmed unanimously, indicating there had never really been any opposition to her.<sup>111</sup> Keenan was not alone in

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102. *The Filibuster Today and Its Consequences*, *supra* note 3, at 164-65 (statement of Sen. Pat Roberts, Member, S. Comm. on Rules & Admin.); Blake, *supra* note 66.

103. *The Filibuster Today and Its Consequences*, *supra* note 3, at 165 (statement of Sen. Pat Roberts, Member, S. Comm. on Rules & Admin.) (“I certainly didn’t want a vote on the Senate floor, where a vote could go the other way and then that puts it in cement and then you have lost the issue.”).

104. *Id.* (statement of Sen. Pat Roberts, Member, S. Comm. on Rules & Admin.).

105. Wallbank, *supra* note 36.

106. *Id.*

107. See Ed Morrissey, *Shelby Places Blanket Hold on Obama Nominees*, HOT AIR (Feb. 5, 2010, 12:16 PM), <http://hotair.com/archives/2010/02/05/shelby-places-blanket-hold-on-obama-nominees/> (“It isn’t at all legitimate to hold up every single appointment to demand more pork for one’s state, or favorable bid decisions, or any other gimme impulse. . . . [A] hold should focus on a specific policy point associated with the nomination or on a critical issue of national security.”); Wallbank, *supra* note 36.

108. See, e.g., Clevenger, *supra* note 4.

109. See *id.*

110. *Id.*

111. See *id.*

experiencing this kind of delay; many of President Obama's other judicial nominees saw their nominations delayed substantially because of filibusters, only to be confirmed with little to no opposition.<sup>112</sup>

Even when the filibuster is used to extract concessions that are at least relevant to the issue being debated, it still can seem like a form of extortion when used by Senators to extract funding for local causes in exchange for votes on issues of national significance.<sup>113</sup> A particularly notorious recent example was the so-called "Cornhusker Kickback," which gave Nebraska an exemption from having to pay the state share of Medicaid expansion in a pending healthcare reform bill.<sup>114</sup> This exemption was apparently granted to gain the vote of Nebraska's Democratic Senator, Ben Nelson,<sup>115</sup> though his office later denied that this was the reason for the provision.<sup>116</sup> Amidst criticism, the provision was eventually removed.<sup>117</sup>

### C. "Because I Feel Like It:"

#### *Senators Use the Filibuster Even When They Do Not Know Why*

Another problem with the ease with which the current filibuster can be used is that it empowers Senators to stop legislation they purport to oppose, even when they do not really appear to know why it is they oppose it.<sup>118</sup> In 2010, Senator Scott Brown (R-MA) threatened to oppose a financial reform bill and initially voted against cloture on the bill.<sup>119</sup> When asked why he opposed the bill, however, he failed to articulate a reason, instead reflecting the question back to the interviewer and asking, "Well, what areas do you think should be fixed? I mean . . . tell me."<sup>120</sup> Senator Brown eventually relented and voted for cloture,<sup>121</sup> but

112. See Press Release, Leahy, *supra* note 8 (discussing at length the various noncontroversial nominees who nevertheless saw their nominations held up through parliamentary maneuvers).

113. See Chris Frates, *Payoffs for States Get Reid to 60*, POLITICO (Dec. 19, 2009, 7:56 PM), <http://www.politico.com/news/stories/1209/30815.html> (discussing various incentives given to Senators to convince them to vote for a health care reform bill; many of these incentives seem tailored to the local interests of those Senators).

114. *Id.*

115. *Id.*

116. Jordan Fabian, *Obama Healthcare Plan Nixes Ben Nelson's "Cornhusker Kickback" Deal*, HILL (Feb. 22, 2010, 11:00 AM), <http://thehill.com/blogs/blog-briefing-room/news/82621-obama-healthcare-plan-nixes-ben-nelsons-cornhusker-kickback-deal>.

117. *Id.*

118. See *infra* text accompanying notes 119-27.

119. See Jonathan Karl, *Sen. Harry Reid Suggests Sen. Scott Brown Lied*, ABC NEWS (May 19, 2010, 5:52 PM), <http://abcnews.go.com/blogs/politics/2010/05/sen-harry-reid-suggests-sen-scott-brown-lied/> (detailing Senator Brown's vote against cloture on the bill); Matt Viser, *Brown Opposes Current Financial Bill*, BOSTON (Apr. 14, 2010, 2:37 PM), [http://www.boston.com/news/politics/politicalintelligence/2010/04/brown\\_opposes\\_c.html](http://www.boston.com/news/politics/politicalintelligence/2010/04/brown_opposes_c.html).

120. See Viser, *supra* note 119.

given his inability to articulate the reasons he opposed the bill, it seems apparent he had used the filibuster here on an issue he did not genuinely feel strongly about.<sup>122</sup>

A similar situation arose during the health care debate of 2009, in which Senator Joseph Lieberman (I-CT)<sup>123</sup> repeatedly objected to the inclusion of a provision creating a public health insurance option.<sup>124</sup> Over a period of months, Senator Lieberman gave various reasons for his opposition to the public option, none of which held up to much scrutiny, causing him to constantly change his rationale.<sup>125</sup> Despite Senator Lieberman's inability to give a coherent rationale for why he opposed the public option, he nevertheless threatened to filibuster the bill over the inclusion of the provision,<sup>126</sup> and the Senate majority was eventually forced to drop the provision because it needed his vote.<sup>127</sup>

#### *D. Negotiating With Scorpions: Increased Polarization Has Made Invoking Cloture Harder*

One argument often made in favor of keeping the filibuster is that it encourages deal-making and bipartisanship, as the majority party will often need support from at least someone in the minority party to pass legislation.<sup>128</sup> However, over the years, the two parties have become increasingly polarized, including in the U.S. Senate.<sup>129</sup> As the parties grow more polarized, it becomes harder to broker deals, and by

121. See Daniel Indiviglio, *Scott Brown Helps Democrats Push Through Financial Reform*, ATLANTIC (May 20, 2010, 3:53 PM), <http://www.theatlantic.com/business/archive/2010/05/scott-brown-helps-democrats-push-through-financial-reform/57041/>.

122. See *supra* text accompanying notes 119-21.

123. *Biography*, JOE LIEBERMAN: U.S. SENATOR FOR CONN., <http://lieberman.senate.gov/index.cfm/about-joe/biography> (last visited July 27, 2012) (noting that Senator Lieberman is an "Independent Democrat").

124. See Steve Benen, *Lieberman's On to Reason #7*, WASH. MONTHLY (Dec. 9, 2009, 10:40 AM), [http://www.washingtonmonthly.com/archives/individual/2009\\_12/021311.php](http://www.washingtonmonthly.com/archives/individual/2009_12/021311.php); Brian Beutler, *Lieberman: Sure, I'd Filibuster A Health Care Reform Bill With A Public Option*, TALKING POINTS MEMO (Oct. 27, 2009, 1:25 PM), <http://tpmdc.talkingpointsmemo.com/2009/10/lieberman-sure-id-filibuster-a-health-care-reform-bill.php?ref=fpblg>; Angie Drobnic Holan, *The Truth-O-Meter and the Health Care Debate of 2009*, POLITIFACT (Dec. 29, 2009, 3:38 PM), <http://www.politifact.com/truth-o-meter/article/2009/dec/29/health-care-debate-2009/>.

125. See Benen, *supra* note 124.

126. Beutler, *supra* note 124.

127. See E.J. Dionne, *The Public Option Died Last Summer*, WASH. POST (Dec. 15, 2009, 11:02 AM), [http://voices.washingtonpost.com/postpartisan/2009/12/the\\_public\\_option\\_died\\_last.html](http://voices.washingtonpost.com/postpartisan/2009/12/the_public_option_died_last.html).

