

Gregory Koger  
University of Miami  
[gkoger@miami.edu](mailto:gkoger@miami.edu)  
October 21, 2009

*Note: this document collects my posts on filibustering for The Monkey Cage ([www.themonkeycage.org](http://www.themonkeycage.org)) over the last two months. These posts are written to respond to a public debate, so it primarily refers to contemporary blogs and authors. My scholarly work on filibustering, of course, cites to previous research on filibustering and institutional change and explains how my research fits into that literature. I have made some minor edits for this compilation.*

## **I. The Filibuster Begins: Gregory Koger as a Guest Blogger (posted August 19, 2009)**

Over the next few days I shall be guest-blogging the Monkey Cage about filibustering and filibuster reform in the Senate. I have been writing on this topic for over ten years, including a book on filibustering (*Filibustering: A Political History of Obstruction in the House and Senate*) which is scheduled for publication next spring from Chicago University Press.

Filibustering and reform are occasionally “hot” topics. In recent years, when one party controls Congress and the White House following a Presidential election (1993-94, 2005, 2009), the activist base of the majority party has chafed at the power wielded by the “losing” party in the Senate and the havoc it can wreak on their party’s agenda, leading to public debates over the legitimacy of filibustering. We have seen significant filibusters this year against the stimulus bill and several nominations, but it is the specter of a filibuster against health care reform that motivates calls for all-night sessions, use of the budget reconciliation process for health care, or generally abolishing the filibuster.

This debate is over a century old. What I (and other political scientists) can offer is a grasp of Congressional history, some data & analysis, and a devious parliamentary mind. Since I started working on this topic in 1998 (Clinton, GOP Senate) we have seen every configuration of party control (Bush and a Republican Senate; Bush and a Democratic Senate; Obama and a Democratic Senate), so I have been able to observe the same game with different players.

## **II. The Fundamentals of Filibustering (Posted August 19, 2009)**

### **1) Definition**

If we wish to understand filibusters, it helps to start with a clear definition. Filibustering is delay, or the threat of delay, in a legislative chamber to

prevent a final outcome for strategic gain. The key features are the *purpose* (delay) and the *motive* (gain) and NOT the specific legislature where the obstruction occurs or the method used.

## 2) Obstruction occurs in many legislative settings

Although our current focus is on the U.S. Senate, filibustering is a general phenomenon. While collecting data on filibusters in the modern Senate, I found references to filibustering in 20 state legislatures, 19 foreign countries, and the United Nations. In 2003, for example, Democrats in the Texas legislatures fled the state to block a redistricting plan. These other legislatures provide case studies that can help us understand the Senate and the general practice of filibustering.

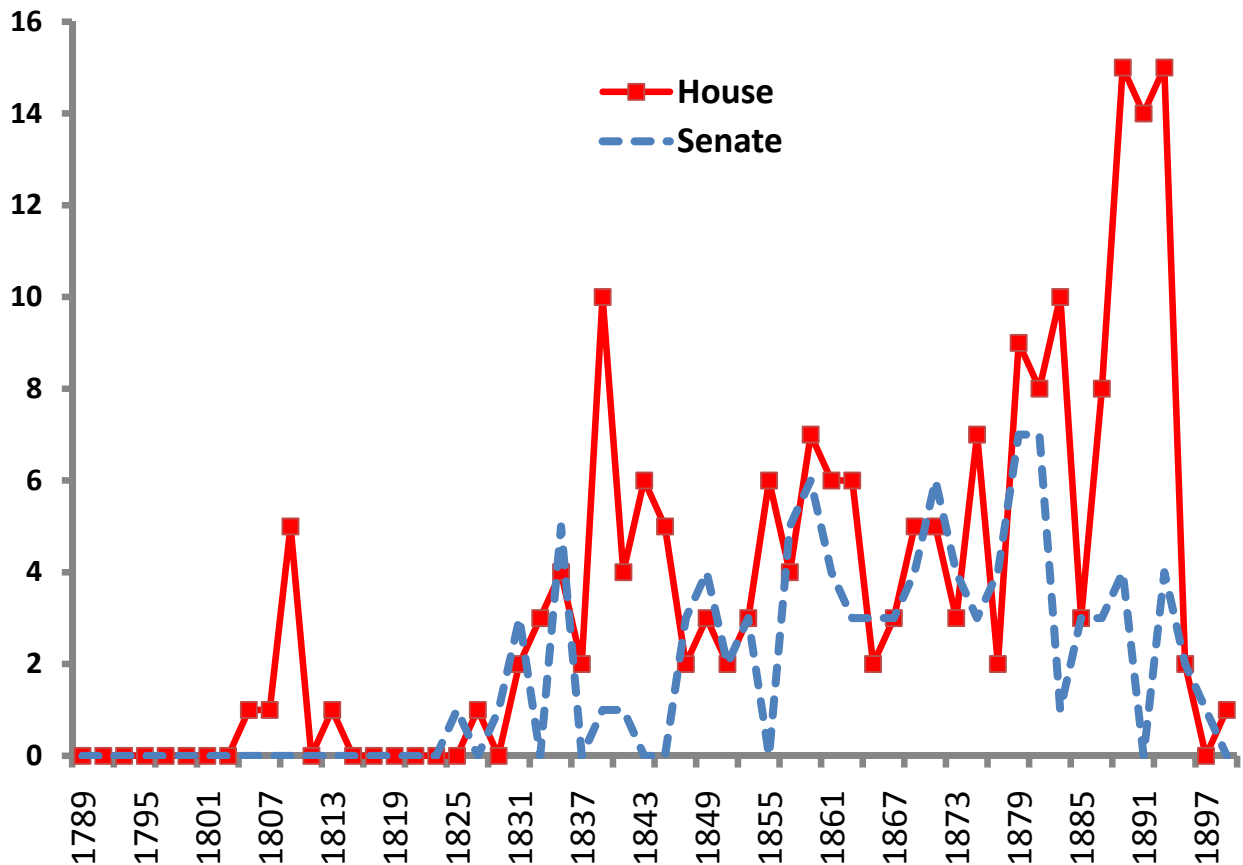
## 3) Methods

There are lots of ways to kill time. We might associate filibustering with long speeches, but this is because Southerners opposed to civil rights favored germane speeches as the most legitimate form of obstruction (and hence more difficult to criticize or deny). However, legislators can also delay by calling for unnecessary roll call votes, e.g. on motions to adjourn. Another classic technique is and by refusing to vote in the hopes of “breaking” a quorum, also known as a “disappearing quorum.” The U.S. Constitution requires a simple majority to be in the chamber (or, the classic interpretation, joining in a vote) in order for a vote to be valid. So, if attendance is low, a minority of those present can block a decision by NOT voting. This was the Republican strategy in 1988, when Majority Leader Robert Byrd had the Senate sergeant-at-arms drag Bob Packwood (R-OR) to the Senate floor.

