

Center for American Progress



# From Deliberation to Dysfunction

It Is Time for Procedural Reform in the U.S. Senate

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# Introduction and summary

The U.S. Senate has a proud tradition of ensuring that important decisions are carefully weighed before they become law. This has served the nation well at times. But under current practices the latitude granted to individual senators to obstruct does not always contribute to more measured consideration of national policy. In recent years, the Senate has been less and less able to follow the regular order in the consideration of pending legislation, the confirmation of senior executive branch officials, and other work.

Increasingly, the Senate has been forced to rely on legislative shortcuts that severely undermine the philosophy of full and careful consideration of all matters before the body. Even so, the chamber fails to complete much of the work for which it is responsible and falls so far behind schedule in completing the work it does do as to seriously undermine the capacity of the entire federal government to respond in an effective and efficient way to the problems facing our country.

The root cause of these problems is the institution's inability to adopt rules that balance the responsibilities of Congress against the rights of individual senators. Rules that allow the Senate to limit debate and maintain a functional schedule have not been strengthened in more than four decades, but during that period the workload has increased significantly, and the willingness of senators to use all of the powers offered by the rules to obstruct legislative progress has increased exponentially.

While many Americans continue to think of the filibuster as it was portrayed in the 1939 film, "Mr. Smith Goes to Washington," it has evolved into a very different practice over the course of the past 71 years. It has been decades since a senator actually took to the floor and attempted to block legislation through extended speechmaking. Now a senator merely needs to serve notice that he or she will not concur in a procedural motion by the leadership that the prospects for making progress on the legislation proposed for consideration are so diminished that it is often pulled from the legislative schedule. This practice applies to not only new laws altering national policy in some significant way, but also to the annual spending bills that keep the government operating and even the appointment judges, senior, and even not-so-senior executive branch officials and military officers.

While it is unlikely the Senate will abandon the filibuster, it is clear that the rules governing the use of the filibuster must change if the body is to be prevented from becoming a

more serious impediment to competent governance. The chaotic, hit-or-miss process in which rather mundane matters are debated at great length while more important issues are slipped past the full Senate without significant debate or opportunity for amendment turns the concept of deliberation on its head.

The long delay in adopting spending measures diminishes the capacity of program managers in executive branch agencies to effectively manage public funds. And the hundreds of unfilled administrative positions across the executive branch created by Senate inaction on executive branch nominees further reduce the prospects that taxpayer dollars will be spent in a thoughtful and effective manner.

At a minimum, the Senate needs to adopt modest procedural changes to its rules curbing some of the filibuster's worst abuses and making the Senate not only more responsible in performing its work but at the same time more deliberative.

## Origins of the filibuster

The word filibuster is taken from Spanish and translates roughly to the English word "pirate," as in stealing the legislative process. The framers of the Constitution did not envisage that individual senators would hold this powerful tool. The original Senate Rules provided for the termination of debate at any time by majority vote. A motion to ask for a vote on the business pending before the Senate, or in legislative-speak to move "the previous question," was allowed until the rules were rewritten in the 9th Congress in 1806, but even then, prolonged debate for the purpose of obstruction was not practiced until 1841 as comity deteriorated in the decades leading up to the Civil War.

In the two decades preceding the Civil War, the filibuster became strongly established in Senate tradition. During that period, there was no legislative recourse to a decision by a small number of senators to kill legislation—even if they were the only ones in the entire country who opposed it. As a result, Congress ceased to be a forum for resolving the major issues of the day unless senators themselves recognized the need to limit their power to obstruct.

From the decade following the Civil War until the U.S. entry into World War I, there were repeated attempts to change Senate rules and allow limitations on debate—all of which failed. But when antiwar isolationists used the filibuster to block the arming of U.S. merchant ships against German submarines in 1917, President Woodrow Wilson recognized the

opportunity to force change. Calling a special session of Congress to complete the work that filibusters had blocked in the previous Congress, Wilson demanding reform:

*"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."*

Days later, the Senate adopted Rule XXII, which allowed limits to be placed on debate if two-thirds of the senators present and voting concurred. Then (as is the case today) the rule still provided several days of debate and parliamentary maneuvering before the matter being subjected to filibuster could be resolved. In essence, the Senate moved somewhat in the direction advocated by President Wilson, but established a threshold for terminating debate that made reform more apparent than real.