128. See *The Filibuster Today and Its Consequences*, *supra* note 3, at 143 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

129. See *The Polarization of the Congressional Parties*, VOTEVIEW (May 10, 2012), [http://voteview.com/political\\_polarization.asp](http://voteview.com/political_polarization.asp).

extension, harder to invoke cloture.<sup>130</sup> It is noteworthy, however, that even though the increased polarization in the Senate makes it harder to broker deals and overcome the sixty-vote threshold required to invoke cloture,<sup>131</sup> the modern Senate has nevertheless overcome this threshold and enacted legislation with bipartisan support on multiple occasions.<sup>132</sup>

*E. The Vanishing Judiciary:*

*The Current System Has Left Many Vacancies on the Bench*

A further problem with the current system of filibusters and holds is that it has led to a high number of vacancies that remain unfilled on the bench.<sup>133</sup> Approaching the end of President Obama's second year in office, only forty percent of his judicial nominees had been confirmed.<sup>134</sup> By contrast, at similar points in their presidencies, President Obama's immediate predecessors, George W. Bush and Bill Clinton, had seventy-seven and ninety percent of their judicial nominees, respectively, confirmed.<sup>135</sup> President Obama's nominees averaged 169 days pending from nomination to confirmation, including an average of 150 days for nominees ultimately confirmed without opposition.<sup>136</sup> Judicial nominees Joseph Greenaway and James Wynn both waited over 200 days for their confirmation votes, only to be confirmed without opposition.<sup>137</sup> Delays like this have resulted in a high number of vacancies on the bench.<sup>138</sup> In December 2010, there were 110 federal court vacancies—more than twelve percent of the entire federal judiciary.<sup>139</sup>

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130. See *The Filibuster Today and Its Consequences*, *supra* note 3, at 157-58 (statement of Sen. Tom Udall, Member, S. Comm. on Rules & Admin.).

131. See *supra* text accompanying notes 38, 129-30.

132. See, e.g., Carl Hulse, *Senate Ends Military Ban on Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at 1; Matthew Jaffe, *Obama Hails Senate Passage of Wall Street Overhaul*, ABC NEWS (July 15, 2010), <http://abcnews.go.com/Politics/wall-street-overhaul-rolls-final-passage-senate/story?id=11170998>.

133. Press Release, Leahy, *supra* note 8.

134. ALLIANCE FOR JUST., *supra* note 43, at 2; Kimberly Schwandt, *2010 Rewind: Moments that Marked Obama's Second Year in Office*, FOX NEWS (Dec. 30, 2010), <http://politics.blogs.foxnews.com/2010/12/30/2010-rewind-moments-marked-obamas-second-year-office>.

135. ALLIANCE FOR JUST., *supra* note 43, at 2.

136. *Id.* at 1-2.

137. *Id.* at 1.

138. See *id.* at 2.

139. *Id.*



## IV. PROPOSED AND ENACTED FILIBUSTER AND HOLD REFORMS

This Part will discuss recent reforms to the filibuster and proposals for more reforms going forward. A series of reforms were enacted in 2011,<sup>140</sup> but other reform proposals were specifically rejected,<sup>141</sup> and many other proposals for filibuster reform have yet to receive a vote.<sup>142</sup> Additional reform proposals have been made which address the Senate hold specifically.<sup>143</sup> Admittedly, there are considerable obstacles to reforming the filibuster.<sup>144</sup> But if additional reforms are not made, abuse of the practice is likely to continue.<sup>145</sup>

A. *The Senate Acts: Recently Enacted Reforms to the System*

Between the end of 2010 and the beginning of 2011, the Senate looked at numerous proposed reforms to both holds and filibusters.<sup>146</sup> All Democrats who returned to the Senate in 2011 from the previous session of Congress signed a letter to Majority Leader Harry Reid (D-NV) urging reforms to the filibuster.<sup>147</sup> But there was skepticism and pushback as well: outgoing Democratic Senator Chris Dodd (D-CT) cautioned the Senate against “unwise” rule changes to the filibuster,<sup>148</sup> and a spokesman for Minority Leader Mitch McConnell (R-KY) warned that Democrats would come to regret changes to the rules should they find themselves in the minority some day.<sup>149</sup> These reform efforts came to a culmination on January 27, 2011, when votes were held on several proposed reforms.<sup>150</sup> The Senate passed some modest rule reforms, but voted down more substantial ones.<sup>151</sup>

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140. See *infra* Part IV.A.

141. See *infra* Part IV.B.

142. See *infra* Part IV.C.

143. See *infra* Part IV.D.

144. See *infra* Part IV.E.

145. See *infra* Part IV.F.

146. See, e.g., Dan Friedman, *Senate's Returning Democrats Unanimously Favor Filibuster Reform*, NAT'L J. (Dec. 23, 2010, 11:24 AM), <http://www.nationaljournal.com/congress/senate-s-returning-democrats-unanimously-favor-filibuster-reform-20101222>; Greg Sargent, *Harry Reid Sure Sounds Serious About Filibuster Reform*, WASH. POST (Jan. 5, 2011, 2:27 PM), [http://voices.washingtonpost.com/plum-line/2011/01/harry\\_reid\\_sure\\_sounds\\_serious.html](http://voices.washingtonpost.com/plum-line/2011/01/harry_reid_sure_sounds_serious.html).

147. Friedman, *supra* note 146.

148. J. Taylor Rushing, *Dodd Says Senate Should Keep Filibuster*, HILL (Nov. 30, 2010, 8:59 PM), <http://thehill.com/homenews/senate/131277-in-farewell-dodd-says-senate-should-keep-filibuster>.

149. Friedman, *supra* note 146.

150. 157 CONG. REC. S295, S326–29 (daily ed. Jan. 27, 2011).

151. See Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20.

One Senate rule reform that passed was a resolution abolishing the secret hold by prescribing specific language that people intending to place a hold must use.<sup>152</sup> A Senator intending to place a hold must now submit a notice of intent to an appropriate Senate leader, stating that, “I, Senator \_\_\_\_\_, intend to object to \_\_\_\_\_, dated \_\_\_\_\_. I will submit a copy of this notice to the Legislative Clerk and the Congressional Record within [two] session days and I give my permission to the objecting Senator to object in my name.”<sup>153</sup> Furthermore, a Senator objecting on the Senate floor itself must state, “I object to \_\_\_\_\_, on behalf of Senator \_\_\_\_\_.”<sup>154</sup> The Senate also passed a rule limiting the stalling tactic of reading a bill on the floor in its entirety, as long as the law has been publicly available for a given period of time.<sup>155</sup>

In addition to these formal resolutions, the Senate also reached some more informal agreements to modify the filibuster.<sup>156</sup> Senators Charles Schumer (D-NY) and Lamar Alexander (R-TN) pledged to work together to introduce a bill to reduce the number of federal government positions requiring Senate confirmation.<sup>157</sup> Senator Schumer later introduced the Presidential Appointment Efficiency and Streamlining Act of 2011, which encompassed these goals.<sup>158</sup> The Senate subsequently passed the bill, on a vote of 79-20, but it has not yet passed the House of Representatives.<sup>159</sup> Another filibuster reform was agreed to via a “handshake deal” between Minority Leader McConnell and Majority Leader Reid.<sup>160</sup> The majority party agreed to limit the use of “fill[ing] the amendment tree,” a parliamentary maneuver used to prevent the minority party from offering amendments,<sup>161</sup> in exchange for

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152. See S. Res. 28, 112th Cong. § 1 (2011) (enacted).

153. *Id.* § 1(a)(3).

154. *Id.* § 1(a)(4).

155. See S. Res. 29, 112th Cong. § 1(b) (2011) (enacted); Hulse, *supra* note 151, at A20.

156. Paul Kane, *Senate Leaders Agree on Changes in Filibuster, Confirmation Process*, WASH. POST, Jan. 28, 2011, at A5.

157. See *id.*

158. See Presidential Appointment Efficiency and Streamlining Act of 2011, S. 679, 112th Cong. (2011); Ed Feulner, *Wrong Way to Speed Up Nominations: Cutting Out Senate Approval Would Subvert the Founders' Intent*, WASH. TIMES, Apr. 12, 2011, at B3.

159. See Carl Hulse, *Senate Votes to Streamline the Confirmation Process*, N.Y. TIMES, June 30, 2011, at A18; S. 679: *Presidential Appointment Efficiency and Streamlining Act of 2011*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s679> (last visited July 27, 2012).