## 4) Filibustering in the U.S. House

The House has always been a larger chamber than the Senate, and hence has had stricter limits on speaking than the “upper chamber.” However, in the 19<sup>th</sup> century House members were avid obstructionists, using dilatory motions and disappearing quorums. When we measure these techniques in both chambers and identify measures that faced a significant level of obstruction, we get a rough measure of the number of filibusters in the historic House and Senate.

Filibusters in the U.S. House and Senate, 1789-1901



For details & more charts, see the book! But the recurring finding is that there was more measured filibustering in the U.S. House than the Senate. And when columnists and academics were arguing over the merits and demerits of filibustering 120 years ago, they were talking about the U.S. House.

Filibustering in the House was reduced after stringent reforms were imposed after a long parliamentary campaign that lasted from 1890 to 1894. But it is noteworthy that some obstruction continued afterwards, and is still possible in the current day, e.g. Republicans blocking a revision of the “motion to recommit” rule on May 16, 2007.

### 5) Motives

We know that legislators can kill a bill with a filibuster, or extort concessions like the \$100+ billion cut from the stimulus bill to attract three Republican votes. And sometimes, since they are politicians, what they really want is attention.

Legislators often filibuster to preserve their ability to make speeches and offer amendments. As Norman Ornstein and Thomas Mann have noted, the House increasingly stages straightjacket debates in which the majority chooses how

long a bill will be debated (not long, so they can go back to raising money and visiting their districts) and which amendments will come up for a vote (not many, and nothing that gives heartburn to majority party members). In the Senate, the minority party has some leverage to ensure that major legislation faces a real debate, and that critical issues (e.g. should we drill in ANWR?) come up for a vote.

Finally, legislators filibuster to draw attention to a new issue on the legislative agenda. During the 1990s, Democrats (and John McCain) held major bills (appropriations, highway funding) hostage until Trent Lott promised them votes on campaign finance reform. In some cases, this power can broaden the public debate and keep the majority party from bottling up important and popular proposals.

## 6) Responses

There are several ways to deal with a Senate filibuster: negotiating, voting on cloture (which currently requires 60 votes), institutional change, and attrition. For anyone who wants to understand the history of filibustering in Congress, the last option is the most important. "Attrition" means that the majority simply waits until the obstructionist(s) is exhausted, e.g. Strom Thurmond's futile 24-hour filibuster in 1957. In *Mr. Smith Goes to Washington*, filmed in the 1930s, the senators choose to wait out Jefferson Smith's speaking rather than file a cloture petition, because attrition offered a quicker and easier resolution to the contest. This was a realistic touch, and the 1930s Senate successfully waited out several filibusters. Even before the Senate had a cloture rule (and before the House adopted its 1890s reforms), attrition was a realistic solution to a filibuster.

## 7) Reform

Bottom line: a simple majority has—and has always had—the power to restrict filibustering if senators are willing to take extreme measures to achieve their goals. Although parliamentary rules are discussed in legal terminology (with "rules" and "precedents" and "rulings from the chair") they can be interpreted however a majority of the legislature prefer.

Some blogs explain the persistence of filibustering to an 1806 decision to eliminate the "previous question" motion from the Senate rulebook—the same motion which the House uses to cut off discussion. However, this is a confused and confusing argument: the previous question motion did not actually end filibustering in the House (see above), nor does the absence of this motion leave the majority of the Senate powerless to limit filibusters. As I discuss in a recent paper (Koger 2008), there are several tactics senators have used, have proposed, or could use to restrict filibustering. Ezra Klein ably applies this idea

to the budget reconciliation process: in the end, the rules are malleable if a majority is determined to win.<sup>1</sup>

## 8) Puzzles

If 1-7 are correct, there are two big questions about filibustering in the Senate. First, if filibustering has always been possible, why and when did it stop being an occasional test of wills and become an everyday test of whether the supporters of a bill could muster enough votes to invoke cloture? Second, if a simple majority senators can restrict filibustering whenever they want, why haven't they done so?

## III. Is Filibustering Constitutional? (Posted August 20, 2009)

One question about filibustering which comes up frequently is whether the Senate filibuster is "constitutional". This came up in a 1994 New Yorker piece and a recent exchange between Kevin Drum and Matthew Yglesias.<sup>2</sup> The gist of the argument is that the Constitution already spells out all the supermajority requirements for legislative action (2/3 for treaties, removal, expulsion, Constitutional amendments) so the 60-vote threshold for most legislation and nominations to clear the Senate is an additional and unintended hurdle in the process. As evidence, they cite the inclusion of a previous question motion in the initial Senate rules as proof that the Senate was "supposed" to be a majority rule chamber, with the deletion of this motion in 1806 representing an unintended embrace of filibustering (Harold Meyerson agrees with this reading of history).<sup>3</sup>

Since serious people take this argument seriously, it is worth deconstructing.

### 1) Persistence is 9/10s of the (Constitutional) law

Any argument that "X is unconstitutional" where X has occurred since 1789 is probably not going to fare well. Many features of modern politics are not explicitly provided for in the Constitution—political parties, primary elections, interest groups, the Daily Show, bloggers—and yet I don't expect the Supreme Court to go Robert Bork on them. There is a profound case to be made that the influence of filibustering has increased dramatically over the last fifty years,

---

<sup>1</sup> [http://www.prospect.org/cs/articles?article=the\\_fifty\\_vote\\_senate](http://www.prospect.org/cs/articles?article=the_fifty_vote_senate).

<sup>2</sup> [http://www.newyorker.com/archive/1994/08/22/1994\\_08\\_22\\_009\\_TNY\\_CARDS\\_000368434](http://www.newyorker.com/archive/1994/08/22/1994_08_22_009_TNY_CARDS_000368434); Kevin Drum's post is here: <http://www.motherjones.com/kevin-drum/2009/08/bipartisanship-and-filibuster>, and Matthew Yglesias' posts are here <http://yglesias.thinkprogress.org/archives/2009/08/the-constitutional-status-of-the-filibuster.php> and here: <http://yglesias.thinkprogress.org/archives/2009/08/hertzberg-on-the-constitutionality-of-the-filibuster.php%208/6/2009>.

<sup>3</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080402425.html>.

but this is an extraconstitutional development rather than an explicit violation of some specific passage of the Constitution.

