Mr. Chairman and members of the subcommittee:

During last month’s hearing examining the filibuster, you recognized that the filibuster is an “almost-daily fact of life in the Senate, influencing how we handle virtually everything debated on the Senate floor.” For the first time in history, filibusters are so much the norm that a supermajority vote of 60 is assumed necessary to conduct regular Senate business.

Even more alarming, the frequency of filibusters continues to rise. Throughout the 1990s, there were, on average, about 29 filibusters per congressional session. This number is ever increasing: there were 32 filibusters in the 107th Congress, 27 in the 108th, and 36 in the 109th. In the 110th Congress, there were approximately 52 filibusters – a 44 percent spike from the prior session. The current Senate hit its “golden” 50th filibuster in mid-April of this year. Many fear that the Senate is perilously close to total breakdown.

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1 The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that focuses on fundamental issues of democracy and justice. This testimony was primarily authored by Mimi Marziani, counsel and Katz Fellow at the Brennan Center. Diana Lee, a researcher at the Center and special assistant to the Center’s executive director, provided invaluable research and writing assistance. Today’s testimony supplements our April 22, 2010 submission, available at


3 All filibuster statistics are taken from BARBARA SINCLAIR, The New World of U.S. Senators, in CONGRESS RECONSIDERED 7 (9th ed. 2009).


The modern filibuster – constant and unprincipled – has grave effects upon our democracy. As explained in greater detail below, as it currently operates, the filibuster devalues the Senate as an institution, disrupts Congress’ proper operation, and threatens to derail governmental checks and balances. “The Filibuster Today and Its Consequences” is thus not a partisan issue, but one that should concern all who cherish our American system of government.

The Modern Filibuster Devalues the Senate

The Framers intended the Senate to be a deliberative institution, different from the House of Representatives in both function and character.6 With a smaller assembly of older members with longer, staggered terms of service, the Senate was intended to balance the “tendency to err from fickleness and passion” expected from the House.7 Proponents of the filibuster paint it too as a feature of the Senate’s original design, one that facilitates deliberation and compromise by extending the period for debate. A right to unlimited debate was not, however, envisioned by the Framers.8 Moreover, and perhaps more to the point of today’s hearing, the modern filibuster seldom fosters deliberation and compromise.

In the contemporary Senate, the filibuster is relentlessly wielded as a tool of obstruction, driven by partisan or strategic motives.9 Last fall, for instance, a filibuster blocked a bill to extend unemployment benefits for weeks, even after the House approved the measure with substantial bipartisan support. The hold-up had little to do with the merits of the benefits – senators were apparently squabbling about unrelated issues.10 Incredibly, when the bill finally reached the Senate floor, it passed unanimously.11 Similarly, in February of this year, Senator Richard Shelby announced that he would place a blanket hold on every pending executive nomination (70 in total), thereby holding the Senate ransom to obtain earmarked

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6 In the Federalist Papers, James Madison writes that the more stringent qualifications of a senator “is explained by the nature of the senatorial trust; which, require[es] greater extent of information and stability of character.” THE FEDERALIST NO. 62, at 342 (Barnes & Noble Ed., 2006).
funding for his home state of Alabama. The Senator made no pretences that his holds were based on objections to any nominee; instead, he was seeking a strategic bargaining position. Indeed, a review of voting records shows that some senators simply refuse to agree to end debate and allow a vote as a matter of course. Presumably, they believe there is political advantage in continuously seeking to block all legislative progress.

Not only does the modern filibuster fail to advance substantive deliberation, it often discourage public debate. Today’s “stealth” filibuster does not require debate from, or even the presence of, the filibustering senator. Instead, the mere threat of a filibuster prevents votes from reaching the floor. If debate occurs at all, it is blocked from public view; deals are struck in backrooms behind closed doors, with no official record of the proceedings. As one legal academic bluntly put it, “[t]his cannot be called a procedure that enhances the quality of deliberation or protects the free speech of individual senators.”

Often, to overcome paralysis, the majority must appease individual Senators whose votes are needed to reach a supermajority. This provides substantial leverage to these pivotal few and concessions are regularly made that do not promote the collective good. For instance, before agreeing to supply the 60th vote for the recent health care reform bill, one senator notoriously negotiated special federal funding for the cost of Medicare expansion in his home state. As this example and others show, a legislative process held hostage by the filibuster repeatedly yields incoherent and compromised results.