160. Kane, *supra* note 156, at A5.

161. See GOLD, *supra* note 19, at 102; see also Mark Strand, *Filling the Tree*, CONG. INST. (June 12, 2008), [http://www.conginst.org/index.php?option=com\\_myblog&show=Filling-the-Tree.html&Itemid=26](http://www.conginst.org/index.php?option=com_myblog&show=Filling-the-Tree.html&Itemid=26) (discussing how the Majority Leader can “fill the amendment tree” and prevent the minority from offering amendments to legislation by offering his or her own, even if they are inconsequential in substance, because the Majority Leader is given precedence for introducing amendments and because most bills have a set limit of amendments that are allowed).

the minority party's agreement to limit filibustering matters from even coming up for debate.<sup>162</sup>

*B. The Senate Punts: Additional Proposals That Were Voted Down*

While the Senate did implement the previously discussed filibuster reforms, several other reform ideas were voted down.<sup>163</sup> Senator Tom Harkin (D-IA) proposed one such reform idea (the "Harkin Proposal").<sup>164</sup> According to the Harkin Proposal, an initial sixty-vote threshold for invoking cloture would be preserved, but upon failure to invoke cloture, a Senator could file another cloture motion.<sup>165</sup> Two days later, the Senate could vote again on the issue, but this time, the threshold for invoking cloture would be reduced by three votes to fifty-seven votes.<sup>166</sup> If that vote failed, the process would repeat itself: a Senator could file for another cloture motion, and after two days, the vote could be held, with the threshold for cloture once again being reduced by three votes.<sup>167</sup> The process would continue, until eventually cloture could be invoked with a simple majority of fifty-one votes.<sup>168</sup> In addition to its support within the Senate, this proposal has received support from outside the Senate chamber from congressional scholars, including Sarah Binder, a senior fellow at the Brookings Institution.<sup>169</sup>

The Senate voted on the Harkin Proposal in January 2011, and it failed decisively.<sup>170</sup> Only twelve Senators, all of them Democrats, voted for the proposal, whereas eighty-four Senators, including every Republican and a strong majority of Democrats, voted against it.<sup>171</sup> The ultimate ability under the Harkin Proposal to pass legislation on a simple majority vote was likely a deal-breaker for many Senators.<sup>172</sup> For instance, leaders Reid and McConnell were both adamant that a

162. Kane, *supra* note 156, at A5.

163. Hulse, *supra* note 151, at A20.

164. See Christinia Crippes, *Harkin Filibuster Effort Falls Flat*, HAWK EYE, Jan. 29, 2011, at 1A.

165. Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 7-8 (2011).

166. *Id.* at 8.

167. *Id.*

168. *Id.*

169. See S. Res. 8, 112th Cong. (2011) (demonstrating that S. Res 8 is the Harkin Proposal); Rigdon, *supra* note 7, at 26 (discussing Binder's support); *On the Resolution (S. Res. 8)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00004](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00004) (last visited July 27, 2012) (showing support for S. Res 8 in the Senate).

170. See 157 CONG. REC. S295, S327 (daily ed. Jan. 27, 2011).

171. *Id.*; *On the Resolution (S. Res. 8)*, *supra* note 169.

172. See Crippes, *supra* note 164, at 1A; Kane, *supra* note 156, at A5.

supermajority requirement to invoke cloture should not be changed.<sup>173</sup> As long as there is bipartisan agreement in the Senate that invoking cloture should require something more than a majority, proposals like Senator Harkin's will likely continue to be voted down by large margins.<sup>174</sup>

Two additional proposals for filibuster reform that were defeated in 2011 would have required that filibusterers talk continuously (Mr. Smith-style).<sup>175</sup> In one of the proposals, the rules would be changed so that if the Senate failed to obtain three-fifths of the Senate to vote for cloture, the Senate would then enter a period of continuous debate until no Senator sought recognition to speak, at which point cloture would be deemed invoked.<sup>176</sup> The second proposal was more complex, but the essential goal was the same: once no Senator sought recognition, the Senate could pass the bill on a majority vote.<sup>177</sup> While these two proposals received more support than the Harkin proposal, they too were defeated, receiving only forty-four and forty-six votes, respectively.<sup>178</sup>

While resurrecting Mr. Smith-style filibusters may be appealing<sup>179</sup> (and indeed, such filibusters do still occasionally occur),<sup>180</sup> it is worth remembering that two-tracking was formulated to reduce them for a reason.<sup>181</sup> Two-tracking was created because compelling filibusters to be done in "Mr. Smith-style" often led to a backlog of Senate business.<sup>182</sup>

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173. Kane, *supra* note 156, at A5.

174. See S. Res. 8, 112th Cong. § 1 (2011) (outlining how the Harkin Proposal would allow legislation to pass on a majority vote); Kane, *supra* note 156, at A5 (showing that both the Senate Majority and Minority leaders oppose such a plan); *On the Resolution (S. Res. 8)*, *supra* note 169 (showing a majority of Senators in both parties opposing such a plan).

175. See, e.g., Reid Pillifant, *Gillibrand Wants to Bring Mr. Smith Back to Washington*, N.Y. OBSERVER (Jan. 6, 2011, 9:41 PM), <http://www.observer.com/2011/politics/gillibrand-wants-bring-mr-smith-back-washington>; see S. Res. 10, 112th Cong. § 4 (2011); S. Res. 21, 112th Cong. § 1 (2011); *On the Resolution (S. Res. 10 As Amended)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00005](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00005) (last visited July 27, 2012); *On the Resolution (S. Res. 21 As Amended)*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00006](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00006) (last visited July 27, 2012).

176. S. Res. 10.

177. S. Res. 21.

178. *On the Resolution (S. Res. 8)*, *supra* note 169; *On the Resolution (S. Res. 10 As Amended)*, *supra* note 175; *On the Resolution (S. Res. 21 As Amended)*, *supra* note 175.

179. See S. Res. 10; *On the Resolution (S. Res. 10 As Amended)*, *supra* note 175 (showing that forty-four Senators supported such a proposal).

180. Alexandra Petri, *[Updated] Filibernie and Mr. Smith: Is Senator Bernie Sanders Still Filibustering? Yes!*, COMPOST (Dec. 10, 2010, 6:23 PM), [http://voices.washingtonpost.com/compost/2010/12/filibernie\\_and\\_mr\\_smith\\_is\\_sen.html](http://voices.washingtonpost.com/compost/2010/12/filibernie_and_mr_smith_is_sen.html).

181. See *The Filibuster Today and Its Consequences*, *supra* note 3, at 147 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

182. See *id.*

Any filibuster reform that compels filibusterers to engage in marathon talking sessions would likely lead to a return of the very problems that two-tracking was designed to prevent.<sup>183</sup>

Steven S. Smith, Director of the Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis,<sup>184</sup> is likewise skeptical of such a plan.<sup>185</sup> According to Director Smith, simply making obstruction more difficult would have only a marginal effect on the amount of obstruction because most Senators who vote against cloture have already calculated that obstruction is good politics for them, and making their obstruction more visible would not affect that calculation.<sup>186</sup> Director Smith further believes that when the majority party faces such a filibuster, it will be subjected to just as much outside criticism as the minority, as it will inevitably be portrayed as unwilling to compromise and be accused of misplaced priorities by sidelining more important issues in favor of forcing the filibuster.<sup>187</sup> Finally, Director Smith concludes by noting that the last time a Majority Leader forced a Mr. Smith-style filibuster, it was unsuccessful in ultimately getting the legislation passed.<sup>188</sup> A 1987 campaign finance reform bill was subjected to seven cloture votes, yet the most votes in favor of cloture were on the first vote, with absentees causing the total number of votes in favor of cloture to decrease on subsequent votes.<sup>189</sup> Thus, simply bringing back Mr. Smith-style filibusters is a flawed remedy to the current problem.<sup>190</sup>

### *C. Outside of the Box: Additional Filibuster Reform Proposals*

There are several additional filibuster reform proposals beyond those discussed in the previous Section.<sup>191</sup> One such proposal, advocated by former Vice President Walter Mondale, would reduce the number of votes required to invoke cloture but still require more than a majority (i.e., it can be invoked with somewhere between fifty-five and fifty-eight votes, lower than the current sixty-vote threshold, but still more than just

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183. *See id.*

184. Steven S. Smith, *The Senate Syndrome*, ISSUES GOVERNANCE STUD., June 2010, at 1, 2.

185. *Id.* at 22-23.

186. *See id.* at 22.

187. *Id.* at 23.

188. *See id.*

189. *Id.*

190. *See supra* text accompanying notes 182-89.