And, the historical record is more complex than the authors discuss. There was filibustering in the Continental Congress (e.g. a case of quorum-breaking in 1778) and Madison refers (favorably!) to quorum-breaking in the Virginia legislature during a discussion of quorum thresholds in the Constitutional Convention.<sup>4</sup> That's not to say that the authors of the Constitution generally approved of obstruction; just that they anticipated it would happen, sometimes with positive effects and sometimes with negative effects.

## 2) "Each House may determine the rules of its proceedings"

Drum and Yglesias note that a court case against the Senate filibuster would probably be struck down as a "political question." But, more directly, the Constitution (Article 1, Sec. 5) delegates to each chamber the right to choose its own rules. Unless there is a credible case that obstruction is interfering with some other Constitutional mandate, Congress's discretion over its rules appears absolute.

During the 1950s, reform-minded senators and interest groups promoted a more subtle Constitutional claim that their ability to "determine the rules" of the Senate were being blocked by the rules themselves. That is, since the rules carried over from one Congress to the next and set out a supermajority process (or, from 1949 to 1959, NO process) for overcoming a filibuster against cloture reform, their rights were truncated. The problem with this argument is that the reformers frequently managed to force a test vote on their argument in the Senate, and (until 1975) could not get a simple majority to agree with their contention that a simple majority should be able to revise the rules of the Senate at will.

## 3) Both chambers make extensive use of supermajority requirements...

The Senate cloture threshold is NOT the only supermajority threshold in Congress. Some examples: about half the bills that pass the House do so under "suspension of the rules," which requires a two-thirds threshold in the House. House rules also allow for passing bills on the "Corrections Calendar" by a 3/5 vote, for waiving Calendar Wednesday by a 2/3 vote, and require a 3/5 majority to pass a tax increase. Senate rules require a supermajority to waive the Budget Act for many amendments, and (following a 1915 precedent) a two-thirds vote is required to suspend the rules. So, if the cloture threshold is unconstitutional, each of these items could be the subject of litigation as well. And each round of litigation injects uncertainty into the legislative process, e.g. whether a bill has "really" become law or not.

---

<sup>4</sup> See [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw110216\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw110216))) on the 1778 case and [http://avalon.law.yale.edu/18th\\_century/debates\\_810.asp](http://avalon.law.yale.edu/18th_century/debates_810.asp) on the discussion of the quorum threshold.

#### 4) ...and a committee system

The Constitution says nothing about a Congressional committee system. Yet the committee system “kills” 70-90% of all bills in Congress, which never get a hearing or reported to the floor. If filibustering is open to a court case, why not the committee system? Perhaps the supporters of every bill that does not get out of committee can sue to ensure that their bill gets an up-or-down vote in each chamber or, failing that, is simply declared to be a law.

#### 5) Where There’s a Will, There’s Majority Rule

As I mentioned in yesterday’s post, the notion that the Senate “backed into” allowing filibustering is a fallacy.

- First, the House retained its previous question motion but there was MORE filibustering in the 19th century House than in the Senate, because the previous question was ineffective against dilatory motions and quorum-breaking.
- Second, as Joseph Cooper proved back in 1962, the previous question motion was not originally used to limit debate (See “The Previous Question: Its Status as a Precedent for Cloture,” Senate Document No. 104, 87th Congress, 2nd Session). So the existence of this motion in the 1789 Senate rules does NOT suggest that the early Senate was committed to majority rule.
- Third, and most important, the previous question is NOT the only motion that can be used limit debate. There are any number of strategies that can be used to limit obstruction: in the final analysis, senators are only constrained by their imagination and their constituents’ taste for procedural reform. If senators are determined to restrict filibustering (which I would not recommend—more on this later) I personally think the simplest mechanism would be to revise the interpretation and use of the motion to suspend the rules. Or, they can adopt the Republicans (circa 2005) doublethink approach of “60 means 50”, i.e. the “true” threshold for cloture on some issues is simple majority. Or, as one senator suggested in 1915, any senator can move the previous question and—with the support of a determined majority—defeat the inevitable point of order that the Senate doesn’t have one. The means don’t matter: what senators lack—and have always lacked—is the desire to impose majority rule. But that is a topic for another post.

#### IV. Well, How Did We Get Here? The Rise of the 60-Vote Senate (Posted August 25, 2009)

Last Thursday, I made the case for the constitutionality of the filibuster. Critics of the filibuster are right about one thing, however: in its current form, the Senate filibuster represents a major innovation on the legislative process laid

out in the U.S. Constitution. This point is made elegantly in Keith Krehbiel's 1998 book *Pivotal Politics*. Krehbiel puts the filibuster on par with the Presidential veto as the major brake points in the legislative process. The odd thing about this setup is that one veto power is explicitly provided in the U.S. Constitution, while the other is not even explicitly granted in the rules of the Senate. One veto has been wielded (true, with some evolution) since 1789, while the other has only become institutionalized over the last 50 years. This is the puzzle of today's post: why has the Senate filibuster become a central feature of U.S. lawmaking?

It is clear that there has been a transformation of the Senate. Filibustering has skyrocketed from an annual average of 3.2 filibusters during 1951-1960 to 16.5 between 1981 and 2004 (based on a scan of news stories using the term "filibuster"). But this statistic only tells half the story: identifying a "filibuster" in the modern Senate is like handing out speeding tickets at the Indy 500. As a Senate leadership aide explained: "Obstructionism is woven into the fabric of things. The [party] leadership deals with it on a day-to-day, even a minute-to-minute basis. ... You can't underestimate the importance of it. There are offshoots of obstructionism every day."<sup>5</sup> Filibustering has been institutionalized into the way the Senate sets the agenda, writes legislation, and considers nominations.

The gist of my explanation is that filibustering became an everyday event because senators began responding to obstruction by attempting cloture rather than attrition, i.e. waiting for filibustering senators to become exhausted. This change in tactics decreased the costs for obstruction, and once it was easy, then more senators were willing to filibuster against a broader range of proposals. This general argument has been made by reporters and Congressional observers over the years (e.g. [this column](#) by Norman Orstein and a [2004 NYT article](#)) and in a 1985 "Congress Reconsidered" chapter by Bruce Oppenheimer. However, this thesis has a short half-life, so reporters are constantly re-discovering and re-answering the question; while academics do better, the underlying story is often omitted from our studies, and there is a great deal we do not know about how and why Senate tactics changed.

