

**CENTER FOR AMERICAN PROGRESS ACTION FUND**

**DELIBERATION, OBSTRUCTION OR DYSFUNCTION?**

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JIM THURBER: Good morning, everyone. I'm Jim Thurber. I'm the director of the Center for Congressional and Presidential Studies at American University. This is a joint forum with the Center for American Progress.

And I want to say at the very beginning before we get into the program all of us are saddened by Sen. Reid's wife's accident, injury of their daughter. His wife is in serious condition. If you didn't know, they were rear ended yesterday at 1:00 by a tractor trailer on Interstate 95. They're both in the hospital right now and a moment of silence I think would be good to send good thoughts to the Reid family.

It's my pleasure to yet again work with Scott Lilly and the Center for American Progress. This is the 30<sup>th</sup> anniversary of our center. It happens to be the 30<sup>th</sup> anniversary of C-SPAN. And we've had over 200 forums in 30 years and C-SPAN has covered many of them. But they usually cover, Scott, the ones that we do together. And we've had five of them on issues related to the presidency but also issues that are of importance to Congress and that's what we're doing today.

We're going to have, as you know, a forum on the filibuster. But to put the filibuster in context, it is a problem, people think. I think it's a problem and there are efforts by Senator Udall who'll be introduced later, and others to change the rule, Rule XXII on the cloture vote.

But let's put it in the context of the perception of the American people of the institution of Congress and many other problems that are facing the institution. This is one problem, in my opinion, facing the institution. But we also have holds that clog the legislative work, delays in confirming executive branch officials. We really have a lack of true deliberation and debate often in the Senate.

There's a breakdown of the budget process frequently. It's not passed on time or it's changed every year. There's an excessive use of earmarks. There's a debate as to whether they're excessive or not but I think the American people think it's excessive and riders added not only to appropriation bills but also tax bills and sometimes they become a crutch to act on significant policy issues that cannot be acted by the authorizers.

There's withholding sometimes of appropriations to fully fund authorization bills. There's a tendency towards government by continuing resolution. There's the nonuse, or abuse, of the conference committee, I think really met recently, very often, and there's a lack of comity and civility that the American people are concerned about, a lack of true bipartisanship.

Now that's controversial because some people think that we don't need bipartisanship. Some of this comes from the polarization of Congress where there are fewer and fewer moderates. Back in the 1970s, a third of the Senate were considered moderates – if you look at ideological sports scores as we do in political science. Now it's down to about 5 to 8 percent

moderates in the Senate and in the House of Representatives and then there's criticism of the institution for ineffective or no oversight of the executive branch.

It is within these trends that we look at the filibuster. And these trends have led, in my opinion, to a serious decline of public confidence in the institution, trust in Congress generally, and government generally and it's increased skepticism, cynicism, and discouraged public participation and trust in the institution of Congress.

The forum today is primarily on the filibuster but it's within that context that we look at the filibuster. In conclusion in the introduction remarks, I'm reminded that change comes from elections. Change comes from freshmen frequently.

Change in this particular case on the filibuster is coming from the class of 2006, 2008 and indeed now in the leadership race in the Senate. The leaders are becoming focused on this issue and the leader of this change on the filibuster is Senator Tom Udall, Democrat from New Mexico. And I'd like to have my colleague Scott Lilly, here from the Center for American Progress, introduce the senator at this point.

SCOTT LILLY: It's always great to work with Jim and American University. They're great partners in these kinds of events and I hope you find it as useful to listen to as we've found it useful to prepare for.

If you go back to 1954, it was halfway through the Eisenhower – first term of the Eisenhower administration and there were 19 new Democrats who were elected to the House of Representatives. And when they got there they found out that all the things they'd campaigned on, all of the ideas that they had presented to their constituents about how the country needed to change and adapt were things that they really could do almost nothing about.

The institution – there'd been an election and the institution had come from Democratic chairman – or from Republican chairman to Democratic chairman, but the Democratic chairmen were in many cases even more conservative than the Republicans.

They were old line Southerners who'd been in the Congress for decades and decades. They were extremely conservative on social grounds, certainly on civil rights, on economic issues, and these freshmen found that it was next to impossible to get anything done.

One of the 19 new Democrats was a young congressman from Arizona named Stewart Udall and Stewart Udall began meeting with a couple of other disgruntled younger members, Lee Metcalf of Montana, who'd come two years earlier, and Frank Thompson, who was elected later in 1955, and they typically met in Eugene McCarthy's office over in the Cannon building and plotted how they were going to change the system.

That little band grew into what became known as the Democratic Study Group. And before Stewart Udall left the House of Representatives to become secretary of interior in 1961, they'd already pulled off their first coup. They had increased the size of the House Rules

Committee, which allowed Speaker Rayburn to gain control of that committee and block Judge Smith of Virginia who was the chairman from controlling the floor agenda.

That in turn made it possible for the Kennedy administration to get the New Frontier agenda to the House floor. So they already had that one victory before Stewart Udall left the House. But he was succeeded by his brother Mo who immediately became a major figure in the reform movement.

In 1969, he led the effort of the reforms to replace Speaker McCormack, who at that time was 78 years old and by most accounts was not really functioning very effectively as speaker. Mo was crushed in that effort, which shows that reform's not easy because he said when he left the caucus, his famous words comparing a caucus with a cactus. He said, you know, with a cactus, the pricks are on the outside.

But at any rate, six years later, the reformers did win. In 1974, after the Watergate landslide, they changed the House rules. They turned the institution upside down. They made committee chairmen subject to votes before the caucus. They removed three sitting committee chairmen and the House of Representatives was never the same again.

It took 20 years from when Stewart Udall started meeting in Eugene McCarthy's office. But they finally did it and they permanently changed it. I say that in part to say that even the biggest and most powerful of institutions with the most intimidating people running them can be changed if people are smart and stick to it. And I also point that out to say that our speaker has the genes that it takes to do that. So we're very pleased to have him.

He has spent his life in public service. He was a federal prosecutor for a number of years. He was elected as attorney general of the state of New Mexico and served two terms before he came to the House where he was a member for 10 years and very much beloved in the House.

There was great displeasure at the fact that he decided to run for the other body. But I think everybody is glad now that he's done that because he is someone who can be part of an institution, be loyal to the institution, and still recognize the imperfections and the need for change. Tom, thank you for coming.

SEN. TOM UDALL (D-NM): Boy, that's an impressive opening statement and an impressive introduction and I thank you all for being here. My brothers – I have five brothers and sisters and when you talk about genes, Scott, I think they would – they always say in the family that none of them are in elected office. None of the five brothers and sisters are interested at all in running for office. They think I got the defective gene. That's what they say.

But anyway, thank you and it's going to be great to be on this wonderful panel. Let me also echo what you said. We're a very small Senate family and our thoughts and prayers really go out today to Senator Reid and his family and I hope I'll be able to give him some encouraging words in person in the next couple of days.

Jim, I couldn't agree with you more in terms of kind of setting the stage on the filibuster. In my 11 years here in the Congress and now the first year in the Senate, the way I see the institution is it's an institution in much need of reform, whether it's the committee structure. It used to be you specialized on a committee. Now we're on so many committees we can't specialize. The appropriations part is – Labor-HHS, the biggest bill, hardly ever gets to the floor anymore and I know Scott's going to talk about that.

We have authorizing responsibilities where 250 programs or agencies don't come to the floor for their regular authorization. Somebody told me the other day the Department of Justice has a mandatory requirement in the law that it be authorized every year. That doesn't happen and then the thing that I think undermines and corrupts and is the most corrosive influence is the fundraising.

So I think we'll have an opportunity to talk about all of that as we move on here onto the panel but I'm going to focus now on Senate rules reform and specifically talk about the filibuster.

Scott talked about my dad. After my election in 2008, my father gave me some good advice. He suggested that I reread the autobiography of Clinton Anderson, the man who held the same Senate seat I now hold. Anderson addressed many issues during his time in the Senate. But the one that stood out to me was his dedication to making the Senate a functional legislative body. It's a dedication we share.

One of the main reasons I ran for the Senate is because I saw the world's greatest deliberative body turning into a graveyard of good ideas. After a year of observing this body in action, or in many cases in lack of action, it's clear that we're in danger of becoming just that.

In Anderson's day, the toxic partisanship we face today had not yet poisoned the system. But the manipulative use of the filibuster had already taken hold. It was used to block some of the most important legislation of that time, including civil rights bills that now rank among the Senate's greatest accomplishments.

Anderson heard the same thing from Senate leadership that we hear today. He was told the changing the rules would never happen because of the two-thirds requirement to limit debate. In other words, any attempt to change Rule XXII, the filibuster rule, would get filibustered. But Anderson didn't agree. He knew the Constitution, not the Senate rules, gave each house the authority to adopt its rules by a majority vote.