Following the Watergate scandal a second wave of reform swept the Senate in 1975. Included in the changes adopted by the post-Watergate Senate was the requirement that committee meetings be open to the press and public and that the two-thirds requirement for ending a filibuster be lowered to three-fifths, or 60 percent of the membership.

# The disappearance of authorizing legislation

The federal government is run through a two-track process. In one, Congress enacts legislation “authorizing” the parameters of a particular program, for instance the National Park Service, while in a separate process it decides annually the amount of money that will be spent on the programs that are authorized. Over the course of the past several decades, the authorizing process—in which many of the most contentious issues affecting programs should be resolved—has been in decline.

The Congressional Budget Office reports that in the current fiscal year, FY 2010, about half of the money provided for the nondefense activities of the government (\$290 billion out of \$584 billion) had to be appropriated without legal authority. That is because a total of 250 laws authorizing various pieces of the federal bureaucracy had expired, and Congress had failed to take the necessary steps through the authorizing process to enact replacement legislation.

There are a variety of reasons why these “authorizations” were not renewed, but chief among them is that the chairmen of the committees of jurisdiction in the Senate cannot get the legislation scheduled for consideration by the full Senate. The reason? The legislative calendar is so consumed by extended debate and deliberation—often on minor issues—there is no time left for most major authorizations to come to the Senate floor.

This problem then cascades into the appropriations process as the Senate leaders must decide whether to fund programs for which there is no legal authority or terminate important government services and activities. Appropriation bills must then address programmatic problems that should have been dealt with by the committees with authorizing jurisdiction.

# The appropriations logjam

Despite numerous efforts over the years to ensure that Congress pass all of the 12 annual appropriation measures before the beginning of a new fiscal year, Congress has not enacted all appropriation bills on time in 15 years. Frequently, federal agencies do not know how much they have to spend in a given fiscal year until nearly half of that year has expired. In most instances this is problem is tied to the Senate schedule.

During the past year, the House of Representatives passed 4 of the 12 bills in June and the remainder in July. The Senate passed three in July, one in August, two in September, one in October, and two in November. The remaining three bills, including the largest domestic spending bill, never went to the Senate floor at all. Those three bills nonetheless conferenced went to conference with the House of Representatives as if they had been considered by the Senate when in fact they had only been considered in a committee comprising only 30 of the Senate's 100 members.

That may sound like a terrible abuse of process and a lousy work record, but in fact it is better than normal. In only two of the last 10 years has the Senate considered all of the appropriation bills that were sent to the president for signature. Since FY 2001, the Senate has conferenced 51 annual appropriation measures as though they had been considered by the Senate and brought back conference reports for nothing more than an up-or-down vote on every one of them. The average number of bills failing to get full Senate consideration has been five per year over the course of the past decade.

By the same token, Congress did not enact the last of the appropriation bills for FY 2010 until December 19, 80 days or nearly a quarter of the way into the new fiscal year. But that was better than normal by the standard of the past decade. The FY 2003 bills did not become law until late February. In FY 2004 it was late January, in FY 2006 it was the end of December, and in FY 2007 was mid-February (See table 1).

TABLE 1  
**Failing on the job**

Record on the passage of appropriations bills without full consideration on the floor of the Senate, 2001-10

Fiscal year	Appropriation bills not considered
2001	5
2002	0
2003	10
2004	1
2005	7
2006	0
2007	9
2008	5
2009	11
2010	3
<b>Total</b>	<b>51</b>
<b>Average 2001-2010</b>	<b>5.1</b>

Source: Thomas, "Status of Appropriation Legislation, Fiscal Years 2001 - 2010," Congressional Research Service, available at <http://thomas.loc.gov/home/approp/app10.html>.

# The hollowing out of government leadership

Another major responsibility of the Senate is to confirm or reject presidential appointments to key positions within the federal government. One practice that has evolved with the Senate's handling of this responsibility is a special form of the filibuster known as a "hold" on appointments.

During an earlier period, holds were used to simply give an individual senator an opportunity to have a week or two to examine an appointee before a decision was made on confirming or rejecting an appointment. The hold means that the senator who has placed it is signaling that he will object to a unanimous consent request allowing for consideration of the appointment. That means that a cloture motion will be required to proceed to consider the confirmation. Since that will take the better part of a week—and the Senate must under current law confirm hundreds of executive and judicial branch positions—it is practical to bring up only those nominations that can get unanimous consent.