### Understanding Old School Attrition

Just as there is more than one way to filibuster, there is more than one way to defeat a filibuster. I classify them as "closure" (a classic term meaning any rule for bringing about a decisive vote), "reform" (changing the rules, or making an unorthodox use of existing rules), and "attrition." Attrition means that the coalition seeking to pass a bill remains in the chamber, dragging out the debate until the obstructionists are tired, have run out of opportunities to speak (there's a limit of two speeches per topic), or leave an opening to start a

---

<sup>5</sup> The quote is from Larry Evans and Daniel Lapinski, "Leadership and Obstructionism in the U.S. Senate," *Congress Reconsidered* vol. 8, 2005.

vote—once a vote starts, it cannot be stopped. Attrition was the typical response to a filibuster before the Senate had a cloture rule and, as Gregory Wawro and Eric Schickler demonstrate, majorities did not NEED a closure process to win before 1917 (although Wawro and Schickler emphasize the role of informal norms as a restraint on pre-1917 obstruction).

The 1939 movie “Mr. Smith Goes to Washington” concludes with a very realistic depiction of 1930s style attrition. Smith gains the recognition of the chair and begins speaking from his desk.



And Smith speaks through the night. His speech doesn't have to be about the appropriations bill on the floor, so he can read from books, talk about the Constitution, etc. And, periodically, he can note the absence of a quorum and compel the other senators to show up in the Senate and prove there are enough senators around to conduct business.



But after a few hours, Smith is exhausted. And public opinion (“astroturfed” in the movie) has arrived in the form of telegrams, telling Smith to quit.



I'll let you watch to see how it ends.<sup>6</sup> Note, though, that the senators do NOT file a cloture petition, wait two days, and then vote. That would take too long, and would force them to vote to stop a filibuster. Attrition, even if it means lost sleep or a nap on an army cot, is preferable. Second, a filibuster is a public event: the media perks up at the outbreak of a filibuster (as they had when Huey Long was entertaining them from 1933 to 1935), and the filibuster is Smith's means of "expanding the game" to allow the public to weigh in on the Senate's proceedings with editorials and telegrams.

When did the Senate stop fighting words with patience? Obviously, this is a gradual process (and we still witness an occasional exhibition of attrition in the 21st century), but there are a few key dates in the transition.

- February-March 1960: Senate debates the 1960 Civil Rights bill. Lyndon Johnson attempts a strategy of attrition, complete with cots in the Old Senate Chamber (below). The effort fails, as does a cloture vote.



Senators on cots in the Old Senate Chamber during the 1960 civil rights debate.

---

<sup>6</sup> see also the Mel Gibson version: <http://www.youtube.com/watch?v=QkmjI8gLYI>.

- December 1960: Mike Mansfield is elected as Senate majority leader. Mansfield was convinced by the debacle over the 1960 Civil Rights bill that attrition is a waste of time and harmful to the Senate's image. Mansfield advocates for using the Senate's Rule 22 cloture instead.
- August 1962: a moderate-conservative coalition of Republicans and Democrats votes for cloture on a communications satellite bill. This is the first time cloture has been invoked in 30+ years, and it obliterated conservatives' claim that they were opposed to obstruction "in principle."
- June 1964: Senate invokes cloture on 1964 Civil Rights Act. Obviously, a huge moment for civil rights, but also a milestone for the Senate as an institution. Strategizing over civil rights had dominated senators' thinking about cloture; after the passage of the 1964 CRA and 1965 Voting Rights Act, it was easier to take a broader view of voting on cloture and revising Rule 22.
- March 1975: Senate revises cloture threshold from 2/3 of those senators who cast a vote to 3/5 of ALL senators (basically, 60). This is a slight decrease, but it also ends a 26-year campaign for simple majority cloture. The Senate has continued to refine the rule but not change the threshold.

So why did the Senate change? The stock answer is that the chamber's responsibilities grew with the size and scope of the federal government, so it became more costly to sit around watching obstructionists kill time. There is some truth in that explanation. Also, however, senators' work habits changed. The introduction of railroads, cars, and (especially) air travel made sitting around in the Senate chamber so...boring. Tedious. Totally lame. During the mid-20th century, the Senate increasingly became a Tuesday-Thursday club, and individual senators began insisting that major legislation be kept from the floor to accommodate their travel schedules. A serious attrition effort would mean cancelled speeches in Manhattan and Chicago, foregone trips to the Delaware coast, and waiting longer to return to the ranch back in Texas.

Several stock explanations do NOT have a significant effect in my analysis: Senate turnover, partisanship, and the threat of reform are not strongly correlated with Senate filibustering (1901-2004). Most cloture rule changes (1917, 1949, 1959) have no clear effect, while the 1975 change is correlated with an INCREASE in filibustering. One reform that did matter was the 20<sup>th</sup> Amendment to the Constitution, which cut down on filibustering during the final months of each Congress by changing the Congressional schedule.

Last week, Seth Masket asked if the recent increase in filibustering is attributable to the polarization of Senate parties. No. It is true that if you chart any measure of Congressional partisanship and the number of filibusters (or cloture votes) since 1970, they will both show the same trend. If we take the long view of American history, however, partisanship is a cycle with a low

point in the 91st Congress, while Senate filibustering is a trend. So, when I include the early decades of the 20th century (high partisanship, low filibustering) the mid-20th century (medium partisanship, low filibustering) in my analysis, party polarization (measured as the distance between party medians) is associated with LESS filibustering. Personally, I take this result with a grain of salt, but it does drive home the notion that you can't explain a trend with a cycle.

Still, it FEELS like there's a relationship between partisanship and filibustering. When the media reports that there is a filibuster in the Senate, it is almost always framed as minority party obstruction. And, Sarah Binder and Steven Smith (1997) demonstrated that voting on cloture has become more partisan since the 1950s. Part of this perception is due to a selection process: majority party members do "filibuster" in the form of placing holds on bills and nominations, but these tend to lead to backroom negotiations, or they are low-level conflicts that aren't newsworthy enough to make the lead.

The perceived relationship may also stem from the adoption of cloture as the dominant response to a filibuster. The necessary condition for an old-school attrition filibuster was a team of intense warriors ready to defy the rest of the chamber—"a little group of willful men" as Woodrow Wilson put it. These groups were typically identified in press reports by ideology (liberals, conservatives, progressives), region (Southerners, Westerners, etc.), or policy preference (isolationists). Even filibusters conducted on behalf of a party (say, to forestall an investigation into a questionable election) were carried out by a few senators identified by name.

Once cloture became the test of a filibuster, however, the necessary condition for a successful floor filibuster was a coalition big enough to prevent cloture. In the context of a Senate that is polarizing for other reasons (hint: not because of redistricting), this increasingly means uniting one party or the other behind a filibuster. And often the most newsworthy filibusters are those when the minority party met behind closed doors and agreed to filibuster, which reporters describe as "stalemates" and "showdowns." So these are the stories we read.

