

Partisanship And Procedural Battles In The U.S. Senate, 1960-2010

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Preface

Over the past quarter century, a parliamentary arms race between the parties has emerged in the U.S. Senate. These developments have caused considerable confusion among senators, the media, and the public about the Senate's recent history. Filibusters, reconciliation, holds, unorthodox post-passage mechanisms, and other developments have spurred waves of commentary, much of it inaccurate and ahistorical.

In this report, Professor Steven Smith places recent developments in the larger context of the Senate's modern history. The report is essential reading for journalists, columnists, bloggers, scholars, and commentators concerned about today's Senate politics.

Professor Smith is the country's preeminent scholar of Senate politics and policy making. He is the Kate M. Gregg Distinguished Professor of Social Sciences, Professor of Political Science, and the Director of the Murray Weidenbaum Center on the Economy, Government, and Public Policy at Washington University. He has taught at George Washington University, Northwestern University, and the University of Minnesota, where he was the Distinguished McKnight University Professor of Political Science and Law. He has authored or coauthored several books on congressional politics—*Party Influence in Congress* (2007), *Politics or Principle? Filibustering in the United States Senate* (1997), *Managing Uncertainty in the House of Representatives* (1988), *Call to Order: Floor Politics in the House and Senate* (1989), *The American Congress*, a Cambridge University Press textbook, which is in its sixth edition. He has worked on Capitol Hill in several capacities, served as a Congressional Fellow of the American Political Science Association, and was a senior fellow at the Brookings Institution. He served as the chair of the Legislative Studies Section of the American Political Science Association, served on the Executive Committee of the Research Committee of Legislative Scholars of the International Political Science Association, and served as a member of the board of directors of the Dirksen Congress Center. He served as an editor of *Legislative Studies Quarterly* and on the editorial boards of the *American Journal of Political Science*, *Journal of Politics*, and *Congress & the Presidency*.

The Procedural Senate, 1960-2010

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The United States Senate, known for the stability of its rules, exposed its procedural fragility in the first decade of the 21st century. The parliamentary arms race between the parties that has unfolded in the Senate in recent decades eventually brought the Senate to the brink of chaos in 2005. Tensions had been building for years—minority obstructionism motivated majority countermoves, generated partisan incrimination, and led to more obstruction and preemptive action. In the spring of 2009, the majority leader promised to change the application of Senate’s most distinctive rule, Rule XXII, by a ruling of the presiding officer, rather than suffer more delay in acting on several judicial nominations. The minority promised to retaliate by “going nuclear”—making the Senate ungovernable by obstructing nearly all Senate action—but a small group of senators negotiated an arrangement for either the majority or the minority to follow through on their threats. In the view of many observers, including many senators, the episode brought the Senate to a new state of dysfunction. It remains there.

The Senate’s procedural apparatus is now much more complex than it was in the mid-20th century. The distinctive feature of Senate parliamentary procedure is the ability of a large minority of senators to block votes on most legislative matters. Consequently, the most important developments in the Senate modern procedural history concern adaptation to, circumvention of, or reform of the super-majority requirement for cloture under Rule XXII, which requires a super-majority of senators to support a cloture motion in order to impose limits on debate and amendments. The possibility of obstructionism and the details of Rule XXII provide the foundation for much of the Senate’s decision-making machinery. Exploitation of Rule XXII by minorities and majority responses have forced strategists to be far more expert in parliamentary rules and precedents, encourages more gamesmanship by senators and their parties, and intensifies frustration with the Senate among both insiders and outsiders.

At least five temporally overlapping and mutually reinforcing developments contributed to the emergence of the Senate’s new procedural environment. First, the passing of the civil rights era of the 1960s freed conservatives, particularly Southern Democrats, to use the filibuster to oppose the broader legislative agenda of the liberal majorities of the 1970s. Second, the incentives for senators to exploit their personal procedural prerogatives amplified as the lobbying community expanded and electioneering pressures intensified through the 1960s and 1970s. Third, minority strategies from the House of Representatives, where minority party Republicans adopted all-out opposition strategies as standard operating procedure in the late 1980s, were adapted to the Senate as House members were elected to the Senate. Fourth, competition with the president, who often has exploited his own

popularity, national security threats, and Congress's sluggishness to expand his power, has led the Senate to incorporate limits on debate in larger packages involving checks on the exercise of delegation power. Fifth, movement from a pluralistic Senate, one in which voting coalitions shifted from issue to issue, to a polarized Senate, one in which the parties are sharply divided on most issues, has encouraged elected party leaders to more aggressively use the procedural tools at their disposal.

This report focuses on the consequences of these developments for the way the Senate conducts legislative business. I ask how the Senate, a body of legislators who long took pride in the informality and civility of their deliberations, became so obsessed with parliamentary procedure, as they are today.¹ I conclude by noting a few of the lessons from the story about the role of the Senate, the blame to be attributed to senators and the parties, and the prospects for reform.

The Procedural Condition of the Senate, Circa 1960

The Senate of the mid-20th century had settled into a fairly stable procedural pattern. The cloture rule, Rule XXII(2), was modified in 1949 to clarify that cloture may be applied to procedural motions (such as the motion to proceed), thereby making it possible to limit debate with the requisite number of votes and get a vote on a bill. In 1959, the Senate changed the majority required for cloture from two-thirds of senators duly chosen and sworn (67, when 99 or 100 seats are filled) to two-thirds of senators present and voting. The 1959 rule also explicitly provided that cloture may be applied to motions to consider changes in Senate rules. With the 1959 rule in place, the Senate enacted the major civil rights legislation of the 1960s and early 1970s. In 1975, the threshold for cloture was reduced to three-fifths of senators duly chosen and sworn, except for measures that change Senate rules, for which the threshold at two-thirds of senators present and voting was retained. The 1975 thresholds remain in place.

1960 was Lyndon Johnson's last year as majority leader. Johnson was lauded for his personal skills and tactical maneuvering as leader, but he struggled throughout his service as leader to manage the deep divisions within his party on civil rights legislation. Indeed, the mid-20th century efforts to reform Rule XXII were championed by liberal Democrats who were motivated primarily by the need to overcome filibusters on civil rights legislation. Johnson did not champion cloture reform, usually hoped that reformers would not press for reform, and, in 1959, played an instrumental role in finding a compromise that would be acceptable to the major factions of his party.

¹ This chapter limits its focus to floor parliamentary procedures in the Senate. Rules and precedents related to the content of legislation, the committee system, ethics, and other issues are not considered.

Johnson's Senate of the 1950s was one with only a few procedural innovations. Most bills were considered on the floor by unanimous consent, with only about one out of 50 passed bills considered under any "time agreement," as they often were called (Smith and Flathman 1989). These agreements—often called unanimous consent agreements or "UCs" in Senate lingo—can be used to supplant or substitute for standing rules and precedents governing floor procedure. The difficulty of limiting debate through Rule XXII leads the majority leader, bill managers, and others to seek unanimous consent to limit on debate and amendments. Since 1914, unanimous consent agreements have been treated as orders of the Senate that are enforced by the presiding officer, but they require unanimous consent and so require senators' tolerance of the limits proposed.

Although time limitations on debate had been imposed by unanimous consent for many decades (Keith 1977), they were sought and approved more frequently by Johnson. Most *major* bills during the late 1950s were subject to a unanimous consent agreement that limited debate on the bill, amendments, and motions. In most cases the time-limitation agreements were reached after the measure had been debated for a while, although Johnson often worked hard to get a time limit in place before bringing to the floor one of the few measures that might be subject to a filibuster.

The vast majority of Johnson's time agreements took a form that had been standardized before he arrived in the Senate (Smith and Flathman 1989, Roberts and Smith 2007). Nevertheless, more frequently than his predecessors, Johnson successfully propounded time agreements before the motion to proceed on a measure was offered, which gave the length of debate on major bills more certainty from the start. Moreover, Johnson's agreements more frequently divided control of time for general debate on a bill between the floor leaders, giving Johnson more control over the flow of debate and an opportunity to offer amendments of his own in a timely way. Johnson also sought to keep the Senate focused on the bill at hand by barring non-germane amendments in his unanimous consent agreements when he could. Johnson's agreements also were more likely to provide for special treatment of one or more amendments than were his predecessors' time agreements.

In the main, Johnson was a force for the procedural status quo. With the support of Republicans and southern Democrats, he successfully avoided efforts by Democratic liberals in 1953 and 1957 to gain floor consideration of cloture reform resolutions. In 1959, he preempted the liberals with the modest proposal that was negotiated with Republican leaders and adopted after a simple-majority cloture proposal was defeated (CQ Almanac 1959).² The Senate entered the 1960s with

² Johnson made a further commitment to southerners by amending Rule V to provide that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." This rule was later challenged on constitutional

liberals continuing to agitate for reform.