Over the years, senators have realized that presidents not only need these nominations to proceed but are willing to pay a price in certain instances to get them. A White House desperate to put their team in place may be willing to make valuable concessions to a senator willing to release a hold—but you can't be a player if you don't have a hold to begin with. Increasingly, holds are attached to nominees for reasons having nothing to do with the nominee or his or her ability to serve.

Evidence of how much this practice has grown surfaced recently when it was revealed that Sen. Richard Shelby (R-AL) placed a hold on every single one of the 80 administration appointees who had been cleared for approval by Senate committees. Sen. Shelby explained that he thought the Obama administration had a bias against his home state in awarding grants and contracts. In particular, he was concerned that the U.S. Air Force might decide that the bid by European Aeronautic Defense and Space Corporation to build a new generation of tanker aircraft was not the best value to U.S. taxpayers. EADS had indicated that although the components of the plane would be largely produced in Europe they would be shipped to the United States and assembled in Shelby's home state of Alabama. The senator felt holding up all nominees would place maximum pressure on the administration to ignore other contract bids.

After a barrage of negative press reports, Sen. Shelby released the hold on most of the appointees but continued until recently to block confirmation of nominees to manage the

Department of Defense's acquisition and technology operations and Air Force installations and logistics (both of whom had now been awaiting confirmation for nearly seven months). Sen. Shelby also continued to block the confirmation of the administration's nominee to be undersecretary of the Air Force.

As of March 1, there were 228 presidential nominees pending confirmation before the U.S. Senate. There are six who were nominated more than 10 months ago. A total of 34 nominees have been on hold more than six months, and 34 more have been on hold between four and six months. Among the positions left vacant during that period are the head of the office of legal counsel at the Department of Justice, the undersecretary of treasury for international affairs, and the undersecretary of commerce for international trade.

What's more, many nominees who eventually were confirmed were prevented from joining the Obama administration for most if not all of its first year in office. One emblematic case in point: The administration sent the Senate a nominee to run the Office of Resources and Technology at the Department of Health and Human Services on June 1 of last year. She was confirmed more than eight months later on a voice vote, but only after the president's budget for the department had been submitted for the coming fiscal year, which ends in September 2011.

Or consider the undersecretary for science and technology at the Department of Homeland Security. She also was approved on a voice vote, but only six months after her nomination had been submitted to the Senate while a critical office in planning our defenses against possible terrorist attacks remained vacant.

Having run on a platform of reforming government contracting and procurement policies, a top priority for the Obama White House was filling the top position at the General Services Administration. In the end, their nominee got all of the 96 votes cast on her approval, but it was nearly 10 months after her name had been sent to the Senate for confirmation.

# Systemic government failure

Unfortunately the failure of the Senate to pass new authorizations, send spending measures to the White House in a timely manner, or confirm nominees for key positions in the executive and judicial branches of government are not simply measures of how well the Senate is performing in a given year. They have immense implications that extend far beyond the Senate chamber.

The failure to pass new authorizations means that most of the resources available to the Senate to oversee the functioning of the federal government are disengaged. Executive branch managers are not challenged on program performance. Standing authorities for program management are left in place for years after they should have expired and new authorities that are needed are not granted. Further, failure to resolve issues through the work of the 18 Senate committees that are charged with reviewing, repealing, or updating authorizations means that contentious issues that should be resolved through that process are dumped onto annual appropriation bills, making expeditious consideration of those bills more difficult.

The failure to adopt spending legislation in a timely manner has a more profound and immediate impact on government programs and how efficiently tax dollars are spent. Each agency has finite resources to manage the workload it is assigned under federal law. If project managers, contract officers, or grant administrators get their budget at the beginning of a fiscal year in October, they have a full 12 months to publish solicitations for grant and contract proposals, appoint reviewers to select proposals that give the taxpayer the greatest value, draft contracts that protect the government's interests in the timely and effective performance of work, and consummate those contracts.

If appropriation measures are not agreed to until February, however, then funds may not be allocated to agencies until March. That means there simply isn't enough time to make the process work, and there is certainly not enough time to make it work well. As a result, the delay in adopting annual appropriation measures that has become a routine consequence of the Senate's methods of making decisions is a prescription for waste, fraud, and abuse. Contracting procedures are necessarily short circuited. Noncompetitive contracting becomes routine and the reviews to determine best value become pro-forma.

