So with 14 million Americans still unemployed, our country will tune in to the State of the Union tonight with keen ears for ideas that create jobs, that boost the economy. But our three negotiated trade deals continue to sit there. It is unacceptable, and it needs to change. By this July, the European Union and South Korea will have implemented their own free-trade agreement, putting U.S. business at a competitive disadvantage.

The Korea-U.S. Free trade Agreement fixes that. Our friends to the north in Canada and south in Mexico have trade deals in place with Colombia. While our agreement languishes, their exports are winning the marketplace. Imagine how our exporters feel watching their competition move to the front of the line, knowing that the agreements put them ahead.

If we fail to act on the agreement, it is clear that our U.S. producers will fall behind. It is happening. Thus, today, some of my colleagues and I introduced a resolution pushing for the approval of the Korea, Colombia, and Panama trade agreements. Our President and this Congress hold the keys to unlocking the benefits.

According to the U.S. International Trade Commission, these agreements would increase new U.S. exports between $10 and $12 billion, reducing the U.S. trade deficit and boosting the economy. In addition, these new U.S. goods exported to South Korea, to Colombia, to Panama would yield 27,000 new jobs. Overall this means an estimated gain in GDP of over $12 billion from net exports annually.

This would be music to the ears of our exporters and those looking for work. Their government should similarly be chomping at the bit to get this done. It is within our grasp. American workers and businesses are essentially pleading for us to move forward. The folks on the production line, in our fields, those seeking employment, are the ones with true skin in the game.

We need to unleash their potential by unleashing the pending agreements with South Korea, Colombia, and Panama. These agreements will level the playing field and eliminate barriers for U.S. goods. Our workers are always ready to roll up their sleeves and do what they can to start producing.

Recently our Federal Reserve Chairman, Ben Bernanke, said: Our current pace of hiring will require 4 to 5 years to reach normal unemployment levels. Now, 4 to 5 years is too long to wait. We need to do everything we can to change that picture. So imagine the impact of immediately eliminating tariffs on 80 percent of U.S. exports to South Korea. Remember, only 13 percent of our goods and services are currently exported tariff free. How about immediately eliminating tariffs on U.S. exports to Colombia for more than 77 percent of agricultural goods and 76 percent of industrial goods. Consider a whopping 90 percent of Colombian imports already enter our country duty free under the Andean Trade Preference Act. This leveling of the playing field is sorely needed.

To be clear, I do not oppose helping our neighbors, and the Andean agreement was designed to do that. But should we not at least seek the same treatment for our businesses and our workers?

Almost 1 year ago today we heard the President speak about aggressively expanding the marketplace in the international market. These agreements would do that. I hope tonight he reaffirms his commitment.

Finally, the third pillar of the competitive package that I introduced today will lower our corporate tax rates 20 percent. For many years, the United States has had the second highest corporate tax rate in the world—second highest corporate tax rate in the world—second only to Japan. Japan has now announced that they will reduce their corporate rate for 2011. With this reduction, the United States will have the highest corporate tax rate of anyone in the entire world. That means the U.S. tax environment for our job creators will be the least attractive in the entire world.

Here is the math: When you take into account a Federal corporate tax rate of 35 percent and the average State corporate tax rate, the combined U.S. corporate tax rate totals more than 39 percent, nearly 40. This combined rate soars above those of other countries with which American businesses compete. That makes absolutely no sense. Is it any wonder that jobs are leaving this country to go to other competitive countries? Our Nation should be encouraging business creation and growth, not putting our job creators at a disadvantage with this extraordinary, No. 1-in-the-world tax rate.

At least 27 of 34 nations in the Organization for Economic Cooperation and Development have cut their general corporate income tax rates since 2000. These countries have benefitted from increased capital investment, and—get this—they have seen their corporate tax revenues, as a share of GDP, actually increase even with the lower rate because they are expanding the base.

According to a July 2010 analysis by PricewaterhouseCoopers, the U.S. would have to reduce its Federal rate to 20.3 percent to match the average corporate rate of other OECD countries. Thankfully, many recognize the need to bring our corporate tax rate in line with those of other industrialized nations. In fact, in December, the President's Export Council recommended the corporate tax rate be reduced to 20 percent. This will stimulate job creation across the country, all sectors of the job market.

Washington cannot continue to say one thing and do another. That is why today I am introducing the Restoring America's Competitiveness in Enterprise Act of 2011. This legislative package, the 1099 repeal, the resolution supporting the trade agreements, the bill to reduce the highest—soon to be the highest—corporate tax rate in the world will provide a solid foundation for our country to move forward.

It will send a powerful message that this 112th Senate supports job creation and is committed to unleashing America's competitiveness. I am hopeful that my colleagues will join me in supporting this important package. We are off to a good start, and I thank my colleagues on both sides of the aisle who have joined me in this effort.

I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. JOHANNS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 2:15 p.m.

Thereupon, the Senate, at 12:27 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. WEBB).

Mr. LEAHY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MERKLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. FRANKEN.) Without objection, it is so ordered.

UNANIMOUS CONSENT REQUEST—S. RES. 21

Mr. MERKLEY. Mr. President, I submit a resolution on behalf of myself and Senator TOM UDALL to amend rule XIX and rule XXII of the Standing Rules of the Senate, and I ask unanimous consent that the Senate proceed to the immediate consideration of the resolution.

The PRESIDING OFFICER. Is there objection?

Mr. MERKLEY. Mr. President, for purposes of having the resolution go over, under the rule, I object.

The PRESIDING OFFICER. Objection is heard. The measure will go over, under the rule.

Mr. MERKLEY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MERKLEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MERKLEY. Madam President, I ask unanimous consent to speak on the issue of Senate rules. I will be joined by a few colleagues in a few minutes.

The ACTING PRESIDENT pro tempore. The Senator is recognized.

Mr. MERKLEY. Thank you, Madam President.

The reason I am rising to talk about rules is because we are at the start of a new 2-year period for Congress. This is the appropriate time to be considering how well the Senate is working and whether we should amend the rules by which the Senate functions.

The last major debate over many of the rules was in 1975. The reason there was a debate that particular year is that in 1973 and 1974, the Congress preceding, there were 44 filibusters, each eating up about a week of the Senate's time. There was a tremendous amount of frustration over the dysfunction of the Senate. So at the start of the Congress that began in 1975, there was an enormous amount of debate, debate that went on for weeks, with all kinds of motions. The spreadsheet tracking them fills pages. In the end, what this body, the Senate, decided to do was to change the rule that requires 67 Senators to terminate debate and have a final vote on a bill and replace it with the decision to have 60 Senators required to end debate and have a final vote on a bill. This is for the so-called cloture motion.

Now we are in a period immediately preceded by the 2009–2010 Congress. In 2009 and in 2010, we didn't have 44 filibusters, we had 135 filibusters. In other words, the Senate has been three times as dysfunctional as it was preceding the last major debate in this Chamber over rules. Since each filibuster delays the work of the Senate for approximately a week under the rules, if you have 135 objections in a 2-year period, that would be 135 weeks of delay in a 104-week period. Obviously, many things are not going to get done with that type of obstruction. Indeed, during 2010 this Chamber was unable to pass a single appropriations bill of the 13 appropriations bills traditionally taken under consideration, debated on this floor, and sent forward. Why is that important? Because in the appropriations bills, we make decisions about what the most pressing problems in America are and how we are going to allocate resources to address those pressing problems. We didn't fail to do this in one or two areas; we failed to do it in all 13. Furthermore, this body did not pass a budget during the last year, 2010. This body did not proceed to advise and consent on all of the nominations that came before it. In fact, we left over 100 nominations pending.

This merits a little bit further discussion because under the Constitution, it is the Senate, this esteemed Chamber, that weighs in on the President's nominations to fill key executive branch positions. It is this Chamber that weighs in on the President's recommendations to fill judicial positions, to assign judges.

If we never get to the debate on the floor of the Senate, then we have not fulfilled our constitutional responsibility to advise and consent. In fact, we have wounded the executive branch, and we have damaged the judicial branch. Certainly, under our theory of balance of powers, it was never envisioned that the advise-and-consent function of the Senate would be used to damage other branches of government. We have failed in our responsibility.

Furthermore, we have left over 400 House bills lying on the floor, collecting dust, unprocessed, unconsidered. The saying in the House of Representatives is the Senate is where good House bills go to die.

It is appropriate that as we start a new 2-year period, we ask ourselves how we should address this dysfunction. There was a time in which the Senate was called the greatest deliberative body in the world. Unfortunately, today there is very little deliberation in the Senate. No appropriations bills, nominations unprocessed, hundreds of House bills untouched, an incomplete budget. The main culprit in this is the filibuster. A filibuster is kind of street language, if you will, for an objection to the regular order of holding a majority vote and triggering about a week's delay in the Senate's process, and it also triggers a supermajority of 60.

It has gotten to the point that in this constitutional function as a majority body, a body in which we need 51 votes, it is functionally becoming a supermajority body.

The Framers of the Constitution were very clear and they laid out a supermajority required for certain purposes. A supermajority is required to approve treaties or a supermajority is required to impeach but not to pass legislation. That was not the vision.

Today, I rise to say we can do better in the Senate and that we owe it under our constitutional responsibilities to do better.

There are a series of proposals that have been filed. One of my colleagues has arrived, Senator UDALL, who has been a key leader, enormously instrumental in this effort to reform the Senate. In a few minutes, I am going to ask unanimous consent for one of these rule changes to be considered on the floor. I will do that when my colleagues across the aisle have arrived. I will go further in discussing how we need to change the Senate.

Before I go further, Senator UDALL already asked for a colloquy. I thought I would stop at this moment and see if he wants to jump in and share some general thoughts before we get into the specifics of the various resolutions which we might ask unanimous consent to have considered.

The ACTING PRESIDENT pro tempore. The Senator from New Mexico.

Mr. UDALL of New Mexico. Madam President, first of all at the beginning, let me thank two of my colleagues who have worked incredibly hard with me on the issue of Senate rules reform—Senator MERKLEY from Oregon and Senator TOM HARKIN from Iowa. Senator HARKIN will be joining us at some point.

I also wish to thank the Chair. One of the very early leaders on the constitutional option on Senate reform of the rules was Senator JEANNE SHAHEEN from New Hampshire. She is in the chair today. I know she cares about this a lot. I know she wants to see this move forward.

What we are trying to do is follow what has been the history in the Senate. At various points in the Senate, there has been respect for each other, the ability to get legislation on the floor, to have debate. With the rules, it is pretty extraordinary when we look at the history.

When we look at the history of the Senate rules, one of the things that is very clear in the movements in the fifties, sixties, and seventies to consider rules reform, both leaders would allow proposals onto the floor, allow these proposals onto the floor to be voted upon.

We have the extraordinary situation today—extraordinary, and we will see when our colleagues show up—where our friends on the other side of the aisle are basically saying: We don't want your rules reform on the floor today. We are not going to allow that to happen.

As everybody in the Senate knows, we have to have unanimous consent to do this. We are not going to get consent today, but we want to lay out for people what it is that could happen if we were able to get something on the floor.

It is my belief, I say to Senator MERKLEY, that the proposals we make—the proposal Senator MERKLEY and I are on and the Presiding Officer, Senator SHAHEEN, and 26 other Senators are on, S. Res. 10, that we filed on January 10, is a reasonable proposal; it is a commonsense proposal. The five proposals that are contained in the resolution have had substantial bipartisan support in the past.

I am going to be asking unanimous consent to put S. Res. 10 onto the floor so we can have a debate on it, so we can move forward. What is, as I said, extraordinary is we are not going to get that consent. Our research indicates—and I know Senator MERKLEY and his staff worked very hard. They had a chart that was three pages long. In the fifties, sixties, and seventies, these proposals were on the floor. They were debated on the floor. Sometimes there was a motion to table, sometimes there was an up-or-down vote. But we are having great difficulty getting this reasonable, commonsense proposal on the floor.