The Struggle to Tame the Individualistic Senate: 1960-1988

The 1958 and 1964 elections greatly strengthened the liberal faction of the Senate majority party. In 1963, 1967, 1969, and 1971, an effort to invoke cloture on reform proposal received majority, but not two-thirds, support. The majority leader, Mike Mansfield, who was not the task master that Johnson attempted to be, sympathized with reformers but generally stood for Senate traditions and against reform. The result was stalemate on cloture reform until 1975.

Elaboration of Unanimous Consent Agreements

Unanimous consent agreements designed to structure floor action evolved in important ways. Even before Johnson left the Senate for the vice-presidency, the Senate began to change in ways that made the standard form unworkable in some situations. A major problem was that the standard form allowed intervening amendments and motions to lengthen floor consideration of a measure. A more assertive membership proved increasingly unwilling to accept unanimous consent requests to impose a general limit of debate on amendments and instead insisted on limits tailored to individual amendments. Most of this came to be done on an ad hoc, amendment-by-amendment basis, but sometimes it what accomplished in long agreements that listed many amendments. To further close loopholes that senators learned to exploit, leaders began to offer agreements that barred intervening motions.

By the end of Johnson's service as majority leader, resistance to the routine inclusion of a germaneness requirement for amendments had begun to surface. During the 1960s and 1970s, leaders could seldom gain approval of a blanket prohibition of nongermane amendments. In the early 1970s, several senators objected to Majority Leader Mike Mansfield's standard request that agreements be in the usual form, which included the germaneness requirement. This came to a head in 1971, when Senator Jacob Javits complained, "I have seen unanimous-consent agreements entered into in which the rule of germaneness was never mentioned here; but when we read it in the order the next day, the rule of germaneness was there" (*Congressional Record*, October 27, 1971, 37729). In fact, Mansfield, following Johnson, frequently asked for the agreement in "usual form" without mentioning the germaneness restriction. In response to objections, Mansfield promised to give the Senate notice of future requests for a germaneness restriction and indicated that he would consider eliminating the germaneness provision as a part of the usual form (*Congressional Record*, October 27, 1971, 37730). I have been unable to find evidence of any follow-up action on Mansfield's

grounds by Democratic liberals and vice presidents Hubert Humphrey and Nelson Rockefeller.

part, but the Javits-Mansfield exchange exemplified the resistance of activist rank-and-file senators to the standardized procedures that mid-20th century majority leaders had relied upon.

As senators insisted on protecting their procedural prerogatives, majority leaders' efforts to manage the floor required longer unanimous consent agreements that were customized in response to senators' demands. Such agreements protected a senator's right to have an amendment considered, whether it was germane or not, guaranteed all senators an opportunity to debate an amendment, and, as the majority leader desired, still provided some order to floor consideration of amendments. Unanimous consent agreements became highly individualized and far more complex.

Senator Robert Byrd, who became Mansfield's assistant leader in 1971 and was active on the floor before that, took the lead on a number of innovations. Byrd aggressively pursued a tactical use of time agreements, frequently offering multiple agreements for floor action of amendments for a single bill to speed floor action whenever possible. An agreement for a single amendment became common, as did agreements that barred second-degree amendments and subsidiary motions.

Tracking and Holds

Tracking, holds, and clearance practices emerged under Byrd's guidance. Tracking—sometimes called the “two-track system”—emerged in 1972 as a way to allow a filibuster to continue on a measure while, at other times in the day, the Senate acts upon other legislation (CQ Almanac 1972, 1973). Majority leaders have sometimes opted to force the Senate to devote all of its time to a filibustered bill (notably, Byrd did this for a labor bill in 1977, not long after inventing the approach). Observers have noted that tracking may reduce the disincentive to filibuster by reducing the backlog of legislation a filibuster otherwise causes (Smith 1989). Majority leaders continue to seek unanimous consent to bring up and pass other legislation during filibusters.

Holds and clearance practices emerged in tandem in the early 1970s (Smith 1989). Holds are requests to the floor leader asking that a measure not be considered on the floor. For a minority senator, a hold represents an expectation that the floor leader will object to a majority-side request to proceed to the consideration of a measure. The practice became regularized in the 1970s as leadership staff recorded holds on their copies of the Senate *Calendar*. Lobbyists began to request that senators place holds on bills to delay action. And senators found that a hold could be used to hold hostage a bill for some unrelated purpose, such as to get a committee chair to commit to considering another bill.

At about the same time, the majority leadership began to clear their plans for taking up measures on the floor in advance with their own membership and with the minority leader. Clearance helped the majority leader avoid surprise objections

to his request to consider a measure, but the practice also contributed to making holds appear to be a right and prompted more holds to be registered. The practice of keeping confidential the identity of a senator placing a hold, which floor leaders may have used to their advantage at times, also may have encouraged holds. During the 1970s and 1980s, repeated announcements by majority leaders that holds are not a right and could be ignored did not make much difference. Leaders still wanted advance notice of problems and senators appreciated the opportunity to exercise something approaching a personal veto, at least for legislation of only modest importance (Smith 1989). Wherever they could, Mansfield (with Byrd's assistance), Byrd, and Howard Baker, the Republican majority leader for the 1981-1986 period, sought a time agreement before debate on a bill started (Table 2) and gain agreement to a debate limit for all amendments (denoted a general limit in Table 2).³

Holds gained their effectiveness as implicit threats to object to a unanimous consent request to proceed to the consideration of a bill and then to filibuster. The threats became more credible and the floor leader's need for predictability increased as the number of actual filibusters increased.⁴ Filibusters, which were rare in the mid-20th century, became more frequent in the late 1960s and 1970s (Table 1).⁵ Oppenheimer (1985) argues that a increasingly severe time constraints, caused by an expanding role for the federal government and a large liberal agenda, increased the value of time to the majority and enhanced the leverage gained by a minority, or even individual senators, through threatened and actual filibusters. It seems likely that time constraints, willingness to obstruct, and leadership practices were mutually reinforcing. It also seems likely that southern Democrats, who once agreed to limit their filibustering to civil rights measures so as not to generate even more interest in cloture reform, contributed to the uptick in filibustering once

³ Information about holds is available only in party and leader records. Only one detailed study of holds from archival records has been done—from the records of former minority and majority leader Howard Baker (Evans, Lipinski, and Larson 2003 and Evans and Lipinski 2005). The study shows that holds are more common in the minority party but more effective in the majority party.

⁴ Holds became a regular subject of complaints from majority leaders, bill managers, and other senators. For a sampling of floor discussion, see *Congressional Record*, April 17, 2002, S2850; *Congressional Record*, December 9, 1987, 34449; *Congressional Record*, February 20, 1986, S1465.

⁵ Establishing a reliable count of filibusters over the past century is difficult. Here, we use data compiled by Binder and Smith (1997). The primary source for their data is the Library of Congress's Congressional Research Service (see Beth, 1995), which relies on "Senate Cloture Rule" (1985) and other internal reports issued by the Congressional Research Service. Beth (1994) lists filibusters eventually subject to cloture votes and, where evidence can be found, filibusters not subject to cloture votes. Binder and Smith (p. 220, Note 15) use Burdette's (1940) history of the filibuster to search for additional filibusters, using the *Congressional Record* to evaluate discrepancies between Beth and Burdette. Finally, annual volumes of *CQ Almanac* (1993-1996) are used to identify filibusters in the 103rd (1993-1994) and 104th (1995-1996) Congresses.

the civil rights legislation of the mid-1960s was enacted and the liberal agenda expanded.