Anderson's constitutional option was soundly based in constitutional interpretation and common law. Article 1, Section 5 of the Constitution clearly states, "Each house may determine the rules of its proceedings." Each house may determine the rules of its proceedings. The Constitution also explicitly requires a supermajority vote in seven instances, for things like overriding a presidential veto or ratifying a treaty or amending the Constitution.

It clearly spells out when a supermajority vote is required and in stating that each house may determine its rules, a supermajority vote requirement is noticeably absent. There is also a

longstanding common law principle upheld in the Supreme Court that one legislature cannot bind its successors. Liberals and conservatives alike have cited this principle to argue the Senate can change its rules by a majority vote.

Professor Steven Calabresi, a cofounder of the Federalist Society, stated in congressional testimony that “to the extent that the Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rules change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature,” end quote.

Armed with the Constitution and common law on his side, Senator Anderson went to the floor in January 1953 and moved that the Senate immediately consider the adoption of its rules. His motion was tabled but he introduced it again at the beginning of the 85<sup>th</sup> Congress. In the course of that debate, Senator Hubert Humphrey presented a parliamentary inquiry to Vice President Nixon, who was presiding over the Senate. Nixon understood the inquiry to address to basic question, do the rules of the Senate continue from one Congress to another.

Noting that there had never been a direct ruling on this question from the chair, Nixon stated, and I quote, “While the rules of the Senate have continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of a previous Congress,” end quote.

Nixon went on to say that any provision to deny that right was unconstitutional and I would also note on this point, three vice presidents, Democrats and Republicans, sitting in the chair president as Nixon did, have all come to the same conclusion and to the same result. But despite Nixon’s opinion, Anderson’s motion was tabled.

In 1959, Anderson again introduced the constitutional option, this time with the bipartisan support of some 30 other senators. Then Majority Leader Johnson wasn’t happy with Johnson’s proposal – wasn’t happy with Anderson’s proposal. He saw it as gaining momentum and realized a majority of senators might join the cause.

To prevent Anderson’s motion from receiving a vote, Johnson came forward with his own compromise. He proposed changing Rule XXII to reduce the required vote for cloture to two-thirds of the senators present and voting. Johnson’s compromise passed but attempts to change the filibuster rule continued for more than a decade.

Rule XXII was last changed in 1975 when Senators Walter Mondale and James Pearson used the constitutional option to change the cloture requirement for most issues, except rule changes, to three-fifths of those senators chosen and sworn.

Only three of my colleagues, Senator Byrd, Inouye, and Leahy, were in the Senate then and have ever had the opportunity to vote on Rule XXII. Ninety-seven of us have never voted on the rule that prevents today’s Senate from passing critical legislation.

All of this brings us to today. Over the past couple of years, the impact of the filibuster has become even more pronounced. Senators from both sides of the aisle have increasingly used it as a weapon of partisan warfare. You only have to look at the lengthy and winding path of healthcare reform to understand that something is seriously broken in the system. And just recently, we saw another example when a single senator used the Senate rules to play politics and ultimately prolong passage of an unemployment bill that otherwise had wide bipartisan support.

These examples underscore for me, for dozens of my colleagues, and for the American people, the time has come to address rules reform again. I intend to lead that effort. At the beginning of the 112<sup>th</sup> Congress by constitutional authority and because one legislature cannot bind its successors, the next Senate will not be bound by Rule XXII. It can end the debate on a rules change by a simple majority and proceed to a vote on its rules.

Next January, I will follow in the tradition of Clinton Anderson and offer a motion to adopt our rules. Now, we don't have to make drastic changes nor do I think a majority of senators want to. But we can modify the filibuster rule in a way that still respects minority rights but prevents our current state of minority obstruction.

We should also look at reforming other provisions that are being abused or misused, provisions like the use of anonymous holds to block legislation and nominations. I'm often asked how much support there is for my proposal. As you know, many senators have expressed a desire to reform or end the filibuster.

Sens. Harkin and Bennett of Colorado have both introduced resolutions to change the cloture requirement. All of the proposals under discussion have merit. But the reality is none stand a chance of passage without the constitutional option as the foundation for reform. Each time the cloture requirement has been changed since its enactment in 1917, it was the constitutional option that provided the impetus for the Senate to act.

But let me make clear, my proposal is not the nuclear option, despite the assertion by some. The nuclear option was a threat by Republicans in 2005 to declare the filibuster rule unconstitutional in the middle of a Congress. To me, that's like a baseball team that's losing in the fifth inning trying to make the opposition's home runs stop counting.

I understand that through the 111<sup>th</sup> Congress we're bound by the current rules, the ones we acquiesced to in 2009. We can't change course midstream and simply declare a rule unconstitutional because we don't like the way it's being used. The right way to make the changes for the Senate is to exercise its responsibility and examine the rules at the beginning of a new Congress. That's what the Constitution provides and that's what members of past Senates have called for. The nuclear option is just a continued manipulation of the rules. It's not a real solution.

And finally, I hear the question of what happens if your party is in the minority. Won't you want the filibuster the way it is? Well, first of all, history tells us that shift is inevitable. But I think the real question to ask is this. Shouldn't the minority's primary concern be the well-

being of our country, not the power of its party and what will happen to this country if we fail to pass critical legislation?

I have every intention of making a motion for the Senate to adopt its rules next January regardless of the majority party. As senator, I want to have the chance to legislate, whether I'm in the majority or the minority, and to advance the best ideas developed by great minds throughout our country.

Our current state of paralysis prevents that and it's unacceptable. The constitutional option will help ensure that the Senate does not become a graveyard of good ideas. I'm very pleased to be here and as I understand the schedule, Jim, we're going to take a few questions and then move into the panel. So I'm happy to do –

MR. THURBER: We have about 20 minutes for Q&A at this point.

SEN. UDALL: Yeah, I wanted to try to keep my remarks brief and then try to do some Q&A and then we'll move into the panel and all of us will have a crack at this too. So, Jim why don't you –

MR. THURBER: I should say when you raise your hand, introduce yourself and we'll bring a mike to you and we'll go that way. I'll be Oprah.

MS. : Christine will take the mike.

MR. THURBER: Okay, all right, I didn't know what –

SEN. UDALL: In your dreams you'll be Oprah.

Q: Hi, I'm David Ducraken (ph).

SEN. UDALL: How are you?

Q: Hi. I am puzzled by the assertion that we have to wait for the Senate rules changed. There have been no Senate rules adopted. They can be set at any time and I'm puzzled by the assertion that this will be like changing the rules in the middle of a baseball game. This is not a game. This is governing the country and it is ungovernable at present.

It's more like saying these rules that say the other side gets two home runs for every one they hit are bad rules and they should not be acquiesced to. The country can't afford more of this game playing. So what I want to know is can't the Senate change its rules right now?

SEN. UDALL: Well, I gave you a little bit of the basis of why I come to the conclusion that I have that changing in midstream is not a good idea and the reason is, those three vice presidents looked at exactly the issue that you're talking about. They looked at the issue because it was brought to them at the beginning of a Congress and it was brought to them at some points

later and they knew that there was going to be the critical thing – can you in the middle just throw out the rules and put in new rules and here’s what they concluded.

Their analysis is they looked and they looked at the constitutional provision. They said at the beginning of a Congress by a majority vote that you can do that after you move past the beginning, basically what you have done is acquiesce in the adoption of the rules from the previous Congress and so the crazy thing is – I mean, in some of these debates, this may be interesting to you, they extended the first day of the Senate, in this case, sometimes to six weeks while they debated the issue that I’m talking about in order to try to come to a conclusion.

But still the same construct and legal analysis is there, that on the first day, on the first day you can take up this issue and it may be extended as I’ve said, the first legislative day, and that is the appropriate time to do it. It doesn’t mean – now, and I couldn’t agree more with your frustration about the current system.

I mean, you don’t think I’m frustrated? I came here to legislate. I was elected in 2008. I can’t believe that the energy that went into that 2008 election, electing a president that for the first time got this huge majority, more than 25 or 30 years in the country and what we stood about, stood for was change. He wanted to change our healthcare system. He wanted to tackle these economic issues.

You know what the issues are out there and here we have a situation where a rule is being abused and misused and we have basically with the rules we have given the minority the power over the will of the majority and so I read this book before I was elected, this Anderson autobiography, and I thought, well, I should offer it in 2009 and as I came in, we preside.

The newer senators preside over the Senate and I kept asking the parliamentarians, how’s this work with the adoption of the rules? Well, I was two days later than the opening day and they said, oh, the rules are the standing rules of the Senate. They go from one Senate to the next. I didn’t take that as an answer. I researched it and the deeper and deeper that I got, I realized and came back to the conclusion that the three vice presidents have come to. The time to do it is at the beginning of a Congress.

There are many things we can do now to try to break this logjam and I think one of them happened yesterday or the day before when Harry Reid basically sent a warning out the Mitch McConnell supporting the constitutional option and supporting changing the rules at the beginning of the next Congress.

