

RECONCILIATION ... A LITTLE ON “FILIBUSTER”, AND CLOTURE ... AND AN INTRODUCTION TO THE SENATE’S ROLE IN ALL OF THIS

Stephen L. Bakke – December 20, 2010

You’ve got to break out of what I call, sort of, the 50-plus-one pattern of presidential politics. Maybe you eke out a victory of 50-plus-one, then you can’t govern. You know, you get Air Force One, I mean there are a lot of nice perks, but you can’t deliver on health care. We’re not going to pass universal health care with a 50-plus-one strategy. – Then Senator Barack Obama in 2007 – Really changed his tune hasn’t he! – He just supports what is convenient at the moment.

Reconciliation was intended to adjust revenue and spending levels in order to reduce deficits ... [I]t was not designed to ... restructure the entire health care system ... violate the intent and spirit of the budget process, and do serious injury to the Constitutional role of the Senate. – Senator Robert Byrd (D-W.V.) one of the original authors of the reconciliation rule, often referred to as the ‘Bird Rule.’

Late in the fight over passing Obamacare, for a while all we were hearing about was the tactics to be used by the Democrats to pass the legislation without having 60 out of 100 votes in the Senate. Don’t both houses of Congress require a simple majority to pass legislation? Well, yes. Then what’s this all about?

Reconciliation – in 100 Words or Less

Reconciliation is a process developed by Senator Robert Byrd, et al, several decades ago for use in adjusting budget items. It was structured to get around the Senate rule which traditionally has allowed unlimited debate. Unlimited debate, unique to the Senate, came to be known as a “filibuster.” In order to stop debate and bring legislation to a vote on the floor, the Senate established “cloture” rules. It is this cloture rule that requires a vote of 60 senators. Once on the floor for a vote, 51 votes will provide passage – but it takes 60 votes (a supermajority) to get to that point.

But They Haven’t Been Debating!

A more recent Senate rule permits “debate-less debate” whereby there is no longer “continuous” discussion going on. This was a practical change – sometimes Senators just read from the dictionary. The Senate can now proceed with other business while the politics go on in the background. Once Senate leadership feels they have 60 votes to bring cloture, they can force a cloture vote and bring the legislation to the floor for an “up or down” vote.

What's the Democrats' "Beef"?

Here's what our President had to say in a February 7, 2010 interview with Katie Couric:

I would have loved nothing better than to simply come up with some very elegant, academically approved approach to health care, and didn't have any kinds of legislative fingerprints on it, and just go ahead and have that passed. But that's not how it works in our democracy. Unfortunately, what we end up having to do is to do a lot of negotiations with a lot of different people.

“Academically approved approach”? Ever the aloof and elitist professor! “Democracy”? No, we are a republic (the topic for another day)! “Unfortunately ... negotiations”? GOOD GRIEF! Our President and the democrats appear to have a real problem with our form of government. George Will recently wrote:

Liberals say filibusters confuse and frustrate the public ... Liberals are deeply disappointed with the public, which fails to fathom the excellence of their agenda. But their real complaint is with the government's structure. And with the nature of politics this structure presupposes in a continental nation wary of government and replete with rival factions. Liberals have met their enemy, and he is the diminutive “father of the Constitution”, James Madison.

But Obama did seem to have an understanding of our form of government when he made this statement as a Senator in 2005 – acting very appropriately as a member of the “loyal opposition” to President Bush and the Republicans:

You know, the Founders designed this system, as frustrating (as) it is, to make sure that there's a broad consensus before the country moves forward.

He's like a chameleon – talking from both sides of his mouth and alternating support for all sides of every issue – whatever suits the situation. GOOD GRIEF!

But Why Are the Republicans Complaining – Haven't They Used Reconciliation More Than the Democrats?

For this discussion I am relying heavily on the reporting and analysis by the Congressional Research Service and by National Review Online.

Reconciliation has been used to enact legislation 19 times. The types of legislation using reconciliation cover everything “from soup to nuts.”

As to whether Republicans have been the culprit in a vast majority of reconciliations, I believe no such pattern is apparent. Remember, for reconciliation to be successful, both houses of Congress must cooperate. Since a partisan use by the Carter administration and a lame-duck Democratic Congress to pass relatively modest tax hikes and spending cuts,

reconciliation has been used under every conceivable combination of Republican and Democrat control.

National Review Online discovered that “all seven reconciliation bills enacted on President Reagan’s watch ... required the cooperation of a Democratic controlled House. And after the Democrats regained control of the Senate in 1987, [he] negotiated a reconciliation measure with an entirely Democratic Congress. Similarly the first President Bush negotiated two reconciliation packages with Congresses controlled entirely by Democrats ... Bill Clinton negotiated a reconciliation measure with a Democratic controlled Congress in 1993.”

In 1994 Republicans gained majorities in both houses of Congress and Clinton worked with the Republican controlled Congress on three reconciliation bills. George W. Bush had Republican controlled Congresses on four reconciliation measures including the dramatic tax cuts of 2001 and 2003. In 2007 he and the Democrats worked together on a relatively minor reconciliation bill.