## **V. The Case for Filibustering; or, How I Learned to Stop Worrying and Love Mitch McConnell<sup>7</sup> (Posted September 23, 2009)**

The nice thing about studying the Senate filibuster is that it is periodically a hot topic, and civilians actually get interested in what academics have to say. Predictably, these bouts of relevance coincide with unified party control of Congress and the White House (1993, 2003-5, now) when filibustering is the last institutional barrier to the majority party's agenda item. Filibustering has

---

<sup>7</sup> \*Mitch McConnell is da bomb.

slowed several items on the 2009 Democratic agenda (the stimulus bill, FY 2009 appropriations, climate change) but it is health care that has progressives feeling the fierce urgency of now and despairing at the low prospects of a “strong” bill surviving the Senate gauntlet.

### Health Care as a Hard Case

And they have a strong case. While the 2008 election was about many things (the economy, Iraq, race), no informed observer could deny that health care reform was at or near the top of the Democrats’ policy agenda. It was a critical point of comparison during the Democratic primary and prominently featured in Barack Obama’s fall campaign, e.g. it was the 3rd section of Obama’s *Blueprint for Change* (behind “Economy” and “Ethics”).<sup>8</sup> While it would be a stretch to say that a majority of voters endorsed Obama’s health plan when they voted for Democratic candidates, this is as close to a mandate for action as our system permits.

And there is desperate need for health care reform. Despite the fact that 17.6% of our GDP is devoted to health care, 47 million go uninsured, receiving substandard care if any.<sup>9</sup> How do we manage this feat? Not with more doctors or hospitals; the trick is lots of machines that go “ping.”<sup>10</sup> And if we don’t restrain growth in Medicare spending,<sup>11</sup> the critical question in health policy will become, “how many baby boomers can we fit on an ice floe?” Providing better care to millions of Americans while cutting back on health care spending means defying a deeply entrenched array of health-related corporations, interest groups, and skeptical consumers—not the sort of legislation that easily attracts Congressional votes.

Which brings us to the Senate. In short, it seems likely that there are enough votes to pass some elements of health care currently under consideration (e.g. preventing insurance companies for excluding patients for preexisting conditions) but not a “public option,” i.e. an insurance plan offered directly by the federal government in competition with private insurance companies. Progressives (including a critical portion of House Democrats) consider a public option critical to expanding coverage, cutting costs, and keeping insurers honest. Consequently, commentators have urged the Senate Democrats to consider options other than a standard cloture petition (again, cloture requires 60 votes) when they bring up a health care bill, including the budget reconciliation process (which would guarantee a simple majority vote), a

---

<sup>8</sup> See <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

<sup>9</sup> <http://www.nchc.org/facts/cost.shtml>.

<sup>10</sup> <http://www.forbes.com/2009/07/02/health-care-costs-opinions-columnists-reform.html>.

<sup>11</sup> See <http://prescriptions.blogs.nytimes.com/2009/08/30/looking-ahead-runaway-health-costs/?emc=eta1>.

prolonged “live” filibuster that would embarrass the Republicans if not wear them down, or cutting back on the right to filibuster.<sup>12</sup>

For this post, health care reform provides the backdrop for a discussion of the merits of filibustering. It is no challenge to defend filibusters against bad ideas, e.g. appointing Richard Cheney to the Supreme Court. The real test for political institutions is whether we still value them when they are inconvenient. For clarity, I shall compare filibustering in its present form to simple majority rule (conditional upon the presence of a quorum, of course).

### **The Generic Case against Majority Rule**

One need not look far to find political thinkers doubting the wisdom of majority rule. To avoid rehashing 2,500 years of democratic theory, I shall confine myself to a quick summary.

a) Just because one side’s got more votes, that doesn’t make its position true. In this country, ending slavery, enfranchising women, and adopting federal minimum wage were all once minority positions—certainly that did not make them incorrect or immoral.

Of course, to make this argument is to beg the question, how shall we identify the best policy? If wise minds and patriotic hearts disagree, shouldn’t we give weight to the more numerous side? If the alternative to “majority rule” is “minority rule,” surely the latter approach violates the principle of equality between citizens.

b) The (fragile) conditions for majority rule. In the latter half of the 20th century, the implications of majority rule were a central theme of positive political theory. One classic work by Kenneth May listed “independent, necessary, and sufficient conditions for simple majority decisions.” While this article is sometimes cited as an argument FOR majority rule, it actually sets up a very narrow scenario for majority rule to be the best approach. Paraphrasing May (and ignoring condition #4), majority rule is preferable if it i) yields a stable decision, ii) each policy option is (and should be) weighted equally, and iii) each voter is (and should be) weighted equally.

Consider the last condition. For some policy questions, some voters have a deeper stake than others. Last November, Californians voted on whether to allow same-sex marriage; isn’t it fair to say that people in same-sex relationships had a deep, personal stake in the question while heterosexual voters had an abstract (and typically less intense) interest in the issue? In a perfect world, we might recognize this asymmetry and attach special weight to the preferences of intense voters.

---

<sup>12</sup> On the budget reconciliation process, see [http://www.rules.house.gov/archives/bud\\_rec\\_proc.htm](http://www.rules.house.gov/archives/bud_rec_proc.htm).

Under some conditions, filibustering can reflect asymmetric intensity. For years, senators from Nevada filibustered against proposals to accelerate plans to store nuclear waste in Nevada. Obviously, these bills affected Nevada intensely, so I considered it fair that Nevada's senators were able to make their case and slow (but not defeat) legislation to make Nevada the nation's nuclear dump. In 2005-6, senators Murray (D-WA) and Clinton (D-NY) placed holds on nominations to force the FDA to decide whether "Plan B" contraceptives would be available without a prescription; filibustering enabled two intense senators to force a stubborn agency to do its job.

### c) A Bias for Stability

Continuing with May's conditions: majority rule is appropriate IF all policies are weighted equally. In practice, all policy options are not treated equally. Some options, like establishing a state religion, are forbidden. Others, like bills to increase taxes in the U.S. House, face a supermajority threshold to introduce a bias against change.

James Madison makes the case for policy stability in Federalist 62; all else equal we should prefer stable laws because "A continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions." *Ceteris paribus*, that is, we should prefer stability to avoid the effort of adjusting to new laws and the uncertainty of learning how new laws work in practice. Of course, that's not an argument for doing nothing, but it is a case for bias for the status quo until a good case for change has been made.

### What is a Majority of the Senate?

The next three arguments are more specific to legislative settings.

Let's say that nothing you have read so far has shaken your commitment to the principle of majority rule, so whatever policy most Americans prefer ought to be a law. How would you apply that principle to roll call voting in the U.S. Senate? As we all know, senators represent states of varying populations and serve rotating six-year terms, with at least one-third of all senators up for election every two years. Advocates on both sides of the debate can use the Senate's malapportionment to their advantage: senators representing just 17.7% of the nation's population can form a majority in the Senate, while senators representing less than one-sixth of the national population can defeat a cloture motion. While these are extreme scenarios, they highlight the tenuous relationship between a majority of the Senate and a majority of Americans.