To me, he was saying to Mitch and the opposition party, if you continue this, you may find yourself in a very different situation when we get at the beginning of the next Congress and so I hope that with all of the things that are going on, that we will see some lessening of this opposition and this obstructionism that has really become a part of the system.

One more thing, if we had a chart here – I was going to bring charts today and my staff said, oh don’t bring a bunch of charts. But imagine a chart of filibusters that have been utilized, motions for cloture filed. If you go back to the beginning of the filibuster, close to a hundred

years ago, you would see on this chart very, very small numbers and then you would see at the 111<sup>th</sup> Congress, the 110<sup>th</sup> Congress, the last Congress, you would see it come up to 112 clotures filed.

So that 112 is more than all of the filibusters in the 1950s and 1960s and we are on a path in the 111<sup>th</sup> Congress to break the record for the 110<sup>th</sup> of 112 and it's probably going to happen. So this is a trend that we've got to deal with and the way to deal with it is the constitutional option. Yes sir, all the way back there.

Q: Bill Klein, I'm a retired Army physician. I'm a great believer in our government of buy in on your side for the people. So my question is where does the electorate fit into this issue? I have a feeling there's a lot of anger but also an awful lot of ignorance. It's an extremely complex issue but where can you get going if you don't have the support of the electorate behind you?

SEN. UDALL: Well, the interesting thing, the other day and I at first thought what the premise of your question is the public doesn't know much about this. This public has focused on this and there's an energy behind this that is pretty amazing. Why do I say that?

In a recent New York Times poll, a majority of the public wanted to do away with the filibuster. That identifies the frustration that the gentleman that spoke earlier talked about, the frustration that I have of saying how can you allow the minority to prevent the majority from doing the will of the American people.

So that's where we are with that. I am trying to do everything I can to engage the American people. We're on Facebook. Normally on Facebook you have fans of people. We'll I'm trying – I've set up a Facebook site called "Fixing Senate Rules" and you can sign up as a fan. We're trying to use every bit of media savvy we know to get the word out there.

But I can tell you what I hear over and over again when I go home, and this subject comes up, is people say why don't you make them stand up and filibuster these unpopular – these popular things and show how unpopular they are and the answer is that's very tough. But we should be doing more of that.

One of the reforms I'm looking at – I haven't signed on to any particular filibuster reform. I'm trying to lead the entire effort at rules reform with the constitutional option, utilizing the constitutional option, noting the history, every time there was a change in the rules it came about by the constitutional option being the catalyst for that and I think people are engaged.

One other thing on reform. One of the things we might look at in filibuster reform is what I would call use it or lose it. If you view the Senate today during a filibuster, many of you would look at that screen on C-SPAN2 and what you will see is quorum call and nothing's going on and so you flip on to something else.

Well, what's happening during that filibuster period is time is being utilized. The filibuster's going on but nobody is on the floor and that's the case for a significant amount of

time. What my use it or lose it proposal would do would basically say if you're not utilizing that time, then for every minute you don't use, a minute gets yielded back and we're working on something like that.

But we're working on – the important this is working on something, protect the minority rights, don't make the Senate exactly like the House, but make it work so that when you have a majority that you can get things done and I think that's what the American people want and that's the frustration we feel out there. Yeah, please, go ahead right here. She's bringing you the microphone. There you go.

Q: Hi, my name is Maggie Reinstein (ph). And my question is if you have to wait until January, don't you need to make it concrete for the rest of the electorate? Don't you have to – even though it is tough, don't you have to let some of these filibusters, let these senators go. Don't you need to show that to the American people?

My second question is that I had had a discussion with Norm Ornstein a couple of months ago and he seemed to still feel that the Senate rule, the two-thirds to change the Senate rules, was still the top priority. How do you answer his arguments?

SEN. UDALL: Give me the second one again or hold on, let me just deal with your first issue there which is basically we're coming back again, aren't we, to what I was talking about. How do you make them stand up on what is a popular issue and show the obstruction, show the face of obstruction, rather than having a quorum call be the face of obstruction, which then people don't understand.

We're going to do more of that. I think the poster child of doing more of that was the senator from Kentucky standing up on unemployment and one senator – it shows you the way the Senate rules are structured – one senator is able to stop the entire show. But he paid a price for that. We had a number of senators come down to the floor and talk about what was happening with unemployment, what was happening with the Highway Trust Fund and the fact that we had to stop projects and people were being laid off in these tough economic times.

It took us several days but he ended up folding. He ended up folding and the result was, I think, that the aggressiveness that we showed on that front meant that they were going to have to think very hard, are we going to do that again, and so by being aggressive like that, I think we can make a difference and try to change it a little bit.

Let me just jet a second into the more arcane part of the way this rule is structured to show you how difficult it is today to actually require them to get up and vote and to get up and talk about a particular issue that we're considering a vote on.

The first step that is required is to get a quorum before you can force that. Well, a quorum is 51 senators and they don't need to get the quorum. We need to get the quorum. The majority needs to get the quorum. So you have 51 senators – we have 59 Democrats now – that have to be on the floor or near to the floor to establish a quorum call to force that debate.

So they can strategically, the opposition, in this case the Republicans – it can always be reversed – but the opposition designates four senators who will take a four hour block of time and come down and speak.

Well guess what, when they get up and speak about whatever the issue is – let's pick unemployment like the senator from Kentucky did and so they're talking about, well, this unemployment, we don't like the way this bill's structured. Well, as soon as they notice that 51 senators are no longer on the floor, they can note the absence of a quorum.

The Senate goes into a quorum call, which is what you see on the screen, and then the clerk has to call the names of all the senators to determine when 51 are there. The 51 come back onto the floor and then when a quorum is established you then go back into the debating session. But you only have one senator at a time have to stand up while 51 of us have to be there to meet the quorum call.

So under the current rules we're talking about a very time intensive process. And as you will hear from these other panelists in the things that they would like, reforms they would like to be done, the most precious thing in the Senate is the time on the floor because that's the time that you need to put the healthcare proposal, the financial reform proposals, all these proposals onto the floor in order to move them along and so by killing time you stop that kind of thing. Give me your second question there because the first had a lot of parts to it there.

Q: It's mainly how would you argue to Norm Ornstein, who still seems to feel that in order to change the Senate rules you need the two-thirds of the Senate to vote for it.

SEN. UDALL: Oh, you mean the two-thirds.

Q: Yeah.

SEN. UDALL: Well, I wish Norm was here. Maybe one of our panelists is going to argue Norm's position. My answer would be look at the Constitution. Look at Article 1, Section 5. Each house may determine the rules of its proceedings. There's nothing in that provision that says it requires a supermajority. So you have that provision.

On top of that, this constitutional principle which is embedded and been ruled upon by the Supreme Court, one legislature cannot bind a subsequent legislature. The Supreme Court has ruled that over and over and over again. It's a standing parliamentary principle before our Supreme Court even existed. One legislature cannot bind a subsequent legislature, meaning – let's pick a little example.

Let's say you passed a piece of legislation and said in the future you're going to need 75 votes in the Senate in order to change this legislation. That would be held unconstitutional in a minute. What we have done with the Senate filibuster rule is exactly the same thing. In the Senate filibuster rule it says that you need 67 votes to change the rules.

If you follow that logic, you're caught in the box where Norm Ornstein is caught. I want to free him, okay? Norm, you don't have to be caught in the box, Norm. You don't have to be caught in the box. We're going to free you.

You can just go to the Constitution and to the constitutional case law and constitutional principles and say that at the beginning of a Congress now, as I said, beginning of a Senate, right at the beginning there you have the authority to change the rules by a majority vote.

There are going to be two positions out here. if you go back and read the debate in 1917 and you read the debate in '59 and in '75 when the changes took place on cloture, there was always two sides. So there's room for Norm but I would suggest the better view and the better legal and constitutional view is that by a majority vote at the beginning of a Congress you can change – you can adopt new rules and change the rules or modify the rules. Yes sir?

Q: My name is Jim Connors and my question is has Vice President Biden expressed an opinion on this and going back a little further when the Republicans were in the majority, do you know whether Vice President Cheney offered an opinion?

SEN. UDALL: Yeah, the answer is Vice President Biden has not expressed an opinion on this. On specifically I'm saying the question can the Senate adopt rules at the beginning of a Congress by a majority vote. He has not taken a position on that.

Vice President Biden has said when he was asked recently, do you think the filibuster is being utilized in the way that it was historically designed, and he came out very strongly and said, this Senate that I was first elected to, I believe he was elected in 1972, is a completely different Senate and he pointed out that the filibuster has been abused and up until very recently it wasn't utilized many times, the 112 times that I talked about in the last Congress and we're going to break that record.