Limits on Debate in Budget Measures

It was in this context of intensifying obstructionism and a stronger but frustrated liberal faction within the majority Democratic conference that the Senate began to take steps to limit debate, at least for limited purposes, in the 1970s. Debate limits were adopted for budget measures as a part of the Budget Act of 1974, which was enacted in the midst of budget battles with the Nixon administration (Schick 2000).⁶ The Budget Act created expedited procedures for implementing a schedule under which budget resolutions and reconciliation measures are considered, procedures that include a 50-hour debate limit for budget resolutions, a 20-hour debate limit for reconciliation measures, debate limits for conference reports, and a prohibition on non-germane amendments.⁷ The Budget Act created points of order to protect restrictions on the provisions of budget measures and floor action, which were extended by the Budget Enforcement Act of 1985 and subsequent amendments thereto. Most notable about the enforcement mechanisms is that a point of order can be waived, or a ruling of the presiding officer overturned, only with a three-fifths majority. These mechanisms include the “Byrd rule,” which provides for a point of order for violation of limits on the content of reconciliation bills.⁸

The experience with the budget process turned Senate procedures on their head. Historically, the Senate did not limit debate but allowed a simple majority to accept (by a motion to table) or overturn (by supporting an appeal) rulings of the presiding officer. In the Budget Act, the Senate accepted debate and amendment restrictions for one of the most important classes of legislation. It did so at a time when competition with the executive branch, with the House, and among standing committees required a grand compromise that was possible only with a credible commitment to a new set of procedures. The Senate minority, after all, had a habit of delaying or killing legislation it did not like and budgets surely were among the most controversial measures. The Senate agreed to limit debate and amendments on budget measures in order to ensure that a simple majority could pass the necessary legislation. Subsequent additions to the enforcement mechanisms were motivated more by conflict among majority party factions that were resolved by medium-term commitments to deficit reduction that were credible only with special procedures. These commitments would be particularly dubious in the Senate, where the habit of overturning rulings of the presiding officer at the convenience of

⁶ Titles I-IX of the Congressional Budget and Impoundment Control Act of 1974.

⁷ The process usually takes longer than 20 hours because motions and amendments may be voted upon without debate at the end of the period, yielding what has been labeled a “vote-a-rama” as the last step in considering a budget measure.

⁸ For background on the Byrd rule, including a review of points of order and waivers considered under the rule, see Keith (2008).

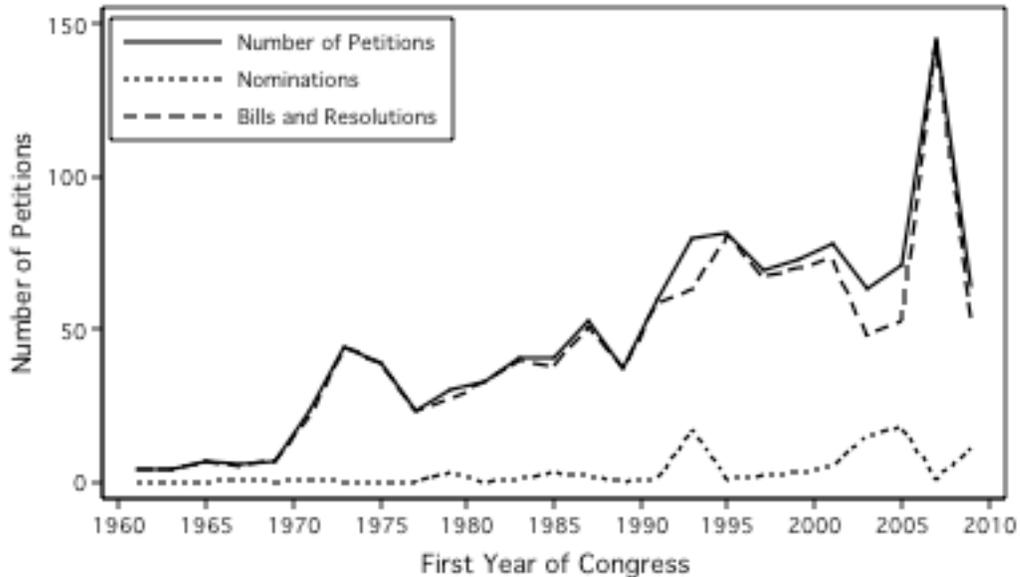
the majority was well established. To add teeth to the Budget Act's provisions, the Senate accepted a three-fifths majority requirement for sustaining an appeal of the ruling of the presiding officer or waiving points of order related to the most important features of the Act. Thus, for this class of legislation, the Senate not only accepted limitations on debate and amendments, but also bound itself more tightly to formal rules that it generally does.

Rule XXII and Cloture

The battle over the cloture rule continued in the early 1970s as liberal Democrats became frustrated with the spread of filibusters to a wide range of issues (see Figure 1). In 1973 and 1974, in what seemed to be an eruption of obstructionism at the time, liberals' legislation on voter registration, the boycott of Rhodesian chrome, legal services, and campaign finance reform were narrowly defeated when the two-thirds majority required for cloture could not be mustered. In 1975, with a cooperative presiding officer in Vice President Nelson Rockefeller, liberals again pushed for cloture reform. Rockefeller, initially backed by a Senate majority, ruled that a simple majority could close debate on a rules resolution at the start of a Congress, opening possibility that a simple majority could reform Rule XXII.⁹ Delays in acting on the resolution caused by a variety of dilatory motions orchestrated by southerners threatened a serious rupture in the party. Mansfield, who opposed Rockefeller's ruling, negotiated a compromise—he persuaded conservative Democrats to accept a threshold of three-fifths of senators duly chosen and sworn (60 if 100 or 99 seats are filled) for most legislation and, in order that the conservatives would not have to fear additional reform in the foreseeable future, persuaded liberal Democrats to accept retention of the old threshold of two-thirds of senators present and voting for measures changing the Senate rules.

⁹ A motion to table the appeal of Rockefeller's ruling was adopted 51-42. A subsequent motion to table a point of order, raised by Mansfield, against a motion to consider the reform resolution was adopted 46-43.

Figure 1. Cloture Petitions.



Source: U.S. Senate website.

Other new limits on debate adopted in the 1970s were less visible. The Senate had accepted debate limits for a few specific purposes, such as executive organization plans, since the 1930s. These rules were placed in statutes and were, at times, controversial. The Reorganization Act of 1939 provided for a joint resolution of approval upon which the Senate agreed to a 10-day limit on debate. Southerners objected but their amendment to remove the debate limit was defeated. Binder and Smith (1997, 189) list nearly three dozen statutes with debate limits, such as for “fast-track” provisions in trade bills. Typically, these statutory rules give the specified legislation privileged status so that it is easily made the pending business, limit debate so that a filibuster is not possible, and ban amendments and extraneous motions. Such provisions were particularly common in the 1970s in legislation in which the Congress both delegated substantial power to the executive branch and insisted on resolutions of approval or disapproval, considered under debate limits and amendment bans, to check the exercise of that power. It is noteworthy that Senate procedures established in statute are not considered changes to Senate rules, which would be subject to the two-thirds threshold for cloture under Rule XXII.¹⁰ The practice continues: The 2010 health care reform bill

¹⁰ Statutory provisions for Senate procedures are nearly always accompanied by a statement that the provisions are enacted “(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such are deemed a part of the rules of each House, respectively, and such procedures supersede other rules only to the extent that they are inconsistent with such other rules; and (2) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the

included fast-track provisions for commission recommendations for programmatic changes in Medicare.

Reform by Ruling. Also notable were a few “reform-by-ruling” episodes that set precedents relevant to the judicial nominations crisis of 2005 (Binder, Madonna, and Smith 2007, Gold and Gupta 2005, and Wawro and Schickler 2006). In these episodes, a new interpretation of a standing rule through a point of order was so different that it effectively changed the rule. This happened in one of two ways. In most cases, the presiding officer agreed to a new interpretation of a standing rule and is backed by a simple majority of the Senate that agrees to table an appeal. It also happened when a point of order was overruled by the presiding officer but then was successfully appealed by a simple majority. The key point is that new interpretations were imposed by a simple majority, usually with the cooperation of the presiding officer.

In the 1970s and 1980s, the reform-by-ruling events involved prominent procedural issues—a post-cloture filibuster of an energy bill, legislating on appropriations bills, whether a motion to go into executive session can indicate the nomination to be considered, and whether repeated requests by senators to be excused from voting related to approval of the *Journal* were dilatory. These episodes were not the first or last, but they reflected the more complete exploitation of procedural options by both parties during the 1970s and 1980s. While none of these rulings concerned the essential features of Rule XXII, they reinforced a precedent that certain limitations on senators’ rights, which could reasonably be viewed as important interpretations or elaborations of the standing rules, could be accomplished through the process of a point of order, ruling, and appeal with the support of just a simple majority.