Then, to state the obvious, there is no guarantee that the majority of the Senate were elected to reflect contemporary public opinion. Imagine, for the sake of argument, that the Republicans had won 51 seats in 2004 and 2006, but

lost every Senate election in the 2008 cycle. The Republicans would constitute a majority of the chamber, but be clearly at odds with the mandate of the (hypothetical) 2008 election. We might justify this situation by saying that the Senate represents the “long term majority” or that it “ensures stability” in our system, but it would be difficult to make a simple argument that the majority of the Senate reflects the central tendency of public opinion.

## Deliberation

In our polarized polity, it is easy to forget that legislators are more than voting machines with “D” or “R” stamped on their foreheads. In fact, a healthy legislature does more than vote. Its members talk, and propose alternatives, and acknowledge each other’s views. In doing so they can improve legislation, represent their constituents, and explain their behavior to each other and to the nation.

However, the majority party often considers open deliberation a waste of time or even adverse to its interests. United majority parties may consider deliberation a waste of time, since its members’ minds are made up; talking and voting just consumes time that could be spent on other legislation, or holding fundraisers, or flying home to visit constituents. Moreover, a central claim of rational choice analysis of legislative settings is that diverse coalitions (i.e. a majority composed of legislators with distinct preferences) will be susceptible to “killer amendments” or other attempts to amend a bill in such a way that some portion of the coalition supporting the bill defects and the bill is defeated.

Imagine, for example, that health care reform comes to the House floor under an open rule (any amendment allowed) and the Republicans offer an amendment setting up a single-payer government health care system. If the amendment is adopted by a coalition of sincere liberals (who think a single-payer system is ideal) and strategic Republicans (who vote for a position contrary to their conservative views in order to defeat the bill), then the bill would probably fail on final passage; moderate Democrats and Republicans would oppose a single-payer system, leaving liberal Democrats supporting a defeated bill. Or, the Republicans could offer an amendment to increase limits on medical malpractice reform. If all House members voted sincerely, such an amendment could pass, but the amendment could lead to the defeat of the bill if Republicans voting against the overall package and some liberal Democrats voting against the bill due to the malpractice restrictions.

In the contemporary House, the majority party typically avoids these situations by carefully limiting the debate and amendments on key bills. The key to the majority party’s power is the ability of the Rules Committee to propose a “special rule” that governs debate on a specific bill and passes by a simple majority vote. In the Senate, the majority party has no such power; the majority party leader can propose the ground rules for debating a bill by

unanimous consent, but the minority party can reject those terms and threaten to filibuster. The result is that the majority and minority party haggle over the process for debating major legislation to ensure that members of both parties are able to deliberate fully. Without the minority party's power to filibuster, it is likely that the majority party in the Senate would be no more generous than its counterpart in the House.

The more open amending process in the Senate means that coalitions supporting a bill are tested by a variety of amendments—some of which may actually moderate the bill, or expand its supporters. It also means that the majority party has a tougher time keeping issues off the chamber's agenda. For years, Sen. McCain and the Democrats repeatedly filibustered to force the Senate to vote on campaign finance reform. Their efforts drew attention to the issue and forced senators to go on the record so their constituents could hold them accountable. On balance, I prefer the broader range of issues considered by the Senate and fully-debated legislation the Senate produces.

## Parties

The U.S. lawmaking system was designed to impose multiple barriers on attempts to change the status quo: laws need the approval of two chambers whose members (by design) are likely to approach policy questions differently, and the consent (or supermajority override) of an independent executive. In the vernacular of political science, our lawmaking system as designed has three veto players with distinct preferences (see George Tsebelis' *Veto Players*, Princeton UP, 2002).

Then along came political parties. In their most benign form, parties are simply clubs of like-minded actors who coordinate action (e.g. deciding which bill to bring up on Wednesday, and which one to bring up on Thursday) without compromising their personal views or their obligation to represent their constituents. The earliest parties may have approximated this form, but they quickly took on two key features: a focus on elections, and party leaders capable of rewarding loyalty and punishing (or at least shunning) defectors.

A group of legislators running for reelection under the same party label has a collective interest to (1) follow through on promises from its last campaign, (2) defuse issues that give the opposing party an issue advantage (see prescription drugs, 2003), and (3) trade policy favors (or effort to achieve results) for electoral support—either the votes of swing groups or donations from pragmatic interests. But just because a party has a shared interest in passing legislation, that doesn't make it in the interest of individual party members to back the party's agenda...just ask Sen. Ben Nelson, or the Blue Dog caucus. As Gary Cox and Mat McCubbins point out in *Legislative Leviathan*, this can lead to collective action dilemmas in cases when less than a majority of legislators prefer to vote for a bill, but (at least) one party has a significant stake in its passage. In such cases, a party needs to be able to induce its reluctant

members to support the team over their personal interests. While this can include a simple logroll over several issues (“vote for this bill now and other legislators will hold their noses and vote for your priorities later”), additional incentives are often used to shape legislators’ preferences leading up to key votes and to “buy” the last few votes needed for passage.

Some scholars focus on the formal inducements available to Congressional leaders: influence on committee assignments (or the lack thereof), perks like office space and overseas trips, or promising to bring bills up on the Congressional agenda. In addition, party leaders play a significant role in fundraising: donating to members from leadership PACs, visiting districts to speak at fundraisers, and signaling to party-affiliated donors which MCs need their donations the most.

But wait, there’s more. A political party is best understood as a network of autonomous but cooperating actors, and this network extends beyond Congress. Presidents have long been heavily involved in agenda-setting and vote-buying, using their power over executive patronage, Presidential visits, and other perks to build support for party measures. And there are informal party actors—party-affiliated interest groups like the AFL-CIO or Christian Coalition, partisan fundraisers, liberal bloggers, Rush Limbaugh—who can reward or punish legislators for their votes. As Joe Lieberman and Arlen Specter can tell you, there is a price to be paid for forgetting whose side you are supposed to be on.

The effect of these incentives for legislators to go along with their parties is that the policy stability and deliberation that our three-veto system is intended to ensure can be reduced to a de facto single-veto system. This is especially true when one party controls the White House and both chambers of Congress *and* offers high rewards for party loyalty and punishments for disloyalty, as is the case today.