So he has not ruled and the prudent thing for him, because he's going to be sitting in the chair, is to not answer that question because he's going to have to answer it on the advice of the parliamentarian. Three other vice presidents, Rockefeller, Nixon, Humphrey, all answered the question, Democrats, Republicans, answered the question, yes, at the beginning of a Congress, majority vote, you can adopt rules.

That's the catalyst that we have here is the constitutional option is the catalyst for change. It's the fundamental part of reform. So if you hear anybody stand up and say, we want to put a new rule in on holds, make them more transparent, 24 hours, 48 hours your name comes out. It has to be public and it has to be for a reason related to the individual, for example, if it's a nomination rather than a policy issue that has nothing to do with the individual.

All of those reforms, the Harkin, where you lower the threshold on the filibuster, 60 for three days, 57, 54, and then down to 51, a declining threshold, none of those ideas can be put in place unless the constitutional option is utilized at the very beginning of a session.

So if you're interested in this reform, the key is studying and knowing this constitutional option and advocating for it and then advocating for whatever reform you believe in, in the rules. Jim's standing here with the hook but I'm sure all of you that have questions you can throw them at us after we have panel presentation here.

MR. THURBER: Right, we're going to switch into a panel right now and after the statements from Tom and Scott and the senator, we'll go into Q&A again and so let's come forward for the panel please.

Well, it's my pleasure to introduce this panel and two colleagues that have written about this extensively. First, Scott Lilly to my immediate left has written a statement. Some of you have picked up the statement. For those of you that are viewing on C-SPAN, it's on the Center for American Progress Web site. He's a senior fellow at the Center for American Progress. He's been here since 2004.

He was chief of staff to Representative Dave Obey, spent 31 years in the service of Congress, clerk and staff director of the House Appropriations Committee, executive director of the House Democratic Study Group, and had other positions. He writes about governance, appropriations, budgeting. He writes also about the economy and in the context of governance he's expressed himself in writing and speaking on the filibuster and other reforms.

Tom Mann, to my immediate right, is the Averell Harriman chair and senior fellow of governance studies at Brookings. He was director of their government studies division for many years, 15 years. He has written a book that's relevant to this with Norm Ornstein. I guess Norm came out of his box in order to help you with the book and it's called "The Broken Branch: How Congress is Failing America and How to Get It Back On Track", Oxford University Press.

He's written almost a dozen other books. Several are relevant to the functioning of Congress: "The Permanent Campaign and Its Future", "Partly Lines: Competition Partisanship and Congressional Redistricting". Some think that redistricting has had an effect, especially on the House of Representatives and the nature of representation there.

Both will have short statements. There will be a response from Senator Udall and myself and then we'll open it up to the audience for questions and comments. I know several of you, I can see your faces, are experts on this topic and I will call on a couple of you that I know are experts. Walter Oleszek, quit hiding back there in the back. He has the best book on procedures in Congress. So Walter, be prepared to ask a question. We'll get to you later. Let's go to Scott Lilly.

MR. LILLY: Thank you. For only about four of the 31 years I worked on the Hill was I on Senate payroll. But it was Alan Drury's depiction of the Senate in "Advise and Consent" that I read as a teenager that really got me interested in politics and public service generally.

In college, I read Donald R. Matthews' "U.S. Senators and Their World," which I still think is one of the great books on American government and that further raised by esteem for the body. So I do not come at this as an embittered House staffer who is angry at the guys on the

other side of the Hill. I have great regard. The Senate should not be the House. It should be the leavening force.

It should be a force for more measured consideration of events and policies and I've been in situations more than a few times during my career in Congress where I saw the Senate make a very valuable contribution by slowing down the pace of which we were moving on issues that had not been as carefully thought through as they should have been.

But having said that, I think there are some very serious issues with respect to the way the Senate works today. I think that anybody that is governed by a set of rules at one period of time has to review those rules as the workload on the institution changes, as the nature of the culture and the problems facing the country change, as the type of individuals who are members of the institution change. And I don't think that that has happened as frequently as it should and it's one of the reasons why I think we should take Senator Udall's advice very carefully.

The thing that I think is overlooked in much of the current discussion about the Senate is that while we may have strong views on issues like healthcare and we may be very angry that the deliberation is being slowed, our conclusion that we think the country has arrived at should be ratified by the legislative body and not blocked by a body.

Those are all important things. I feel those very strongly myself. But I also think that those are going to be quite difficult to change. What we do not view as carefully as I think we should is the fact that the Senate is just broken in a very standard workload diagnosis and I want to go through three areas where I think that we can see that.

First is the authorization process. I think that's kind of an arcane term but probably most Americans don't know that we create programs all across the government through passing legislation that establishes the structure of those programs, sets spending levels, but does not actually provide spending for those programs.

This year, according to the Congressional Budget Office, 50 percent of all spending outside of the Defense Department, 50 percent of all appropriations, were for programs that are no longer authorized. The authorizations have expired. CBO identified 250 authorizations that have expired and money was appropriated for them even though there was no authorization.

The leaders of the Senate were basically put in a situation where you either had to terminate major portions of the Department of Justice or other critical activities or fund them in the absence of an authorization. The reason that we don't have the authorizations is the chairmen of the authorizing committees in the Senate – there are 18 committees that do nothing but work on establishing the structure of government programs.

The chairmen of those committees cannot get the floor time from the leadership. The leadership does not have the floor time to give because so much time is consumed with appointments, appropriation bills, and various other business including the lengthy quorum calls that you see on C-SPAN all the time.

I think not having authorizations is a much more profound problem than it might seem at first. You can see well, the Appropriations Committee goes ahead and funds it so what's the problem? I think first of all every program in the government needs to be looked at with a fresh eye every few years.

Government agencies need to come before the House and Senate and explain what they're doing and give the authorizing committees an opportunity to probe and try to find out if this is a place where we can make savings, is this a place that we can modernize and create efficiencies, are there programs that can be combined, are there authorities that these people in the bureaucracy need that they don't have in order to make the programs work better.

Those kinds of questions just are not being asked on a routine basis and the authorization process is what makes that happen and until we find a way to get the Senate to go back to a system where it can adopt authorizations, then it's very difficult to motivate authorizing committees in the House to move legislation that they know will die in the Senate which has been what will happen repeatedly.

The second area, and I think this is an area that really turns the whole notion that the filibuster is being used to give more measured deliberation, is in the area of appropriations. This year, of the 12 appropriation bills, nine actually were considered in the Senate. Three, including the biggest of all the domestic appropriation bills, the Labor-HHS bill, was not considered in the Senate.

It was reported by the Appropriations Committee in the Senate. But when Senator Reid decided that there simply was not the floor time to take up those bills, the committee reported bill was taken to conference with the House and conferenced as though the Senate had actually voted on it.

It was then wrapped into a conference report, voted on by the Senate at a point in the process where no amendments could be offered to change funding of any of the programs contained. They simply had an up or down vote on whether or not to continue the Departments of Health and Human Services, Labor, and Education or not continue them.

As bad as that sounds, three of the 12 bills actually never being considered on the Senate floor or subject to amendment, that's better than we've done most years for the last decade. On average over the last decade we have had five bills that never went to the Senate floor but that were enacted circumventing the floor because there was not time to get there.

I think that is necessary to get the work done, to get the government functioning. But it is about as big an abuse of process and the rights of the 70 senators who do not serve on the Appropriations Committee, as you can imagine.

Further, this process means that the bills that do come up cannot be considered in a timely way. The past year the House passed four bills in June, four of the 12 appropriation bills in June, the other eight in July. The Senate passed I believe two bills in July and were passing bills off the Senate floor through September, October, November and December.

So what that meant was the final bill was not enacted until late December. We were almost 25 percent through the fiscal year that we were providing agencies with money to operate in. What that means was one, the agencies had to go on a restricted budget between the time that the fiscal year began and the time that the appropriation was actually put in place. That meant that agencies that have regulatory responsibilities had to cut back the travel of the people that perform those functions.

It meant that the program officers, the grant administrators in government agencies had nine months to do 12 months' work. Again, that may sound like a pretty lousy record. It's better than we've done most years in the past. Several years we have given agencies only six months to spend 12 months' worth of money.

That means that they have to restrict their contracting process. You can't go through the full, free, open bidding contract and do it in six months' time. You can't get it published in the Federal Registry. You can't take the awards and have them reviewed. So it means that you really have a prescription for waste, fraud, and abuse built into or resulting from the legislative calendar.

Now the final area that I think we have a huge problem is what I call the hollowing out of the scenario executives in the government. Right now, we have 228 empty positions in the federal government for appointments that are pending before the United States Senate. And there are a number of those – I think there are 12 of those – who have been pending for more than 10 months.

They can't get a vote up or down. I think it would be much better for the administration, the government and the country if the ones that there are serious objections to would be brought up and voted down so another appointee could be moved, but we sit in gridlock with very important positions unfilled.