191. *See infra* text accompanying notes 192-253.

a majority).<sup>192</sup> Vice President Mondale, who was influential in creating the sixty-vote requirement during the 1970s filibuster reforms, argues that the threshold for invoking cloture should “assure deliberation and prevent debilitation,” and that while the sixty-vote threshold was a good number for meeting this middle ground in the 1970s, it is too high a threshold in today’s more “harshly partisan” environment.<sup>193</sup>

Gerard N. Magliocca, a professor of law at Indiana University, Robert H. McKinney School of Law,<sup>194</sup> has made a different proposal for filibuster reform: turn it into a suspensory veto that the majority can override after one year has expired.<sup>195</sup> Under this proposal, modeled after the rules of the United Kingdom’s House of Lords, the minority’s power to resist legislation would be weakened, but it would “retain the benefits of extended debate.”<sup>196</sup> The underlying justifications for such a reform are that it would: (1) improve debate because the minority would know that they needed to eventually bring over majority Senators to their cause to defeat the bill permanently; (2) in some cases, give the voters a chance to influence the bill because an election would take place during the year in which the bill was being delayed; and (3) allow the general populace to infer that the pieces of legislation offered earliest in the session by the majority party were that party’s highest priorities.<sup>197</sup> However, Professor Magliocca recognizes potential shortcomings to this reform.<sup>198</sup> Legislation which is introduced with less than a year left in the Congressional session might be barred from passing until the next session began, at which point the one-year clock would need to be restarted, unless the Senate were to also amend its rules allowing bills to pass over successive sessions.<sup>199</sup>

Senator Michael Bennet (D-CO) has proposed several ways to reform the filibuster (the “Bennet Proposal”), including substantive changes to the cloture-threshold requirement.<sup>200</sup> One important element

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192. *The Filibuster Today and Its Consequences*, *supra* note 3, at 144, 146–47 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

193. *Id.* at 146–47; Eric Black, *Fixing the Filibuster Problem: What Mondale Would Do*, MINNPOST (Feb. 2, 2010), <http://www.minnpost.com/eric-black-ink/2010/02/fixing-filibuster-problem-what-mondale-would-do>.

194. Gerald R. Magliocca, IND. U., <http://indylaw.indiana.edu/people/profile.cfm?id=40> (last visited July 27, 2012).

195. Gerald R. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 316 (2011).

196. *Id.* at 316–17.

197. *See id.* at 318.

198. *See id.* at 318–19.

199. *Id.*

200. *See* S. Res. 440, 111th Cong. § 2 (2010); *Colorado: Sen. Michael Bennet (D)*, NAT’L J., <http://www.nationaljournal.com/almanac/2010/person/michael-bennet-co/> (last visited July 27, 2012).

of his proposal is that it requires “forty-one hundredths of the Senators duly chosen and sworn” to vote against cloture in order to prevent it from being invoked, as opposed to requiring sixty Senators to invoke it.<sup>201</sup> Furthermore, this threshold can change if there are multiple cloture votes and the majority party is able to convince some Senators in the minority party to support cloture.<sup>202</sup> Under the Bennet Proposal, after three failed cloture votes, the threshold for preventing the invocation of cloture would be raised to forty-five “hundredths of the Senators duly chosen and sworn,” unless the minority party can persuade at least one member of the majority party to vote against cloture.<sup>203</sup> If the minority party persuades a majority party Senator to do so, the threshold is reduced back to forty-one, unless the majority party can similarly persuade three members of the minority party to vote for cloture, at which point it would be raised again to forty-five votes.<sup>204</sup> Senator Bennet testified before the Senate Committee on Rules and Administration in support of his plan in July 2010,<sup>205</sup> but it died after it was referred to Committee.<sup>206</sup>

The Bennet Proposal has two strong attributes.<sup>207</sup> First, its requirement that the minority prevent cloture from being invoked, as opposed to requiring the majority to invoke it, would help put the onus of a filibuster back on the minority.<sup>208</sup> Under such a rule, cloture would have been successfully invoked on the first vote for the Hurricane Irene supplemental bill and the nomination of Craig Becker to the NLRB, both of which received only thirty-three votes in opposition to cloture.<sup>209</sup> Even prominent supporters of the filibuster, such as Professor Gregory Koger, have argued in favor of implementing a similar reform.<sup>210</sup> Second, the Bennet proposal’s variable thresholds for the invocation of cloture would give both parties incentives to foster compromise and encourage Senators from the other party (“converts”) to support the opposing cause.<sup>211</sup> Senators in the minority party will want Senators in the majority party to support their cause because it will keep the

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201. S. Res. 440 § 2(c) (internal quotation marks omitted).

202. *See id.* § 2(d).

203. *See id.*

204. *See id.*

205. Press Release, Bennet, *supra* note 5.

206. S. Res. 440 (111th): *A Resolution Improving the Senate Cloture Process*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/sres440> (last visited July 27, 2012).

207. *See infra* text accompanying notes 208-12.

208. Press Release, Bennet, *supra* note 5 (“If you want to block the majority from moving ahead, then you at least ought to be required to show up for the vote.”).

209. *See supra* text accompanying notes 89-94.

210. *See* Rigdon, *supra* note 7, at 26.

211. *See* Press Release, Bennet, *supra* note 5.

threshold for preventing the invocation of cloture at forty-one votes, and the majority party will want to get the support from Senators in the minority party because it could increase that requirement back to forty-five votes.<sup>212</sup>

However, elements of the plan are flawed.<sup>213</sup> The requirement that the minority party needs only one majority party convert to reduce the number of votes needed to invoke cloture, whereas the majority party needs three minority party converts to raise it again, is counterintuitive.<sup>214</sup> Simple math dictates that the minority party will have a wider range of potential converts to target than the majority party would. In a Senate with fifty-four majority party Senators and forty-six minority party Senators, for instance, the minority party will have fifty-four Senators to target as potential converts, whereas a majority party only has forty-six Senators to target. Furthermore, the rigidity of the Bennet Proposal's numbers would give vastly disproportionate influence to converts in some situations.<sup>215</sup> Under the Bennet Proposal, a single majority party Senator voting against cloture could reduce the cloture-vote requirement by a full four votes, from forty-five votes to forty-one.<sup>216</sup> Similarly, the third minority party Senator to vote for cloture would increase the cloture requirement from forty-one votes back to forty-five votes, a similar full four-vote increase.<sup>217</sup>

Other filibuster reform proposals would limit the kinds of Senate business that can be subjected to filibusters.<sup>218</sup> No Labels, a bipartisan organization with various proposals to reform the federal government, has noted that under current Senate rules, Senators can filibuster both the motion to proceed to debating the issue and the substantive issue itself.<sup>219</sup> The organization supports banning the use of the filibuster on the motion to proceed, arguing that such a reform alone could "cut the number of filibusters in half."<sup>220</sup>

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212. *See id.*

213. *See infra* text accompanying notes 214-17.

214. *See* ELLEN WEISBORD, BRUCE H. CHARNOV, & JONATHAN LINDSEY, *MANAGING PEOPLE IN TODAY'S LAW FIRM: THE HUMAN RESOURCES APPROACH TO SURVIVING CHANGE* 98 (1995); *Group Dynamics*, BRIAN MAC, <http://www.brianmac.co.uk/group.htm> (last visited July 27, 2012).

215. *See infra* text accompanying notes 216-17.

216. S. Res. 440 § 2(d) (2010).

217. *Id.*

218. *See* Steven S. Smith & Kate M. Gregg, *Reporter's Guide to Filibuster Reform in the U.S. Senate*, WASH. U. ST. LOUIS, [http://news.wustl.edu/Documents/Record/Reporter's Guide to Filibuster Reform.pdf](http://news.wustl.edu/Documents/Record/Reporter's%20Guide%20to%20Filibuster%20Reform.pdf) (last visited July 27, 2012).

219. *See* NO LABELS, *MAKE CONGRESS WORK!: A NO LABELS ACTION PLAN TO CHANGE THE RULES AND FIX WHAT'S BROKEN* 2, 10, available at [http://nolabels.3cdn.net/91487f08fcfc87870a\\_p2m6iii9t.pdf](http://nolabels.3cdn.net/91487f08fcfc87870a_p2m6iii9t.pdf).

220. *Id.* at 10.