The consequences of leaving key executive branch positions unfilled for extended periods is more obvious, but the costs in terms of quality government are underestimated.

Government programs must be funded without formal standing legal authority because there is no time on the Senate schedule to bring such authorizations to the Senate floor. Funding for much of the government is not agreed to until months after the fiscal year has already started, leaving program managers and contract officers with only six or eight months to do a full year's work. A major portion of the agencies and programs across the government are left leaderless not simply for months, but in some instances for years because the Senate finds it impossible under its rules of procedure to move forward with nominations.

An additional price paid by taxpayers for the manner in which nominations are now managed is the increasing unwillingness of qualified people to place their lives on hold for the extended periods of time that is frequently required for Senate confirmation. By shrinking the pool of qualified people willing to become candidates for managing government programs the Senate is without question increasing the cost of those programs and lowering the quality of services provided.

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### More aggressive use of obstruction

Filibusters used to be viewed as an option to slow consideration on measures of great import on which there were deep philosophical divisions. Remarkable restraint was exercised in the use of this powerful and undemocratic tool during most of the 20th century. During the 44 years between 1917 and 1970, motions to limit debate were filed on 56 occasions or little more on average than about once a year.

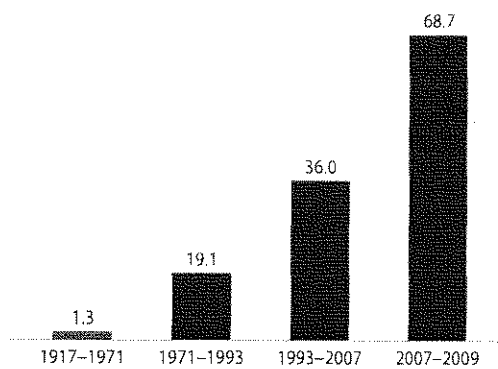
Significant change in the use of the filibuster began to occur beginning in the 1970s. During the 22 years between 1971 and 1993, 420 cloture motions were filed, or an average of nearly 20 filibusters per year. The pace picked up again in 1993. Between 1993 and 2006, there were 504 cloture motions or 36 per year.

But since the 2006 elections the use of the filibuster has again doubled. To borrow a term from "Star Wars," filibustering has gone from overdrive to "hyperspace." Filibusters are now commonly used to block not only legislation the minority opposes, but to block legislation the minority does not necessarily have strong feelings on but will use to place a stick in the spokes of the legislative wheel anytime an opportunity presents itself.

During the two sessions of the 110th Congress, 139 cloture motions were required. And in the first session of the current Congress, 67 such

**FIGURE 1**  
**Flooding the zone**

Average cloture motions to end filibusters per year in the Senate, 1917–2009



Source: U.S. Senate, Senate Action on Cloture Motions, available at [http://www.senate.gov/page/layout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/page/layout/reference/cloture_motions/clotureCounts.htm).

motions were required. This represents an average of about 69 filibusters per year over the past three years. Since the cloture rule was created almost 93 years ago, more than two-thirds of the motions for cloture have occurred in the last two decades, and more than a quarter of those have occurred in just the last three years (see figure 1).

Further, the number of cloture motions is only a partial picture of the total range of obstruction taking place in the modern U.S. Senate. Cloture is filed against only those threatened filibusters that the Senate leadership has the floor time and possible votes to overcome. Much legislation and many presidential appointments are killed before they can be reported by committee either because 60 votes cannot be obtained or the cost in time to the Senate schedule is too great to warrant the effort required to defeat a threatened filibuster.

# Modest changes to make the Senate a more responsible institution

This is a sensitive subject. It is unlikely the Senate will adopt reforms that go as far as many feel appropriate. Whether the Senate should be able to resolve major transformative issues such as the current proposals for changing the nation's health care system by a majority vote is fair question for debate and there are good arguments on both sides.

But that is a different question from the procedural issues raised in this paper. Approving administration nominees in a timely manner or passing the annual appropriation bills before the beginning of a new fiscal year is not about deliberation—it is about whether the country wishes to grant individual senators so much power that the institution can devolve into the kind of anarchy, chaos, and gridlock we are now witnessing.