In recent months or in the last months we've had a number of people that were confirmed. For instance, the under secretary for science and technology at the Department of Homeland Security was pending for over six months. When her nomination came to the floor, it passed on a voiced vote. For 10 months, we've had a vacancy in the administrator of the General Services Administration, which is a key position in terms of moving this administration's agenda on contract reform, which should not be a partisan issue. Nonetheless, she was held up for 10 months and then confirmed with 96 positive votes.

So there's a great deal of this that really does not have to do with the controversial nature of the appointment. It has to do with individual senators using their ability to put a stick in the spokes in order to get parochial concessions about things that may be totally unrelated to that nominee. The poster child for this activity has been Sen. Shelby in recent months, who, up until about three weeks ago, had a hold on every single one of the administration's appointees hoping that he would somehow influence their decision over buying an Air Force tanker plane that would be made in his district.

And I think it's sort of funny, sort of aggravating, but in the end you have literally of hundreds of important positions across the government that are unfilled. The career people that are working there cannot get the information from the higher-ups in the executive branch because you've got a break in the link of communication with the policy people and the implementers in the government.

And as a result, you've got more waste and fraud and abuse and ineffective government. And that's a cost that we pay for not the big, major issues, but just the minor day-to-day functioning of the Senate in ways that do not make sense, that put the rights and prerogatives of individual senators above the functioning of the institution and above the wellbeing of the government. And I think that needs to change.

I have two – in this little paper, I've got two suggestions with respect to that, that I don't think do any great damage to the deliberative nature of the Senate. One is to simply put a limitation on how long it takes to consider an appropriation bill. I don't really think most of those bills should take more than two days, three days at the outside.

I would be willing to associate with that a guarantee that every senator gets to offer one amendment and debate it for an hour. You could have as many items in this amendment as he wanted, but that would be far more input and protection of minority rights than we have today, where we don't even take many of the bills to the Senate floor. And I think that's a very reasonable compromise.

Another thing that I think absolutely has to be done is some serious limitation on how long administrative appointees can be held up before a vote is taken on that. There are a lot of different ways to do it. I'm open to any of them, but I think some action has to be taken. Thank you.

MR. THURBER: Thank you very much, Scott. Tom, I'm getting depressed. I hope that you've got some answers for some of these problems.

THOMAS MANN: Of course.

MR. THURBER: We've talked about backdoor authorizations, the regular process for appropriations, holds on confirmations. I listed about 12 problems at the beginning. Scott has a couple of recommendations. So when you come with the problems, I like the spirit of coming up with solutions too.

MR. MANN: Got it. Hold on. Take notes, Jim.

MR. THURBER: I am.

MR. MANN: Listen, I'm delighted to be here at the Center for American Progress and to share this table with Sen. Udall. He gave, I thought, a really lucid discussion of and case for the fact that the Senate is not a mere waif amid forces; that its force is created, sometimes by absolutely inadvertent actions, like living out the previous question motion in 1806 in the rules.

And that there is a sort of constitutionally grounded case for a new Senate, which he would classify as one whose membership has been changed, not completely re-elected to determine its own rules. And I think that really advances the argument very far.

And Scott Lilly has taken our eyes away from the drama and melodrama of health reform and these other major partisan ideological battles and pointed to the problematics in the functioning of one of our legislative chambers that get too little attention but go to the root of problems today.

Let me just say, I'm delighted with all of the attention being given to this. You know, there is this sense, a feel that all of government is dysfunctional. In fact, once the pundits got a hold of it, I knew it had to be wrong. Beware of conventional wisdom on almost all of this. But the element that's true is that much of the problem of government today is associated with the Senate.

We have seen, over recent decades, an extraordinary increase in the percentage of legislation and nominations that had been subject to delay-related problems from less than 10 percent to more than 80 percent. That's a change. This isn't just like the old days. It's a profound change. We have seen the routinization of the filibuster such that there is a basic acceptance that there is a 60-vote threshold for passing anything or doing anything in the Senate.

Now, that's not written into the rules. There is no democratic legislature I'm aware of that has a supermajority requirement for the routine actions of the body. There are exceptions, as Sen. Udall pointed out, in the Constitution, but not for the routine. Now, obviously that routinization of the filibuster has partisan roots and has everything to do with the changing character of the party system in recent decades. But we also have what has become a promiscuous use of holds.

Listen, it's been around for a long time and we know all about the need because of increased business and before the Senate, the use of the holds for the two-track system. But you know, we've had people use holds or really objections to unanimous consent agreements – Howard Metzenbaum, Jim Allen – who actually parked themselves on the floor of the Senate and, when they thought something nefarious was going through and no one knew what was in it, demanded some transparency. And that was a very healthy thing.

In any case, this has had consequences, as Scott said, for appropriations bills not getting passed, for the demise of authorizations, of the problems with nominations, with hundreds of House-passed measures being queued up in the Senate. The case for the filibuster is that it turns out, it leads to quote, “reasonable bipartisan negotiations that produces more moderate, more deliberative and better legislation.” And yet, the evidence for that is sorely lacking in contemporary times.

Okay, Jim. Here it begins. What to do. Number one, you could abolish the Senate. (Laughter.) You know, how about a – Nebraska unicameral. It turns out it's really hard to abolish the Senate given its place in the Constitution, even to change its representational base. So I'll strike that one off the list.

The second, you could change the party system. The ideologically polarized parties today make the filibuster more problematic than it's been in the past and the sort of parliamentary-like parties intersecting with a congressional set of rules creates particular problematics. Now, if I knew how to change the party system, I'd go ahead and do it, or if I could tell you how to do it. It's probably true that more lopsided majorities for one party or the other would probably produce more cross-party coalitions. But it's hard to do much about that.

Okay, next possibility: You could try to discredit filibusters and holds – politically discredit them, use the power of shame. That's what the senator and some of his colleagues were up to with Sen. Bunning, with Sen. Shelby. You could imagine presidents being engaged in this. The one thing that Tom made perfectly clear you can't do, as well, just go back to the old filibusters.

If you try to wait them out, force actual filibusters, the burden is on the majority, not on the minority that's filibustering. And it will – it simply won't work. But shame gets you something, and I think a more aggressive use of an effort to discredit the filibuster, which is happening now, is both useful in its own sense, but also as a predicate to moving toward more systematic change. Okay?

Fourth, use existing alternatives to dilatory tactics. And here, exhibit number one is, of course, reconciliation. Right now in the health-care debate, Republicans are crying foul, but I think any objective, fair-minded assessment of the budget empowerment control act, of Senate rules of history of reconciliation demonstrates that this particular use, which is a new twist but much more modest than previous uses, is not to enact the whole health reform.

Versions had passed the House and the Senate – in the latter with 60 votes for cloture. But to have the House adopt the Senate bill and then to approve, under the reconciliation process, a set of changes, amendments – that would be germane under reconciliation rules. Sometimes we have special trade authority which creates fast-track procedures. Occasionally it's written into the law.

The health reform law has – at one time or another, bills have looked for requiring an up or down vote on recommendations regarding Medicare practices. So it's perfectly legitimate. The Senate has looked for these alternatives in the past and they could do so again. The final opportunity is to change the rules. There, we need to talk about the substance of changes as well as the politics of it. Okay.

Quickly – you could carve out additional exceptions to unlimited debates. Scott has already suggested that. Extend the reconciliation process to appropriations bills; in effect, have time limits on debate, time for considering these matters. You could set up fast-track procedures for handling nominations, and you might do it differently for executive nominations and judicial nominations. You might treat district court different from appellate circuit courts from the Supreme Court, but there's nothing keeping the Senate from setting up such procedures. Okay. That's carving out exceptions.

The second is to limit time-consuming requirements presently associated with invoking cloture. For example, you can filibuster at various stages of the process now. Even on the motion to proceed, of getting something to the floor on adopting the underlying measure, on going to conference, on approving a conference report.

Well, you could set up authority for the majority leader to have non-debatable motions both to proceed, to consider a matter on the agenda. Most leaders have the capacity to sort of bring measures to the floor still preserving the opportunity to filibuster the measure itself but that alone would make a difference – you could do the same thing on a motion to proceed to conference, again, not a time at which you might do that.

You could do other changes like a quicker ripening of the cloture motion and just looking at the particular ways in which you can extend a filibuster on a bill to well over two weeks before it even goes to conference and you could get that down in certain ways. Okay. Third is to reduce the number of votes needed to invoke cloture. You could go from the present 60 of two, three-fifths of those present and voting.

That puts a little more burden on those who would filibuster because right now you don't need any votes against the cloture motion. All that matters is do you get 64. So present and voting would be a big change. And you could have, as Senator Udall reported of Senator Harkin's proposal as a sliding scale. There are various things you could do with that.

Finally, here's another sort of radical proposal. You could readopt the previous question motion and include it in the rules of the Senate and instruct the parliamentarian to say which other items in Senate rules and precedents must be struck to be consistent with that. But of course, that would very quickly potentially turn the Senate into the House and it's probably too radical a change. Okay.