The 1986 elections returned the Democrats to majority status in the last Congress (the 100th) in which Robert Byrd served as floor leader for his party. Byrd attempted to create more order to Senate proceedings, promising a week off each month in exchange for longer sessions. He attempted to limit roll-call votes to the official 15-minute limit to speed proceedings and, to encourage senators to be present for full day sessions, he held roll-call votes in the early morning—called “bed checks” by some of his colleagues. Byrd’s success was limited and Republicans weary of his surprise parliamentary moves. As Byrd’s service ended, the Senate parties were more sharply polarized than they had been for many decades, senators continued to be frustrated with the quality of life in their chamber due to long

procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House.” Oddly, Senate precedent does not treat provisions of bills that establish special procedures by statute as changes in the Senate rules that are subject to the two-thirds threshold under Rule XXII. See *Congressional Record*, December 21, 2009, S13708-9. Although there is no precedent on this, presumably the Senate could amend such procedural provisions with a resolution that establishes a standing order and, if necessary, would be subject to a three-fifths cloture vote, just as the original bill.

sessions and an unpredictable schedule, the Senate suffered from frequent periods of inaction when senators did not come to the floor to offer amendments, the minority objected to proceeding to bills, and final action on bills awaited cloture votes. The 100th Congress (1987-1988) witnessed the most cloture votes of any Congress to that time—43 cloture votes. Only 12 were successful.

Unorthodox Appropriating—Exploiting the Conference Process, Part I

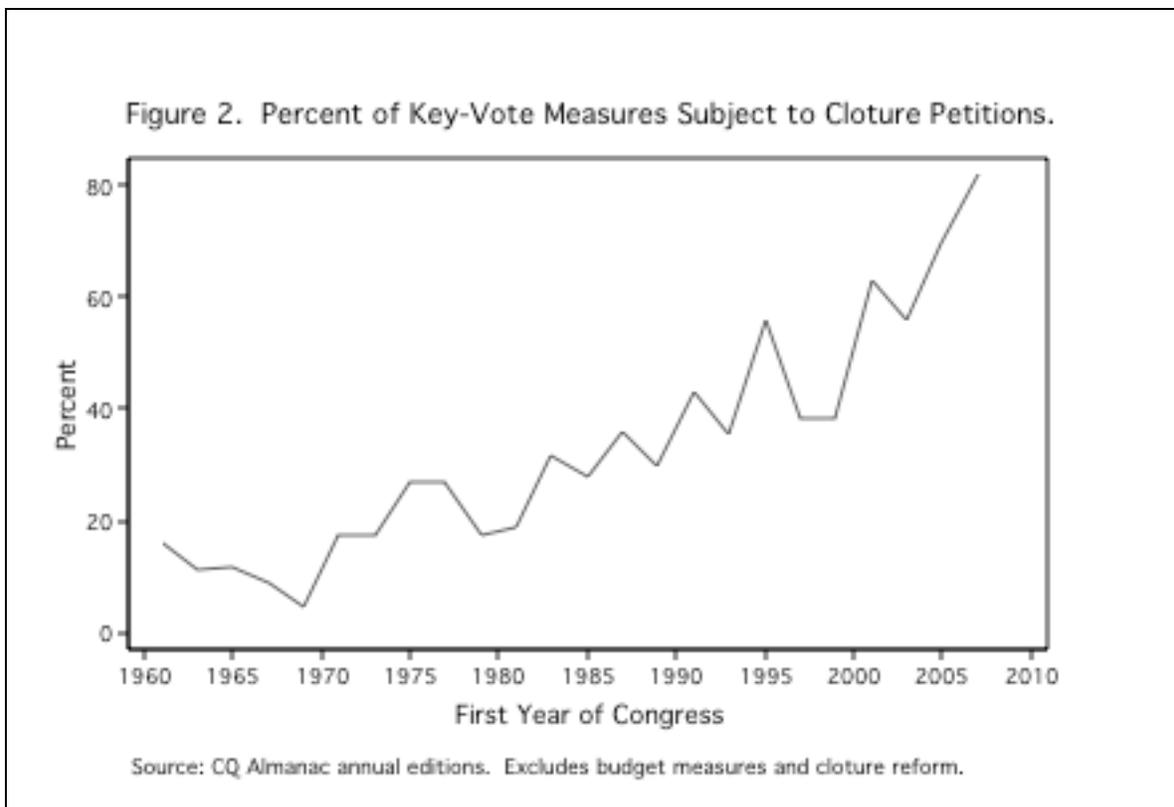
The 1980s also brought large continuing resolutions (technically, joint resolutions) for appropriations that were, in part, both cause and effect of procedural developments in the Senate. Looming deficits, long-delayed budget resolutions that guide appropriations bills, unpopular spending cuts, divided party control of the House and Senate, and threatened presidential vetoes were blamed for untimely or no action on appropriations bills in the Senate. Election year concerns about casting unpopular votes also motivated the majority party leadership to avoid consideration of separate bills at times. In 1982, the Senate had passed just six of the bills, which meant that seven bills were covered by a continuing resolution for the full fiscal 1983. That was topped in 1984, when nine bills, five of which were not considered on the Senate floor, were included in a year-long continuing resolution. And then in 1986 all 13 bills were placed in one measure, four of which had been agreed to in conference and the other nine were negotiated as a part of the continuing resolution, seven of which were not considered on the Senate floor (*CQ Almanac*, 1982, 1984, 1986, Sinclair 2000, Krutz 2001, LeLoup 2005, Hanson 2009).

The importance for Senate procedure was that many of the regular appropriations bills were not considered on the Senate floor and escaped the normal debate and amending process. The large continuing resolutions were negotiated in conferences dominated by appropriations committee members with little input from other legislators. The legislation was then considered on the Senate floor under severe time constraints, sometimes in a lame duck session, as a conference report. A conference report is privileged so that the motion to consider it is not debatable or subject to a filibuster. The report can be filibustered, but necessity to keep agencies funded kept senators operating under severe time constraints. And a report cannot be amended, which handed to conferees substantial discretion over the details of the legislation.

Plainly, with divided party control of the House and Senate and both houses agreeing to the approach in the early 1980s, the primary purpose of omnibus continuing resolutions was not to close amending and debate opportunities for the Senate minority. A lack of time for considering these must-pass bills, inter-party and intra-party differences, and a desire of both parties to avoid difficult votes seem to have generated the conditions that produced a reliance on omnibus bills and the conference process. Indeed, because of dissension within the Senate majority party, some of the bills may not have passed as separate measures without being packaged in larger measures.

The Flowering of the Polarized Senate, 1989-2000

As the parties became more sharply polarized, Senate floor leaders became more centrally involved in negotiating the details of major bills, building the required floor coalitions to pass or block legislation, and shepherding legislation through negotiations with the House. Intense obstructionism by minority parties emerged as cohesive minorities became quite capable of blocking the majority party's agenda in most Congresses. In response, majority leaders continued to innovate in their procedural strategies, but their level of frustration with floor proceedings reached very elevated levels.



Intensifying Obstructionism

Intensifying obstructionism by minority parties and corresponding procedural maneuvers by majority party leadership characterize the last quarter century of Senate history. The number of cloture petitions receiving votes jumped from an average of fewer than 25 per Congress in the 1970s and 1980s to over 50 for the five Congresses starting in 1991 (Figure 1). The percentage of major

measures (key-vote measures, Figure 2) had been trending upward since the 1970s and continued to ratchet upward in the 1990s.

Democrat George Mitchell, elected majority leader in late 1988, sought to improve relations with minority Republicans with more transparency about the schedule, a greater willingness to tolerate debate and votes on key amendments, and, perhaps as a consequence, holding fewer cloture votes (Hook 1989b). Better relations between the parties did not last. Long before his first Congress as leader ended, Mitchell was openly frustrated about the difficulty of gaining unanimous consent to gain votes and expedite business. He struggled with colleagues who failed to inform bill managers of their intended amendments and were slow to come to the floor to offer amendments that they had submitted. He resorted to Monday, Friday, and long sessions to overcome obstructionism, and, predictably, pursued more cloture votes (Alston 1990, Hook 1989a).¹¹ Although it is difficult to document, it appears that Republicans deliberately resisted time agreements to slow action on the Democrats' legislative agenda. The Senate has been in procedural turmoil ever since.

The 1980s Republican minorities under Byrd and Mitchell made it very difficult for the floor leaders to obtain unanimous consent agreements to structure debate before a bill was brought up for consideration (by unanimous consent or a successful motion to proceed). After a bill made it to the floor, the leaders battled, amendment by amendment, to gain time limits on debate, which yielded a highly unpredictable, stop-and-go, floor process. By necessity, majority leaders more frequently sought agreement to bar second-degree amendments to lend some minimal order to the process.

Obstructionism on executive and judicial nominations contributed to inter-party tensions. Senators of both parties expanded the use of holds to block action on nominees in order to gain some leverage with the administration (Hook 1993), but, as is reflected in Figure 1, Republicans forced Majority Leader Mitchell to seek cloture on an unusually large number of executive branch nominees in President Bill Clinton's first two years in office (Doherty 1994, Palmer 1993). Republicans used some nominations to gain leverage on a Justice Department investigation, but others were obstructed for no public reason.