Let me talk a little bit about S. Res. 10, which 26 other Senators cosponsored on the first day. First of all, it deals with a serious problem. There are five parts to this issue. The first one is debate on motions to proceed. It may

sound a little crazy to people out there, but when we try to get something onto the floor, it does not happen automatically. Actually, what has to happen is if both sides do not agree, the majority leader files what is called a motion to proceed. We can end up on the motion to proceed, going along for 1 week, have to file cloture, which means to cut off debate on the motion to proceed, and then with all the ripening time it takes about 1 week to get through that. We can get to the end of the week, and if we do not get the 60 votes to cut off debate on the motion to proceed, we are back to square one and have wasted a week. That is what we believe is a dilatory tactic. It does not let us get to the point, the people's business.

Mr. MERKLEY. If I may interrupt for a moment, I wish to clarify what the Senator from New Mexico just said, which is, a supermajority of the Senate, after 1 week of debate, is required just to get to the point where we might start debate on the bill, and the Senate wastes weeks and weeks debating whether to debate rather than doing the people's business. That is a problem.

Mr. UDALL of New Mexico. Senator MERKLEY hit it on the head. That is a problem, and we have had that consistently in the 2 years that he and I have been here. My understanding is, it happened in many of the years before that time. In fact, Senator Byrd was very upset about the way the motion to proceed was being used. In 1979, he came down to the floor—he was the majority leader—and he did everything he could to change the motion to proceed and try to make sure it was used more rationally and more reasonably.

What our proposal is, I say to Senator MERKLEY, and other Senators on this resolution know, we are talking 2 hours of debate on the motion to proceed. Rather than wasting a week, if Majority Leader REID comes down and says we are going to proceed to legislation about jobs and he puts it on the floor, the side over there gets an hour and our side gets an hour and then we are on the legislation, ready to have amendments filed, ready for debate to take place.

We have saved us what we believe would be 1 week of time. That is dealing with the first proposal on the motion to proceed.

The second proposal is very simple, but it is going to move the Senate along in a dramatic way; that is, section 2, eliminating secret holds. I know we have several Senators who have worked for years and years on secret holds. When I talk about the bipartisanship on secret holds, Senator GRASSLEY, Senator WYDEN, from Senator MERKLEY's great State of Oregon, Senator CLAIRE MCCASKILL of Missouri more recently, have all been working on the issue of secret holds.

We very simply do this in one little section. We say:

No Senator may object on behalf of another Senator without disclosing the name of that Senator.

That gets right to the heart of secret holds.

Mr. MERKLEY. Madam President, the Senator from New Mexico is telling me it has become a common practice on the floor of the Senate for an individual Senator who wants to oppose something to not have the courage to stand here and tell the world their position but instead to secretly object to a particular issue being raised. I cannot imagine the American public can believe that Senators do not have the courage of their convictions to come here and say: I am going to hold up this legislation because I disagree with it, and I am going to fight it any way I can. So the public can weigh in if they agree with them or not. They will be accountable to the U.S. citizens.

Mr. UDALL of New Mexico. One of the things that happens—and we have seen a lot of this—we know some Senator is objecting, for example, to a nomination, a high nomination in an executive department and does it secretly so we do not know on the Senate floor, the press who covers this does not have an idea, and the people do not know. Then, the same Senator goes to the department and negotiates policy, national policy about a particular issue that concerns the whole Nation, all our States, and tries to get an agreement, a backroom deal and an agreement. That is not the way we should be doing business, and that is why this very simple proposal: ''No Senator may object on behalf of another Senator without disclosing the name of the Senator.''

You own the hold.

Mr. MERKLEY. I wish to note, as Senator UDALL observed, Senator WYDEN, Senator GRASSLEY, and Senator MCCASKILL have worked hard on a much more detailed version than we have in S. Res. 10, but the basic notion is the same. If a colleague is going to place a hold, they are going to do so in a public and accountable fashion and that would greatly improve the quality of ballot.

I have been in the position of trying to get help for the Klamath Basin in Oregon because they have had little rainfall. I eventually did find out, but it took me quite a while, asking a lot of questions about who had the hold so I could ask them to release the hold so we would have a chance of moving that assistance for this drought-impacted portion of my State.

With this change, those holding up assistance to Klamath or any other area would have to come to the floor and make clear where they stand.

Mr. UDALL of New Mexico. Then it is transparent, then if you as a Senator on the Klamath Basin want to do something, you can go to that Senator—whoever it is—and say: I have an issue with my State. Can we work together to try to work it out?

Right now the problem we have is that some Senator is putting on a secret hold and we do not know who it is and we do not have the ability to clear that away. This is a good, solid proposal.

Mr. MERKLEY. It is not only secret to the public, it is often secret to fellow Senators, greatly complicating our effort to dialog with fellow Senators as to why we are pursuing something and get their partnership in it.

Mr. UDALL of New Mexico. I am going to move on to the third section of S. Res. 10, which is the right to offer amendments. As Senator MERKLEY knows very well and our Presiding Officer, one of the big issues around here—and this is getting into a little bit of the weeds, but one of the big issues that can help us function better is if we just agree, whether we are in the majority or in the minority, that we want both sides to have the opportunity to debate and to offer amendments. And so we are trying to protect that right. Many of us are thinking in terms of these rulings, and we are saying we want them to be fair to both sides. So the provision on the right to offer amendments is in the legislation. It talks about them being majority and minority amendments. It doesn't talk about parties because a lot of the pundits are saying we are going to be in the minority in 2 years, and I think it is only fair in the Senate that we have that kind of relationship.

Senator MERKLEY.

Mr. MERKLEY. I want to note this is important to both the majority and the minority. For example, we recently had a bill on the floor of the Senate which was a major bill regarding the compromise struck by President Obama with our Republican colleagues to spend almost $1 trillion. I had an amendment I wanted to present that would have taken some of the money in that bill that was being spent in a fashion which created very few jobs and to spend it in a fashion which would create a lot of jobs. I had another proposal to take money that wasn't being put to good use and to proceed to fill in and support the solvency of Social Security and Medicare.

Now, people can argue about whether these were good ideas, but if I had been able to offer one or both of those amendments, I think it would have improved the debate and dialogue and perhaps have resulted in a better piece of legislation.

Mr. UDALL of New Mexico. The fourth provision—and I think the Senator is very right on section 3, but section 4 is the issue of extended debate, and I would like to have the Senator talk about that issue because that is the issue on which you worked the most closely.

The Senator from Oregon has raised the issue of what we have going on right now is what we call a silent debate. It is a silent filibuster. We have people who say they want to filibuster and object, but then they go home or they go on vacation or something like that. So my colleague has drafted a

provision—he is the architect of this provision in S. Res. 10, if he could just go through that and talk about that section on extended debate, what it does and why it is important to what we are dealing with today.

Mr. MERKLEY. Certainly. This provision about a talking filibuster says rather than having a situation where a Senator objects to a majority vote and then we delay the work of the Senate for a week, though nobody is here explaining their position to the American public, instead we would switch to a provision that says if 41 Senators want continued debate on a bill, we will get continued debate on a bill. We will have debate on a bill, not silence.

Currently, we have the hidden or the silent filibuster. With this, we would create the public or the talking filibuster. To give a sense of the numbers on this, these blue bars represent filibusters during the last 2-year period. During the first 6 months 33, 34 in the second 6 months, 36 in the third 6 months, and then 33. I think that is 136 total filibusters in a 2-year period.

This is why we didn't have any appropriations bills. This is why we didn't have a budget. This is why we didn't deal with hundreds of House bills. And this is why we didn't get nominations done and advice and consent on them.

Is this the way the Senate has always operated? Absolutely not. In the last few decades there has been a huge change in how the Senate has functioned. So let's take a look at the average per year.

In the 1900–1970 period, the average was one filibuster per year. In the 1970s, the average was 16 filibusters per year. In the 1980s, 21 filibusters per year, average; in the 1990s, 36 filibusters per year, average; in the 2000s, 2000–2010, 48 filibusters per year; and from 2009 to 2010, this last session, an average of 68. There were 136 total.

So you can see from this chart the growing dysfunction. There was always a social contract that existed in which an individual Senator didn't exercise his or her power to object to a simple majority vote unless they thought it was an issue of huge consequence. Maybe that would occur once or twice in a career, but not routinely week after week. But that social contract has been eliminated. The filibuster was honoring the right of every Senator to be heard; that we were not going to hold a vote until every Senator had his or her say so we could be fully informed and have a full dialogue. It is that reciprocal respect that is being routinely disregarded and abused on the floor of the Senate.

Many of us have an image of the filibuster that comes from the movie, ''Mr. Smith Goes to Washington.'' Here is Jimmy Stewart playing the character of Jefferson Smith, and he comes to defend a corrupt action and to stop it regarding a camp for children. He talks through the night, and there are many forces assaulting him, but Jimmy Stewart is going to stay on the Senate floor and he is going to tell the American people what he is fighting for and why. This is the talking filibuster, where you don't object and go away and leave the Senate suspended. You don't vote for additional debate and then not have that debate. You come to this floor and you hold the floor and you join with other partners to hold the floor in order to explain why you are holding up the Senate and to carry on the debate, to have that additional debate you have voted for.

So the talking filibuster is almost that simple—it replaces the silent filibuster with the talking filibuster. The result is two critical things: First of all, transparency and accountability with the American public. The public can see what you are saying on the floor of the Senate and can say you are a hero or you are a bum. They can agree with you or they can disagree, but it is visible, not hidden.

The second thing is each Senator has to expend time and energy to carry out a filibuster, so this will strip away all these frivolous filibusters that are done for no other reason than to prevent the Senate from being able to carry on with its responsibilities.

Mr. UDALL of New Mexico. Let me also say one thing about the talking filibuster that hit me, and that is bipartisanship. As we know, both of us, I think, were on the Senate floor when Senator Arlen Specter gave his farewell address. I believe the Presiding Officer was also here. Senator Specter served in the minority for 2 years and then was in the majority for almost 2 years and both times he came forward with a proposal where he was calling for the same thing—a talking filibuster, whether he was on the minority side or the majority side.

So I think, once again, that just demonstrates that each of these provisions has bipartisan support in it.

We don't think this debate is about partisanship. We don't think it is about a power grab. We don't think it is about those kinds of things. It is about, as the Senator has elucidated, making the Senate work better. When we say ''make the Senate work better,'' we are talking about it working better for the American people.

I think if we did the oversight of government when it comes to appropriations bills, a budget, getting the budget out on time, getting appropriations bills done on time, that does a lot to make sure the public's money is well spent, and that is something I hear a lot about back home.

I will ask unanimous consent to have printed in the RECORD a Republican Policy Committee paper titled ''The Constitutional Option: The Senate's Power To Make Procedural Rules by Majority Vote,'' dated April 25, 2005.

We keep hearing that any use of the constitutional option is simply a power grab by Democrats. That is simply not true—and a 2005 Republican Policy Committee memo provides some excellent points to rebut the power grab argument.

Let me read part of the 2005 Republican memo and I will ask that the entire memo be printed in the RECORD:

> This constitutional option is well grounded in the U.S. Constitution and in Senate history.
>
> The Senate has always had, and repeatedly has exercised, the constitutional power to change the Senate's procedures through a majority vote. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the first cloture rule in 1917. Simply put, the constitutional option itself is a longstanding feature of Senate practice.
>
> The Senate, therefore, has long accepted the legitimacy of the constitutional option. Through precedent, the option has been exercised and Senate procedures have been changed. At other times it has been merely threatened, and Senators negotiated textual rules changes through the regular order. But regardless of the outcome, the constitutional option has played an ongoing and important role.

The memo goes on to address some ''Common Misunderstandings of the Constitutional Option.'' Let me read some of those.

Again, this is a direct quote:

> Senate procedures are sacrosanct and cannot be changed by the constitutional option. This misunderstanding does not square with history. As discussed, the constitutional option has been used multiple times to change the Senate's practices through the creation of new precedents. Also, the Senate has changed its Standing Rules several times under the threat of the constitutional option.

The next misunderstanding addressed in the memo is that ''Exercising the constitutional option will destroy the filibuster for legislation.''

The Republican rebuttal is:

> The history of the use of the constitutional option suggests that this concern is grossly overstated. Senators will only exercise the constitutional option when they are willing to live with the rule that is created, regardless of which party controls the body.

And a final misunderstanding in the memo, and one which the Republicans are happy to use now, is that ''the essential character of the Senate will be destroyed if the constitutional option is exercised.''