Final point is, of course, the procedure and politics of filibuster reform. Is it required, as someone said – Norm argued that you have to have two-thirds. That is in the rules of the Senate. No one disputes that. But there is a contrary argument that no new legislative body can be bound by its predecessors. And I think a majority could do it, okay. A majority could pull it off at the beginning of the Congress.

But is there a majority in favor of doing much? That's really the question because it's partly partisan that is the current minority will see it as an outrage and a way to sort of weaken their power but on the other hand, they are thinking ahead, gee, Democrats have many more seats up in 2012. We might be back in the majority. That might be appealing and Democrats may say, we might be back in the minority. We may not want to do it. So I don't think there's a clear partisan case for producing it.

Finally, it's the individuals. What will individual senators give up – because as Sen. Udall made clear, this is the basis of some individual power within the institution and they're really reluctant to do it. But this is where we really have a breakdown in the system because when the norms governing the use of this power by individuals give way to its promiscuous use, the body breaks down.

So I think the politics are really tough, but I think there are things that could be done and I think there is a constitutionally defensible route to the Senate acting at the beginning of a new session following an election.

MR. THURBER: Tom, thank you very much. Let's go to Sen. Udall. Please.

SEN. UDALL: Thank you very much, and very insightful comments. Let me just step back a little bit and look at the big picture here with all of these suggestions that are out there. I'd also like to say that many of the things that we're talking about in terms of the House – if you look at the House of Representatives, there are things broken over there, too. The attention right now is on the Senate, but many of things that have been mentioned here, we have the same problem. And so we have the bigger issue.

As a country, when you look at our legislature, when you look at the Congress, are we capable of governing? When we had this election, I talked about high expectations, a mandate for change, and here, we've seen it kind of all grind to a halt, and the Congress and the Senate playing a significant role in that. And that worries me a lot.

And so I think all of us, as senators, need to look and, as has been suggested here, and I think I've said this before, to be willing to give up a little bit for the good of all so that we can move along and get things done. One of the areas that troubles me – and I think it's been mentioned by Tom before in his book – is committee structure. It used to be – and now I'm going to try to follow, Jim, on your suggestion. Let's get solutions. Here's a solution from history.

It used to be, on committee structure, that the reason the committees worked so well – you wonder, when you have a big body – 100 or 435 – how do you get expertise? Well, the idea is you go on one committee, that's your major committee, and you really learn things. You specialize. And that's the reason you're given deference by all of the other senators or representatives, because you spend all of your time in terms of studying the issues.

My dad told me a story about how Archibald Cox came down in the 1950s and taught six or seven members of the House Education and Labor Committee labor law. If you even find a committee nowadays, fellows, that they're studying issues like that, let me know what it is. I want to get on it because when you get six or seven senators spending three and four hours at a time studying an issue, learning an issue, focusing on a committee, that's when you start producing very, very good legislation.

I asked several of these scholars, when was the last time we did committee reform in the Senate? Nineteen seventy-five, about the last time we had – we had 1976 – '76. So that was the last time we had filibuster reform, also, was in 1975. So the institution has become ossified and we need to break through.

The one final thing I just want to say is that it kinds of ties this all together is I remember, in the House, getting very frustrated with the schedule and the way – the House does get the

appropriations bills out, Scott, you're right. But it's a brutal process and it's very quick. Why don't we get more time?

And an old-time parliamentarian told me, he says, change the fundraising. And what he meant was, is these extensive numbers of hours that are spent – it's just been highlighted with this congressman that just resigned where he went on television and talked about, I think he said, five to seven hours a day. Others have said that's higher or lower. It depends on how tough your race is.

But most people think that we were sent here to do the job of the American people, spend the time legislating. If they knew the numbers of hours that we spend on a phone dialing for dollars or over in a fundraising meeting or whatever it is, compared to what we're doing on the other side, I think they would say the balance is tipped the wrong way.

And so the solution is meaningful campaign finance reform. We need to try to get – and by the way, we're headed in the opposite direction. The Supreme Court opinion – we're opening the flood gates now for corporations to put in money. We're going to try to take care of that by the end of the year in the Senate if we don't have a filibuster. This is a huge, huge issue. So that's a couple of comments and I'm sure the audience has others here that they're – (inaudible, off mike).

MR. THURBER: Thank you, Senator. I'd like to ask a couple of questions, first of you and then the other two panelists. The lack of civility and comity in the Senate has been a problem for years. It's not that way on some committees. Some committees are pretty good. Do the members talk about the anger of the American public, the decline of confidence and trust in Congress linked to these problems to the filibuster and other things? And do they worry about the lack of civility and comity?

SEN. UDALL: Yes. And senators talk about it. We talk on it on an informal basis. It's a regular part of the discussion. The part that's really broken in Washington, I think, is that if you go back 30 years, the oil that kept everything going was the comity. It was having time to spend time with each other.

I'm sure Scott Lilly can tell many stories about how the Appropriations Committee or other committees would spend time with each other. There are stories about Saturday night – you know, Congress back in the '50s and '60s worked the full week, worked into the weekend. There would be a potluck on Saturday night and Democrats and Republicans would all show up with their families and have a dinner together.

And that was the oil that kept things going. You knew each other. You were very reluctant to step onto the floor of the House of Representatives and really nail somebody personally if you had dinner with him the night before and met the spouse and also knew the children. And the frustration, I think, is getting to know individuals in such a way that you get a relationship where you have a bond and you can trust each other and you know that you can move forward with things.

And so that's very much missing. And we're trying, the younger members, trying to find ways where we can get together and talk with each other on an informal basis and try to do it in bipartisan way. But it's very, very difficult with the structure and the demand and the fundraising. And so we need major reform.

MR. THURBER: Let me ask one more question of you, Senator, and it's related to the committee system. Are the junior members concerned about the committee system? We have over 200 committees and subcommittees. Some would argue, indeed, you have too many committee assignments and too many committees in the Senate.

Is there an effort – is there a working group informally in the Senate that is pushing this? The last time it was done, it was 1976, and no one has really looked at it seriously in the Senate since then. The House has looked at it four times and they had limited success there.

SEN. UDALL: That's right. And the real issue in the way committees are treated today is, if you get on a committee, it's a feather in your cap. And with the numbers of committees, it's just so hard to spend the time and to get the specialization. And so there is concern. The senator from Delaware who was appointed after Joe Biden left – Sen. Ted Kaufman, who was a chief of staff here for 30 years – that's one of his passions. He and I talk about it. We're trying to talk how to build up the fires a little bit to get something going there.

But I think if you ask a question to senators or House members and had them answer it truthfully, are you serving on too many committees and have you become in one area really specialized so that you have something to offer to everybody else, have something to contribute to a better piece of legislation, I think most of them would truthfully answer, I'm spread too thin. And that's a problem.

MR. THURBER: Are you willing to give up some of your assignments?

SEN. UDALL: I think, as Scott said and I think some of you have said, if you look at the whole structure, whether it's appropriations, authorizations, committee structure, if all of us were willing, as a group, to give up a little bit, we could have a much better working institution. And I'm willing to do that with all of the others. And that's what part of the discussion is.

When we – you know, I came here to talk about the constitutional option and people have questioned, you know, why are you trying to do this? Well, the real core here is to spend – the reason I chose January of the second year is I thought we would need at least a year to pull everybody together, to have the discussion, to get working groups going.

We have going right now – Sen. Durbin has a working group. We're going to hold hearings in the rules committees that Chairman Schumer is going to have historical hearings on the filibuster and the state of the filibuster. The freshman and sophomore classes – the 2006-2008 classes – are working together on reform and have small working groups going, and we're trying to get together for lunch on a regular basis. So there's a lot happening that I think is going to bear fruit.

MR. THURBER: If your constitutional option works, do you see some effort at that point to suggest that a committee be created to look at the committee system and some of the other procedural problems in the Senate?

SEN. UDALL: My guess, in the Senate, is a lot of that will be done in the Rules Committee. That's the responsibility of the Rules Committee. I'm on the Rules Committee. Much of the leadership of the Senate is on the Rules Committee.

And so I hope when we do these hearings on the filibuster that we also look a little more broadly at other ideas that have been raised today and other things that I've talked about today to try to see what kind of reform we can do. I imagine at some point it may get to the leadership saying, well, we're going to have a working group on this. There're already informal working groups on almost everything we've talked about here.

MR. THURBER: Final question for the three of you, I mentioned at the beginning, some people feel that the congressional budget process is really broken. It gets changed every year in terms of the procedures. We do now have PAYGO – pay-as-you-go – as part of the appropriations process that links to the budget process. Are there serious problems with the congressional budget process? If so, what are they? What should we do?

MR. LILLY: I often used a graph showing the increase and decrease of the public debt as a percentage of GDP, which I think is the correct way to look at it. At the end of World War II, we had the public debt that was 109 percent of GDP, which is very high, dangerously high debt. But over a period of 30 years, they were able to bring that down to 26 percent, which is very reasonable. We're at 50 percent added, toward 65 percent right now.