Finally, the modern filibuster has spurred an obsession with procedure that threatens to take precedence over substantive lawmaking. For example, as witnessed in the recent health care reform debate, legislators increasingly force bills through alternative procedural routes – like reconciliation – in order to beat the filibuster. Senators also frequently employ a procedural tactic called “filling the amendment tree.” Because Senate rules restrict the number of amendments pending at any given time, the majority leader can shut out all other,

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12 Holds placed for no reason other than to obstruct are, for all practical purposes, indistinguishable from a threat to filibuster. See Chafetz & Gerhardt, supra n. 8, at 260-61 (Chafetz Closing Stmt.).
14 Senator Jim DeMint, for instance, has voted against 92% of the cloture motions filed in this congressional session; Senator Jim Bunning has voted against 91%. Filibusted, The Whole List, http://filibusted.us/senators (last visited May 14, 2010). Expressing this mindset, one top senator recently declared that “[t]here will be no cooperation [with the majority party] for the rest of the year.” Editorial, After Health Reform, Is Anyone Willing to Compromise?, WASH. POST, Mar. 24, 2010.
16 See WAWRO & SCHICKLER, supra n. 9, at 259-260; Fisk & Chemerinsky, supra n. 15, at 203; Magliocca, supra n. 9, at 24.
17 See Magliocca, supra n. 9, at 24.
19 Thomas Mann, Norman Ornstein & Raffaela Wakeman, Reconciling With the Past, N.Y.TIMES, Mar. 7, 2010, at WK12; see also Binder & Smith, supra n. 8, 192-194.
potentially germane, amendments by offering one amendment after another, *i.e.*, occupying all available branches of the tree. In these ways and others, time that should be spent on policy deliberation is wasted on an endless game of procedural chess, in which success is measured not by the passing of effective legislation, but by the advancement of individual or party goals.

Relentless obstruction devalues the Senate, leaving it far from the distinguished institution envisioned by our Framers. Even worse, however, is that the Senate’s dysfunction is uncontrollable; it taints Congress as a whole.

**The Modern Filibuster Disrupts Congress**

Under Article I, section VII of the Constitution, a bill must pass the Senate and the House before it may be enacted into law. As legal scholars have forcefully argued, the term “passed” embodies a principle of majoritarianism that binds both chambers of Congress. The Senate’s current operation, requiring a *de facto* supermajority vote for ordinary legislative action, thus offends constitutional intent. Moreover, the gridlock caused by this supermajoritarian requirement alters the balance of power between the Senate and the House, disrupting the Constitution’s bicameral design.

When a minority of the Senate uses the filibuster to block that chamber’s proceedings, it sabotages the overall legislative process. In this way, and as the Senate currently operates, 41 senators enjoy a disproportionately large, negative power over the lawmaking process.

A minority veto of this sort enables a polarized, unified minority party determined to oppose the main thrust of the majority’s agenda to bring government to a halt. The minority cannot itself govern, of course. But

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21 CONST. art I, § 7. As the Supreme Court has explained, “[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.” INS v. Chadha, 462 U.S. 917, 951 (1982).
22 See Chafetz & Gerhardt, *supra* n. 8, at 249 (Chafetz Opening Stmt.) (citing Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996)).
23 There is substantial evidence that the Framers intended the Senate to operate under majority voting rules. The Constitution specifically requires a supermajority vote in seven extraordinary situations, implying that a majority vote would be used for all other legislative action. The Constitution also specifies that a simple majority “shall constitute a Quorum to do Business.” And, 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. Finally, the Federalist Papers expressly argue against supermajority requirements. See Fisk & Chemerinsky, *supra* n. 15, at 239-241; BINDER & SMITH, *supra* n. 8, at 30-33; see also *The Federalist* No. 22, at 119-121 & No. 75, at 415-417 (Alexander Hamilton) (Barnes & Noble ed., 2006); *The Federalist* No. 58, at 326-237 (James Madison) (Barnes & Noble ed., 2006).
neither can the majority in the presence of this kind of veto and polarized parties.24

Unsurprisingly, whereas bills used to be blocked by both chambers in roughly equal number, today most legislation dies in the Senate.25 This continuous threat of death by filibuster provides the Senate with a substantial bargaining advantage vis-à-vis the House, particularly during conference negotiations.26

In addition, there is little doubt that the modern filibuster in fact prevents both chambers from fulfilling Congress’ Article I duties. The self-perpetuating pattern of an increasing number of filibusters and growing workload makes it virtually impossible for the Senate to accomplish all of its duties;27 as a result, key legislative items are blocked from the Senate floor because there is not enough time to go around. Appropriations bills are a prime example. By Constitutional design, these bills originate in the House before moving to the Senate for amendment.28 Although, year after year, the House submits such measures to the Senate in a timely fashion, Congress consistently fails to enact appropriations bills by deadline.29 The consequence is substantial – agencies are left adrift and ineffectual, wondering if they will ever receive sufficient funding for their work.

The filibuster’s impact thus reaches far beyond the walls of the Senate. Congressional dysfunction, in turn, has even graver implications for our democracy writ large.

The Modern Filibuster Threatens to Derail our System of Government

Our Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity”30 – a system integral to the proper functioning of our government. “The existence of checks and balances between rivalrous branches, each with an incentive to

25 SINCLAIR, supra n. 3, at 18.
27 See BINDER & SMITH, supra n. 8, at Table 1-3.
29 THOMAS MANN & NORMAN ORNSTEIN, Is Congress Still the Broken Branch?, in CONGRESS RECONSIDERED Table 3-3 (9th ed. 2009).
monitor and prevent the other’s misbehavior,” ensures intragovernmental accountability. This structure “allows government officials not just to report each other’s bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers.” Our country’s Framers recognized this arrangement as a necessary supplement to the electoral accountability provided by democratic elections. The modern filibuster, however, threatens to derail this careful balance.

