Testimony of

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Mr. Chairman and members of the subcommittee:

Over the last decade, it has become increasingly evident that Senate procedures have been used to prevent substantive decision-making rather than to promote deliberation and debate, as intended. Recently, this troubling trend has reached a breaking point – we are now dealing with a difference in degree that has become a difference in kind. We applaud the decision of this committee to explore this issue and to contemplate appropriate reform.¹

Today, witnesses will discuss the filibuster’s history. You will learn that our country’s Framers intended that majority voting be used to conduct regular Senate business.²

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² After witnessing frequent gridlock in the Continental Congress due to the numerous supermajoritarian requirements imposed by the Articles of Confederation, the Framers decided that a supermajority vote was appropriate only in seven, extraordinary situations — which they specifically listed in the Constitution. The Constitution also specifies that a simple majority “shall constitute a Quorum to do Business.” Article I, Section 3, Clause 4 provides further support. That clause, which states that the Vice President “shall have no Vote, unless [the Senate] be equally divided,” necessarily assumes majority voting rules. The Federalist Papers also illustrate the Framers’ commitment to majoritarianism. See Catherine Fisk & Erwin Chemerinsky, The Filibuster, 29 STAN. L. REV. 181, 239-241 (1997); SARAH BINDER & STEVEN SMITH,
Witnesses will explain that the Senate has a variety of structural features meant to facilitate deliberation – such as its smaller size, longer terms, older members, and egalitarian structure. An absolute right to unlimited debate, by contrast, is not part of the constitutional design.

 Witnesses will also describe the Senate’s devolution into an increasingly partisan institution with a decreasing commitment to comity. This change in culture, coupled with scarce floor time, has created incentives to filibuster – most Senators, especially those in the minority party, now calculate that the benefits of filibustering far outweigh its costs. Predictably, the use of filibusters spiked. In the 110th Congress, for instance, 70 percent of major legislation was affected by filibuster. In the modern Senate, for the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary.

Finally, you will learn of the centuries-old fight to curb abusive dilatory tactics through reform of the Senate’s Rules. Witnesses will explain that scholars, Senators, and several Vice-Presidents have long argued that the Senate Rules – by expressly imposing the rules upon future Senates, including the requirement of a two-thirds vote to amend the rules – unconstitutionally binds each new Congress. This, in effect, improperly entrenches the


4 See Binder & Smith, supra n. 2, at 29-39.


6 See Sinclair, supra n. 5, at 6-8; see also Binder & Smith, supra n. 1, at 15-19.

7 Sinclair, supra n. 5, at Table 1-2.

8 Historically, policy-makers assumed that 51 votes would be enough to pass even the most contentious legislation. For instance, in a December 8, 1964 memo concerning the Medicare bill, Mike Manatos wrote to Lyndon Johnson’s campaign director “...if all our supporters are present and voting, we would win by a vote of 55 to 45.” Memorandum by Mike Manatos to Larry O’Brien (Dec. 8, 1964), available at http://voices.washingtonpost.com/ezra-klein/obriencropped.jpg. Franklin Roosevelt’s notorious attempt to pack the Supreme Court provides another example. Then-U.S. Attorney General Homer Cummings voiced publically that the administration’s position was “promising” when he learned of 53 supportive votes. See Jeff Shesol, Supreme Power 300 (2010). By contrast, a recent New York Times article reported, “[t]o get the 60 votes needed to pass their bill, Democrats scrapped the idea of a government-run public insurance plan.” Robert Pear, Negotiating to 60 Votes, Compromise by Compromise, N.Y. Times, Dec. 20, 2009.


supermajority vote now required by Senate Rule XXII to evoke cloture and force a substantive vote.

While it is important to understand the filibuster’s complicated history, it is imperative to recall the larger picture of what is at stake. The current system – dictated by the constant threat of filibuster – blunts legislative accountability to voters. The Committee should look beyond the filibuster’s affect on specific legislation or on the relative strength of political parties to assess its impact on the core democratic value of accountability. Our Constitution is ordained and established by “We the People” and our government is “a government of the people.”

To properly exercise our right to choose, voters must be able to weigh the choices made by legislators. A dysfunctional system marked by gridlock, paralysis and minority vetoes makes genuine choice impossible.

**Political Accountability is a Core Democratic Value**

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government. . . .