The memo rebuts this by stating:

> When Majority Leader Byrd repeatedly exercised the constitutional option to correct abuses of Senate rules and precedents, those illustrative exercises of the option did little to upset the basic character of the Senate. Indeed, many observers argue that the Senate minority is stronger today in a body that still allows for extensive debate, full consideration, and careful deliberation of all matters with which it is presented.

I ask unanimous consent that the memo be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Republican Policy Committee, Apr. 25, 2005]

THE SENATE'S POWER TO MAKE PROCEDURAL RULES BY MAJORITY VOTE

EXECUTIVE SUMMARY

The filibusters of judicial nominations that arose during the 108th Congress have created an institutional crisis for the Senate.

Until 2003, Democrats and Republicans had worked together to guarantee that nominations considered on the Senate floor received up-or-down votes.

The filibustering Senators are trying to create a new Senate precedent—a 60–vote requirement for the confirmation of judges—contrary to the simple-majority standard presumed in the Constitution.

If the Senate allows these filibusters to continue, it will be acquiescing in Democrats' unilateral change to Senate practices and procedures.

The Senate has the power to remedy this situation through the ''constitutional option''—the exercise of a Senate majority's constitutional power to define Senate practices and procedures.

The Senate has always had, and repeatedly has exercised, this constitutional option. The majority's authority is grounded in the Constitution, Supreme Court case law, and the Senate's past practices.

For example, Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents that changed Senate procedures during the middle of a Congress.

An exercise of the constitutional option under the current circumstances would be an act of restoration—a return to the historic and constitutional confirmation standard of simple-majority support for all judicial nominations.

Employing the constitutional option here would not affect the legislative filibuster because virtually every Senator supports its preservation. In contrast, only a minority of Senators believes in blocking judicial nominations by filibuster.

The Senate would, therefore, be well within its rights to exercise the constitutional option in order to restore up-or-down votes for judicial nominations on the Senate floor.

INTRODUCTION

In recent months, there has been growing public interest in the Senate's ability to change its internal procedures by majority vote. The impetus for this discussion is a Senate minority's use of the filibuster to block votes on 10 judicial nominations during the 108th Congress. Until then, a bipartisan majority of Senators had worked together to guarantee that filibusters were not to be used to permanently block up-or-down votes on judicial nominations. For example, as recently as March 2000, Majority Leader Trent Lott and Minority Leader Tom Daschle worked together to ensure that judicial nominees Richard Paez and Marsha Berzon received up-or-down votes, even though Majority Leader Lott and most of the Republican caucus ultimately voted against those nominations. But that shared understanding of Senate norms and practices—that judicial nominations shall not be blocked by filibuster—broke down in the 108th Congress.

This breakdown in Senate norms is profound. There is now a risk that the Senate is creating a new, 60-vote confirmation standard. The Constitution plainly requires no more than a majority vote to confirm any executive nomination, but some Senators have shown that they are determined to override this constitutional standard. Thus, if the Senate not act during the 109th Congress to restore the Constitution's simple-majority standard, it could be plausibly argued that a precedent has been set by the Senate's acquiescence in a 60-vote threshold for nominations.

One way that Senators can restore the Senate's traditional understanding of its advice and consent responsibility is to employ the ''constitutional option''—an exercise of a Senate majority's power under the Constitution to define Senate practices and procedures. The constitutional option can be exercised in different ways, such as amending Senate Standing Rules or by creating precedents, but regardless of the variant, the purpose would be the same—to restore previous Senate practices in the face of unforeseen abuses. Exercising the constitutional option in response to judicial nomination filibusters would restore the Senate to its longstanding norms and practices governing judicial nominations, and guarantee that a minority does not transform the fundamental nature of the Senate's advice and consent responsibility. The approach, therefore, would be both reactive and restorative.

This constitutional option is well grounded in the U.S. Constitution and in Senate history. The Senate has always had, and repeatedly has exercised, the constitutional power to change the Senate's procedures through a majority vote. Majority Leader Robert C. Byrd used the constitutional option in 1977, 1979, 1980, and 1987 to establish precedents changing Senate procedures during the middle of a Congress. And the Senate several times has changed its Standing Rules after the constitutional option had been threatened, beginning with the adoption of the first cloture rule in 1917. Simply put, the constitutional option itself is a longstanding feature of Senate practice.

This paper proceeds in four parts: (1) a discussion of the constitutional basis of the Senate's right to set rules for its proceedings; (2) an examination of past instances when Senate majorities acted to define Senate practices—even where the written rules and binding precedents of the Senate dictated otherwise; (3) an evaluation of how this history relates to the present impasse regarding judicial nomination filibusters; and (4) a clarification of common misunderstandings of, the constitutional option. The purpose of this paper is not to resolve the political question of whether the Senate should exercise the constitutional option, but merely to demonstrate the constitutional and historical legitimacy of such an approach.

THE CONSTITUTION: THE SENATE'S RIGHT TO SET PROCEDURAL RULES

''Each House may determine the Rules of its Proceedings.'' —U.S. Constitution, art. I, sec. 5., cl. 2.

The Senate's constitutional power to make rules is straightforward, but two issues do warrant brief elaboration—the number of Senators that are constitutionally necessary to establish procedures and whether there are any time limitations as to when the rulemaking power can be exercised.

The Supreme Court addressed both of these questions in United States v. Ballin, an 1892 case interpreting Congress's rulemaking powers.[1] First, the Court held that the powers delegated to each body are held by a simple majority of the quorum, unless the Constitution expressly creates a supermajority requirement.[2] The Constitution itself sets the quorum for doing business—a majority of the Senate.[3] Second, the Supreme Court held that the ''power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house.''[4] Thus, the Supreme Court has held that the power of a majority of Senators to define the Senate's procedures exists at all times—whether at the beginning, middle, or end of a Congress.

The Senate majority exercises this constitutional rulemaking power in several ways:

First, it has adopted Standing Rules to govern some Senate practices and procedures. Those rules formally can be changed by a majority vote. Any motion to formally amend the Standing Rules is subject to debate, and Senate Rule XXII creates a special two-thirds cloture threshold to end that debate.

Second, the Senate operates according to Senate precedents, i.e., rulings by the Chair or the Senate itself regarding questions of Senate procedure. A precedent is created whenever the Chair rules on a point of order, when the Senate sustains or rejects an appeal of the Chair's ruling on a point of order, or when the Senate itself rules on a question that has been submitted to it by the Chair.[5] As former parliamentarian and Senate procedural expert Floyd M. Riddick has said, ''The precedents of the Senate are just as significant as the rules of the Senate.''[6]

Third, the Senate binds itself through rulemaking statutes that constrain and channel the consideration of particular matters and guarantee that the Senate can take action on certain matters by majority vote. At least 26 such rule-making statutes govern Senate procedure and limit the right to debate, dating back to the 1939 Reorganization Act and including, most prominently, the 1974 Budget Act.[7]

Finally, the Senate can modify the above procedures through Standing Orders, which can be entered via formal legislation, Senate resolutions, and unanimous consent agreements.

It is important to emphasize, however, that these rules are the mere background for day-to-day Senate procedure. As any Senate observer knows, the institution functions primarily through cooperation and tacit or express agreements about appropriate behavior. Most business is conducted by unanimous consent, and collective norms have emerged that assist in the protection of minority rights without unduly hindering the Senate's business.

Consider, for example, the Senate's contrasting norms regarding the exercise of individual Senators' procedural rights. Under the rules and precedents of the Senate, each Senator has the right to object to consent requests and, with a sufficient second, to demand roll call votes on customarily routine motions. If Senators routinely exercised those rights, however, the Senate would come to a standstill. Such wholesale obstruction is rare, but not because the Senate's standing rules, precedents, and rulemaking statutes prohibit a Senator from engaging in that kind of delay. Rather, Senators rarely employ such dilatory tactics because of the potential reaction of other Senators or the possibility of retaliation. As a result, informed self enforcement of reasonable behavior is the norm.

At the same time, some ''obstructionist'' tactics have long been accepted by the Senate as features of a body that respects minority rights. Most prominent is the broadly accepted right of a single Senator to speak for as long as he or she wants on pending legislation, subject only to the right of the majority to invoke cloture and shut off debate. Indeed, an overwhelming and bipartisan consensus in support of the current legislative filibuster system has existed for 30 years.[8] Thus, the norms of the Senate tolerate some, but not all, kinds or degrees of obstruction.

Thus, while written rules, precedents, and orders are important, common understandings of self-restraint, discretion, and

institutional propriety have primarily governed acceptable Senatorial conduct. It is the departures from these norms of conduct that have precipitated institutional crises that require the Senate to respond.

THE HISTORY: THE SENATE'S REPEATED USE OF THE CONSTITUTIONAL OPTION

The Senate is a relatively stable institution, but its norms of conduct have sometimes been violated. In some instances, a minority of Senators has rejected past practices and bipartisan understandings and exploited heretofore ''off limits'' opportunities to obstruct the Senate's business. At other times, a minority of Senators has abused the rules and precedents in a manner that violates Senators' reasonable expectations of proper procedural parameters. These are efforts to change Senate norms and practices, but they do not necessarily have the support of a majority.

Such situations create institutional conundrums: what should be done when a mere minority of Senators changes accepted institutional norms? One option is to acquiesce and allow ''rule by the minority'' so that the minority's norm becomes the Senate's new norm. But another option has been for the majority of Senators to deny the legitimacy of the minority Senators' effort to shift the norms of the entire body. And to do that, it has been necessary for the majority to act independently to restore the previous Senate norms of conduct.

This section examines those illustrative instances—examples of when the Senate refused to permit a minority of Senators to change norms of conduct or to otherwise exploit the rules in ways destructive to the Senate, and, instead, exercised the constitutional option.

Then-Majority Leader Byrd's Repeated Exercise of the Constitutional Option

When Senator Robert C. Byrd was Majority Leader, he faced several circumstances in which a minority of Senators (from both parties) began to exploit Senate rules and precedents in generally unprecedented ways. The result was obstruction of Senate business that was wholly unrelated to the institution's great respect for the right to debate and amend. Majority Leader Byrd's response was to implement procedural changes through majoritarian votes in order to restore Senate practices to the previously accepted norms of the body.

1977—Majority Leader Byrd Exercised the Constitutional Option to Alter Operation of Rule XXII and Prevent Post-Cloture Filibusters

In 1977, two Senators attempted to block a natural gas deregulation bill after cloture had already been invoked.[9] A ''post-cloture filibuster'' should seem counterintuitive for anyone with a casual acquaintance with Senate rules, but these obstructing Senators had found a loophole. Although further debate was foreclosed by Rule XXII once post-cloture debate was exhausted, the Senators were able to delay a final vote by offering a series of amendments and then forcing quorum calls and roll call votes for each one. Even if the amendments were ''dilatory'' or ''not germane'' (which Rule XXII expressly prohibits), Senate procedure provided no mechanism to get an automatic ruling from the Chair that the amendments were defective. A Senator could raise a point of order, but any favorable ruling could be appealed, and a roll call vote could be demanded on the appeal. Moreover, in 1975, before a point of order could even be made, an amendment first must have been read by the clerk. While the reading of amendments is commonly waived by unanimous consent, anyone could object and require a reading that could further tie up Senate business. Thus, the finality that cloture is supposed to produce could be frustrated.

These practices were proper under Senate rules and precedents, but Majority Leader Byrd concluded in this context that these tactics were an abuse of Senate Rule XXII. His response was to make a point of order that ''when the Senate is operating under cloture the Chair is required to take the initiative under rule XXII to rule out of order all amendments which are dilatory or which on their face are out of order.''[10] The Presiding Officer, Vice President Walter Mondale, sustained the point of order, another Senator appealed, and Majority Leader Byrd immediately moved to table. The Senate then voted to sustain the motion to table the appeal. In so doing, the Senate set a new precedent that ran directly contrary to the Senate's longstanding procedures which required Senators to raise points of order to enforce Senate rules. Now, under this precedent, the Chair would be empowered to take the initiative to rule on questions of order in a post-cloture environment.