Along these same lines, some commentators have proposed to limit the amount of time allotted for debate after a motion to proceed.<sup>221</sup> Senate Resolution 10, one of the proposals to enact the Mr. Smith-style approach to filibusters,<sup>222</sup> reduced the duration of post-cloture debate on nominations to only two hours.<sup>223</sup> Such a plan, however, does not differentiate between a genuinely controversial nominee like David Hamilton,<sup>224</sup> and an uncontroversial one like Barbara Keenan<sup>225</sup>—both would receive two hours of post-cloture debate.<sup>226</sup> Moreover, it is not clear this reform could seriously address the issue of blanket holds: if every nominee is given two hours of post-cloture debate, placing holds on large swathes of nominees would still force the Senate to spend substantial amounts of time invoking cloture on all nominees.<sup>227</sup>

The Bennet Proposal has a different post-cloture debate time frame that more explicitly ties the amount of debate time to how controversial the issue is, which could help to diffuse these particular problems.<sup>228</sup> Under the Bennet Proposal, three-fifths of the Senate may vote to reduce the thirty-hour debate time requirement on given issues.<sup>229</sup> However, such a proposal might go too far toward the reduction of debate time. Elizabeth Rybicki, an analyst on Congress and legislative process for the Congressional Research Service, has suggested that, in connection with other elements of the Bennet Proposal and with current Senate rules, such a provision could allow the Senate to pass legislation with a two-thirds vote and no debate time.<sup>230</sup>

Some commentators have also argued that the filibuster's use on substantive issues thought to be "important to the exercise of the Senate's constitutional powers" should be limited.<sup>231</sup> The filibustering of

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221. See, e.g., *The Filibuster Today and Its Consequences*, *supra* note 3, at 146 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

222. See *supra* note 176 and accompanying text.

223. S. Res 10, 112th Cong. § 5 (2011).

224. Cristina Corbin, *Obama's First Judicial Nomination Re-Ignites Controversy Ahead of Vote*, FOX NEWS (Nov. 6, 2009), <http://www.foxnews.com/politics/2009/11/05/vote-nears-obamas-judicial-nominee-stirs-controversy/>; see *supra* text accompanying note 58.

225. See *supra* text accompanying notes 108-11.

226. See S. Res 10 § 5.

227. See *supra* text accompanying notes 63-65 (describing how the Senate hold derives its power from the amount of debate time allotted in the event of a cloture vote).

228. See S. Res. 440, 111th Cong. § 2(b) (2010).

229. *Id.*

230. See *Examining the Filibuster: Legislative Proposals to Change Senate Procedures: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. 403-04 (2010) (statement of Elizabeth Rybicki, Analyst on the Congressional & Legislative Process, Congressional Research Service, Library of Congress, Washington, D.C.).

231. Smith & Gregg, *supra* note 218.

judicial nominations has often proven to be particularly controversial.<sup>232</sup> In 2005, some Senate Republicans sought to end judicial filibustering.<sup>233</sup> Similarly, in his 2012 State of the Union Address, President Obama called on the Senate to give “all judicial and public service nominations . . . [an] up or down vote within 90 days.”<sup>234</sup> No Labels argues for putting real teeth into such a ninety-day requirement, stating that Senate rules should be amended so that if a nominee is not confirmed or rejected on an up or down vote within ninety days, the nominee would be confirmed by default.<sup>235</sup>

Finally, and perhaps most radically, some argue for the complete abolition of the filibuster.<sup>236</sup> Pundit Ezra Klein has argued that true bipartisanship in the Senate no longer exists. In today’s environment, it makes sense politically for the minority party to attempt to thwart the majority party as often as possible, and the filibuster makes it too difficult for the majority party to govern successfully.<sup>237</sup> While it may be true that there is increased partisanship in Congress, and that in such an environment the filibuster may make governing exponentially harder, Congress has nevertheless continued to pass bipartisan legislation, undermining any assertions that bipartisanship is truly impossible.<sup>238</sup> If one does value the idea of compromise, a proposal like Senator Bennet’s, which alters the number of votes needed to invoke cloture depending on the abilities of both the majority and minority parties to bring converts to their cause, would more effectively balance compromise and effective governance than would a complete abolition of the filibuster.<sup>239</sup>

Emmet J. Bondurant, a partner with Bondurant, Mixson & Elmore, LLP in Atlanta, Georgia,<sup>240</sup> goes even further than Mr. Klein.<sup>241</sup> Mr. Bondurant believes the filibuster, as it is currently practiced, is

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232. See, e.g., Hulse, *supra* note 53, at 29 (discussing an attempt to ban the use of filibusters on judicial nominations).

233. *Id.*

234. Barack Obama, President of the U.S., Remarks by the President in State of the Union Address (Jan. 25, 2012) [hereinafter Obama, State of the Union], available at <http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript>.

235. NO LABELS, *supra* note 219, at 9.

236. See, e.g., Klein, *supra* note 8.

237. *Id.*

238. See *supra* text accompanying notes 131-32.

239. See S. Res. 440, 111th Cong. § 2(d) (2010).

240. Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 467 & n.\* (2011).

241. See generally *id.* (arguing that the filibuster is unconstitutional).

unconstitutional.<sup>242</sup> He argues that a sixty-vote requirement is unconstitutional in seven different ways, among them that the Constitution specifically enumerated issues which required a supermajority to pass and that the document was written under a presumption that all other issues would be decided by a simple majority.<sup>243</sup> Mr. Bondurant subsequently agreed to represent the government watchdog group Common Cause in their lawsuit against the U.S. Senate, which alleges that the filibuster “violates the principle of majority rule” and is unconstitutional.<sup>244</sup>

Others dispute the idea that the filibuster is unconstitutional.<sup>245</sup> Catherine Fisk and Erwin Chemerinsky, both professors of law at University of California, Irvine School of Law,<sup>246</sup> argue that “[b]ecause the text [of the Constitution] is silent about the [number of] vote[s] needed to stop debate or pass a law, Congress has the option to set the voting requirement,” and the enumeration of supermajority requirements elsewhere does not mean that only those issues can constitutionally require a supermajority vote.<sup>247</sup> John O. McGinnis, a Professor of Law at Northwestern University School of Law,<sup>248</sup> and Michael B. Rappaport, a Professor of Law at the University of San Diego School of Law,<sup>249</sup> agree.<sup>250</sup> Professors McGinnis and Rappaport state that no one would seriously argue, for instance, that the Constitution’s requirement that a President address Congress on the “State of the Union” means that he is constitutionally prohibited from addressing Congress on other matters.<sup>251</sup> Similarly, the constitutionally-mandated supermajority requirements for some issues do not mean that all other supermajority requirements are unconstitutional.<sup>252</sup> Regardless of how the Supreme Court would

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242. *Id.* at 480.

243. *See id.* at 479-82.

244. Kitty Felde, *Common Cause Challenges the Senate Filibuster in Court over Dream Act Being Blocked*, 89.3 KPCC (May 15, 2012), [http://www.scpr.org/news/2012/05/15/32437/lawsuit-tries-dump-filibuster/](http://www.scpr.org/news/2012/05/15/32437/lawsuit-tries-dump-filibuster/Fix_the_Filibuster); *Fix the Filibuster*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=5958583> (last visited July 27, 2012).

245. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 240-45 (1997).

246. Catherine Fisk, SCH. L. U. CAL. IRVINE, [http://www.law.uci.edu/faculty/profile\\_c\\_fisk.html](http://www.law.uci.edu/faculty/profile_c_fisk.html) (last visited July 27, 2012); Erwin Chemerinsky, SCH. L. U. CAL. IRVINE, [http://www.law.uci.edu/faculty/page1\\_e\\_chemerinsky.html](http://www.law.uci.edu/faculty/page1_e_chemerinsky.html) (last visited July 27, 2012).

247. Fisk & Chemerinsky, *supra* note 245, at 240.

248. John O. McGinnis, NW. L., <http://www.law.northwestern.edu/faculty/profiles/JohnMcGinnis/> (last visited July 27, 2012).

249. MICHAEL B. RAPPAPORT, <http://www.profmikerappaport.com/> (last visited July 27, 2012).

250. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995).

251. *Id.*

252. *Id.*

ultimately rule if it was ever presented with a legal challenge to the filibuster, the considerable debate as to the merits of such a case leave the judiciary as a dubious avenue to enacting filibuster reform.<sup>253</sup>

*D. Hold the Filibuster Reform Please!:  
Rule Reform Proposals That Address the Hold Specifically*

There are also various proposals for rule reform that address only the Senate hold and not the filibuster.<sup>254</sup> One such proposal is to place a time limit on holds.<sup>255</sup> Senator Metzenbaum, notorious for his extensive usage of the hold,<sup>256</sup> nevertheless thought it should be limited, and stated that, absent “special circumstances,” a hold should expire after two weeks.<sup>257</sup> Various other proposals have been given for time limits on holds, ranging anywhere from twenty-four hours to sixty days.<sup>258</sup> Another proposal for hold reform is to require more than one Senator to place a hold.<sup>259</sup> The Bennet Proposal contains such an element, requiring that, for a hold to continue to be honored after two days from when the original objection is made, at least one Senator from each party must raise objections to the nominee.<sup>260</sup> Others have suggested that as many as sixteen Senators should need to support a hold before it can be honored.<sup>261</sup>

While these proposals might rein in some abuses of the hold, because the hold is not formally created by the Senate rules but instead derives its power from the filibuster,<sup>262</sup> in many cases these proposals could run into the same problems as did Senator Baker’s decision to treat holds as non-binding.<sup>263</sup> If a Senator’s hold is no longer recognized, the Senator would still be able to use the filibuster, and the amount of debate time it compels, to slow down significantly the passage of the issue.<sup>264</sup>

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253. See *supra* text accompanying notes 242-52.

254. See OLESZEK, *supra* note 62, at 3-12 (discussing various proposals to reform the hold, almost none of which involve filibuster reform).

255. *Id.* at 3-4.

256. See *supra* text accompanying notes 72-74.

257. OLESZEK, *supra* note 62, at 4.

258. *Id.*

259. *Id.* at 11-12.

260. S. Res. 440, 111th Cong. § 3(1) (2010).

261. OLESZEK, *supra* note 62, at 11-12.

262. See *supra* text accompanying notes 60-65.

263. See Waldman, *supra* note 5 (explaining how even if the Majority Leader chooses to go ahead and force a Senate vote in spite of a hold, it can still use up significant amounts of debate time); *supra* text accompanying notes 69-70; *infra* text accompanying note 264.

264. See *supra* text accompanying note 65.

Thus, filibuster reform is a necessary component of any serious hold reform.<sup>265</sup>

A potential way to weaken the hold through filibuster reform is to reduce the amount of allotted post-cloture debate time on certain matters.<sup>266</sup> Senate Research 10's provision reducing the amount of post-cloture debate on nominations to only two hours would help to accomplish that goal.<sup>267</sup> The hold on Representative McHugh's nomination<sup>268</sup> is a good example of how this rule would work to diffuse holds on noncontroversial nominations.<sup>269</sup> Assuming that Senators Roberts and Brownback went through with their implied threat and forced a cloture vote on the nomination,<sup>270</sup> it would only force the Senate to spend two hours debating the issue.<sup>271</sup> As such, the threat to filibuster would have been less meaningful, and simply holding a vote on the nomination would have been a much more viable option for the Majority Leader.<sup>272</sup> However, as discussed earlier, such a proposal runs the risk of simply replacing the current practice of Senators placing holds on individual nominees with Senators placing blanket holds on all nominees.<sup>273</sup>

### *E. That Might Be a Problem: Obstacles to Reform*

Despite the attention recently given to the importance of filibuster reform, there remain many obstacles to any meaningful reform.<sup>274</sup> One of the most basic is that there is considerable incentive for both majority party and minority party Senators to keep the status quo: the minority party never wants to vote its power away, and the majority party is always fearful about the diminished power it will have when it is the minority party again.<sup>275</sup> For majority party Senators, the fear of a lack of power when they once again become the minority party often trumps

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265. See *supra* text accompanying notes 262-64.

266. See *infra* text accompanying notes 268-72.

267. See S. Res. 10, 112th Cong. (2011); see also *infra* text accompanying notes 268-72.

268. See *supra* text accompanying notes 101-04.

269. See *infra* text accompanying notes 270-72.

270. See *supra* text accompanying notes 63-65 (explaining how a hold usually involves an implied threat to filibuster and why that is a deterrent to the Majority Leader from forcing a vote on the matter).

271. See S. Res. 10.

272. See *supra* text accompanying notes 64-65 (explaining that while the Majority Leader can hold a vote on a matter in spite of a hold, he has incentive to refrain from doing so because of the amount of time the Senator placing the hold can force the Senate to spend debating the matter).

273. See *supra* text accompanying notes 226-27.

274. See *infra* text accompanying notes 275-300.

275. See Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1054 (2011).

their desire to implement their own agenda while they remain the majority party.<sup>276</sup> Furthermore, Senators have an individualistic interest to preserve the filibuster because it makes them more powerful relative to other government officials and increases the influence of “rank-and-file” Senators relative to Senate leaders.<sup>277</sup> Majority party Senators may also be wary of the political aesthetics of significant filibuster reforms: attempts to change the Senate rules are sometimes framed as a “power grab.”<sup>278</sup>

Furthermore, because both parties have used the filibuster for their own ends in recent history,<sup>279</sup> anyone who calls for reforming the process runs the risk of looking hypocritical.<sup>280</sup> For example, during the debate over ending judicial filibusters in 2005, the unsuccessful filibusters of judicial nominations that had occurred under President Clinton became an object of contention.<sup>281</sup> When Senate Majority Leader Frist argued that the Democrats’ filibustering of judicial nominations was unprecedented, Senator Schumer pointed out that Senator Frist himself had supported the filibuster of Richard Paez’s nomination to the United States Court of Appeals for the Ninth Circuit.<sup>282</sup> Senator Frist sought to differentiate between his judicial filibuster and those of the Democrats, suggesting he had voted to filibuster Judge Paez simply because he wanted more information about the nominee.<sup>283</sup> Senator John Cornyn (R-TX) noted that Judge Paez did ultimately get an up or down vote, and columnist Byron York further argued that because the filibuster against Judge Paez was not successful and received only a small number of votes, it should not be considered a

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276. See Ezra Klein, *Wonkbook: Filibuster Reform Dead*, WASH. POST (Jan. 28, 2011, 6:45 AM), [http://voices.washingtonpost.com/ezra-klein/2011/01/wonkbook\\_filibuster\\_reform\\_dea.html](http://voices.washingtonpost.com/ezra-klein/2011/01/wonkbook_filibuster_reform_dea.html) (discussing the concept of “loss aversion” and how people in general often fear the consequences of loss more than they value the benefit of gains).

277. Bruhl, *supra* note 275, at 1054-55.

278. See Ezra Klein, *Filibuster Reform and Power Grabs*, WASH. POST (July 28, 2010, 12:23 PM), [http://voices.washingtonpost.com/ezra-klein/2010/07/filibuster\\_reform\\_and\\_power\\_gr.html](http://voices.washingtonpost.com/ezra-klein/2010/07/filibuster_reform_and_power_gr.html) (internal quotation marks omitted).

279. See, e.g., Obama, State of the Union, *supra* note 234 (“A simple majority is no longer enough to get anything—even routine business—passed through the Senate. . . . Neither party has been blameless in these tactics.”).

280. See *infra* text accompanying notes 281-89.

281. Compare Byron York, *What Sort of Filibustering Has Taken Place in the Senate, Where Judicial Nominations are Concerned?*, NAT’L REV., June 6, 2005, at 20, 22 (arguing that these alleged filibusters were not actually filibusters), with Judd Legum, *Frist Implodes on Senate Floor*, THINKPROGRESS.ORG (May 18, 2005, 11:06 AM), <http://thinkprogress.org/politics/2005/05/18/906/frist-implodes-of-senate-floor/> (presenting a counter-argument that these filibusters were in fact filibusters).

282. Legum, *supra* note 281, at A9.

283. *Id.*

filibuster.<sup>284</sup> Others, however, have argued that an unsuccessful filibuster is still a filibuster.<sup>285</sup>

Several years later, President Obama opened himself up to similar criticisms of hypocrisy on judicial filibusters.<sup>286</sup> During the 2005 filibuster reform debate, then-Senator Obama opposed banning judicial filibusters, saying, "One day Democrats will be in the majority again, and this rule change will be no fairer to a Republican minority than it is to a Democratic minority."<sup>287</sup> Seven years later, after Senator Obama had become President Obama, he reversed course and called for simple up or down votes on judicial nominations.<sup>288</sup> Senator Cornyn was then quick to point out that when President Obama was a Senator, he had himself voted for judicial filibusters and opposed Republican efforts to ban them.<sup>289</sup>

The Senate rules themselves also contain significant hurdles for any changes to the implementation of the filibuster.<sup>290</sup> Technically, a vote of "two-thirds of the Senators present and voting" is needed to change a Senate rule,<sup>291</sup> and Senate rules are binding on subsequent sessions of Congress unless they are changed via this two-thirds vote requirement ("entrenchment").<sup>292</sup> Exactly how big a procedural hurdle these rules could be for filibuster reform, however, is unclear.<sup>293</sup> There is debate as to whether entrenchment is constitutional,<sup>294</sup> and the Senate has apparently disregarded the two-thirds vote requirement and changed the Senate's rules with a majority vote on multiple occasions.<sup>295</sup> Indeed, the rule was disregarded as recently as October 2011, when the Senate

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284. Meredith Shiner & Humberto Sanchez, *Senators Shy From Obama Filibuster Reform*, ROLL CALL, Jan. 26, 2012, at 3; York, *supra* note 281, at 22; Lies, *Damn Lies and the Fight Over Judicial Confirmations*, CFIF (Apr. 28, 2005), [http://www.cfif.org/htdocs/freedomline/current/in\\_our\\_opinion/nuclear-option-lies.htm](http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/nuclear-option-lies.htm).