A huge amount of Senate floor time has been consumed each year in the consideration of the annual appropriation bills. Last summer after two days of seemingly endless debate on the Energy and Water Appropriation bill a cloture motion was filed by Senate Majority Leader Harry Reid (D-NV). The following day, Sen. Byron Dorgan (D-ND), the chairman of the Appropriation Subcommittee that had produced the bill, explained:

*"The cloture motion was filed last evening, and I understand why ... We bring an appropriations bill to the floor that has very widespread support and then it largely comes to a standstill. It would not make much sense for us to be here in this position all week."*

When the opposition to the bill realized debate would be shut off, they allowed it to come to passage and moved their effort to clog the legislative calendar to other targets, allowing the bill in question to be acted on. The opposition then moved their efforts to a different target, allowing the appropriation measure to pass the Senate and go on to conference with the House on an 85-9 roll call vote.

There was a far less satisfactory outcome, however, for a majority of the 12 annual appropriation measures. Eight had to be delayed for consideration until September, when there was little prospect that they could be enacted before the beginning of the new fiscal year. Of those eight, three were not even brought before the Senate until the fiscal year they were intended to fund had already begun, and three others including the largest domestic bill never came before the Senate at all. Those three bills were wrapped into a must-pass, year-end legislative measure that was not subject to amendment.

The full Senate's failure to consider a significant portion of the annual appropriation bills is not simply a monumental failure of process. It also ironically defeats the very objective that the filibuster was intended to protect: the right of individual senators to fully debate and if necessary amend the decisions delegated to Congress under the Constitution. When the extended consideration of appropriation bills consumes so much floor time that authorization bills can never get to the floor, it means that authorizing committees are blocked from real participation in the legislative process and that the appropriation process is the only real means of affecting government policy.

But when legislation produced by the Appropriations Committee goes directly to conference with the House without debate in the full Senate, it means that only the 30 members of that committee have a real say in the only part of the legislative process that is left. More than two-thirds of the body is excluded from the exercise of the most fundamental power of the legislative branch.

In 1974, the Senate agreed to an important exception to the rule of unlimited debate. The Congressional Budget Act provided that if a budget resolution passed by both houses of Congress directed Congress to enact legislation altering the size of the budget deficit (or surplus), then that legislation would be considered in the Senate with only limited opportunity for amendment and with no more than 20 hours of debate.

It is time for the Senate to adopt a second exception to ensure the deliberate and timely consideration of all appropriation measures. All debate on each measure could be limited to no more than 16 hours—except that each senator who chose to offer an amendment could do so even if the 16-hour time limit had been exceeded. Debate on a single amendment could be limited to one hour.

If this kind of reform were enacted, then most senators would have more say in appropriation matters than they do presently. The Senate would be able to pass funding bills and get their bills to conference committee with the House in time to send final legislation to the president before the beginning of the fiscal year. And a more orderly and structured approach to appropriations would free the Senate to spend more time on other important legislation.

The logjam created by extended debate on appropriation bills in the Senate often makes it nearly impossible for chairmen of authorizing committees to get important legislation on the Senate calendar. Authorizing legislation dealing with philosophical issues that have proven historically to be more difficult to resolve would still be subject to current rules of debate, but authorizing committees would have greater opportunity to take their legislation to the Senate floor by virtue of the restraints placed on the consideration of appropriation bills. More frequent authorizations would in turn help reduce the number of contentious issues in appropriation measures.

# Factors behind the out-of-control filibuster practice

What has changed? What fostered a culture of broad restraint in the use of obstructionism for more than four decades but seems to have steadily dissipated in the subsequent 30 years and has now disappeared altogether? One explanation has less to do with the Senate as an institution than the change that has taken place in our national political culture over that period. As politics has become more confrontational and less genteel in the country, it has gradually been reflected in the types of people elected to the Senate and their approach to the legislative process.

Beyond that, however, are other factors. Some observers believe the Senate has gradually become an institution that is more focused on protecting the prerogatives of its individual members than in protecting the integrity of the institution to act as a rational and functioning legislative body. The capacity of a single senator to unilaterally block the confirmation proceedings of senior administration appointees or to stall the consideration of essential legislation may weaken both the Senate and the nation, but it ensures that any administration or any Senate leader who ignores the demands of any senator regardless of seniority, party, or standing among his or her colleagues places a great deal at risk.

The current staff director of the Senate Finance Committee, Bill Dauster, said it well in a 1996 article in *Roll Call*: “These powers to debate and amend make every single United States Senator a force to be reckoned with.” The absence of hierarchy and discipline within the body may create a dysfunctional institution, but it insures a certain minimal power threshold for all of its members.