The reason for Majority Leader Byrd's tactic immediately became clear. He began to call up each of the dilatory amendments that had been filed post-cloture, and the Chair instantly ruled them out of order. There was no reading of the amendments (which would have been dilatory in itself) and there were no roll call votes. The Majority Leader then exercised his right of preferential recognition to call up numerous remaining amendments, and similarly disposed of them. No appeals could be taken because any appeal was mooted when Majority Leader Byrd secured his preferential recognition to call up additional amendments.''[11]

This was the constitutional option in action. Majority Leader Byrd did not follow the regular order and attempt to amend the Senate Rules in order to block these tactics. Instead, he used a simple point of order that cut off the ability of a minority of Senators to add a new layer of obstruction to the legislative process. His method was consistent with the Senate's constitutional authority to establish procedure.

1979—Majority Leader Byrd Exercised the Constitutional Option to Change Operation of Rule XVI (Limiting Amendments to Appropriations Bills)

Majority Leader Byrd used the constitutional option again in 1979 in order to block legislation on appropriations bills.[12] Standing Rule XVI barred Senate legislative amendments to appropriations bills. By precedent, however, such amendments were permissible when offered as germane modifications of House legislative provisions. Thus, when the House acted first and added legislative language to an appropriations measure, Senators could respond by offering legislative amendments to the House's legislative language. While another Senator might make a point of order, the Senator offering the authorizing language could respond with a defense of germaneness. And, by the express language of Rule XVI, that question of germaneness must be submitted to the Senate and decided without debate. By enabling the full Senate to vote on the germaneness defense without getting a ruling from the Presiding Officer first, the legislative amendment's sponsor avoided having to overturn the ruling of the Chair and create any formal precedents in doing so. The result was a breakdown in the appropriations process due to legislative amendments, and it was happening pursuant to Senate rules that plainly permitted these tactics.

Majority Leader Byrd resolved to override the plain text of Rule XVI and strip the Senate of its ability to decide questions of germaneness in this context. Senator Byrd's mechanism was similar to the motion he employed in 1977: he made a point of order that ''this is a misuse of precedents of the Senate, since there is no House language to which this amendment could be germane, and that, therefore, the Chair is required to rule on the point of order as to its being legislation on an appropriation bill and cannot submit the question of germaneness to the Senate.''[13] The Chair sustained the point of order, and the Senate rejected the ensuing appeal, 44–40.

The result of Majority Leader Byrd's exercise of the constitutional option was a binding precedent that caused the Senate to operate in a manner directly contrary to the plain language of Rule XVI.[14] Moreover, the method was contrary to past Senate practices regarding germaneness. But the process employed, as in 1977, was nonetheless constitutional because nothing in the Senate's rules, precedents, or practices can deny the Senate the constitutional power to set its procedural rules.

1980—Majority Leader Byrd Changed Procedures Governing Executive Session and the Treatment of Judicial Nominations

The Senate's Executive Calendar has two sections—treaties and nominations. Prior to March 1980, a motion to enter Executive Session, if carried, would move the Senate automatically to the first item on the Calendar, often a treaty. Rule XXII provides (then and now) that such a motion to enter Executive Session is not debatable. However, unlike the non-debatable motion to enter Executive Session, any motion to proceed to a particular item on the Executive Calendar was then subject to debate. In practice, then, the Senate could not proceed to consider any business other than the first Executive Calendar item without a Senator offering a debatable motion, which then would be subject to a possible filibuster.[15]

Majority Leader Byrd announced his objection to this potential ''double filibuster'' (once on the motion to proceed to a particular Executive Calendar item, and again on the Executive Calendar item itself), and exercised another version of the constitutional option. This time he moved to proceed directly to a particular nomination on the Executive Calendar and sought to do so without debate. Senator Jesse Helms made the point of order that Majority Leader Byrd could only move by a non-debatable motion into Executive Session, not to a particular treaty or nomination.[16] The Presiding Officer upheld the point of order given that it was grounded in Rule XXII and longstanding understandings of Senate practices and procedures. But Majority Leader Byrd simply appealed the ruling of the Chair and prevailed, 38–54. Thus, even though there was no basis in the Senate Rules, and even though Senate practices had long preserved the right to debate any motion to proceed to a particular Executive Calendar item, the Senate exercised its constitutional power to ''make rules for its proceedings'' and created the procedure that the Senate continues to use today.

As an historical sidenote, Majority Leader Byrd used this new precedent to great effect in December 1980 when he bypassed several items (including several nominations) on the Executive Calendar to take up a single judicial nomination—that of Stephen Breyer, then Chief Counsel to the Senate Judiciary Committee, to be a judge on the U.S. Court of Appeals for the First Circuit. Judge Breyer was later nominated and confirmed to the U.S. Supreme Court in 1994. Without Majority Leader Byrd's exercise of the constitutional option earlier that year, it is almost certain that Justice Breyer would not be on the Supreme Court today.

1987—Majority Leader Byrd Forced Change to Rule XII's Voting Procedures through Execution of the Constitutional Option

A fourth exercise of the constitutional option came in 1987 when Senator Byrd was once again Majority Leader. The controversy in question involved an effort by Majority Leader Byrd to proceed to consider a particular bill, an effort that had been frustrated because a minority of Senators objected each time he moved to proceed. To thwart his opponents, Majority Leader Byrd sought to use a special feature of the Senate Rules—the Morning Hour (the first two hours of the Legislative Day).

Under Rule VIII, a motion to proceed to an item on the Legislative Calendar that is made during the Morning Hour is non-debatable. This feature of the rules gives the Majority Leader significant power to set the Senate agenda due to his right to preferential recognition (which is, itself, a creature of mere custom and precedent). Such a motion cannot be made, however, until the Senate Journal is approved and Morning Business is thereafter concluded (or the first of the two hours has passed). Meanwhile, the clock runs on the Morning Hour while that preliminary business takes place. When the Morning Hour expires, a motion to proceed once again becomes debatable and subject to filibuster.[17] It was this feature of the Morning Hour that Senator Byrd believed would enable him to proceed to the bill in question.

Majority Leader Byrd's plan was complicated, however, when objecting Senators forced a roll call vote on the approval of the Journal, as was their right under the procedures and practices of the Senate. Rule XII provides that during a roll call vote, if a Senator declines to vote, he or she must state a reason for being excused. The Presiding Officer then must put a non-debatable question to the Senate as to whether the Senator should be excused from voting. When Majority Leader Byrd moved to approve the Journal, one Senator declined to vote and sought to be excused. Following Rule XII, the Presiding Officer put the question directly to the Senate—should the Senator be excused?—but during the roll call on whether the first Senator should be excused, another Senator announced that he wished to be excused from voting on whether the first Senator should be excused. The Chair was likewise obliged to put the question to the Senate. At that point, yet another Senator announced he wished to be excused from that vote. There were four roll call votes then underway—the original motion to approve the Journal and three votes on whether Senators could be excused. If Senators persisted in this tactic, the time it took for roll call votes would cause the Morning Hour to expire, and the Majority Leader would lose his ability to move to proceed to his bill without debate. All this maneuvering was wholly consistent with the Standing Rules of the Senate.

Majority Leader Byrd countered with a point of order, arguing that the requests to be excused were, in fact, little more than efforts to delay the actual vote on the approval of the Journal. His solution was to exercise the constitutional option: to use majority-supported Senate precedents to change Senate procedures, outside the operation of the Senate rules. In three subsequent party-line votes, three new precedents were established: first, that a point of order could be made declaring repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) to be ''dilatory;'' second, that repeated requests to be excused from voting on a motion to approve the Journal (or a vote subsumed by it) ''when they are obviously done for the purpose of delaying the announcement of the vote on the motion to approve the Journal, are out of order;'' and third, that a Senator has a ''limited time'' to explain his reason for not voting, i.e., he cannot filibuster by speaking indefinitely when recognized to state his reason for not voting.[18] Majority Leader Byrd had crafted these new procedures completely independently of the Senate Rules, and they were adopted by a partisan majority without following the procedures for rule changes provided in Rule XXII. Yet the tactics were wholly within the Senate's constitutional power to devise its own procedures.

This 1987 circumstance offers a very important precedent for the present difficulties. Majority Leader Byrd established that a majority could restrict the rights of individual Senators outside the cloture process if the majority concluded that the Senators were acting in a purely ''dilatory'' fashion. Previous to that day, dilatory tactics were only out of order after cloture had been invoked.

Additional Senate Endorsements of the Constitutional Option

The Senate also has endorsed (or acted in response to) some version of the constitutional option several other times over the past 90 years—in 1917, 1959, 1975, and 1979.

The original cloture rule, adopted in 1917, itself appears to be the result of a threat to exercise the constitutional option. Until 1917, the Senate had no cloture rule at all, although one had been discussed since the days of Henry Clay and Daniel Webster. The ability of Senators to filibuster any effort to create a cloture rule put the body in a quandary: debate on a possible cloture rule could not be foreclosed without some form of cloture device.

The logjam was broken when first term Senator Thomas Walsh announced his intention to exercise a version of the constitutional option so that the Senate could create a cloture rule. His method was to propose a cloture rule and forestall a filibuster by asserting that the Senate could operate under general parliamentary law while considering the proposed rule. Doing so would permit the Senate to avail itself of a motion for the previous question to terminate debate—a standard feature of general parliamentary law.[19] In this climate, Senate leaders quickly entered into negotiations to craft a cloture rule.[20] Negotiators produced a rule that was adopted, 76–3, with the opposing Senators choosing not to filibuster.[21] But it was only after Senator Walsh made clear that he intended to press the constitutional option that those negotiations bore fruit. As Senator Clinton Anderson would remark in 1953, ''Senator Walsh won without firing a shot.'' [22]

The same pattern repeated in 1959, 1975, and 1979. In each case, the Senate faced a concerted effort by an apparent majority of Senators to exercise the constitutional option to make changes to Senate rules. In 1959, some Senators threatened to exercise the constitutional option in order to change the cloture requirements of Rule XXII. Then-Majority Leader Lyndon Johnson preempted its use by offering a modification to Rule XXII that was adopted through the regular order.[23] In 1975, the Senate three times formally endorsed the constitutional option by creating precedents aimed at facilitating rule changes by majority vote, although the ultimate rule change (also to Rule XXII) was implemented through the regular order after off-the-Floor negotiations.[24] And in 1979, Majority Leader Byrd threatened to use the constitutional option unless the Senate consented to a time frame for consideration of changes to post-cloture procedures. The Senate acquiesced, and the Majority Leader did not need to use the constitutional option as he had in the other cases discussed above.[25]

The Senate, therefore, has long accepted the legitimacy of the constitutional option. Through precedent, the option has been exercised and Senate procedures have been changed. At other times it has been merely threatened, and Senators negotiated textual rules changes through the regular order. But regardless of the outcome, the constitutional option has played an ongoing and important role.

The Judicial Filibuster and the Constitutional Option

The filibusters of judicial nominations during the 108th Congress were unprecedented in Senate history.[26] While cloture votes had been necessary for a few nominees in previous years, leaders from both parties consistently worked together to ensure that nominees who reached the Senate floor received up-or-down votes. The result of this bipartisan cooperation was that, until 2003, no judicial nominee with clear majority support had ever been defeated due to a refusal by a Senate minority to permit an up-or-down floor vote, i.e., a filibuster.[27]

The best illustration of this traditional norm is the March 2000 treatment of President Bill Clinton's nominations of Richard Paez and Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. When those nominations reached the Senate floor, Majority Leader Trent Lott, working with Democrat Leader Tom Daschle, filed cloture before any filibuster could materialize. Republican Judiciary Chairman Orrin Hatch likewise fought to preserve Senate norms and traditions, arguing that it would be ''a travesty if we establish a routine of filibustering judges.'' [28] Moreover, as a further testament to the bipartisan opposition to filibusters for judicial nominations, more than 20 Republicans who opposed the nominations and who would vote against them nonetheless supported cloture for Mr. Paez and Ms. Berzon, and cloture was easily reached.[29] Had every Senator who voted against Mr. Paez's nomination likewise voted against cloture, cloture would not have been invoked. Thus, as recently as March 2000, more than 80 Senators were on record opposing the filibuster of judicial nominations.[30] If the new judicial nomination filibusters are accepted as a norm, then the Senate will be rejecting this history and charting a new course.

It is not only the Senate norm regarding not filibustering judicial nominations that risks being transformed, but the effective constitutional standard for the confirmation of judicial nominations. There can be no serious dispute that the Constitution requires only a Senate majority for confirmation. Indeed, many judicial nominees have been confirmed by fewer than 60 votes in the past—including three Clinton nominees and two Carter nominees.[31] Never has the Senate claimed that a supermajority is necessary for confirmation.