¹¹ In September, 1989, the Senate Committee on Rules and Administration approved a resolution, sponsored by Senators David Pryor (D-AR) and John Danforth (R-MO), to require the third reading of a bill (that is, move a bill to final passage) if 15 minute have passed since the disposition of the last amendment considered or the conclusion of other debate on a bill. Most Republicans, the minority party, opposed the resolution, which was not considered on the floor.

Changing Cloture Practices

Like all leaders, Mitchell looked for ways to move legislative business while struggling with minority obstructionism. Mitchell was quick to seek cloture on motions to proceed once he discovered resistance from the minority party to unanimous consent to bring up significant legislation (Hook 1990). Cloture was seldom applied to motions to proceed until the 101st Congress (1989-1990), Mitchell's first as floor leader. In a few cases, Mitchell withdrew the motion to proceed once the cloture process was initiated so that the Senate could consider other matters while waiting for the cloture vote two days later. If cloture failed, Mitchell had lost little time. Cloture on the motion to proceed now is the most common place to file cloture motions, which reflects minority willingness to oppose legislation at every stage and, at times, the insistence of majority leaders to test the strength of the minority at the start of floor action on legislation.¹²

In 1993, at the start of his last Congress in the Senate, Mitchell proposed reforms of Rule XXII that he hoped would be endorsed by the Joint Committee on the Organization of Congress. His proposals included a two-hour debate limit for motions to proceed, a three-fifths majority to overturn a ruling of the chair under cloture, counting the time for quorum calls under cloture against the senator who suggested the absence of a quorum, and allowing the Senate to go to conference with only one debatable motion (and cloture vote). With minority Republicans opposed, the Mitchell proposals went nowhere.

Soon after the Republicans won a Senate majority in the 1994 elections, Democrats Tom Harkin and Joseph Lieberman again advanced their proposal to ratchet down the number of votes required for cloture from 60 to 51 over a series of votes. The proposal was defeated in a 76-19 vote that found more than half of the Democrats, including Byrd and Democratic leader Tom Daschle, who saw no need to disarm now that they were in the minority, opposing the measure. The majority Republicans opposed reform because they distrusted the Democratic sponsors of the reform and foresaw a long filibuster over the matter that would obstruct action on their Contract with America legislation. It turned out that several of the Contract with America bills were killed by filibuster or radically altered to gain cloture.

¹² Majority leaders since the late 1990s also have attempted to save time by entering a motion to reconsider a failed cloture vote, which allows them to return to another cloture vote without the two-day period required for ripening a new cloture petition. The practice has become routine in recent Congresses as leaders recognized that the approach allows them to return to cloture more rapidly if there is a change in circumstances that makes it useful to do so (Beth, Heitshusen, Heniff, and Rybicki 2009).

New Uses for Reconciliation

Republican leaders Bob Dole, Trent Lott, and Bill Frist became at least as frustrated with obstructionism as Byrd and Mitchell had been. Republican leaders were stuck with the same limited set of procedural tools to structure Senate floor action as their predecessors. The most important procedural development was the use of the reconciliation process, provided in the Budget Act, for the purpose of imposing the debate and amendment limitations and avoiding a filibuster on legislation providing tax cuts (thereby reducing revenues and increasing deficits).

The precedent for passing measures that reduce revenues as reconciliation bills was established in 1996, when a Republican majority rejected a point of order raised by Senator Daschle, then the minority leader, on a party-line vote (*Congressional Record*, May 21, 1996, S5419). The result was the consideration of three reconciliation bills, one a tax bill. It is noteworthy that Mitchell and the Clinton White House considered using reconciliation for health care reform in the 103d Congress (1993-1994), but the idea was opposed by Byrd and considered impractical by the parliamentarian. In practice, reconciliation has been used for a wide variety of legislation, including the creation of federal nursing home standards in 1987 (Democratic congressional majorities) and the Children's Health Insurance Program in 1997 (Republican congressional majorities).¹³ Tax bills taken up as reconciliation measures were vetoed by President Bill Clinton in 1999 and 2000, apparently sanctioned by the Republican-appointed parliamentarian, Bob Dove. Democrats voiced only token opposition to the use of reconciliation for tax measures in those years.

Rising Obstructionism in a Polarized Senate, 2001-2010

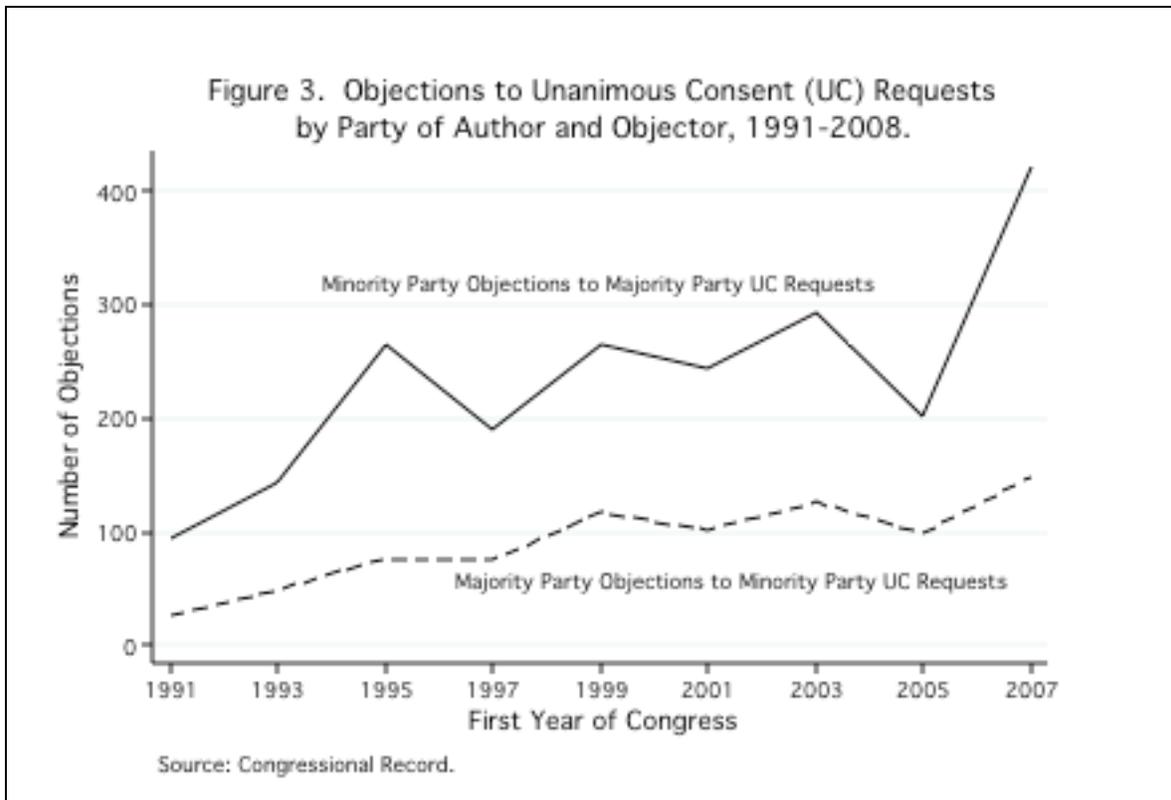
As sharply partisan as the 1990s turned out to be, the Lott-Daschle battle was mere child's play in comparison with what was to come in the first decade of the 21st century. As Figure 1 shows, more bills, including more minor matters, were subject to cloture petitions and votes. At the same time, a much higher proportion of major bills felt the sting of obstructionism (Figure 2).¹⁴ The majority Democrats resorted to cloture for the vast majority of important measures in the 110th (2007-2008) and 111th (2009-2010) Congresses.

Daily floor action now resembles hand-to-hand combat. As Figure 3 shows, the frequency of minority objections to majority party unanimous consent (UC) requests skyrocketed in the new century. In the 110th Congress (2007-2008),

¹³ See Mann, Reynolds, and Ornstein 2009.

¹⁴ Figure 2 reports the number of "key-vote" measures subject to cloture petitions. *CQ Almanac* identifies 20-30 votes per Congress that Congressional Quarterly deems to be the most important votes on the most important issues. Budget measures, which are subject to debate limits, and resolutions to reform Rule XXII are excluded from the count in Figure 2.

objections averaged about one per day when the Senate was in session.¹⁵ Before the recent period, most UC requests were offered by the majority leader, majority whip, or bill manager and when a minority objection was made it was made by their minority counterparts. But in the first decade of the 21st century, objections to UC requests by rank-and-file minority party members became far more common. Moreover, minority party members made far more UC requests, sometimes to slow down or disrupt the proceedings and often to show the unwillingness of the majority party to treat them fairly by prompting an objection to a request.