But the interesting part of that is that the lowest point that we have been, in terms of the public debt as a percentage of GDP, was in 1974, when we passed the Budget Act. And I don't think that there's – I think there is some connection between that. I think that the Budget Act, which was supposed to clarify budget choices, actually confounded the budget choices. I think it made it look like there were processes to deal with issues that really wasn't – you set up a whole legislative process which is engaged in planning what the real process is going to be like and it leans itself to members being able to posture that they favor one route on budget, which in fact is the opposite what they do when the appropriation bills get to the floor.

And so I think it has – it's undercut budgeting. I think it really does need some serious change. If no other change, limiting the amount of time the Congress spends on, which I think we really, in the end, only get one number out of that, which is the 301(a) budget allocation to the Appropriations Committee. We basically say you can spend \$1.3 trillion, or \$1.31 trillion and that number could really be arrived at by the leadership without eating up weeks of time in both houses doing that process.

MR. THURBER: So you do away with the budget.

MR. LILLY: No, I don't think you can do away with it entirely, but you certainly could restrict the amount of time that is consumed doing it and bring it down to establishing that one number in an expeditious manner.

MR. THURBER: I heard, in 1974, Congressman Obey express similar views of why did we need it at that point. He wasn't supporting it at the time. Were you working for him in '74?

MR. LILLY: No.

MR. THURBER: Yes, right, okay. Tom?

MR. MANN: I think most budget process discussions are ways now of avoiding the real problems that we confront and because we have such a difficult time dealing with them, we imagine if we just get the process right, either within Congress or say we have to go outside Congress, or to have something beyond the regular order, be it a bipartisan commission to deal with the problems, I'm just skeptical that it's worth investing a lot of energy in process changes.

And I'd sort of – I think what's needed and our leaders ought to be doing is trying to educate the public to confront the nature of the problems we have. We have – and have had – an immediate short term need for big deficits, both created by sort of financial stabilization and stimulus programs, but also as a consequence of the worst recession since the 1930s.

And there's nothing wrong with them existing in the short term. In fact, it'd be nice if we could get people in Congress to speak to that in a clear fashion, but that in both the medium and long term, we've got huge imbalances that will require steps to be taken to certainly slow the rate of health care cost increases and to create additional revenues.

Instead, we sort of patrol at the margins and are having big fights over how much money we're going to save from earmark reform and talk about what PAYGO should apply to this and that. I think the problem now is one of party and ideology and that's the problem more generally – a party and ideology trumping institutional responsibility and straight talk. And I'd put all of my energies into the latter to try to overcome the former.

MR. THURBER: Senator?

SEN. UDALL: I think the American public would be shocked to know that most of our executive agencies don't have, at the beginning of the year, a budget that they know that they can spend. That is the reality of what's been described here. And Scott's proposal, which is to say, give limited time on the floor for appropriations with limited amendments, but for heaven's sake, get it done.

What we have right now is a situation where these appropriations bills don't get finished, are rolled into an omnibus. It usually takes place anywhere from three months to six months later. And so you have, as has been pointed out here, executive agencies who do not have the ability to know what they're going to spend. Talk about doing something about waste, fraud and abuse; you could really do something about waste, fraud, and abuse if, in fact, you focused on

just getting the budget done every year, which is our major responsibility, is getting the budget done for the government so the government works for the American people.

MR. THURBER: Thank you. Let's go to the audience. I earlier mentioned Walter Oleszek. Walter, I see you back there. He's a national treasure when it comes to understanding the procedures and rules of the House and the Senate. He's written the best book on the topic. He's a senior analyst scholar at CRS. And he, for 27 years, has been associated with our center as a scholar also.

MR. MANN: And Jim gets 10 percent of his royalty.

MR. THURBER: And Tom is my agent. (Laughter.) Walter, do you have a question?

Q: (Off mike.)

MR. THURBER: Usually not with you, but let's do it anyway.

Q: (Off mike) – by all means. But in any event, maybe more a comment, maybe a question evolving into it and that is, in terms of the constitutional option, I'm just wondering why there are not – what Sen. Byrd might think of that?

I know that he would probably view the current situation as really sort of an abuse, but he's also on the record many, many times about how the Senate is really a supermajoritarian institution and that the House is really a majoritarian institution. And so he would, I would assume, be reluctant to go along with any really fundamental change because really big changes could potentially make the Senate more like the House.

If the principle is established – and it's certainly a legitimate one, as Sen. Udall has pointed out – at the start of every new Congress, you can change the rules of the Senate, then perhaps over time, the Senate would become more like the House, where every new Congress, as we all know, new rules are adopted in the House of Representatives. And how are they adopted? They are adopted by majority votes of the party in charge. And so this might lead to a circumstance where you would have constant changes in the rulebook of the House triggered by the majority party, who is upset with what the minority party is doing.

And more specifically, I guess, where – Tom alluded to this – but there are many – everything is filibusterable in the Senate, almost. And so there've been consensus in the past about establishing cloture on, or limiting the amount of time for the motion to proceed. You're certainly getting to conference committee is just an enormous task these days. You've got – you just can't do it because of the threat of the filibuster, given you have to have agreement on sort of the three parts – insist on your amendment, request, and authorize the presiding officer to name conferees. Each one of those is filibusterable.

If you limit those, there's an innumerable number of places to filibuster on the motion to instruct. So this is a huge issue. I'm not saying anything – it's not to be done. I think there're certainly lots and lots of room for improvement. And even if you curtail the ability of senators to

use the filibuster, extended to be, there're lots of other avenues. You can filibuster by offering amendment the size of the Manhattan telephone directory.

And as we've seen when Sen. McConnell asked that the Sen. Reid's majority manages amendment be read, I think that took seven or eight hours. And so you have the clerk do the reading for you and you urge that clerk to read slowly because every word is important. So those are just sort of a few off the cuff comments and I don't want to filibuster myself, but that's it.

SEN. UDALL: Yes. When we talk about the House and say we don't want the Senate to become like the House, I think we first of all need to remember that in the Constitution, we designed the Senate so that it would not be like the House in a fundamental way. And that will always be there, unless we make a constitutional change. And that is that two thirds of the senators are always a fairly long ways from an election.

At this particular point in time, I am five years from an election. Two thirds of the senators are in my situation. So when we talk about the Senate being a cooling force, when we talk about the Senate slowing down things and being deliberative, but still doing something, it's the structure of a third elected two years, a third elected two years, a third elected two years that I think builds in that principle. That's the first thing that I think is important.

And the House has – and if you look at the House rules, the House has, every time there's a partisan change, dramatically changed the rules. It's usually when there is a reform movement, there is a change, but the House rules are tweaked a little bit, but they're the same rules. So there isn't a pattern necessarily over there.

The final thing I would say about your question about Sen. Byrd – and I know there're going to be other comments here, but just on the constitutional principle of one legislature binding a successor legislature. He is quoted as saying, “we should not be ruled by the dead hand of the past.” And I think that that's a very appropriate comment in light of what we're trying to do in the constitutional option.

MR. MANN: I'd just simply footnote and underscore what Sen. Udall said. One of the quotes – one of my favorites, Walter, when Sen. Byrd was a majority leader in 1979, trying to push a change in the post-cloture debate, post-cloture filibuster matter, said, it is my belief, which has been supported by rulings of vice presidents of both parties and by votes of the Senate, in essence upholding the right in power of a majority of the Senate to change the rules of the Senate at the beginning of a new congress.

Now, as you know, that ended up being a threat. It produced the change. And then they kind of removed any hint of precedent there, but in fact Sen. Byrd has stated that. I also think it's interesting to know that there haven't been the radical changes in the House rules with the change of party control. And I have the feeling you will – as long as you don't sort of completely eliminate the possibility of some extended debate, that there're enough structural features and incentives to provide continuity in those in the Senate as well.

MR. THURBER: Scott?

MR. LILLY: I – the point was well made.

MR. THURBER: Let's go to another question from the audience, comment, question, please. Let's go over here to the left first.

Q: Jack Liebowitz (sp). In talking about the financing, could we have – is it possible to get public financing of all senators and congressmen?

MR. THURBER: Let's go to the senator first.

SEN. UDALL: Yes, I – and that's what I was suggesting earlier. If you have a system – Dave Obey and I worked in the House of Representatives on a proposal that I'm considering right now on the Senate. And Obey was such a student of the process. And what he determined, he said, "let's look" – and we have these discussions. He said, "let's look at a system where you try to maximize the time being spent on legislation and minimize the time in fundraising." And so what you did is take out all of the private money, the corporate money, all of it, and ban it. That means you're taking head on Buckley v. Valeo, which I think you have to take that head on if you're serious about campaign finance reform.