To start, the modern filibuster impacts the relationship between the legislative and executive branches in a number of ways. First, Congressional stalemate is likely to push the President to seek policy change through administrative action. The result is a troubling expansion of executive power that is likely to remain unchecked. Indeed, as then-Professor Elena Kagan has chronicled, this is precisely what happened during Bill Clinton’s presidency. President Clinton responded to legislative inaction by issuing numerous directives to administrative agencies – ultimately, with little resistance from the deeply-divided Congress.

[President Clinton’s] political calculus depended on a judgment, confirmed in practice, that Congress would fail to override presidential directives. . . . [I]n general, a Republican Congress proved feckless in rebuffing Clinton’s novel use of directive authority – just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan’s use of a newly strengthened regulatory review process.

Second, the modern filibuster may prevent Congress from properly monitoring the executive branch for another reason. When a substantially large, cohesive group of senators – such as all members of the minority party – removes itself from the legislative process by continuously opposing initiatives and never affirmatively lawmaking, the majority party is left with full oversight responsibilities. When that same majority party controls the Senate and the Presidency, as is currently the case, Congress is unlikely to aggressively monitor executive actions. Now, the minority party has only a singular, blunt tool – the filibuster – that incentivizes obstruction, not action. Democracy would be better served if the minority were instead empowered by more tailored methods to monitor executive power.

32 Id. at 2344.
33 THE FEDERALIST NO. 51, at 288 (James Madison) (Barnes & Noble ed., 2006) (“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; but experience has taught mankind the necessity of auxiliary precautions.”).
34 See Levinson & Pildes, supra n. 31, at 2362.
36 Id. at 2313-2314.
37 Pildes, supra n. 24, at 42.
38 As Professor Pildes has argued,
Third, when relentless minority obstruction prevents the President from fulfilling his responsibilities under the Appointments Clause, the filibuster impinges upon the President’s constitutional duty to “take Care that the Laws be faithfully executed.”

Anticipating that “the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body,” the Framers placed primary responsibility to make appointments with the President. Accordingly, the President “shall nominate” and “shall appoint” high-ranking executive officers, while the Senate provides “Advice and Consent.”

Although requiring the Senate’s approval provides an essential check on Presidential power, a minority of senators has no constitutional right to endlessly delay or actually veto the President’s picks. In fact, during the Constitutional Convention, James Madison adamantly rejected any arrangement that could permit a nationally popular minority to control federal appointments.

Moreover, there is evidence that the modern filibuster is actually preventing the President from executing his duties. On March 27th of this year, after waiting an average of 214 days per nomination, President Obama resorted to temporary recess appointment of 15 individuals nominated to serve in key administrative agencies. He explained,

Most of the men and women whose appointments I am announcing today were approved by Senate committees months ago, yet still await a vote of the Senate. At a time of economic emergency, two top appointees to the

would give the minority party, which has the appropriate incentives, greater tools to oversee the executive branch. Some other democracies do so. As I and others have described, we might consider giving the minority control of a certain oversight committee, such as an auditing committee; enabling the minority to call hearings under certain circumstances; or otherwise increasing the opposition party’s ability to get information from the executive branch. These measures are not minority-veto rights, but ways of enabling more effective oversight.

Id.

39 CONST. art II, § 3; see also CONST. art II, § 2. As federal judges are nominated for life, judicial nominations raise different constitutional considerations. The instant discussion deals with non-judicial nominations only.

40 Edmond v. United States, 520 U.S. 651, 659 (1997). Indeed, Alexander Hamilton was adamant that the President was better positioned than Congress to make federal appointments.

41 CONST. art II, § 2.


Department of Treasury have been held up for nearly six months. I simply cannot allow partisan politics to stand in the way of the basic functioning of government.

Indeed, as of May 18th, there were 133 non-judicial, civilian nominations pending before the Senate.44

Finally, the modern filibuster also impedes Congress’ ability to check the Courts’ power of judicial review. As envisioned by the Constitution, Congress can respond to judicial decisions in a variety of ways – by fixing unconstitutional provisions of otherwise valid statutory schemes, by holding evidentiary hearings to create a factual record in support of legislation, by clarifying improperly vague laws, and so on. A Congress paralyzed by the filibuster, however, has little ability to counteract or refine judicial decisionmaking.

There is thus no question that the modern filibuster disrupts the balance of powers between the legislative, executive and judicial branches. Upsetting our Constitution’s structural safeguards leaves our democracy in a vulnerable state. Especially now, during this era of war, economic crises, and social unrest, we cannot afford to allow the Senate’s procedural dysfunctions to derail our entire system of government.

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And so, once again, we encourage you to continue this searching assessment of the functioning of the Senate. As this Committee works to remedy the current state of affairs, we urge you to consider the ways in which Senate dysfunction harms our democracy and to focus on solutions that advance democratic values.

44 U.S. Senate, Nominations in Committee (Civilian), http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm (last visited May 15, 2010).