Recently, however, some filibustering Senators have suggested that a failed cloture vote is tantamount to an up-or-down vote on a judicial nomination. The new Senate Minority Leader, Harry Reid, has stated that the 10 filibustered judges have been ''turned down.'' [32] Senator Charles Schumer has repeatedly stated that a failed cloture vote is evidence that the Senate has ''rejected'' a nomination.[33] Senator Russell Feingold described the filibustered nominees from the 108th Congress as having ''been duly considered by the Senate and rejected.'' [34] Judiciary Committee Ranking Member Patrick Leahy has referred to the filibustered nominees as having been ''effectively rejected.'' [35] And in April 2005, Senator Joseph Lieberman

claimed that 60 votes should be the ''minimum'' for confirmation.[36] These characterizations illustrate the extent to which the Senate has lost its moorings.

Without restoration of the majority-vote standard, judicial nominations will require an extra-constitutional supermajority to be confirmed, without any constitutional amendment—or even a Senate consensus—supporting that change. Any exercise of the constitutional option would, therefore, be aimed at restoring the Senate's procedures to conform to its traditional norms and practices in dealing with judicial nominations. It would return the Senate to the Constitution's majority-vote confirmation standard. And it would prevent the Senate from abusing procedural rules to create supermajority requirements. Instead, it would be restorative, and Democrats and Republicans alike would operate in the system that served the nation until the 108th Congress.

COMMON MISUNDERSTANDINGS OF THE CONSTITUTIONAL OPTION

Senate procedures are sacrosanct and cannot be changed by the constitutional option.

This misunderstanding does not square with history. As discussed, the constitutional option has been used multiple times to change the Senate's practices through the creation of new precedents. Also, the Senate has changed its Standing Rules several times under the threat of the constitutional option.

Exercising the constitutional option will destroy the filibuster for legislation.

The history of the use of the constitutional option suggests that this concern is grossly overstated. Senators will only exercise the constitutional option when they are willing to live with the rule that is created, regardless of which party controls the body. For the very few Senators (if any) who today want to eliminate the legislative filibuster by majority vote, the roadmap has existed since as early as 1917. Moreover, an exercise of the constitutional option to restore the norms for judicial confirmations would be just that—an act of restoration. To eliminate the legislative filibuster would not be restorative of Senate norms and traditions; it would destroy the Senate's longstanding respect for the legislative filibuster as a vehicle to protect Senators' rights to amend and debate. It is also worth noting that the Senate is now entering its 30th year of bipartisan consensus as to the cloture threshold (three-fifths of those duly chosen and sworn) for legislative filibusters.[37]

All procedural changes must be made at the beginning of a Congress.

Again, this claim, does not square with history. In fact, there is nothing special about the beginning of a Congress vis-à-vis the Senate's right to establish its own practices and procedures, or even its formal Standing Rules. As discussed above, Majority Leader Byrd used the constitutional option to create a precedent that overrode Rule XVI's plain text—and not at the beginning of a Congress. Moreover, as the Supreme Court held in Ballin, each House of Congress's constitutional power to make procedural rules is of equal value at all times.[38]

The essential character of the Senate will be destroyed if the constitutional option is exercised.

When Majority Leader Byrd repeatedly exercised the constitutional option to correct abuses of Senate rules and precedents, those illustrative exercises of the option did little to upset the basic character of the Senate. Indeed, many observers argue that the Senate minority is stronger today in a body that still allows for extensive debate, full consideration, and careful deliberation of all matters with which it is presented.

Exercising the constitutional option would turn the Senate into a ''rubber stamp.''

Again, history proves otherwise. The Senate has repeatedly exercised its constitutional power to reject judicial nominations through straightforward denials of ''consent'' by up-or-down votes. For example, the Senate defeated the Supreme Court nominations of Robert Bork (1987), G. Harold Carswell (1970), and Clement Haynsworth (1969) on up-or-down votes.[39] Even in the 108th Congress, when the Senate voted on the nomination of J. Leon Holmes to a federal district court in Arkansas, five Republicans voted against President Bush's nominee. Had several Democrats not voted for Mr. Holmes, he would not have been confirmed.[40] In other words, the Senate still has the ability to work its will in a nonpartisan fashion as long as the minority permits the body to come to up-or-down votes. Members from both parties will ensure that the Senate does its constitutional duty by carefully evaluating all nominees.

CONCLUSION

Can the Senate restore order when a minority of its members chooses to upset tradition? Does the Constitution empower the Senate to act so that it need not acquiesce whenever a minority decides that the practices, procedures, and rules should be changed? Can the Senate majority—not necessarily a partisan majority, but simply a majority of Senators—act to return the Senate to its previously agreed-upon norms and practices? The answer to all these questions is a clear yes. The Senate would be acting well within its traditions if it were to restore the longstanding procedural norms so that the majority standard for confirmation is preserved and nominees who reach the Senate floor do not fall victim to filibusters.

ENDNOTES

[1] 144 U.S. 1 (1892).

[2] Ballin, 144 U.S. at 6. There is no serious disagreement with the Supreme Court's conclusion in Ballin. Indeed, Senator Edward Kennedy has said that only a majority is necessary to change Senate procedures. Congressional Record, Feb. 20, 1975, S3848. Senator Charles Schumer conceded during a Judiciary subcommittee hearing on the constitutionality of the filibuster that Senate rules ''could be changed by a majority vote.'' S. Hrg. 108–227 (May 6, 2003), at 60.

[3] U.S. Const., art. I, §5, cl. 1.

[4] Ballin, 144 U.S. at 5.

[5] Floyd M. Riddick, Senate Parliamentarian, Oral History Interviews (November 21, 1978), Senate Historical Office, Washington, D.C., at 429.

[6] Riddick interview at 426.

[7] Martin B. Gold, Senate Procedure and Practice (2004), at 5. For a complete list of the 26 statutes that limit Senate debate, see John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 27 Harv. J. L. Pub. Pol'y 181, 213–214 (2003).

[8] Standing Rule XXII's standard for cloture—three-fifths of Senators ''duly chosen and sworn''—has been in effect since 1975.

[9] See Martin B. Gold & Dimple Gupta, The Constitutional Option to Change Senate Rules and Procedures: a Majoritarian Means to Overcome the Filibuster, 28 Harv. J. L. Pub. Pol'y 206, 262–264 (2004).

[10] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263.

[11] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 263–264.

[12] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 264–265.

[13] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265 (emphasis added).

[14] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265.

[15] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 265–267.

[16] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 266.

[17] Gold, Senate Procedure and Practice, at 68–69.

[18] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 267–269.

[19] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 220–226.

[20] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.

[21] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 226.

[22] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 227.

[23] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 240–247.

[24] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 252–260.

[25] Gold & Gupta, 28 Harv. J. L. Pub. Pol'y at 260; Congressional Record, Jan. 15, 1979.

[26] This historical observation has been conceded by leading Senate Democrats. For example, the Democratic Senatorial Campaign Committee solicited campaign contributions in November 2003 with the claim that the filibusters were an ''unprecedented'' effort to ''save our courts.'' See Senator John Cornyn, Congressional Record, Nov. 12, 2003, S14601, S14605. No Senator has disputed that until Miguel Estrada asked the President to withdraw his nomination in September 2003, no circuit court nominee had ever been withdrawn or defeated for confirmation due to the refusal of a minority to permit an up-or-down vote on the Senate floor.

[27] For a review of all past cloture votes on judicial nominations prior to the 108th Congress, see Senate Republican Policy Committee, ''Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent'' (Feb. 10, 2003), available at http://rpc.senate.gov/__files/JUDICIARYsd021003.pdf. See also Cornyn, 27 Harv. J. L. Pub. Pol'y at 218–227.

[28] Congressional Record, Mar. 8, 2000, S1297.

[29] For Berzon, compare Record Vote #36 (cloture invoked, 86–13) with #38 (confirmed, 64–34); for Paez, compare Record Vote #37 (cloture invoked, 85–14) with #40 (confirmed, 59–39). All votes on Mar. 8–9, 2000.

[30] For a more detailed list of Senators' historic opposition to filibusters for judicial nominations, see Senate Republican Policy Committee, ''Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent'' (Feb. 10, 2003), available at http://rpc.senate.gov/__files/JUDICIARYsd021003.pdf. For an extended examination of filibustering Senators' previous opposition to judicial filibusters, see Cornyn, 27 Harv. J. L. Pub. Pol'y at 207–211.

[31] Examples of judicial nominations made prior to the 108th Congress that were confirmed with fewer than 60 votes include Abner Mikva (D.C. Cir., 1979); L.T. Senter (N.D. Miss., 1979); J. Harvie Wilkinson III (4th Cir., 1984); Alex Kozinski (9th Cir., 1985); Sidney Fitzwater (N.D. Tex., 1986); Daniel Manion (7th Cir., 1986); Clarence Thomas (Supreme Court, 1991); Susan Mollway (D. Haw., 1998); William Fletcher (9th Cir., 1998); Richard Paez (9th Cir., 2000); and Dennis Shedd (4th Cir., 2002).

[32] William C. Mann, Senate leaders draw line on filibuster of judicial nominees, Boston Globe, Jan. 17, 2005.

[33] Senator Charles Schumer, Congressional Record, July 22, 2004, S8585 (''I remind the American people that now 200 judges have been approved and 6 have been rejected''); see also Jeffrey McMurray, Pryor Supporters Debate Timing of Vote, Tuscaloosa News, Jan. 10, 2005 (''To nominate judges previously rejected by the Senate is wrong''); Anne

Kornblut, Bush Set to Try Again on Blocked Judicial Nominees, Boston Globe, Dec. 24, 2004 (quoting official statement by Sen. Schumer).

[34] Keith Perine, Fiercest Fight in Partisan War May Be Over Supreme Court, CQ Weekly, Jan. 10, 2005, at 59.

[35] Congressional Record, Feb. 27, 2004, S1887.

[36] Senator Joseph Lieberman, Transcript of Press Conference, Apr. 21, 2005, on file with Senate Republican Policy Committee.

[37] In 1995, Senators Tom Harkin and Joe Lieberman proposed a major revision to the Senate filibuster rules for legislation, but the proposal failed 76–19, attracting the support of no Republicans and but a fraction of Democrats (who were in the minority). The only current Senators who sought to change the Senate's consensus position on legislative filibusters were Senators Jeff Bingaman, Barbara Boxer, Russell Feingold, Tom Harkin, Edward Kennedy, John Kerry, Frank Lautenberg, Joe Lieberman, and Paul Sarbanes. See Record Vote #1 (Jan. 5, 1995).

[38] Ballin, 144 U.S. at 5.

[39] See Record Vote #348 (Oct. 23, 1987) (defeated 42–58); Record Vote #112 (Apr. 8, 1970) (defeated 45–51); Record Vote #135 (Nov. 21, 1969) (defeated 45–55).

[40] Record Vote #53 (July 6, 2004) (confirmed 51–46).

Mr. UDALL of New Mexico. I think this shows this isn't about a power grab; this is about trying to work to make sure the Senate is going to work better for the American people.

The fifth provision of S. Res. 10—and as Senator MERKLEY knows, we are down here today to try to get S. Res. 10, rules changes, onto the Senate floor, and so we are going to be asking unanimous consent for that. But the fifth provision is called postcloture debate on nominations.

Now, what are we talking about? Well, when we have a nomination that comes to the floor—a judicial nomination, an executive nomination—in the rule nominations have 30 hours of postcloture debate. So when you decide to cut off debate, when you get to the point that you say we are going to cut off debate, that 30 hours is normally used for amendments and to work through the amendment process.

Well, when you have a nomination, you are not amending a nomination. You are trying to either move forward with an up-or-down vote on the nomination—the person is either voted up or down. It makes no sense to have 30 hours. So the other commonsense proposal we have is to shorten that postcloture time to 2 hours, from 30 hours, because there is no reason to amend in that phase.

I know Senator MERKLEY is also familiar with this provision.