National Review Online concludes: “In keeping with the American tradition of demanding that consequential legislation enjoy broad bipartisan consensus, the most ambitious reconciliation bills of the past have been widely popular on both sides of the aisle. In these cases, reconciliation was used for procedural reasons, not to force through a bill that couldn’t get 60 votes. That leaves three reconciliation battles that were both high-stakes and highly partisan: President Clinton’s tax increase of 1993; the Gingrich Revolution’s pivotal package of tax and spending cuts in 1995; and the acceleration in 2003 of Pres. George W. Bush’s signature tax cuts.”

After a comprehensive review, I believe that there is no precedent for using reconciliation to enact a “once-in-a-generation” rewrite of the relationship between the government and U.S. citizens – one “that appeals exclusively to one side of the aisle.”

Senate Rules, Filibuster, Debate-Less Debate, Cloture – Is there Any Constitutional or Historic Basis for These Developments?

Let’s go back to consider the intent of the Founders. A great way to do so is to review the Federalist Papers which were written to explain the Constitution, clarify our form of government, and to give background as to the Founders’ logic and thought process. The authors and supporters of the Constitution could envision the possibility of one or more states voting against the new government in the state ratifying conventions. Alexander Hamilton, along with James Madison and John Jay, began a series of essays explaining and defending the Constitution. These efforts collectively became known as *The Federalist Papers*.

Notwithstanding what I present here, not everyone agrees that the filibuster rule is truly in keeping with the Founders’ intent. Nevertheless, I believe it is consistent with the Founders’ intent and I reach that conclusion in the context of their choice of forming a

“republic” not a “pure democracy”, and their stated fear of a “tyranny of the majority.” I believe their intentions were clear and sound – and they remain relevant.

Consider the following expression of the Founders’ serious concerns about a pure democracy as found in some ancient governments:

Enlightened statesmen will not always be at the helm ... Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob. – James Madison, Federalist No. 55

Thomas Jefferson said it in a different way:

Great innovations should not be forced on slender majorities.

Consider the following comments referring to having different branches of government separate and distinct, but not so far separated that they have no constitutional control over each other. This philosophy is carried forward to different elements of the same branch of government e.g. the House and the Senate. The first quote deals with a prediction that bad things can happen from total separation of branches of government. The second refers to the solution. Here they are:

The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. – James Madison, Federalist No. 47

[The form of government being explained] does not require that the legislative, executive, and judicial departments should be wholly unconnected with each other ... these departments be so far connected and blended as to give each a constitutional control over the others. – James Madison, Federalist No. 48

The following is a brief quote explaining why the Senate is not to be proportionate to population, thus guarding against domination by the large states:

A government founded on principles more consonant to the wishes of the larger States is not likely to be obtained from the smaller States ... the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and instrument for preserving that residuary sovereignty ... Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then a majority of the States. James Madison (probably), Federalist No. 62

The last two sentences above show the inspiration for the eventual rules that permit a single person, perhaps from a small state to filibuster and continue debate while

attempting to defeat a measure that may be bad legislation and has only a thin majority supporting it. Madison goes on to acknowledge that sometimes this process can have less than ideal results, but that the importance of the goal outweighs potential negatives.

A similar sentiment is expressed again in a later paper – essentially this may help protect people from their own temporary “foolishness”:

I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. –
James Madison (probably), Federalist No. 63

Following is an expression of the Senate’s role intended to be accomplished through (by comparison with the House) its higher minimum age, Senators’ longer term in office (6 vs. 2 years) and the non-proportional representation. This shows their belief in the necessity of wise balances and compromises:

... the necessity of some institution that will blend stability with liberty ... liberty may be endangered by the abuses of liberty as well as by the abuses of power. –
James Madison (probably), Federalist No. 63

A consistent theme is seen throughout – checks and balances. And the Senate has an important role in that process. Specifically as a “non-proportionate” representative body which is there for a cautious look, and balance on others’ “folly.”

So, In Summary

While the House of Representatives is intended to provide proportionate representation, the Senate was set up as a “check and balance” on the pure majority required in the House votes – particularly a thin majority. The Senate gives each state, big or small, equal influence in deliberations and voting. In the House, the minority can be frozen out of discussion. In the Senate, the minority has an opportunity to be heard and influence legislation. IT WAS DONE ON PURPOSE! IT WAS INTENDED TO BE DIFFICULT AND MESSY for our legislators to transform our country!

Given the Founders’ desire to keep a check on possible tyranny of a simple majority (clearly preferring broad bipartisan consensus for major issues), and the other concepts stated and implied by the Constitution, The Bill of Rights, and the explanations about the Senate’s role contained in the Federalist papers, the concept of filibuster and the supermajority required for cloture clearly are logical applications of the Founders’ intentions. As Thomas Jefferson wrote:

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed.