

Fix the Filibuster

Christopher Hayes | December 22, 2010

It's not surprising to hear the current United States Senate described as "dysfunctional," even "constipated." It *is* surprising to hear it described that way by a current United States senator. "When I first arrived here," says New Mexico freshman Senator Tom Udall, "the younger senators...were saying, Why do we do it this way? This is driving us crazy. This place is completely constipated! What's going on here?"

Because the filibuster has foiled so much good progressive legislation over the past two years, the sixty-vote supermajority requirement it imposes has attracted the most attention. But the filibuster is just one face of the cube of dysfunction that is the Senate. Almost as much of a problem are the procedural mechanisms that allow the minority, and in some cases a lone senator, to stall or block legislation that the overwhelming majority of senators would support if only it could come to a vote.

In a recent conference call with reporters, Oregon Senator Jeff Merkley pointed out that the noncontroversial food safety bill, which enjoyed broad bipartisan support, required three separate cloture motions, delaying its passage by a number of weeks and taking up precious floor time. Earlier this year at a briefing with members of the progressive media, Michigan's Debbie Stabenow said that if Harry Reid filed cloture petitions on all outstanding nominees, the time that would require would eat up every remaining second of the 111th Congress. No financial reform, no unemployment extensions. Nothing.

A few weeks ago I met Udall in his office to discuss his plan to rectify the situation, and I was struck by how much his frustrations with the Senate sounded like those I've been hearing ever since I moved to Washington. "What is going on here?" is the question that Senate observers (myself included) find themselves asking time and again. More than anything, the sheer opaqueness of Senate procedures is dangerous to democracy. When legislators can sponsor a bill and brag to constituents about their support for it, then filibuster the motion to proceed on that same bill or require a number of minority amendments they know will spell the bill's demise, they are running an insidious hustle on voters. And they are attenuating the basic democratic bond of accountability between people and their elected representatives.

You can never quite tell who stands where in the Senate because so much of the advocacy and opposition are done in the poorly lit antechambers of procedure rather than on the floor. "The basic idea of the Senate always was that if you wanted to speak out you could," Udall recently told reporters during a conference call. "Now it has been turned on its head. Now opposition is lodged, and you don't know who opposed it. We want to bring these people out of the shadows."

It's taken a while for reporters, activists and members of Congress themselves to notice that the straitjacket of Senate procedure has been so tightened it threatens to suffocate the body. But an unprecedented alignment of experts, activists and senators has, for the first time in decades, put

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the issue of rules reform on the table. And they're proposing a simple, straightforward way to get it done.

On the first day of the new session the Senate convenes to pass its rules. For decades this has been a pro forma vote, with each new Senate adopting the rules of the last one. Udall's plan is to find fifty-one senators to vote no on adopting the previous set of rules, thereby opening a debate over a new rules package that would address the reformers' concerns and garner fifty-one votes to pass.

Udall calls this approach "the constitutional option" because Article 1, Section 5 of the Constitution declares that "Each House may determine the Rules of its Proceedings." The only way to interpret "each house" on the first day of the Senate, before the body has actually passed a set of rules creating institutions like the filibuster, is as a simple majority. There's some precedent: this approach was tried in 1975, the last time the filibuster was reformed. As vice president, and president of the Senate, in 1957, Richard Nixon issued an opinion that affirmed the ability of a majority of senators to change the body's rules on the first day of the session (the Senate then reversed itself on this procedural point, though lawmakers still voted to reform the filibuster). In a previous lifetime, during the showdown over judicial nominations in the Senate in 2003, Republican John Cornyn wrote a Harvard law journal article making the case.

But in a body as in love with itself as the Senate, such arguments may not matter. The median age of sitting senators is 63, and the old dudes tend to like things the way they are. Retiring Senator Chris Dodd took time in his farewell speech to chide his junior colleagues for their reformist impulses: "Now in my years here, I have learned that the appreciation of the Senate's role in our national debate is an acquired taste. Therefore, to my fellow senators who have never served a day in the minority, I urge you to pause in your enthusiasm to change Senate rules." (When I asked Udall about the speech he said, "He won't be voting.")

Dodd's sentiments are widespread on both sides of the aisle, and Udall says that convincing his fellow senators that they could change the rules—never mind *should*—has been an uphill battle. But he points to support for reform from Tom Harkin, antifilibuster quotes from Joe Biden and Barack Obama and the enthusiasm of his colleagues in the classes of 2006 and 2008 in the Democratic caucus. And on December 21, former Senators Chuck Hagel and Gary Hart issued a bipartisan call for rules reform.

This may not be enough. The window for acting to save the Senate from itself lasts one day, then vanishes for two years. Once the rules have been passed, the filibuster stands in the way of change, as does a two-thirds vote requirement to alter the rules themselves.

Sensing the importance of this moment, supporters of reform have attempted to craft a campaign around changing the rules. A coalition of progressive groups from the AFL-CIO to the Sierra Club have launched a website, Fix the Senate Now (fixthesenatenow.org), which calls for senators to vote for the constitutional option on the first day. Prominent academics have written an open letter in support.

This is not the kind of issue citizens usually lobby for; but the remoteness and obscurity of Senate procedure are what make it such a powerful tool for the country's ruling interests. Changing the way the Senate works is a vital part of the broader project of redistributing power down and away from the small clutch of oligarchs who currently wield it. Either the Senate votes to heal itself when it convenes on January 5, or it consigns itself to two more years of sclerosis.

The most important vote of the 112th Senate will likely be its first.

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