The heat from inter-party friction intensified. Majority leaders complained bitterly that silent (quietly refusing clearance for bills or nominations) or overt obstructionism had reached a new level, a level that necessitated that they bring up matters on the floor without clearance—generating more objections to unanimous consent requests and more cloture petitions on bills and nominations. Minority leaders insisted that the majority party leaders had a quick trigger when it comes to filing cloture petitions and seeking unanimous consent to bring up minor bills and nominations. The frequency with which a cloture petition is withdrawn or vitiated was cited by both sides: the majority party claiming that they are calling the bluffs of

¹⁵ The count in Figure 3 excludes objections under Rule XIV that place legislation on the Senate *Calendar*.

an obstructionist minority effectively and the minority claiming that their willingness to let matters go forward without a cloture vote shows that they are not obstructing. To the outsider, it looked like both sides were more fully exploiting their procedural prerogatives. Among minority party senators, there seemed to be fewer and fewer dissenters to obstructionism; among majority party senators, there seemed to be fewer dissenters to procedural manipulations by the majority leader.¹⁶

Reconciliation Revisited

Republicans began the decade by using reconciliation for large tax measures proposed by the Bush administration, which would allow them to avoid a filibuster on the top legislative item on their agenda. At Byrd's urging, the Democrats did not raise a point of order against the use of reconciliation again in 2001 so as to avoid reinforcing the 1996 precedent. Confusing matters, the parliamentarian, Bob Dove, appeared to change his views about whether revenue-cutting bills could be treated as reconciliation measures under the Budget Act (Taylor 2001), which created tensions between the Republican leadership and "their" parliamentarian. Although there was precedent for such a move, the Democrats objected and argued that the reconciliation process was intended to balance in *one* bill the spending and revenue decisions to be made before the start of a new fiscal year. With the Senate split 50-50 between the parties and the Republican vice president giving the Republicans official majority status, the Republicans authorized separate reconciliation bills for tax cuts in the budget resolution (the key vote was 51-49, with one Democrat, Georgia's Zell Miller, voting with the Republicans).

The reconciliation process was used for tax legislation again in 2003. An important feature of the 2003 episode was a Senate Republican effort to authorize oil drilling in the Alaskan National Wildlife Refuge (ANWR) through budget measures. Drilling in ANWR would have been defeated in legislation that could be filibustered, as it was on a cloture vote in 2002. The Republicans included in the 2003 budget resolution a separate provision that assumed future revenue from oil and gas leases. If approved, the provision would have allowed ANWR drilling provisions to be included in a subsequent reconciliation bill, also subject to debate

¹⁶ A curiosity: In early 2001, before James Jeffords (VT) changed parties in late May to give the Democrats a Senate majority, Republicans had to struggle with the implications of the 50-50 split. One consequence was giving up the majority's longstanding reliance on motions to table to expeditiously dispose of minority amendments. Because a 50-50 tie would defeat a motion to table, Vice President Richard Cheney would have had to be present whenever the Republicans wanted to use motions to table to defeat unfriendly amendments. To spare him of the need to be available to preside at all times, the Republicans simply voted directly on the amendments, although this meant tolerating more debate on the amendments than would happen with use of the nondebatable motion to table (Parks 2001). It also is noteworthy that a direct vote on an amendment may create more of a political problem for a senator than the procedural motion to table. In this case, however, forcing the vice president to cast a vote on popular Democratic amendments may have caused more political problems for the Republicans.

limitations. An amendment to strip the provision from the resolution was approved with the support of Democrats and a handful Republicans (Goldreich 2003).¹⁷

Nuclear Option

The most spectacular procedural episode of the recent period was the 2003-2005 confrontation over judicial nominations. By the spring of 2003, Republicans had become deeply frustrated with Democrats' obstruction on several judicial nominations (see Figure 1) and anticipated having the same problem with a Supreme Court nomination in the near future. Majority Leader Frist proposed that a mechanism similar to the one proposed by Harkin and Lieberman a decade earlier but applied only to presidential nominations. Not all Republicans were supportive of the proposal, with some of them wondering about the possibilities of future minority status, but Republicans were beginning to recite Democratic constitutional arguments from earlier decades about the right of a simple majority to change the Senate rules, at least at the start of a Congress. Frist's proposal was not considered on the floor, but the proposal stimulated a very sharp exchange of words between the parties, with senators of both parties indicating a willingness to go to any length to get their way (Stevens and Perine 2003). The term, "nuclear option," was invented then by Lott, then chairman of the Committee on Rules and Administration, to describe a scenario in which the Republicans gain a new cloture threshold through a ruling of the chair (Vice President Richard Cheney) backed by a simple-majority motion to table an appeal. Lott's nuclear reference was to the possibility of massive obstructionism by the Democrats in response, which some Republicans doubted would follow.

In early 2005, when the confirmation of several appeals court nominees were being blocked by the Democrats, Republicans shifted arguments but again threatened the "reform-by-ruling" option. By that time, the Senate was divided 55-45 in favor of the Republicans. Frist and many Republicans called their possible procedural move the "constitutional option" and insisted that the Constitution's "advise and consent" provision required the Senate for vote up or down on every judicial nomination.¹⁸ This was a dubious argument (see Binder, Madonna, and Smith 2007), but Republicans found it to be a credible basis for a ruling of the chair that would allow cloture by a simple majority on judicial nominations. As Frist's May deadline for breaking the impasse approached, 14 senators—seven Democrats and seven Republicans—announced their intention to both oppose a constitutional option (thereby creating a majority in favor of an appeal) and support Senate action on some of the nominations in dispute (thereby creating more than 60 votes for

¹⁷ With no Republican votes, Democrats approved a contingent use of reconciliation in the 2009 budget resolution so that reconciliation was authorized for health care reform legislation if the Senate failed to pass the regular legislation by a specified date. Democrats did not avail themselves of the opportunity to do so.

¹⁸ The term, "constitutional option," was borrowed from a law review article written by a former Senate Republican leadership aide (Gold and Gupta 2006).

cloture). The “Gang of 14” announcement diffused the situation and the senators in both sides backed away from the precipice. The technical feasibility of the reform-by-ruling strategy did not seem to be in doubt, but a serious infringement of minority rights by reform-by-ruling was proven too costly, politically or legislatively, for a sufficient number of senators to prevent it from happening (Binder, Madonna, and Smith 2007). Frist appeared to be frustrated with the way the Gang of 14 pulled him away from triggering the nuclear option.

Filling the Amendment Tree

Majority leaders have pursued old procedural tactics more frequently in their efforts to influence outcomes. One such tactic is filling the amendment tree. Due to the precedent that gives the majority leader the right to be recognized before other senators, the majority leader may offer a sequence of amendments to exhaust the amendments that may be pending at one time. The result is that no other amendment may be offered while the majority leader’s amendments are pending or he seeks to offer another amendment. When combined with cloture, which sets a limit for debate and a time for a passage vote, this tactic can prevent amendments unfriendly to the majority leader’s cause from being considered.¹⁹

Senate majority leaders have filled the amendment tree with greater frequency in recent Congresses (Taylor 2000a, 2000b, 2000c, Beth, Heitshusen, Heniff, and Rybicki 2009). Partisan arguments became particularly intense in 1999 and 2000, when Majority Leader Trent Lott appeared to fill the amendment tree to avoid votes on politically sensitive issues. He learned that the practice encourages the minority party to oppose cloture so that filling a tree does not cut off minority opportunities for amendments altogether and extends the length of time required to take action on bills. The uproar over Lott’s practices led him to announce a change as that Congress ended. The issue remained so sensitive that the “power-sharing” agreement between the parties for the period in which each party had 50 members in 2001 included a provision that neither party leader would fill the amendment tree (Taylor 2001). Lott’s successor, Democrat Tom Daschle, disavowed the practice, but used it once. His successors, Frist and Reid, used the technique many times, usually by carefully pairing it with cloture.²⁰

¹⁹ Without cloture, the majority leader’s opposition can simply delay action on a bill until they have an opportunity to offer amendments, which may force the majority leader to take the bill off the floor. The impasse created by filling the amendment tree has sometimes created an opportunity for the parties to attract votes, perhaps to win a cloture vote, or to negotiate a compromise on the associated issues.