Political accountability is a necessary part of our system of representative government by design. For our democracy to properly function, the American people must be able to monitor elected officials and hold them responsible for their decisions. We do this by voting and through other forms of political participation – for instance, by speaking out in favor or in protest of government action, by lobbying elected officials, and by asking the courts to check unlawful governmental activity when it harms us. Indeed, this is why our Constitution protects political expression so completely: “The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

The Supreme Court has repeatedly emphasized that democracy requires elected officials to be answerable to voters for their policy choices. See *Cook v. Gralike*, a 2001 case challenging a Missouri constitutional provision requiring that a so-called “scarlet letter” label be used to

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11 McCulloch v. Maryland, 17 U.S. 316, 404-05 (1819) (“The government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).


identify federal candidates who had opposed legislative term limits, provides one example.\textsuperscript{15} There, a unanimous Court invalidated the provision. Justice Kennedy, writing in concurrence, pinpointed the accountability problem created by Missouri’s law:

\begin{quote}
[F]reedom is most secure if the people themselves . . . hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. . . . Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it.\textsuperscript{16}
\end{quote}

Accountability mechanisms ensure that our representatives fulfill their duty to act for the broader public good rather than for personal or partisan gain.\textsuperscript{17} Accountability likewise ensures the consent of the governed; without it, government loses its legitimacy.\textsuperscript{18} For these reasons, “[a]ll theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy.”\textsuperscript{19}

**The Modern Filibuster Blunts Legislative Accountability**

The Senate’s current system, marked by constant filibustering, undermines legislative accountability in a number of ways. To start, filibusters blur who is responsible for the Senate’s failure to address problems. Voters are left to wonder: Should we fault the majority for failing to override the filibuster or should we hold the minority responsible for obstructing the majority’s will? Who is truly to blame?

Similarly, a successful filibuster prevents Senators from engaging in genuine decision-making. Rather than being forced to take a stand on a particular policy, Senators cast a procedural vote concerning whether to invoke cloture and end debate. When cloture fails and a substantive vote is never taken, constituents are left to guess how their representatives would have voted on the underlying policy matter, thereby furthering the information deficits that already plague the electorate.\textsuperscript{20} Moreover, as we saw in the recent debate over

\begin{footnotes}
\footnotetext{15}{531 U.S. 510 (2001).}
\footnotetext{16}{\textit{Id.} at 528.}
\footnotetext{17}{See Glen Staszewski, \textit{Reason-Giving and Accountability}, 93 MINN. L. REV. 1253, 1256-60 (2009) (explaining importance of legislative accountability within paradigms of legal realism and pluralism theories).}
\footnotetext{19}{Richard Pildes, \textit{The Constitutionalization of Democratic Politics}, 118 HARV. L. REV. 28, 44 (2003).}
\footnotetext{20}{Schacter, \textit{supra} n. 14, at 757 (“One need not demean the broad public to say that research has overwhelmingly indicated that many voters simply don't know very much about legislative policy or politics.”) & n.90 (citing variety of studies).}
\end{footnotes}
health care reform, a relentless focus on procedure can overshadow more important discussion about substance.21

Even worse, today’s “stealth” or “phantom” filibusters22 are often silent, private affairs. No longer do filibustering Senators take the floor and speak until they are physically unable to filibuster any longer.23 Now, a filibuster typically begins when a Senator or group of Senators signals their intent to filibuster – which can be done by a private conversation with the majority leader or by quietly placing a bill or nomination on hold. Given the modern Senate’s scarce floor time, this threat is usually enough to table the disputed issue until the dissenting Senators cave or until there are definitely enough votes to invoke cloture.24 Accordingly, in any given situation, it can be very difficult – if not impossible – to discern who is behind the obstruction. This routine lack of transparency diffuses legislative accountability even further.

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We encourage you to continue this searching assessment of the functioning of the Senate. Public trust in government rises and falls based, in part, on how decisions are made. As this Committee works to remedy this situation, we hope that you consider the ways in which Senate dysfunction harms our democracy and focus on solutions that advance democratic values.


22 See Fisk & Chemerinsky, supra n. 2, at 200-09 (describing creation of modern, “stealth” filibuster); David Repass, Make My Filibuster, N.Y. TIMES, March 2, 2009, at A23, available at http://www.nytimes.com/2009/03/02/opinion/02RePass.html (“The mere threat of a filibuster has become a filibuster, a phantom filibuster. Instead of needing a sufficient number of dedicated senators to hold the floor for many days and nights, all it takes to block movement on a bill is for 41 senators to raise their little fingers in opposition.”).

23 In the 1960s, as a response to repeated civil rights filibusters, then-majority leader Mike Mansfield developed a “two-track system” for handling floor debate. Unlike filibusters of the past, which delayed all Senate business during the course of any prolonged debate, the new system limited the time to debate filibustered legislation, thereby allowing new business to continue. This change, in turn, eliminated the type of all-night debate sessions famously depicted in Mr. Smith Goes to Washington. Over time, the filibuster evolved from this two-track system into the phantom affair it is today. See Binder & Smith, supra n. 2, at 185-186; Fisk & Chemerinsky, supra n. 2, at 201.

24 See Smith & Gamm, supra n. 3, at 232 (“In today’s Senate, the threat of a filibuster is usually sufficient to keep a bill off the floor.”); Cong. Research Service, Filibusters and Cloture in the Senate 22-23 (2003) (describing typical responses to filibuster threats); Fisk & Chemerinsky, supra n. 2, at 204-05 (same); Sarah Binder & Thomas Mann, Slaying the Dinosaur: The Case for Reforming the Senate Filibuster, 13 Brookings Rev., Summer 1995, at 44 (“The mere threat to filibuster is enough to block action on legislation potentially favored by a sizable majority.”).