Mr. MERKLEY. I think what the Senator from New Mexico has set forward is that we would save 28 hours on each nomination. If the Senate goes around the clock, that is a bit more than a day. If we are doing 10-hour days, that is almost 3 days. We save 3 days of Senate time that is put to no purpose right now since by the time you have a 60-vote cloture you already have 60 Members saying they are ready to vote and want to go forward.

So letting people wrap up over a couple of hours, restating their key points for other Members, makes sense. That is why the 2 hours are there. But rather 2 hours than 3 days.

Mr. UDALL of New Mexico. That is correct. So what we are doing today—and I know Senator MERKLEY has introduced a freestanding proposal on the talking filibuster, and we have joined together; I have also signed on to that—we have S. Res. 10, filed on January 5, which has the five solid provisions for reforming the rules. I think if you look at these in history, they have had broad bipartisan support.

I would at this point recognize our colleague in this rules debate, our partner and hard worker and more senior in experience on these rules matters, who has joined us—Senator TOM HARKIN from Iowa. We are in a colloquy situation, so I will yield.

Mr. HARKIN. If the Senator will yield for an observation.

Mr. UDALL of New Mexico. You bet.

The ACTING PRESIDENT pro tempore. The Senator from Iowa.

Mr. HARKIN. Madam President, I wish to thank my colleagues, Senator UDALL of New Mexico and Senator MERKLEY of Oregon, because they are great leaders on this issue. I think they have brought a breath of fresh air to the Senate in exposing what has become gridlock that has made the Senate almost dysfunctional.

I say to my friend, Senator UDALL, especially in focusing on what the Constitution says and doesn't say, I believe—and I am only speaking for myself—that we are not living up to the oath we took as we stood by the well when we were sworn into the Senate. We took an oath that we would uphold and defend the Constitution and that we would bear true faith and allegiance to the same.

Well, quite frankly, the Constitution, I believe, is quite clear in the way it is written, in the verbiage that is used. If you look to what the Founders wanted in the Constitution, they were very clear that but for a few instances, which they clearly spelled out in the Constitution requiring a supermajority of votes—such as treaties, for example, and impeachments, or expelling a Member—everything else is a majority vote.

But the Senate has adopted rules in the past that I believe are, quite frankly, bordering on unconstitutional by requiring that in order to change the rules, it requires a two-thirds vote—67 votes. Well, that might be OK for one Congress, if they wanted to adopt that kind of rule, but how can one Congress bind another? I think it is quite clear from Parliaments of old and other legislative bodies, court rulings in this country, that one legislative body cannot burden a subsequent legislative body. Yet in the Senate, because of a change in the rules that happened some years ago, they say it binds every Senate thereafter.

I believe that is unconstitutional. My friend from New Mexico, Senator UDALL, has pointed this out time and time again, that really we have not only a constitutional right but a constitutional obligation that, on the first convening day of the Senate of any Congress, we adopt rules, and we can adopt those rules by majority vote. If the majority wants to adopt a rule that says that for this Congress we have to abide by a certain number, that is OK, but it cannot bind another Congress.

Senator UDALL has been quite eloquent on this issue. He has been very forthright and has fought very hard for what is known as the constitutional option. That is just a fancy word for saying ''live up to the Constitution.'' We took an oath to bear true faith and allegiance to the same—the Constitution. Senator UDALL is constantly reminding us of what that Constitution says and does not say. As the Senator has pointed out many times, the Constitution says each body shall adopt its rules. So the Senate can adopt its rules. It does not say in the Constitution that each body shall adopt its rules but it requires a two-thirds vote to change those rules. It doesn't say that. It says each body shall adopt the rules, and it does not specify that we have to have a supermajority to do so. I think it only specifies a supermajority, if I am not mistaken, in five cases. Obviously, the Framers of the Constitution were quite clear that each Congress could adopt its rules and it could adopt them by a majority vote. Now we have a situation in the Senate whereby we are throttled by rules that do not permit us to change those rules except by a two-thirds vote.

As I said many times, what if the voters of this country decided to elect 90 Senators from the same party, say, the Republican Party. Could they come in and say: We are going to adopt new rules, and from henceforth it is going to take 90 votes to change those rules, knowing that may never happen again in the history of this country that we would ever have 90 Senators from one party. Could they do that? If you accept the logic of what we are working with right now, the answer is yes, we could do that and bind every Senate from then on in perpetuity that the only way they could change the rules would be with 90 votes. We say that wouldn't happen. Well, what about 67 votes or 75 votes or 78 votes? What is so magic about 67? Where does that magic number come from? It was plucked out of thin air.

That is why I address myself to the issue Senator UDALL has worked so hard on; that is, focusing on the constitutional issue.

Senator MERKLEY, from Oregon, has focused on rule XXII—it is called the filibuster rule—which provides basically that we do not even have to filibuster. In a filibuster, people think they come on the Senate floor, like ''Mr. Smith Goes to Washington,'' and they speak and they hold the floor and they can hold the floor until they drop or, if somebody else wants to speak, they can speak. That is what people

imagine a filibuster to be, and that is what a filibuster used to be. What a filibuster has become is a means whereby the minority can stop us from debating anything. So what has happened to the Senate, supposedly the greatest deliberative body in the world, is we have now become the greatest nondeliberative body because we do not debate because now a minority can decide what we take up and what we do not take up.

Think about it this way. Under rule XXII, as it is now being used, 41 Senators can decide what this body does. They have the veto right—the veto right over anything we bring up, that the majority wants to bring up. Again, when I say ''majority,'' I am not saying Democrats or Republicans; I am saying any majority. That is why I first brought up my proposal in 1995, when we were in the minority, because I wanted to make it clear that this was not a means whereby we were trying to grab power or anything. I said, no, this is for the smooth functioning of this place. I predicted at that time, in 1995, and the record is clear—it is in the RECORD—I predicted that unless we do something, the number of filibusters would escalate, it would be an arms race, and that is exactly what has happened—135 last year.

So the Senator from Oregon has said that if we are going to have a filibuster, at least people ought to come on the floor and talk. At least, if you are going to filibuster, if you are so opposed to a bill and you have a group who is opposed to it, at least stand out here and speak. They don't have to do that now. They put in quorum calls and walk off the floor, and a minority—41 Senators—decides what we take up. They can stop anything.

Think about it this way. For a bill to become law in this country, it requires that it pass the House and the Senate in the same form, and the President has to sign it. Right now, the way we are constituted and the way we operate in the Senate, 41, a minority in the Senate—regardless of what the House wants to do, regardless of what the President wants to do, and regardless of what the voters may want—can stop it. That turns the whole concept of democracy on its head. I thought the majority rules, with rights to protect the minority. So the minority can offer amendments. I don't even mind if the minority wants to slow things down. That should be their right, to be able to do that as a minority. They should have the right to offer amendments, to change a bill as they see fit. But I do not believe a minority ought to have the right to absolutely stop and veto a bill or an amendment from coming to the Senate floor. We have a situation where the power resides with the minority.

I heard the distinguished Senator from Kentucky, Mr. MCCONNELL, said the other day that this is a power grab by the Democrats. No, no; the power grab is by the minority, whatever minority. The power grab is by the minority to insist that they have the right to veto anything here. That is the power grab. So now the power lies with the minority, but the responsibility lies with the majority. So the majority in the Senate has the responsibility to act, but we do not have the authority. The minority has the authority, the right to veto things, but they don't have the responsibility. That is why we have such a dysfunctional system. This is what the people of America are opposed to.

I will have more to say about this tomorrow as I think we will get into a longer debate on this issue. I think the people have the right to understand that if a majority of the House and a majority of the Senate pass something and the President agrees, it ought to become law. That is not the way it is. We used to have a system on the Senate floor where, if you offered an amendment and you got 51 votes, you agreed to the amendment. You can't do that anymore. You cannot get an amendment offered on the Senate floor unless you have 60 votes. That is what happened over the last 4 or 5 years. I know I myself tried to get an amendment offered on the financial regulation bill. I thought I had over 51 votes on it. I don't know if I did or not, but I was not able to offer it because there was a 60-vote threshold. I might have had 52 or 53 or 54 or 55, but I did not have 60. Now in the Senate we require a supermajority to do anything because 41 Senators—a minority—have the right to veto anything the majority wants to bring up.

As I said, I will have more to say about this, but it seems to me this stands democracy on its head and the idea of majority rule on its head. I think the majority ought to have the right. Elections ought to have consequences. If people vote for a certain party to be in power, that party, regardless of what it is, ought to have the authority to act. There ought to be rights for the minority to amend, discuss, debate, slow things down—fine. But the minority should not have the absolute power of a veto, and that is what the minority has in the Senate today.

That is the issue Senator MERKLEY has been going after. At least if you are going to have a filibuster, there ought to be some consequences to it, and the consequences are that you ought to have to be here and talk and not hide behind quorum calls where we sit here for days on end doing nothing because someone has objected to bringing up a bill but they do not have to be here to discuss it.

I thank my two colleagues for their great leadership on this issue. As I said, they brought a breath of fresh air here. The average person out there watching probably thinks: Bring it up for a vote. Things are not quite that simple in the Senate, as we are about to find out. So we are going to do whatever we can to bring this to the forefront, but I daresay that the way the rules are set up right now—requiring a supermajority to change those rules—makes it nearly impossible for a majority of the Senate to act.

Again, I thank my colleagues, Senators MERKLEY and UDALL, for their leadership. I look forward to being in league with them to do whatever we can to make this place function a little bit better and a little bit more in accordance with the principles of democracy, of majority rule, and respecting the rights and wishes of the voters of this country.

I thank my colleague from Oregon for his leadership—I see he is standing there—and I thank my colleague, Senator UDALL, for yielding to me.

I yield the floor.

The PRESIDING OFFICER (Mr. CASEY). The Senator from Oregon.

Mr. MERKLEY. I would certainly like to thank Senator HARKIN for the many years he has pursued reforming the rules of the Senate, especially from the perspective of being in the minority and then maintaining that same effort in the majority. I believe it is important to recognize that the issues we are presenting and bringing to the floor are to make the Senate work better as a deliberative body for both the minority and majority.

If we were to turn the clock back several decades, we would not be here right now carrying on this colloquy. Instead, there would have been a unanimous consent to put a rule proposal on the floor of the Senate, and we would be debating that proposal. That is the way the Senate worked for most of its first two centuries.

In 1953, Senator Anderson put forward a resolution to adopt new rules at the start of Congress. There was a debate on it. Then, eventually, it was tabled. It was tabled by 51. That is what the rule said—51 could table, they could set it aside. He did not win his debate, but he got it on the floor of the Senate, and it was debated.

The same thing in 1957, and in 1959, he again did this.

In 1961, he did this again, and in that case it was debated on the floor of the Senate. Everyone said: Let's get the rule out there, let's hold a debate. Eventually, they referred it to the Rules Committee. Finally, near the end of the cycle, it was moved out of the Rules Committee, back to the floor, and they held another debate on Senator Anderson's proposal. The result of that debate was that it was tabled, the resolution was tabled. It did not pass. To have the debate is not going to guarantee you are going to win the debate but it is to engage in the deliberation, the exchange of ideas that enables us to capture the challenges we see, the challenges in our country and in this case the challenges with making the Senate function and making things work better.

This goes on. Here we have five times in the course of 12 years that a rule proposal was put on the floor and was debated. It was defeated, but it was put

on the floor under the framework that 51 Members could adopt rules under the Constitution, the constitutional power you have been speaking to so eloquently for Congress to organize itself—for the House of Representatives to organize itself and for the Senate to organize itself.

I wanted to go over a little bit of that history to say the very fact that we are not at this moment debating a rule proposal is a reflection of the dysfunction of the Senate. A debate on the rule to fix the Senate itself reflects the dysfunction of the Senate.

I want to thank you for having engaged in so many years of effort to bring these issues forward. The challenge of fixing the Senate has been engaged in by so many names that I was familiar with growing up, folks such as Senator McGovern, Senator Mondale, Senator Church, Senator Pearson. They all brought their effort to make this body work better. We did have a major reform in 1975.

But as a chart I put up earlier showed, the congestion and the paralysis from the abuse of the privilege of having yourself heard, making yourself heard before your colleagues, has now compromised the ability for us to fulfill our constitutional responsibilities and we need to fight hard to try to fix the broken Senate.

Mr. HARKIN. Mr. President, would the Senator yield for a question on that point?