²⁰ In 2007, frustration with filling amendment trees motivated Senators Arlen Specter (R-PA), then still a Republican, and Tom Coburn (R-OK), to introduce a resolution to prohibit a senator from offering a second degree amendment to his or her own first degree amendment. Specter’s floor statement provides a useful summary of many senators’ complaints about “abusive procedural actions taken by both Republican and Democratic majority leaders” (*Congressional Record*, September 24, 2008, S9378).

Avoiding Conference

Senate leaders also have become more involved in managing relations with the House. Senate leaders, who may need to overcome a filibuster to go to conference and appoint conferees, were not so quick as House leaders to manipulate the conference process, but Senate rules played a role in motivating leaders to approach negotiations with the House in new ways.²¹ Minority Democratic frustrations about being excluded from a meaningful role in conference negotiations came to a head in 2003 and 2004, when Democrats said that they were shut out of meetings on Medicare reform and energy legislation, to which the House and Senate majority leaders were appointed. Democrats responded by objecting to unanimous consent requests to take other bills to conference (Allen and Cochran 2003, Cohen, Victor, and Baumann 2004, Stevens 2004). Partisan tensions were heightened in mid-2004 when Frist became the first floor leader to campaign against his opposite floor leader—Tom Daschle—in the latter’s home state. Daschle lost his seat.

Objections to the usual unanimous consent requests to go to conference are potentially costly to the majority, partly near the end of a session, because they can delay the move to conference. Three motions—a motion to disagree with the House, a motion to request a conference, and a motion to authorize the appointment of conferees—are required for the Senate to go to conference and all three are debatable and subject to filibusters. Gaining cloture three times is time consuming, which creates an incentive for Senate majority leaders to advocate non-conference approaches to resolving House-Senate differences. Informal discussions among majority party committee and party leaders can produce either an exchange of amendments between the chambers or the incorporation of new legislative language in other bills. Frist began to pursue these alternatives more frequently.

In fact, non-conference approaches to managing inter-chamber relations have been used with increasing frequency in recent Congresses. The percentage of enacted bills sent to conference fell from 13 in 103d Congress (1993-1994) to 9 in the 106th (1999-2000) to just two in the 110th Congress (2007-2008) (Jansen 2009, Rybicki 2010). For “major” measures, the percentage of enacted legislation going through conference fell from 75 in the 1961-1990 period to 56 in the 1993-2008 period (Sinclair 2009). The stratagem of avoiding conference comes in a variety of forms. One approach is to have committee and party leaders in the two chambers coordinate their action in a way that allows a bill (or parts of bills) to be

²¹ House Democrats, it has been reported, were the first to exclude the minority from conference discussions. Republican Speaker Newt Gingrich became far more assertive by more carefully manipulating the composition of conference committees, assigning a leader to oversee the work of each conference, inserting himself in inter-chamber negotiations, and, from time to time, successfully suggested non-conference methods for working through House-Senate differences among Republicans, and frequently excluded Democrats from a role in the negotiations (Allen and Cochran 2003).

passed in both houses without the creation of differences that must be resolved through an exchange of amendments between the houses or conference. The percentage of bills managed in this way has increased from 63 to 80 between the 103d and 110th Congresses and ticked up a few percentage points for major bills (Jansen 2009, Sinclair 2009).

Tensions about conferences lingered so that by the time Harry Reid was about to become majority leader at the end of 2006 elections he wrote the new Republican leader, Mitch McConnell, that he intended to convene “real” conference committees with minority participation (Kady 2006).²² Of course, this is not something a Senate leader can really promise because inter-cameral processes have to be arranged with House leadership. In fact, the commitment did not last as Reid, particularly in 2008, again worked with House leadership to avoid the conference process on several important bills.

Frist and Reid went a step farther. When the majority leader fills the amendment tree in conjunction when invoking cloture on a House amendment to a Senate bill or amendment, he eliminates opportunity for the opposition to offer amendments and delay a vote on the House amendment. Thus, in combination with cloture, a majority leader’s use of an exchange of amendments between the houses and filling the amendment tree can streamline the process of resolving House-Senate differences and minimize the opportunities for votes on unfriendly or political sensitive amendments. Frist appears to have been the first to fill the tree on a House amendment, doing so twice, and Reid did so eight times (Beth, Heitshusen, Heniff, and Rybicki 2009). Effectively, this makes House amendments non-amendable, like conference reports.²³

Contingent on having 60 votes for cloture at each stage, these developments complete a loop in majority leader’s procedural tools. If a majority leader can invoke cloture on the motion to proceed and on the bill, the leader can fill the amendment tree to get an up-or-down vote on his version of the bill. Then, a majority leader can either invoke cloture on a conference report or invoke cloture on a House amendment, followed by filling the amendment tree, he can get an up-or-down vote on a House-Senate compromise he favors. Sixty votes for cloture at each stage is a necessary condition for this legislative scenario to be realized, but it is a possibility from time to time in a polarized Senate.

²² In January 2007, the House of Representatives adopted a new rule that requires conference committees to be open to all conferees.

²³ It also bears notice that the Senate rules limiting a conference report to the scope of the differences between the House and Senate versions of a bill and be available online for 48 hours before a floor vote do not apply to amendments between the houses (Beth, Heitshusen, Heniff, and Rybicki 2009). It also is noteworthy that Senate Republicans adopted a standing order as a part of a 1996 bill that provides that conference reports are not required to be read. House amendments are not exempt so a reading of an amendment could consume considerable time.

Sixty-Vote Thresholds in Unanimous Consent Agreements

Perhaps the most curious procedural development in the Senate in the 109th and 110th Congresses (2005-2008) is Frist's and Reid's inclusion of 60-vote thresholds for votes on motions under unanimous consent agreements.²⁴ This became a near-standard feature of Reid unanimous consent requests for major legislation. The approach, essentially new to recent Congresses, provides that a motion or an amendment is considered adopted if supported by at least 60 senators; in most cases, the subject of the provision is an amendment, which is considered withdrawn if the 60-vote threshold is not reached. The effect of such a provision is to force motion or amendment proponents to demonstrate sufficient votes for cloture without taking the time for a three-day process of filing a cloture petition, voting on cloture, and completing 30 hours of debate. When applied to amendments, most of the amendments failed to achieve the required 60 votes (Beth, Heitshusen, Heniff, and Rybicki 2009).

The rationale for the 60-vote threshold in unanimous consent agreements is seldom articulated, but some inferences about the tradeoffs are reasonable. The majority leader gets a quick vote on an amendment without suffering a filibuster (on the amendment or the bill), which expedites action on the legislation. In fact, most of the recent bills were high priority legislation with substantial time sensitivity for the majority leader (Beth, Heitshusen, Heniff, and Rybicki 2009). Naturally, for senators who oppose the amendment, primarily majority party members, the 60-vote threshold is no problem. For senators who support the amendment, the unanimous consent agreement must offer some advantage, too. They, too, may favor expeditious action on important legislation but appreciate that the majority is not imposing cloture, filling the amendment tree to avoid votes on the amendment, and allowing senators to vote on the record (as opposed to facing a motion to table). Still, like the practice of holds, it is reasonable to speculate the frequency with which Reid uses the 60-vote threshold may alter senators' expectations about the management of amendments.

Holds

When Trent Lott resigned as majority leader in late 2002, he remained frustrated with the practice of holds and, after taking over as chairman of the Committee on Rules and Administration in 2003, conducted a hearing on reform proposals. The proposal, offered by Senators Charles Grassley (R-IA) and Ron Wyden (D-OR), would mention holds in the standing rules (and precedents, for that matter) for the first time, but Grassley, Wyden, and Lott deemed this necessary to

²⁴ A few, but very few, precedents have been found in previous Congresses. Beth, Heitshusen, Heniff, and Rybicki (2009) find nine votes under the terms of such a unanimous consent agreement in the 109th Congress and a surge to 51 such votes in the 110th Congress.

deal with a troublesome practice that than a quarter century of complaints had not changed. By the time Lott's hearings took place, senators realized that holds reflected the leadership's need to be observed and held confidential, and that the minority leader sometimes used a hold as a way to obscure partisan purposes for objecting to the majority leader's plans. They also complained that some senators would continue to abuse the process. Abuses cited by senators included using a hold on one bill to gain favorable action on another matter (for example, to get a hearing on another bill or gaining a presidential nomination for a political friend), rolling holds (senators taking turns placing holds on a bill to frustrate effort to clear a bill for floor action), and retaliatory holds (placing a hold in response to another hold).²⁵ To be sure, holds were often used for innocent purposes, such as getting notice in order to offer an amendment in a timely way, but Lott and others believed that the efforts of a half dozen floor leaders to limit the practice had failed.²⁶

The Lott hearing produced no action on reform at that time, but a modified version was incorporated in the 2007 ethics reform bill.²⁷ The rule does not ban holds but rather is intended to make public the identity of senators placing holds under certain circumstances. It provides direction to majority and minority floor leaders that they recognize a "notice of intent" to object only if a senator, "following the objection to a unanimous consent to proceeding to, and, or passage of, a measure or matter on their behalf, submits the notice of intent in writing to the appropriate leader or their designee," and then "submits for inclusion in the Congressional Record and in the applicable calendar" a notice not later than six session days.