Parties that set collective agendas and line up their members to vote for their bills can be a force for good—especially when they induce members to vote for measures that are in the national interest but unpopular in the short term. But they can also be an agent of corruption or NON-majoritarian action. Imagine if a corporation simply offered a party an enormous sum of money if the party passed legislation in the corporation’s favor. While there are more contemporary examples, my favorite such case is from the 1880s: a public promise of \$1 million to both parties for passage of a bill to build a canal across Nicaragua. The calculation in such cases is frank: the electoral benefits of a donation outweigh the electoral costs of inducing legislators to vote for the bill...at the cost of the public interest.

More subtly, a party may make campaign promises to swing groups or party-affiliated interest groups in an effort to build a winning coalition, but find that there is insufficient public support for the promised legislation. This puts majority party members in a quandary: passing the legislation could harm their

collective reputation and electoral interests, but angering a critical group or bloc of voters could lead to primary election challenges or weak support in the general election. The Democrats have faced this situation with the “Employee Free Choice Act” as introduced; public support was underwhelming, business opposition was intense, but woe to the Democrat who votes against labor’s #1 agenda item.

Which brings us to filibustering. Historically, one of the strongest cases for retaining the minority’s right to filibuster is as a check on the majority party. Sometimes, a majority party tries to pass legislation that lacks public support and/or is a payoff to some organized group, and in those cases the will of the chamber—and perhaps the interests of the majority party—is better served by a minority party filibuster. In such cases, it may look like the majority party is trying VERY HARD to pass their bill but the minority party is being “obstructionist”...yet behind the scenes at least some members of the majority party (probably moderates) are privately thanking the minority party and the rules of the Senate for sparing them from a difficult choice between their political interests and the national interest.

I sometimes make fun of one of my first articles for being about how “nothing happened” in the Senate from 1918 to 1925 (Koger 2006). But, to be fair, it covers a critical period of Senate history: the chamber had just adopted its first cloture rule (requiring a 2/3 majority) and considered lowering the threshold to a simple majority, but did not. The critical argument then was that “majority rule” in a partisan legislature is an invitation to coercion and corruption. Party leaders will use every means to push through bills that lack the sincere support of a majority of the legislature, and the House offered ample examples of that fear. A lot of things have changed since the 1920s, but the specter of majority party leaders manufacturing majorities for ill purposes is still alive and well.

Once the Democrats replace Senator Kennedy they will have 60 votes in the Senate. While Democrats can complain about Republican obstruction all they want, my calculations suggest that 60 is three-fifths of 100. If the Democrats propose legislation that is in the national interest and marketable in the 2010 election, it should be easy to pass, even if Republicans refuse to support it.

## **VI. Filibustering and Deliberation: the Case for Free and Full Debate (Posted October 16, 2009)**

My last post making a case for preserving the Senate filibuster sparked some skepticism from our colleagues Seth Masket and Matt Jarvis as well as Washington Post columnist Ezra Klein.<sup>13</sup>

In this post I wanted to respond to some of these thoughtful comments by making one main point: filibustering empowers the minority party to insist on a

---

<sup>13</sup> [http://voices.washingtonpost.com/ezra-klein/2009/09/the\\_case\\_for\\_filibustering.html](http://voices.washingtonpost.com/ezra-klein/2009/09/the_case_for_filibustering.html).

fair chance to debate major bills—and this is a good thing. Not only is it fair to the minority party—and good for the electoral process—to allow real debate on major legislation, it also enhances the legitimacy of the majority party and its actions.

### Filibustering and Deliberation

It is common knowledge among Congress scholars that, over the last thirty years, the majority party in the U.S. House has steadily increased restrictions on amendments and debate on the House floor. The majority party's power stems from its 9-4 majority on the Rules Committee, which issues "special rules" that govern debate on important bills. A simple majority is required to approve a special rule, so as long as the majority party sticks together it can control which issues come to the House floor, how long they are debated, and which amendments will be allowed.

The problem with this system is that the ability of the minority to speak and offer amendments depends on the good humor of the majority. If some legislator wants to offer an amendment that will force the majority party members to make a politically awkward choice, then the majority party leadership can save their members grief by selecting which amendments can and cannot be offered to a specific bill. For example, if a House Republican wanted to offer an amendment to the health care reform bill striking the penalties for individuals who refuse to get health insurance (arguing that this constitutes a "tax increase"), Speaker Pelosi and the Rules Committee could deny the Republican an opportunity to propose the amendment on the House floor.

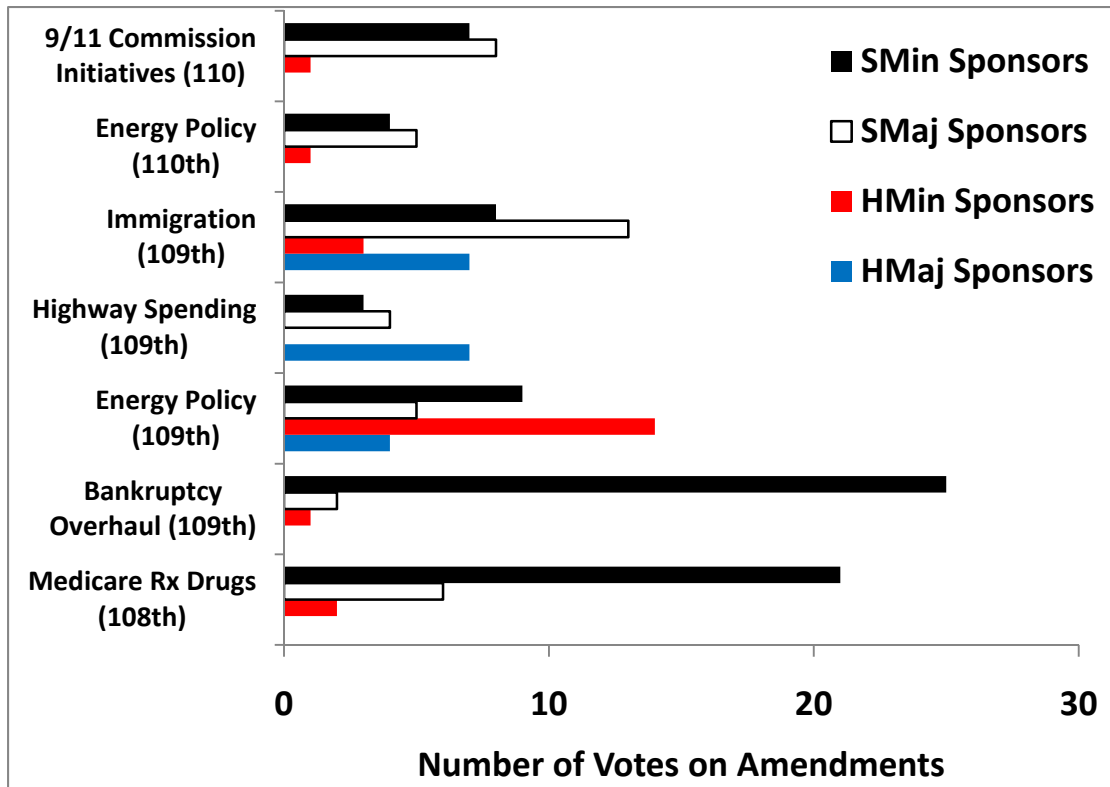
In their book *The Broken Branch* (Oxford UP, 2006), Thomas Mann and Norman Ornstein deplore the degeneration of deliberation in the House over the last three decades, and point out that both parties, during their periods of majority status, have contributed to the gradual tightening of the screws on the House floor.<sup>14</sup> Why don't we observe the same pattern in the Senate? In an effort to avoid filibusters, the majority party leadership consults with all interested senators—including minority party leaders—when bringing legislation to the Senate floor, with the goal of negotiating a unanimous consent agreement. If the majority party proposed the sort of debate ground rules that are common in the U.S. House, the minority party would simply say "no" and hold out for a full debate and amendment process.