Mr. MERKLEY. I would be delighted to do so.

Mr. HARKIN. The Senator is a student of the Constitution. We have all looked at it. We know what it says. I mentioned earlier about the fact that when we come in here, we take an oath of office to uphold and defend the Constitution against all enemies, foreign and domestic, to bear true faith and allegiance to the same. That is our oath of office, to bear true faith and allegiance to the Constitution.

Is it the Senator's view that perhaps the way the Senate is constructed right now may in some way—I just throw this out—take away my constitutional right to adequately represent my constituents? If it takes a supermajority or if we cannot even change the rules, as the Senator has pointed out, does not this kind of take away some of the constitutional rights and obligations, obligations of a Senator, I ask the Senator?

Mr. MERKLEY. Well, certainly I will tell you that Senator Byrd stood on this floor and said the Senate cannot be bound by the dead hand of the past. You can imagine that any particularly bizarre rule that might have been passed by our predecessors that damaged our ability to fulfill our constitutional responsibilities would be inappropriate, and we would need to change it. The Constitution empowers us to change it with a simple majority.

So when the point comes that the Senate is not functioning in the fashion it was constitutionally intended to function—that is, a simple majority to pass legislation—then we certainly have to wrestle with whether we are doing our responsibility if we do not fight to make the Senate work better. We have an obligation to this Chamber, and we have an obligation to our responsibilities under the Constitution.

Mr. HARKIN. I thank the Senator for his response on that.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. UDALL of New Mexico. Mr. President, I know the Presiding Officer has also been a part of this rules reform effort. We very much appreciate that.

It was mentioned here about Senator Byrd. I think one of the most interesting stories about Senator Byrd, I say to Senator HARKIN and Senator MERKLEY, in 1979 when he came to the floor, he was talking about—and we have used this quote many times—the dead hand of the past, not being ruled by the dead hand of the past.

What was he talking about? He was talking about the idea that one Senate could establish a set of rules and bind future Senates. He gave a passionate speech. We are in the situation that he talked about right now. He said, now we are at the beginning of Congress. This Congress is not obliged to be bound by the dead hand of the past.

Take rule XXXII, which is a different numbered rule today. But, for example, the second paragraph thereof says that: The rules of this Senate shall continue from Congress to Congress until changed in accordance with these rules.

That rule was written in 1959, by the 86th Congress. The 96th Congress is not bound by the dead hand of the 86th Congress. The first Senate—now he talks a little bit about history here, which is very important. The first Senate, which met in 1789, approved 19 rules by a majority vote. First Senate.

Those rules have been changed from time to time, and that portion of the Senate rule XXXII I quoted was instituted in 1959. The members of the Senate who met in 1789 and approved that first body of rules did not for one moment think or believe or pretend that all succeeding Senates would be bound by that Senate. The Senate of the 86th Congress could not pretend to believe that all future Senates would be bound by the rules it had written. It would be just as reasonable to say that one Congress can pass a law providing that all future laws have to be passed by a two-thirds vote.

Any member of this body knows that the next—any member of the body knows that the next Congress would not heed that law and would proceed to change it and would vote to repeal it by a majority vote, no doubt about it.

So he says: I am not going to argue the case any further today except to say that it is my belief, which has been supported by rulings of three Vice Presidents of both parties and by votes of the Senate, in essence upholding this power and the right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress.

That is the essence of where we are right today—that we are able, if we have a majority, to move forward with adopting our rules that are going to function for this session of Congress. That is why we are in such a battle here to try to get those proposals onto the floor. We want to get S. Res. 10. We want to get the talking filibuster proposal. We want to get those put onto the floor so we can have debate, we can have votes. And our understanding is there is going to be objection from the other side.

As Senator HARKIN said earlier, we function here by unanimous consent, and they apparently are not going to give us that consent. I know that Senator HARKIN—changing the subject a little bit here—but both Senators HARKIN and MERKLEY mentioned earlier the whole issue of why we want the Senate to function better, that we have pressing national problems and challenges.

I think one of the Senators who said it best made a comment back in 1971. This is Senator Hart, Senator Phil Hart of Michigan. It still resonates decades later.

> The apparent inability of the Senate to take action on our domestic ills, when the needs are so painfully clear, is a basic cause of unrest and disaffection among the citizenry. The imperative of change is obligatory if institutions such as the Senate are to have the capacity to respond well to the complex array of overlapping domestic and international issues.

Long ago Thomas Jefferson said: As new discoveries are made and new truths discovered and manner and opinions change with the change of circumstances, institutions must advance also and keep pace with the times. Institutions must advance also and keep pace with the times.

That is why we are here. We have rules that were adopted long ago that are not working today. You and I have talked several times about, if you want your government to spend money wisely, you want it to be efficient, why do we not give them a budget until half way through the fiscal year? It makes absolutely no sense.

That is the situation we are in right now. We hold hearings, we bring the agency in, we think we are going to have an appropriations bill on the floor—by the way, this year we did not have—but last year we did not have a single appropriations bill on the floor. So they think they are going to get one budget. Then when we pass the fiscal year, last October 1, we start the fiscal year, we start into it, we have done a couple of continuing resolutions. A continuing resolution just gives them month-by-month funding. The next continuing resolution does not expire until March. So who would tell any agency, nonprofit government agency, that we are going to give you a budget but we are not going to quite tell you what it is, and maybe go month to

month, and then about halfway through the year we are going to give you the rest of the budget.

That is not the way to take care of the people's money. It is not the way to be efficient. It is not the way to make sure the people's money is very well spent. I think it is important that we do that work, the work of appropriations bills.

Of the Senators who are on the floor right now, Senator HARKIN is an appropriator. When you bring an appropriations bill to the floor and have all 100 Senators take a look at the appropriations bill, take a look at what is working in that department and what is not, and how we move down the road with that particular set of policy initiatives and programs, that is something the agency pays tremendous attention to, those amendments that are put in, the arguments that are made. And we are neglecting all of that now.

Last year we did not do a single appropriations bill. In my understanding, the House—and I know we were very frustrated when I was over in the House. We would say: Well, why are we even passing the appropriations bills? The Senate does not do them. We are going to end up, at the end of the year, doing one of these continuing resolutions or an omnibus bill.

For the first time in I do not know how long, last year the House gave up doing appropriations bills. So here, one of our core functions as a legislative body, what we all call the power of the purse, tremendously important, that power of the purse has been emasculated, it has been warped beyond recognition to the point where I think we are dysfunctional, the agencies are dysfunctional, and we have got to get it all back.

I know the chairman of the Judiciary Committee has outlined a number of times—and I find it appalling that we do not have the judicial people in place to do the job for the country. Right now the Federal courts are looking at fraud on Wall Street. They are looking at all sorts of major cases that have to do with financial reform and insider trading and all of those kinds of things.

Guess what. If you do not have judges to hear those cases, then all of that justice is going to be delayed. There is an old saying in the law: Justice delayed is justice denied. Today we have 94 judicial vacancies. The Judicial Conference of the United States has weighed in with the Senate and the House and said: These are judicial emergencies. Of 94 vacancies, 44 of them they consider emergencies. They need somebody in there immediately. Yet, still, because of this constant filibuster we are in—it is a filibuster without real debate—it wastes a lot of time, it prevents our ability to put those judicial nominations on the floor and to get an up-or-down vote.

The same thing is true of the executive branch.

I know Senator MERKLEY saw the article in the Washington Post which was at the end of the first year of the Obama Presidency. He only had 55 percent of his team in place of the top people in the agencies to run the government. And it is not all our fault. I think they were slow in sending some things up, but it is a pretty appalling number when you think of the job of a President to put his people in place in the agencies so his policies can be carried out. What has happened is that has been delayed and slowed down.

I harken back when I was a youngster here in Washington growing up. I was about 12 years old when my father became Secretary of the Interior. Here you have only half of the people in place in the Federal Government. I remember my dad, as Secretary of the Interior, telling me when I would travel home: TOM, I have my whole team in place, virtually whole team in place in 2 weeks.

So he had his top people. He was ready to carry out policy, ready to move forward with the President's policies at the Department of Interior. I remember, we had holes, we had a variety of things going in the Department of Interior.

We had a very talented woman from New Mexico who was going to become the Solicitor, who had moved her young family to Washington. They had a 3-month hold on her nomination. Nobody could ever figure out why. But she was finally allowed to become the Solicitor of the Interior Department.

With all of these kinds of things, from holds to the constant filibuster without any real debate, have slowed down the government in a significant way and prevented us from doing the important oversight job we need to do.

I know the Senator from Oregon has other comments he would like to make.

Mr. MERKLEY. Mr. President, it is quite a contrast that the Senator is drawing between an era in which in a 2-week period the bulk of the team was in place, ready to do the work they were elected by the people to do—the executive branch, headed by the President, had his Secretaries, and the Secretaries had their teams in place, and they were ready to go forward to make sure they were working hard on the agenda they had laid out during the election cycle.

As my colleague said, elections have consequences. The vision of our Republic is one in which we elect a President, and the President says: Here is my agenda. Then he puts together a team to get it done. It is not in the spirit of our Constitution, it is certainly not in the spirit of our democratic souls, after the people have elected a President, to try to damage and inflict pain and obstruction upon that President. That is essentially saying one does not accept the judgment of U.S. citizens about electing the President.

This process has to change. We have to find a way that folks can be brought to the floor. It is not that this Chamber will approve every single nomination. It is that it will hold a debate and have a vote. If there is no controversy surrounding someone, then that will probably be reduced to a unanimous consent request. Some will be waived through to not take up the time on the floor of the Chamber.

There is more than 1,000 executive branch positions that have to be confirmed under statute. That, too, should be changed. There is far too many positions that are basically set up so that they have to come to this Chamber. That is certainly a subject of conversation. But for those that under the law need to come for advice and consent, then we need to exercise that responsibility in a manner that is consistent with advise and consent but not with attempting to damage the President and his team.

I was looking at a speech by one of my colleagues from Tennessee, Mr. ALEXANDER. He titles it, ''The Filibuster, Democracy's Finest Show, the Right to Talk Your Head Off.'' That quote at the top of his paper is from a speech before the Heritage Foundation and is taken directly from the film ''Mr. Smith Goes to Washington.'' In other words, the premise that my colleague put in his paper is that there needs to be the right of the people elected by the citizens to have their voices heard on the floor of the Senate. That is what the talking filibuster is about. It is about the people being able to see their Senators, when they are saying there needs to be additional debate, to actually debate.

There is a tremendous amount of bipartisan support for this notion that Senators should not hide from the American people, that they should not be engaging in secret holds, but instead, if they are going to place a hold on a piece of legislation, to do it publicly and have accountability. There is tremendous support for the notion that when we proceed to vote that we want additional debate, we are actually going to debate so we utilize the time of the Senate to weigh the pros and cons, to hear all colleagues. Not that folks say: We want additional debate and then go off to dinner. Not that Senators say: We want additional debate and then go off on vacation.

If they ask for additional debate, then we should have additional debate, laying out the pros and cons, arguing the merits, considering amendments—in short, the talking filibuster.

I have a unanimous consent request that I gave notice of half an hour ago. We are standing by waiting for one of our colleagues from the other side to come, extending the courtesy for them to come and object to this request. I am saying this out loud and looking across the aisle and saying we have been waiting half an hour. I think it is time for one of our colleagues who wishes to object to get here on the floor and, just as we have been talking about, make their case visibly in front of the citizens of the United States as to why they wish to object to having a

full debate on the talking filibuster. I know my colleague is waiting to offer a unanimous consent request to have resolution No. 10 considered before this Chamber. I think we have pretty well laid out the reasons we think this debate is important. But we can't get to that debate without putting forward a unanimous consent request and having it concurred in or blocked by objection.

I will see if my colleague from New Mexico wishes to make any more comments. If not, I will offer my unanimous consent request and await our colleagues to come and either endorse or object.

Mr. UDALL of New Mexico. Mr. President, I am also waiting. Senator MERKLEY is waiting to put in his unanimous consent request on the talking filibuster proposal which goes to the heart of the problem we have today. One of the things I have learned the last 2 years in the Senate is that when 41 Senators vote for more debate, that is basically what is happening. When Senators vote for more debate, 41 of them, then we don't get more debate. A lot of times we are in quorum calls. A lot of times if we have a live quorum, we pull 51 Senators over to the floor to try to get through that, there are a series of dilatory motions, and it is very difficult in the modern Senate to keep 51 Senators here surrounding the floor. In the old days, they used to pull out cots and stay through the night so that Senators would be able to sleep someplace to keep that live quorum going. But in the modern Senate, with everything going on, it is a tremendously unfair advantage for one side to have one Senator and the other side have to have 51 in order to try to conduct any business. That is the situation we are in today. That is what the talking filibuster goes to. It goes to dealing with that situation.

How does it deal with it? If 41 Senators request more debate, if they say to the other 59 Senators they want more debate, we very simply say, just as Senator ALEXANDER said, quoting Jimmy Stewart in ''The Right to Talk Your Head Off'' from ''Mr. Smith Goes To Washington,'' then come down and debate. We are going to have a debate period where nothing else is brought up but debate. The job of the Chair, as the Presiding Officer knows, will be in that period to ask the question: Are there any other Senators on the floor who wish to debate?

At that particular point, the American people could look down and be able to make an observation: Is this debate educating the public? Is it moving things forward, or is it just a filibuster to waste time?

One of the old-time Senators from California made a comment about the filibuster wasting time. This is from Senate Republican whip Tom Kuchel of California. He asked the question on the floor: What is a filibuster? My definition would be that it is irrelevant speech making in the Senate designed solely and simply to consume time and thus to prevent a vote from being taken on pending legislation.

He is pretty condemning of that kind of filibuster. But that is a judgment. We don't want to take people's right to debate away. We just want to make sure there is an honest, fair debate on the floor. That is what I compliment Senator MERKLEY on. He has drafted a proposal, worked long and hard on it. What it ends up doing is, at the end of the debate, when 41 Senators call for debate, we go into a period of extended debate. They talk and they talk. At some point, when the Chair asks: Are any other Senators on the floor who wish to debate, and there is silence, they are then rolled over into what is called postcloture 30 hours.

Mr. MERKLEY. So if I might explain, if there is something critical to my State, the talking filibuster enables me to find a couple of other Senators who share my views. Perhaps they have similar issues in their States.

For example, the citizens of Oregon don't want oil companies drilling off our coast. We have a tremendous business in salmon, in ground fish, rock fish. We have a river economy that depends on the migration of salmon upstream. We have a crab industry. We have a tourist industry, the most spectacular coastline anywhere in the world, the coast of Oregon. The last thing we want is an accident that puts oil all over our beaches and destroys multiple aspects of our economy.

So if there was a bill on the floor that said we are going to drill for oil off the coast of Oregon, and if I believed that was a huge mistake, then I could organize with other Senators and be here day and night to block that misguided legislation. In that sense we are not changing the number. It still takes 60 Members to close debate.

We protect the voice of the minority. We say two Members could continue a debate day and night. For that matter, one could, but eventually one is going to collapse on the floor like Jimmy Stewart did. This is important to note because the talking filibuster is about taking away frivolous obstructions that paralyze the Senate and prevent it from doing its responsibilities on advise and consent and considering regular bills from the House and certainly to be able to get the appropriations bills done, to get the authorization bills done, and so on and so forth.

There may be those who say we oppose the talking filibuster because it takes away the power of the minority to block legislation. Actually, the talking filibuster doesn't do anything of the kind. It just says that when you block legislation, you have to do it in front of the American people. You have to stand on the floor and make your case.

Mr. UDALL of New Mexico. Mr. President, that is the essence of it. What we have now is Senators leaving. We actually had the case where a Senator wanted the cloture vote to take place but then left and went home. That is a pretty disgraceful situation. I have heard that our good friend, Senator ALEXANDER, is going to join us in a little bit. I know the Senator from Oregon was quoting from a speech he recently gave at the Heritage Foundation on January 4, 2011.

One of the things Senator ALEXANDER said in there that I think we, all three of us, have echoed—Senator HARKIN, Senator MERKLEY, and myself—is:

> Now there is no doubt the Senate has been reduced to a shadow of itself as the world's greatest deliberative body, a place which, as Sen. Arlen Specter said in his farewell address, has been distinctive because of ''the ability of any Senator to offer virtually any amendment at any time.

I say to Senator HARKIN, I know he has spoken passionately about the idea of offering amendments, how our democracy has deteriorated in the Senate because it takes now 60 votes—every amendment. I say to the Senator, it did not always used to be like that, did it? I would ask the Senator, did it? The Senator has been here a while. What was the Senate like 10, 15 years ago? Could you get an amendment through with a majority vote?

Mr. HARKIN. Well, if my friend will yield for a response.

Mr. UDALL of New Mexico. Of course.

Mr. HARKIN. Yes, literally up until 4 or 5 years ago you could offer an amendment on the floor, and if you got 51 votes, you won. That happened for—well, I have been here, what, 25, 26 years I guess now, and that is the way it has always been. Sometimes there were tough amendments. Sometimes there were tough amendments by Democrats; sometimes there were tough amendments by Republicans. It did not make any difference who was in the majority or the minority.

I do not think people elected us just to have an easy time of it here and not to ever cast tough votes. Sometimes these are tough votes. But I think the Senator from New Mexico is right. We always operated under the fact that a Senator could offer an amendment. Usually you would enter a time agreement. You would say: How much time do you want? Well, you would have an hour or an hour and a half or 2 hours, something like that. You would have a reasonable time agreement, and you would have debate and then a vote. Sometimes people would move to table it, and that was fine, but at least 51 votes decided that.

Now, as the Senator pointed out, you have to have 60 votes for any amendment, a supermajority. For any single amendment you want to bring up on the Senate floor, you now have to have 60 votes. I say to my friend, it was not always like that.

Mr. UDALL of New Mexico. I say to Senator HARKIN, one of the things that happened to us right at the end of the Congress was when we had a vote on a piece of legislation called the DREAM Act. I believe the majority had 55 votes for the DREAM Act.

Mr. HARKIN. That is right.

Mr. UDALL of New Mexico. Here is a piece of legislation where we were talking about inmigrant children—through no fault of their own; they were probably brought in as tiny babies—who have grown up in the United States and have reached the age of adulthood and they have a ceiling on them. They cannot go to college. They do not have Social Security numbers. So we were basically trying to give them a dream they could go out and be Americans. They could join the military, and after they did their military service get in line for citizenship. They could go to college, and if they did well, get in line for citizenship.

In any other country, if you had the two legislative bodies—the House passed it by a majority; we passed it by a big majority, 55 votes—you would have a law. The President would be signing it, and it would be law today.

That is what has happened to this filibuster rule. A lot of the steps we are taking do not necessarily get right to the heart of that, but I think the people understand that part of it. When I have gone home, people say: What happened? What is going on? Fifty-five Senators voted for the DREAM Act and it did not become law.

Senator HARKIN.

Mr. HARKIN. If the Senator will yield, the Senator is absolutely right. I will give another example. As the Senator knows, the Supreme Court decided a case last year that allows certain entities to contribute money to political campaigns, and they do not even have to disclose who they are or how much they give. It is a Supreme Court decision.

Well, the House passed a bill, and public opinion polls show that 80 percent of the American people were in favor of what we called the DISCLOSE Act. We did not say they could not give the money. We just said they ought to file: Who are you, and how much money are you giving, and where are you getting that money from?

It passed the House. It came to the Senate. I believe we had 57 votes for that, if I am not mistaken. I could be corrected, but I think it was over 55 votes for that. But it did not pass.

The average American out there would say: Wait a minute. I thought if you got 51 votes, you won. No, no, no. Again, we had to have 60 votes in order to pass the DISCLOSE Act. The President would have signed it into law. The House passed it. Eighty percent of the American people were for it. But because there was this 60-vote threshold, we did not get it passed.

I see the Senator from Oregon.

Mr. MERKLEY. Well, I say to Senator HARKIN, I think that is a tremendous example. I believe we actually had 59 votes twice——

Mr. HARKIN. I stand corrected.

Mr. MERKLEY. I believe, one vote short needed to close debate on the motion to proceed to get to the DISCLOSE Act. So we could not even get onto the bill.

So here is a Supreme Court decision that allows unlimited—unlimited—secret foreign donations. I will tell you, as a red-blooded American, the idea of foreign companies secretly influencing American elections is outrageous, and we should have had a debate on that bill. But, instead, we had 41 Senators who said they wanted further debate, and then they were not willing to stand up on the floor to make their case before the American people. And why did they want to hide from the American people? Because the American people do not support secret foreign donations influencing American elections. That is why.

Under the talking filibuster, folks could not have filed an objection and left this Chamber and hid. They would have had to make their case, and the American people could have weighed in and said: You are a hero or you are a bum. In this case certainly most Americans, I believe, would have weighed in and said: Get to that bill. Get to a debate on it and get it done because it is the American tradition for Americans to make their decisions about who they elect, not foreign corporations to secretly spend money on American campaigns.

Mr. HARKIN. I thank the Senator. The Senator pointed out correctly—I was mistaken; I thought it was 57—it was 59 votes. You would think normally that bill would pass and it would go to the President for his signature. It was supported overwhelmingly by the American people, yet thwarted because we have the right—as I said earlier, the minority in the Senate has a right of veto. They can veto whatever they want to bring up. What sense does that make in a democracy?

I thank the Senator and yield the floor.

Mr. UDALL of New Mexico. I thank the Senator.

We see our good friend, Senator ALEXANDER from Tennessee, has arrived, and we very much appreciate that.

I say to Senator ALEXANDER, one of the things we have been discussing—and Senator MERKLEY had a chart and had the history of what had happened as far as rules debates. There have been a lot of rules debates—in the 1950s, 1960s, 1970s, and always—always—the two leaders would allow a rules proposal to be on the Senate floor and be debated and be disposed of.

We now have a situation today where we cannot get our rules proposals onto the floor. Senator MERKLEY is here with a talking filibuster proposal. I say to the Senator, I believe he has been talking with you. I say to Senator ALEXANDER, you have been very open with us in saying: Let's have discussions. And your theme has really been, like you say in your speech at the Heritage Foundation:

[T]he Senate needs to change its behavior, not to change its rules.

That has been the Senator's function. But the Senator is also working on rules changes with Senator SCHUMER, and we very much appreciate that.

But I know Senator HARKIN has a proposal. Senator MERKLEY has a proposal. I have S. Res. 10. I say to the Senator, he was here on the first day of the Senate session on January 5 when we put in, with my two friends, S. Res. 10. We are just trying to get it to the floor, and that is what I am going to ask right now, with my unanimous consent request. We very much appreciate the Senator being here.

Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 10, a resolution to improve the debate and consideration of legislative matters and nominations in the Senate; that there be 6 hours for debate equally divided and controlled between the two leaders or their designees, with no amendments in order; and that upon the use or yielding back of time, the Senate proceed to vote on adoption of the resolution.

The PRESIDING OFFICER. Is there objection?

The Senator from Tennessee.

Mr. ALEXANDER. Mr. President, reserving the right to object, I want to congratulate the Senator from New Mexico. He has been persistent and diligent and enormously well intentioned in this effort throughout the Rules Committee hearings and throughout the floor debate in seeking a way to help make the Senate function better, at the same time preserving the Senate as a forum for deliberation and protection of minority rights.

We have a difference of opinion about whether that is best done by allowing changes of rules by 51 votes or by 67, which is the way the Senate rules currently prescribe. His proposal to change the rules certainly can be considered on the Senate floor in the regular order, and we would be happy to work with him to do that as long as it was by 67 votes.

So because of that difference of opinion, I object.

The PRESIDING OFFICER. Objection is heard.

The Senator from Iowa.

UNANIMOUS-CONSENT REQUEST—S. RES. 8

Mr. HARKIN. Likewise, Mr. President, the Senator from Tennessee knows I have been on this issue for a long time. I have a proposal also.

Again, I ask unanimous consent that the Senate proceed to the immediate consideration of S. Res. 8, a resolution amending the Standing Rules of the Senate to provide for cloture to be invoked with less than a three-fifths majority after additional debate; that there be 4 hours for debate equally divided and controlled between the two leaders or their designees, with no amendments in order; and that upon the use or yielding back of time, the Senate proceed to vote on adoption of the resolution.

The PRESIDING OFFICER. Is there objection?