285. Andrew Seifter, *The Top 10 Filibuster Falsehoods*, MEDIA MATTERS FOR AM. (May 18, 2005, 1:45 PM), <http://mediamatters.org/research/2005/05/18/the-top-10-filibuster-falsehoods/133217>.

286. See *infra* text accompanying notes 287-89.

287. Shiner, *supra* note 284, at 3 (internal quotation marks omitted).

288. See *id.*

289. *Id.* at 10.

290. See *infra* text accompanying notes 291-92.

291. *Rules of the Senate: Precedence of Motions*, *supra* note 89.

292. See Fisk & Chemerinsky, *supra* note 245, at 245; *Rules of the Senate: Suspension and Amendment of the Rules*, U.S. SENATE COMMITTEE ON RULES & ADMIN., <http://www.rules.senate.gov/public/index.cfm?p=RuleV> (last visited July 27, 2012) ("The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.").

293. See *infra* text accompanying notes 294-300.

294. Fisk & Chemerinsky, *supra* note 245, at 247-52 (arguing that it is unconstitutional for one legislature to bind subsequent sessions of that legislative body).

295. *The Filibuster Today and Its Consequences*, *supra* note 3, at 145-46 (statement of Hon. Walter Mondale, Dorsey and Whitney LLP).

changed the rules by a simple majority vote to limit the ability of Senators to force votes on amendments after cloture has already been invoked.<sup>296</sup> Lastly, entrenchment could prove to be a blessing in disguise for filibuster reform.<sup>297</sup> One of the proposed methods of eliminating the perception that filibuster reform is a “power grab” is for the Senate to vote for filibuster reforms that would not take effect until a subsequent session of Congress.<sup>298</sup> Since neither party could be sure which party would control Congress at that time, it would look more like a vote for genuine principle, and less like a “power grab.”<sup>299</sup> Senate rules that bind subsequent sessions of Congress could play a key role in such an approach, as it would bind subsequent Senates to the filibuster reforms to which they agree.<sup>300</sup>

The Bennet Proposal is in many respects more sensitive to these reservations than other proposals to reform the filibuster.<sup>301</sup> The minority party still has influence under the plan: as long as the minority party can convince at least one majority party Senator to vote with them, they can keep the threshold for invoking cloture at forty-one votes.<sup>302</sup> Since the minority party still has the ability to filibuster, implementing such a reform resembles less of a “power grab” and blunts charges of hypocrisy against Senators who have previously used the filibuster.<sup>303</sup> Individual and rank-and-file Senators would still be empowered (both in relation to other government officials and against Senate leaders), as an individual convert could alter the number of votes needed to invoke cloture.<sup>304</sup>

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296. Alexander Bolton, *Reid Triggers “Nuclear Option” to Change Senate Rules, End Repeat Filibusters*, HILL (Oct. 6, 2011, 9:10 PM), <http://thehill.com/homenews/senate/186133-reid-triggers-nuclear-option-to-change-senate-rules-and-prohibit-post-cloture-filibusters>; David Waldman, *Sensationalist Headline About ‘Nuclear Option’ in the Senate! But Not Quite So*, DAILY KOS (Oct. 6, 2011, 5:24 PM), <http://www.dailykos.com/story/2011/10/06/1023638/-Sensationalist-headline-about-nuclear-option-in-the-Senate!-But-not-quite-so>.

297. See *infra* text accompanying notes 299-301.

298. See Ezra Klein, *Filibuster Follies*, WASH. POST (July 26, 2010, 11:13 AM), [http://voices.washingtonpost.com/ezra-klein/2010/07/filibuster\\_follies.html](http://voices.washingtonpost.com/ezra-klein/2010/07/filibuster_follies.html).

299. See *id.* (“[Such an approach] either phases [filibuster reform] in over the next few years or begins six years from now, when we don’t know who’ll be in control.”).

300. See *Rules of the Senate: Suspension and Amendment of the Rules*, *supra* note 292 (providing that the rules of the Senate continue from one session to the next, allowing a rule reform passed in one session of Congress to be carried over into the next one).

301. See *supra* text accompanying notes 200-06, 298-300; *infra* text accompanying notes 302-04.

302. See *supra* text accompanying notes 201-04.

303. See S. Res. 440, 111th Cong. § 2(d) (2010).

304. See *id.*



### F. *It Begins Again: Filibuster Abuse Has Continued*

Despite the reforms voted for in early 2011, filibuster abuse has continued. In December 2011, Republican Senators filibustered the nomination of Richard Cordray to run the Consumer Financial Protection Bureau.<sup>305</sup> What was disconcerting about this filibuster was that Mr. Cordray was not filibustered because the Republicans had any particular misgivings about the nominee himself, but because of their grievances with the agency he was slated to run and their desire to have the law creating the agency rewritten.<sup>306</sup> Senate Historian Donald A. Ritchie has stated that despite extensive searching of Senate history, he could not find another historical case of Senators blocking a nomination solely because they opposed the current structuring of the agency the nominee was appointed to run.<sup>307</sup> Mr. Cordray was eventually given the post via a recess appointment,<sup>308</sup> but the filibuster of the nominee for reasons entirely unrelated to the nominee himself indicates there was no extraordinary resistance to his nomination.<sup>309</sup>

### V. PROPOSAL FOR FUTURE REFORMS

Future efforts to reform the filibuster will likely need to be somewhat modest in scope to have a decent chance of passing.<sup>310</sup> Any plan which would, eventually, automatically allow the Senate to pass legislation and confirm nominees on a simple majority vote is likely to be a non-sequitur, as witnessed by the dramatic failure of the Harkin Proposal to pass.<sup>311</sup> Senators from both parties have indicated a willingness to support some types of reform,<sup>312</sup> but for any filibuster

305. John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

306. See *id.* at B8 (“This is not about the nominee, who appears to be a decent person and may well be qualified.” (internal quotation marks omitted)); see also Brian Darling, *Richard Cordray, the Filibuster and the CFPB*, REDSTATE (Dec. 7, 2011, 12:30 PM), [http://www.redstate.com/brian\\_d/2011/12/07/richard-cordray-the-filibuster-and-the-cfpb/](http://www.redstate.com/brian_d/2011/12/07/richard-cordray-the-filibuster-and-the-cfpb/) (“[T]he real motivation behind the Republican filibuster is an effort to protect consumers from the CFPB.”).

307. Sen. Sherrod Brown Says Republicans’ Refusal to Confirm Richard Cordray to Head Consumer Protection Bureau Was Unprecedented, POLITIFACT (Dec. 12, 2011, 6:00 PM), <http://www.politifact.com/ohio/statements/2011/dec/12/sherrod-brown/sen-sherrod-brown-says-republicans-refusal-confirm/>.

308. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

309. See *supra* text accompanying notes 305-08.

310. See *supra* Part IV.E.

311. See *supra* text accompanying notes 163-74.

312. See, e.g., Hulse, *supra* note 53, at 29 (showing that many Senate Republicans were poised to vote to abolish the use of filibusters on judicial nominees); Friedman, *supra* note 146 (showing that all Democrats returning to the Senate in 2011 from 2010 favored some type of filibuster reform).

reform plan to ultimately pass, it will likely need to be sensitive to the previously enumerated concerns that make Senators hesitant to reform: the fear of having no power when in the minority, the individualistic desire to have more influence with respect to other government officials, the desire of non-leader Senators to gain more influence with respect to Senate leaders, and the concerns about the aesthetics of perceived power grabs and hypocrisy.<sup>313</sup> While implementing filibuster reform in phases over a period of several sessions of Congress may be a viable option to help address some of these reservations,<sup>314</sup> the instant proposal focuses on substantive changes to the filibuster that would be sensitive to Senators' reservations about reforming it. The Senate should pass a modified version of the Bennet Proposal that stays true to the original resolution's goals but includes modifications to address its defects.<sup>315</sup> Specifically, three substantive changes should be made to the filibuster: (1) on the first two cloture votes, a forty-one cloture vote requirement to prevent cloture from being invoked; (2) on all subsequent cloture votes, a flexible cloture vote requirement that can be increased or decreased depending on the amount of converts; and (3) modified post-cloture debate times that reflect the amount of controversy created by the issue.<sup>316</sup>

The first modification, changing the cloture vote requirements on the first two cloture votes from sixty votes in the affirmative to invoke it to forty-one votes in the negative to prevent it from being invoked, is also a key element of the Bennet Proposal.<sup>317</sup> The time limits of the Harkin Proposal should be blended with the substantive cloture vote requirements of the Bennet Proposal on the first two cloture votes. If forty-one Senators or more vote against cloture on the initial cloture vote, the motion fails, and up to thirty hours of debate time is allotted on the issue before it can be brought up for a vote again.<sup>318</sup> If the second cloture vote fails, thirty hours of debate time will once again be allotted before a third cloture vote can be held.<sup>319</sup> Such a proposal would shift

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313. See *supra* Part IV.E.

314. See *supra* text accompanying note 298-99.

315. See *supra* text accompanying notes 213-17 (enumerating the Bennet Proposal's defects of an overly rigid scheme for cloture vote requirements that would place vastly disproportionate influence on particular converts and counterintuitive threshold requirements that made it considerably more difficult for the majority party to take advantage of the flexible cloture vote requirements than the minority party); see also *supra* text accompanying note 230 (discussing how the specific mechanics for reducing debate time enumerated in the Bennet Proposal could have unforeseen negative consequences).

316. See *infra* text accompanying notes 317-39.

317. See *supra* text accompanying note 201.

318. See S. Res. 8, 112th Cong. § 1 (2011); S. Res. 440, 111th Cong. § 2(c) (2010).

319. See S. Res. 8, 112th Cong. § 1 (2011); S. Res. 440, 111th Cong. § 2(c) (2010).

some of the onus of the filibuster currently shouldered by the majority and instead place it back on the minority,<sup>320</sup> and would be more in keeping with the pre-1970s reform tradition of the filibuster being used on issues on which the minority truly strongly opposes.<sup>321</sup> At the same time, the maintenance of two-tracking would allow the Senate to move on to other business as the filibuster occurred.<sup>322</sup>

Second, creating a flexible cloture vote requirement dependent upon the number of converts would modify the Bennet Proposal to fix its defects.<sup>323</sup> For the third cloture vote and all subsequent cloture votes, forty-one votes in the negative are initially needed to prevent cloture from being invoked.<sup>324</sup> However, the number of votes needed to prevent cloture from being invoked increases by one for every member of the minority party that votes for cloture, but decreases by one for every two members of the majority party who vote against cloture (rounded down),<sup>325</sup> so long as the needed number of votes to prevent cloture from being invoked is not reduced to less than forty-one.<sup>326</sup> Under this proposal, each individual convert would, at most, change the ultimate requirement for invoking cloture by one vote, instead of by four, as the Bennet Proposal did.<sup>327</sup> This will avoid the Bennet Proposal's problem of granting vastly disproportionate influence to each individual convert.<sup>328</sup> Furthermore, this proposal recognizes that the field of potential converts is larger for the minority party than the majority party, and as such assigns more weight to minority party converts (each individual convert increases the cloture vote requirement by one) than majority party converts (two individuals are needed to decrease the requirement by one).<sup>329</sup> This is a direct contrast to the Bennet Proposal, which counter-intuitively assigns more weight to majority party converts (a single convert could reduce the cloture vote requirement by four) than

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320. *See supra* text accompanying note 208.

321. *See supra* text accompanying notes 83-85.

322. *See supra* text accompanying notes 39-41.

323. *See infra* text accompanying notes 324-30.

324. *Cf.* S. Res. 440, 111th Cong. § 2(d) (2010). Unlike the Bennet Proposal, this Note's proposal does not default to an increased threshold.

325. Meaning that two Senators would be needed before the threshold could be reduced by one, four Senators would be needed before the threshold could be reduced by two, and so forth.

326. *Cf.* S. Res. 440 § 2(d). The Bennet Proposal's altering cloture vote requirements are more rigid, reducing the threshold by four votes if one majority party Senator votes with the minority party, and not raising it back up again at all unless three minority party Senators vote for cloture, at which point it raises by a full four votes.

327. *See supra* text accompanying note 216-17.

328. *See supra* text accompanying notes 216-17.

329. *See supra* text accompanying note 325-26.

to minority party converts (three converts were needed to remove the impact of the single majority party convert).<sup>330</sup>

Third, modified post-cloture debate times that reflect the amount of controversy created by the issue, are specifically geared toward weakening the Senate hold.<sup>331</sup> The reason that lone Senators can enforce a hold, even without significant support from other Senators, is that if they follow through on their implied threat to filibuster, they can force the Senate to spend substantial amounts of time debating the issue.<sup>332</sup> Thus, the most effective means of weakening the power of the hold on noncontroversial items is to limit the ability of Senators to force the Senate to spend time debating a noncontroversial issue.<sup>333</sup> The Senate should thus amend the post-cloture debate time requirements so that if a matter is noncontroversial, a final vote on the issue can occur in a more expedited manner.<sup>334</sup> Whenever a cloture vote occurs, if there are less than twenty-five votes against cloture, the normal allotment of up to thirty hours of debate is instead reduced to two hours.<sup>335</sup> If there are five or fewer votes against cloture, no additional debate time at all is mandated and the Senate may proceed to immediately vote on the item.<sup>336</sup> Under this modification, a threat to filibuster, which is what gives the hold its power, will have little meaning unless the matter is genuinely controversial, as the Senator placing the hold will not be able to force the Senate to spend substantial amounts of time debating the issue without support from other Senators, even if holds are placed on multiple issues.<sup>337</sup> Unlike the Bennet Proposal, which would have allowed the Senate to pass legislation with no debate at all with a two-thirds vote,<sup>338</sup> two hours of debate would remain for any issue on which more than five Senators voted against cloture, and thirty hours of debate

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330. See *supra* text accompanying note 214.

331. See *infra* text accompanying notes 332-39.

332. See *supra* text accompanying notes 63-65.

333. See *supra* text accompanying notes 266-72.

334. See S. Res. 10, 112th Cong. § 5 (2011) (creating a two-hour time limit for debate on nominations); S. Res. 440, 111th Cong. § 2(b) (2010) (allowing three-fifths of the Senate to vote to reduce post-cloture debate time).

335. Cf. S. Res. 10 § 5. Instead of reducing debate time based upon the substantive type of matter being debated, this Note's proposal reduces debate time depending upon how many Senators express opposition to the issue.

336. Cf. S. Res. 440 § 2(b). Instead of allowing three-fifths of the Senate to vote to eliminate debate time, this Note's proposal instead automatically eliminates debate time if there is truly only token opposition to the issue, and allows two hours of debate time when there is minimal but notable opposition.

337. Cf. Waldman, *supra* note 5. Under this Note's proposal, the enumerated parliamentary maneuvers which enable the hold would no longer be available unless a Senator could get support for a hold from other Senators.

338. See *supra* text accompanying note 230.

would remain on any issue for which there were more than twenty-five votes against cloture.<sup>339</sup>

## VI. CONCLUSION

The filibuster has become a mainstay of current Senate business, and with its entrenchment, has also come a record of abuse, including its ability to enable holds on noncontroversial issues.<sup>340</sup> While few, if any, in the Senate wish for a complete abolition of the filibuster, the hearings held on the procedure and the reforms voted on over the past few years indicate an interest in modifying it.<sup>341</sup> The Senate should take advantage of that interest and pass the modifications enumerated by this Note that will leave the filibuster intact but nevertheless rein in its most egregious abuses.<sup>342</sup>

*Brian R. D. Hamm\**

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339. *See supra* text accompanying notes 335-36.

340. *See supra* Parts II.B., III.

341. *See supra* Part IV.

342. *See supra* Part V.

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