Thoughts on the Reform of Senate Procedures

Senator Jeff Merkley November 16, 2010

Objective

The purpose for reforming Senate procedures is to improve the Senate as a deliberative legislative body. While this can be approached from many angles, at the heart of the Senate's dysfunction is the abuse of the filibuster. Indeed, the Senate's original commitment to full and open debate has been transformed into an attack designed to paralyze and obstruct the Senate's ability to function as a legislative body. This memo addresses that issue and related issues.

It is essential, however, that proposals for reforming the filibuster be aimed at increasing the deliberative process and not at diminishing the right or ability of the minority party to participate. With every idea, members of the majority should ask: Would the proposal, when we are in the minority down the road, be one we could live with?

If done right, in fact, reforms should increase the ability of the minority party to participate in the process. Any approach that fails to take this approach will be viewed as a power grab and will be counterproductive.

Background

The filibuster can be thought of as the power of a single senator to object to the regular order of Senate deliberations, thereby invoking a special order that requires a supermajority and a week delay for a vote.

Historically, this power did not paralyze the Senate because it was invoked upon rare occasions. In recent times, however, minority senators have started objecting to the regular order on nearly a daily basis, paralyzing the Senate.

It is important to observe that a senator who objects to the regular order pays virtually no price in time or energy. At most, one senator must stay near the floor to object to any unanimous consent proposal designed to force a vote. As a "courtesy," this task can be handled by a member of the objecting senator's leadership. Contrary to the deeply rooted popular impression, a filibustering senator does not need to speak continuously on the floor to sustain his or her objection.

Indeed, following the initial objection, the responsibility shifts to the majority to assemble a super-majority. And if the majority wants to maintain continuous debate to dramatize an objecting senator's obstruction, it is the majority that bears the burden of maintaining a quorum on the floor. Without such a quorum, a single senator can shut down debate by asking for a quorum call.

Perverse Effects:

Thus, the filibuster gives any single senator the power to slow down the Senate to a crawl, with multiple perverse effects:

- ** Failure in Budgeting Responsibilities: Given the shortage of floor time, in 2010 the Senate did not adopt a budget and passed no appropriation bills.
- ** Failure to Craft Digestible Legislation: There is no floor time for smaller bills, so issues get assembled into large legislative packages that make it difficult for senators to fully understand and debate the contents.
- ** Failure to Consider House Legislation: The shortage of floor time also means that House bills languish unaddressed. Indeed, Senate Committees don't even bother to take up most of the bills the House sends to the Senate, recognizing in advance that they are doomed.
- ** Failure to Consider Executive Branch Nominations: Over 125 executive nominees are pending [note, this includes members of commissions, etc.], damaging the executive branch. This is an abuse of the Senate's "advise and consent" responsibilities.
- ** Failure to Consider Judicial Nominations: Forty-eight judicial nominations are bottled up in the Senate, leaving crucial federal judgeships unfulfilled.
- ** **Deepening of Partisan Divide:** The minority party's use of the filibuster power to paralyze the senate creates enormous frustration between the parties.

These are not the marks of "the world's greatest deliberative body." Every one of these aspects represents serious dysfunction.

Moreover, while the American public may not understand the details of the filibuster, they do understand that the Senate is broken. And they don't like it. And they believe that we have a responsibility to restore functionality. Blaming the minority doesn't cut it.

Proposed Reforms:

#1) Narrow the Scope:

Eliminate the use of the filibuster on motions to proceed. Blocking deliberation has little place in a legislative body. If a Senator believes a bill is so deeply flawed that debate should be suspended, the senator still has the right to move to table the bill.

#2) Further Narrow the Scope:

We should consider further narrowing the scope. For example, it is worth debating banning filibusters on amendments since members would still have the right to filibuster the final vote. It is also worth examining the value of limiting filibusters on appointing conferees.

#3) Create an Expedited Path for Nominations:

The Senate is failing in its responsibility to "advise and consent" on nominations, doing extensive damage to the other branches of government. This is an abuse of its responsibility.

We should consider, therefore, an expedited regular order for nominations. The regular order for each nominee might still be subject to a filibuster, but only under the revised filibuster requirements discussed below.

#4) Require a filibuster petition:

Require a substantial number of senators, perhaps 10, to file a filibuster petition to block a simple majority vote on an amendment or a bill. By creating a public record, senators have to take responsibility for obstructing the process. This also prevents a single senator from blocking the regular order.

#5) Require filibustering senators to hold the floor:

The public believes that filibustering senators have to hold the floor. Indeed, the public perceives the filibuster as an act of principled public courage and sacrifice. Let's make it so.