Buckley v. Valeo, I believe, was wrongly decided. So you've got to take that head on. And so you pass a piece of legislation, but the one last hope, I think, is to pass a structure where you take all the money out. You have individuals contribute money to a clean campaign fund. What if you, at the beginning of every year for four months, you allow the FEC to advertise and say, citizens of America, you have a chance to get all the special interests money out, contribute money to a clean campaign fund?

And you fill up that fund and distribute it in general elections based on a formula. We would have much more competitive elections. We would return to elections being the marketplace of ideas, with citizens picking what they thought were the best ideas, rather than whoever has the biggest checkbook, whoever has the biggest checkbook.

So you all need to push for it. The American people need to push for this. It's a ways off right now, but I believe that that helps everything we're talking about up here. I want to underscore you want your legislators doing less fundraising, more time on legislating. And that – they're going to fulfill the wishes of the American people if you do that.

MR. THURBER: One follow up with you, Senator, do you think that Citizens United decision is helping that movement to have more reform?

SEN. UDALL: Yes, I do. Jim, I do. I think Citizens United has really crystallized the argument for everyone because for 100 years, we basically had no corporate money in the process. You allowed voluntary packs, which corporations which grew since the big reforms in the 1970s, but we were limiting.

Now, the flood gates are open. The expectation – the other day, I was astounded. At our state level, our state races, when people run in a small state like New Mexico, for a statewide office, you're spending a couple of hundred thousand dollars. People are now expecting the flood gates of corporate money to come in and million of dollars be spent in those races by a variety of organizations.

So as people learn and know about that, I think it'll give us an impetus to try to tackle campaign finance reform regarding that decision. We're on the strongest footing constitutionally, the way that cases are now, for disclosure and transparency. That's – we can do that now. And so you can say the CEO has to be on television and you can disclose all the donors, but otherwise, if you want the big reform the gentleman asked about, you're going to have to take on *Buckley v. Valeo*.

You're going to have to send up the system. And then, if they declare it unconstitutional, you're going to have to amend the Constitution to allow the kind of regulations and legislating that the Congress needs to do in this area. And Sen. Dodd and I are on a constitutional amendment right now that I think forces that issue.

MR. THURBER: Tom Mann has written several books. He'd studied campaign finance for years. He's been involved in the reform. That's why it's working so well right now, Tom.

MR. MANN: We've done a brilliant job. Listen, this panel has been so agreeable. It's time we had a little disagreement. And I'm going to disagree with the senator on this. I don't think banning all private money in elections and campaigns would be a good thing. I also don't think it's constitutionally possible. It would take a constitutional amendment and it would, in my view – and it would seem very much to go against sort of free speech guarantee of the first amendment.

I also just think having citizens put a little skin in the game is something useful. Some market tests for candidates to raise money is a good thing, getting individual – my son got really excited this last time. And he doesn't – he makes very little money, but he made contributions on the internet to an unnamed presidential candidate several times and had a sense of engagement and participation.

Also, I think there's nothing attractive for most citizens to give to a fund that could go to one of the politicians they most despise, whose ideological views they detest. They want to give to people that they admire as individuals, as members of parties, as espousing of public philosophy. Therefore – but I'm for public funding. But I think we ought to be thinking of multiple public matches for small donations that increase the incentives of members of Congress who now get a very small percentage of their funding from small donations, to actually cultivate and go after small donors.

Give them four or 5-to-1 matches, up to a limit, not handing them a grant if they qualify by getting a few names on petitions. That's too vulnerable to charges of welfare for politicians. But let the individual citizen and donor be empowered. Let that contribution be magnified.

Change the incentives of politicians. You're never going to eliminate the role of wealthy people in politics. They are – if they're prepared to act independently, they can do a lot.

Yes, I'm offered the transparency disclosure response to Citizens United. And I thought it was a lousy, awful decision. But in general, I think full public financing, as an idea, has come and gone just in terms of pure constitutional political feasibility and that we ought to get behind a plan to empower the small donors through matching public funds.

MR. THURBER: Let's go to another question. Let's go to Sarah Dufendach, who's head advocate lobbyist for Common Cause. She doesn't call herself a lobbyist, but do you have a question, Sarah?

Q: First of all, I'm just delighted with all the conversation of this panel. Congratulations to all of you. Common Cause is working on all these issues and private-public financing, just like the system you're talking about, Mr. Mann, is one of our big issues.

But kind of back to the filibuster, I agree that there is much to be said that rules in the Senate can be changed by a majority vote, just like it takes majority vote on final passage of bills to pass them. The problem is getting to final passage. And my fear is that in the beginning of next year, when you move to change the rules of the Senate, that that can be filibustered. That's what my fear is, and maybe you can comment on that.

SEN. UDALL: This is – I think I'm back to the Norm Ornstein box again, if I understand your question, which is true in the filibuster rule that it specifically says that 67 votes are required to change the rule. And if you just go by the confines of the rule, you basically are stuck there.

But as it's been pointed out, and more has been pointed out just in my opening comments, the Senate began – if you go all the way back to the history of the early Senate, from the beginning to 1806, there was a motion to order the previous question. For those of you that are real students of the House today, you see that. Every time you move to a vote on the final bill, there is a vote before that on the motion to order the previous question. It is normally a party line vote. It's considered a procedural vote, but it's cuts off debate and then you move.

The Senate had that in place until 1806. And then, it apparently was dropped aside because it wasn't used. It wasn't used. There was so much respect that if you were a senator, you were allowed to stand up and talk for how long you wanted to talk. And then the rest of the body went and legislated.

Now, we've got ourselves into the situation where a minority can determine what the majority will do. We've really given them the power to obstruct and to prevent us from doing anything. And so what the constitutional option is – is let's look over the next 10 months at how we can change the rules to allow the majority will to go forward, but also protect minority rights. And it's grounded in the Constitution, not in the Senate rule.

You're jumping outside of the filibuster rule saying 67 votes to change the rules. You go to the Constitution. No place in the Constitution is it mentioned that a supermajority is needed to change the rules. In fact, it just says, "adopt the rules of its proceeding" and only seven places in the Constitution does it specifically mention supermajorities for things like override of a veto or adopting a treaty or something along that line.

So I think that this gives every senate the ability, at the beginning of a congress, to look at what happened in the previous congress and be able to tweak the rules. My hope is really, as you move down the road to doing this, it brings everybody closer together, Democrats and Republicans, to try to say, you know, let's be fair to the other side, but hey, when we got a majority, let the majority act. It was elected with a mandate to do something. Let them act. And then, they're accountable at the next election for how they acted. And if they overreact, then citizens can take that out at the ballot box.

MR. MANN: Just a procedural footnote to what the senator said. The way it would work is that the chair, the presiding officer would rule favorably on a motion by the majority leader to adopt a new set of rules, presumably someone would challenge that on the ground that it's in violation. The chair would deny it. There would – the chair's already made a statement. It's a motion to overrule the chair. The majority would then move to tabling. A tabling motion is non-debatable, and therefore can pass by simple majority. So you could, in effect, uphold the ruling of the presiding officer, creating the basis for changing the Senate rules by majority.

MR. THURBER: Let's go to another question over here on the left, the gentleman in the sweater. Right there, please.

Q: Hi, my name is Charlie Zito (sp). Is it on? I've just had my 75<sup>th</sup> birthday, so I've been around a while and I worked on a lot of campaigns. And a lot of intelligence up there and you're working the issue. I've also run a lot of companies. And let me just try a different stroke.

We're engaged in two wars. We're recovering from what we're disguising as a deep recession. It's a depression. We have a broken health care plan. And the people who are charge are acting like a French court. You're worrying about the rules. You're worrying about not hurting each other's feelings.

How about some humility? How about some patriotism? How about some understanding that we, the citizens, are getting angry? It scares the hell out of me that we're the most armed country in the world. We've got idiots running around with tea bags on their head and guns behind them.

And we're sitting around saying, well, let's change this rule or let's change that rule. Let's start moving with a sense of urgency. And Sen. Udall, I wish you the very best. I will pray for you. I'll work for you, whatever you need, but let's get moving, guys. Enough. I'm done. (Laughter.)

SEN. UDALL: Just a brief comment. And I understand the passion. And I think what you're going to see – this is a debate by a very skilled and talented panel to try to educate on an

issue. You're going to see from the Congress and from the Senate, in the next couple of months, major pieces of legislation focusing on jobs and economic development and pulling this out of a recession, on financial reform to fix all that it never happens again, health care reform.

And the president has put out there his proposal and I think we're going to get that done. And my guess, by the summer, we're going to have some major things in place. It's going to be big fights. Some of it will be done under reconciliation. But it has to get done and it has to get done for the American people.

MR. THURBER: And with that, we're going to close. I want to thank the Center for American Progress and Scott Lilly and the staff here and the staff of the Center for Congressional Presidential Studies at American University for their work. Gentlemen, thank you very much for your remarks. (Applause.)

(END)