Consequently, the Senate often ends up voting on more amendments than the House, including more amendments offered by the minority party. While I didn't have time to survey every major bill over the last few years, I did scan some illustrative bills from 2003-6 (Republican majorities) and 2007-8 (Democratic majorities). Here are the number of votes on amendments

---

<sup>14</sup> Mann, Ornstein, and Sarah Binder updated the argument in 2009: [http://www.brookings.edu/papers/2009/0108\\_broken\\_branch\\_binder\\_mann.aspx](http://www.brookings.edu/papers/2009/0108_broken_branch_binder_mann.aspx).

(including motions to recommit with instructions in the House) by party in the House and Senate for major legislation:



The punch line is that, on many of the most important legislation of the last seven years, the members of the House generally have fewer opportunities to offer amendments (at least amendments interesting enough to merit a vote) than senators. On some bills, the members of the House were almost completely muzzled.

### The Value of Legislative Debate

Why does open debate and amending matter? One rarely sees legislators on the floor of the House or Senate engaging in genuine dialogue so that their positions converge. However, floor debate can be useful as an information source for members of Congress watching on C-SPAN—debate can help them decide how to vote, to explain their votes, and to understand the talking points of the other side.

Amendments raised by the minority party can improve legislation (e.g. Republican amendments to limit medical lawsuits, if adopted, could help Obama achieve his campaign agenda). Even if they are defeated, they can improve the representative process by creating a clear record of how legislators stand on key issues. This should be especially important to my colleague Seth Masket, who worries about the effects of filibusters on party responsibility; in a healthy system of party responsibility, the minority party is

able to explain how it would govern differently from the majority party (see Downs, Anthony). Roll call votes are a credible basis for understanding how the minority party would govern if given the chance.

Deliberation also has great public value. On some level, citizens want to believe that their views are heard and understood by lawmakers who take them seriously. Even if their viewpoint loses out—ESPECIALLY if their viewpoint loses out—they do not want to feel ignored or ramrodded by a hostile majority. For this reason, the more important the decision, the more important it is to have a full and free debate in Congress. Even if the “debate” is pure Kabuki theater of set speeches to fixed minds, there is great value in compelling the majority to make its case in public and letting the opposition state its case. Mike Mansfield, Senate majority leader from 1961 to 1976, credited the “longest debate” over the 1964 Civil Rights Act for its relatively swift acceptance by Southern whites despite its dramatic effect on social and economic relations. After 70+ days of debate and a two-thirds majority for cloture and passage, no Southerner could argue that his or her views were not voiced or heard, or that the supermajority supporting the bill was ill-informed or insincere.

Which brings us to health care, Obama, and Tea Parties. As we have all seen in recent months, there is a segment of American society that is virulently opposed to Obama, the Democratic agenda in general, and health care reform in particular. And for people outside this movement, their rhetoric and arguments can seem bizarre, conspiratorial, fallacious, and offensive. And yet, the anti-Obama activists are our fellow citizens. They can vote, and donate money. And buy guns...lots of guns.<sup>15</sup> To the extent their arguments are misguided, deliberation may help to correct their views.

More important, anti-Obama activists seem to be driven by a sense of alienation—like many Americans, their lives are caught in an economic vortex beyond their control: 401ks depleted, houses devalued and foreclosed, wages stagnant or jobs evaporated. This is compounded by dramatic political changes that alienate citizens accustomed to being the dominant strain in society. Like the Simpsons locked out of their home by squatters(episode 9.12), they may feel dispossessed by a coalition of outsiders—even when the outsiders are their own sons and daughters voting for Obama. In an insightful column, Ed Kilgore argues that the anti-Obama activists are not generally “racist”, but that race is an element in this sense of lost power, and fear of proposals (like health care) which would expand the power of others over their lives. GOP pollster Frank Luntz echoes this analysis: “The real reason why 72% of the people I interviewed say that they’re ‘mad as hell and they’re not going to take it anymore’ has nothing to do with racism. No, their rage is about a lack of

---

<sup>15</sup> There has been a sharp increase in firearms sales since Obama was elected; many news stories suggest a connection between these events. See <http://www.foxnews.com/politics/2009/01/16/firearms-associations-claim-obama-drove-surge-gun-sales/>.

accountability, a lack of respect, and a lack of progress in the nation's capital."<sup>16</sup>

While it is unlikely that any Democratic action would convert these activists into Obama supporters, a full debate on health care reform could defuse their anger. They would observe that conservative lawmakers got a full and free chance to make their case. And open conversation by lawmakers who are publicly accountable for their claims would dispel some of the worst rumors about the bill, e.g. even the most conservative Republican member would have to admit that the bill does NOT establish death panels to allocate health care. A quick, partisan debate, on the other hand, would probably amplify anti-Obama activists' sense of exclusion.

In the end, there may be some truth to Ezra Klein's statement that "a chamber built for cooperation cannot function in an era of polarization"—the negotiations to bring a health care bill to the Senate floor will probably make a Byzantine blush—but if the price of cooperation is a full debate of health care, both parties and most Americans may come out ahead.

---

<sup>16</sup> Kilgore's column is at [http://www.thedemocraticstrategist.org/ac/2009/10/watch\\_out\\_dems\\_the\\_town\\_hall\\_p.php#more](http://www.thedemocraticstrategist.org/ac/2009/10/watch_out_dems_the_town_hall_p.php#more); Luntz is at [http://www.nydailynews.com/opinions/2009/09/20/2009-09-20\\_the\\_real\\_reason\\_for\\_the\\_rage.html](http://www.nydailynews.com/opinions/2009/09/20/2009-09-20_the_real_reason_for_the_rage.html).