Require a specific number of Senators -- I suggest five for the first 24 hours, 10 for the second 24 hours, and 20 thereafter -- to be on the floor to sustain the filibuster. This would be required even during quorum calls. At any point, a member could call for a count of the senators on the floor who stand in opposition to the regular order, and if the count falls below the required level, the regular order prevails and a majority vote is held.

Several folks have asked how this would work in practice. So here is an example.

Upon request by a member, the Senate President would make the following announcement.

"The Sergeant-at-Arms will bar the doors and the Clerk will take count of all who stand in opposition to the regular order."

The clerk would then announce:

"All senators who stand in opposition to the regular order will declare their opposition."

The President would then report one of the following:

"[_#_] senators stand in opposition. This fails to meet the number required to continue the suspension of the regular order. The regular order is restored and a vote on this [bill/amendment] will be held, according to the rules, at [time stated]."

Or

"[_#_] senators stand in opposition. This meets the number required to continue the suspension of the regular order. Debate will continue."

This accomplishes two important objectives. It makes a filibuster visible to all Americans. And it places the responsibility for maintaining the filibuster squarely upon those objecting to the regular order.

This approach creates two specific ways to overcome a filibuster. First, there is still the existing method of following the current rules for deliberation followed by a 60-vote cloture requirement. Second, however, is that a filibuster could collapse at any time if the filibustering senators fail to maintain the required floor presence.

#6) Require continuous debate:

The Senate could also require debate to be continuous. Under this requirement, if a speaker concludes (arguing either side) and there is no senator who wishes to speak, the regular order is immediately restored, debate is concluded, and a simple majority vote is held according to further details established in the rules.

This further expands the visibility of the filibuster. Americans who tune in to observe the filibuster would not see a quorum call, but would see a debate in process.

#7) Establish the right of the minority to offer amendments:

The Senate wastes enormous amounts of time trying to work out a structure for the presentation and debate of amendments on any given bill. The Senate needs a regular order for the presentation of amendments so that, in the absence of an agreement between the Majority and Minority leaders, debate will proceed.

This regular order must be defined in the rules, and I suggest a regular order that includes the following:

- ** Starting five hours after the start of debate, a member of the minority party would present an amendment chosen by the minority leader.
- ** The amendment would be debated for two hours, with time evenly divided between the majority and minority, followed by a vote.

- ** A member of the majority party would present the next amendment with similar rules.
- ** After each party has had the opportunity to present five [or some other modest number] amendments each, a final vote will be in order.

This regular order would still be subject to the filibuster on any amendment or final vote, but such a filibuster would have to follow the revised guidelines for filibusters.

This regular order would also be subject to any unanimous consent agreement that modifies it. For example, leaders might negotiate an agreement to consider specific additional amendments and the body might consent. Or perhaps members of the minority or majority might start a filibuster by filing a petition because they wanted the opportunity to have additional votes on amendments. The leaders might then negotiate such an agreement and the body might consent.

This approach has several points of value:

- This addresses a major grievance of the minority, namely, the absence of an opportunity to have their ideas presented and debated. In that sense, it is a strong compensating factor for making the minority spend more time and energy on filibusters.
- 2. It gives the majority and minority leaders time to attempt to work out a unanimous consent agreement.
- 3. But if that attempt fails, the body can proceed to debate and vote, honoring its responsibilities as a legislative body.
- 4. The majority and minority leaders have an incentive to work out an agreement, since they might not want to be in the uncomfortable position of choosing which amendments to consider.

#8) Decrease the Segregation of Members

Members of the Senate are segregated by party. They sit on different sides of the aisle in the Senate chamber. They sit on opposite sides of the room in committees. They caucus separately. Even the pages on the floor are designated as "Democratic" pages or "Republican" pages.

These practices may not have been significant in the past when senators lived in Washington and socialized on evenings and weekends. But now senators work evenings and then fly home, greatly diminishing the time for informal interactions with each other.

The segregation of the senators by parties unnecessarily deepens the partisan divide and we should end it. It is worth observing, by the way, that many state legislatures do not practice such segregation, facilitating the forging of informal connections between members of different parties.

Here are three specific suggestions:

- 1. Bolt down the desks in the Senate chamber permanently fifty on each side -- and allow senators to choose desks anywhere they want on the floor among those available.
- 2. End the segregation of senators in committee meetings. One committee, Homeland Security, has already done this.
- 3. End the designation of pages by party.

Conclusion:

There are many ways to address the current dysfunction of the Senate. But address it we must. It is essential, however, that we are prepared to live under the rules we propose currently as majority members when we are in the minority down the road. Any proposal that does not meet that test is not going to be a fair proposal and would be subject to the claim that it is a power grab by the majority.