The 2007 rule establishes a convoluted process full of ambiguity, which reflects the difficulty of regulating what has been an informal, intra-party process for three decades.²⁸ Disclosure is not required until after objection to taking up a bill is made publicly on the floor. The identity of the senator placing the hold need not be publicly disclosed for a minimum of six days (the rule does not specify how quickly the leader must be notified in writing and when the six-day clock starts). Until actual objection is made to a unanimous consent request, the hold remains secret and a private matter between a senator and the leader, as it always had been.

Experience with the new rule is still limited. Just a few days after the 2007 bill was signed into law a Republican senator objected to a motion to proceed on a bill on which a hold was known to exist. The senator's staff insisted that he had not

²⁵ See Hook (1993), Doherty (1998), Eisele and Kelly (1998), Friel (2007), and Pierce (2007).

²⁶ For a review of leaders' efforts and reform proposals, see Oleszek (2007). I am ignoring the practices of the Senate Committee on the Judiciary with respect to blue slips and holds on judicial nominations that are registered with the committee. See Binder and Maltzman (2009) and Palmer (2005).

²⁷ The Honest Leadership and Open Government Act of 2007 (P.L. 110-81), Section 512.

²⁸ For a review of ambiguities in the rules, see Oleszek (2008).

previously placed a secret hold and that was the end of the matter, at least for that bill (Pierce 2007). Some senators have long had a policy of disclosing their holds, but it is clear that confidential communications with leaders have not been disclosed. A majority leader would not object to his own request to bring up a bill so a hold placed by a majority party member is unlikely to yield the objection that triggers publication in the *Record*. The effect of the rule should be greatest for the minority leader, but the minority leader is seldom too concerned about the scheduling problems of the majority and, in any case, can privately discourage the majority leader from proceeding with a bill. In the 110th Congress (2007-2008) and first session of the 111th Congress (2009), four notices of intent to object to proceeding were printed in the *Record*. No one believes that exhausts the holds placed on bills.²⁹ When President Barak Obama called for an end of holds on executive nominations in his 2010 State of the Union Address, many senators' responses were quite negative and cynical (Shanton 2010).³⁰

Unorthodox Appropriating—Exploiting the Conference Process, Part II

A second wave of omnibus appropriations bills occurred in the first decade of the 21st century and again election years proved the most difficult. The decade began much like the Congresses of the mid-1980s. In 2002, with divided party control, divisions between and within the parties made a budget resolution and non-defense spending difficult issues—so difficult that the slim Senate's Democratic majority did not consider a budget resolution or ten of the 13 regular appropriations bills on the floor. Instead, all ten were folded under a series of continuing resolutions, the last of which authorized spending only through January 11, 2003, when a new Republican majority would control the Senate (*CQ Almanac* 2002).

After the Republicans won a Senate majority in the 2002 elections and enjoyed unified control of the White House, House, and Senate, the new strategic circumstances allowed the majority party leadership to orchestrate the process in the party's interest. In 2004, politically unpopular domestic spending cuts were approved after the elections—only the defense, military construction, and homeland

²⁹ In late 2009, the watchdog group Citizens for Responsibility and Ethics in Washington wrote the leadership of the Senate Committee on Ethics to investigate the enforcement of Section 512. It is noteworthy that Section 512 is directed to the floor leaders. Section 512 becomes relevant only when an objection to a unanimous consent request is voiced on the floor, but that hardly exhausts the ways in which a hold could affect floor action. See Yachnin (2009). There is some evidence that Section 512 stigmatized holds and may have reduced their frequency (Stanton 2007).

³⁰ In early 2010, Majority Leader Harry Reid informed his colleagues that Alabama's Senator Richard Shelby had placed a hold on most pending executive branch nominations. An MSNBC report indicated that Shelby was unhappy that the administration was not moving to build an FBI facility in his home state (<http://firstread.msnbc.msn.com/archive/2010/02/05/2195404.aspx>).

security bills were enacted as separate bills before the elections while the other ten bills were included in an omnibus bill. Only the District of Columbia, defense, military construction, and homeland security were considered on the Senate floor. Technically, the 2004 legislation was not a continuing resolution but instead was a bill, which reflected the fact that the full text of regular appropriations bills was included and many non-appropriations subjects were addressed in the bill. In 2006, the Republican Senate majority passed only the defense and homeland security appropriations bills and, after the elections determined that the next Senate would have a Democratic majority, wrapped all others (nine of the now 11 regular appropriations bills) in a more standard continuing resolution that extended spending authority to only early the next year. As in the 1980s, the conference reports were the only opportunities for senators to consider and vote on the appropriations bills folded into the omnibus appropriations measures (*CQ Almanac* 2004, 2006). But, with unified party control during the 2003-2006 period, the Democratic minority complained that Republicans were deliberately exploiting the conference process to prevent serious debate or floor amendments to appropriations bills.

With the Democrats in the majority in both houses after the 2006 elections, confrontations with a Republican president led to stalemate on most domestic spending bills. In 2007, the Senate considered and passed seven of the 12 regular appropriations bills, but only the defense spending bill was enacted and signed by the president as a separate bill. In 2008, seeking to avoid veto showdowns with the president altogether, the Democrats brought no appropriations bills to the Senate floor, placed the text of the defense, homeland security, and military construction bills in one bill, and treated all other bills in a temporary continuing resolution to allow the next Congress, under a Democratic president, to complete action for fiscal 2008 (*CQ Almanac* 2007, 2008).

Lessons

The most important lesson of the past 40 years is the fundamental nature of Rule XXII in the formal and informal practices of the Senate. Most important episodes in the Senate modern procedural history concern deployment of, adaptation to, circumvention of, or reform of the super-majority requirement for cloture under Rule XXII. To be sure, majority and minority leaders have discovered a much wider range of parliamentary tools and tactics, but their use of complex unanimous consent agreements, reconciliation, the amendment tree, holds, tracking, and conference reports reflects the inability to limit and structure debate without special rules or unanimous consent. Other important developments, such as the budget process, gain much of their importance as ways to work around the super-majority threshold for cloture for most legislation.

Nevertheless, several questions are frequently raised about the role of the Senate, the blame to be attributed to senators and the parties, and the prospects for reform.

The Problem: Bad Rules or Misbehaving Senators?

Many observers find the Senate dysfunctional. In early 2010, a Google search of “dysfunctional Senate” returns 7,190 hits. This is an old but deserving theme that resurfaces whenever one party or the other engages in a filibuster on a major piece of legislation. Reasonably, the target of the complaints always is obstructionism associated with the super-majority threshold for cloture and, at times, the practice of holds. Defenders of the cloture threshold usually come from minority party senators and outsiders, who cite Senate tradition, the need to protect the rights of the minority, and the extremism of the majority, but the majority seldom finds these arguments about procedure as a sufficient justification for denying the majority the right to act on policy.

Another perspective is that the problem is not the rules. Rather, the problem is senators. Here is how one observer sees the Senate:

Despite the howls of outrage on the left, the problem is not the filibuster per se. It is apparently beyond the capacity of human nature to focus on the long run; conservatives and Republicans howled when Democrats used filibusters to stop a steamroller during a portion of the Bush presidency, and now liberals and Democrats are taking up that chorus. Don't be surprised if we see a drumbeat on the left to use the nuclear option.

Turning the Senate into a mini-me version of the House is not a great idea. Filibusters, in my judgment, if reserved for issues of great national moment, fit the framers' framework. The problem is less that we are having a filibuster applied to health reform, which is an issue of great national moment, than the total breakdown of related norms in the Senate. Filibusters on civil rights issues were not partisan. Filibusters were never routinely applied to everything, or used just to gum up the works. Filibusters on issues where there is wide and broad support and consensus are just plain wrong. But they are now the norm — not used to enable an intense minority to have its say, but employed cynically to slow down the Senate and bollix up its ability to operate at all (Ornstein 2009).

Assigning blame to the rules or to senators' character is tempting, truly tempting. The Senate could (and should) have different rules and could (and should) have senators who allow institutional norms to trump their policy interests, but neither analysis is complete. Both credible accounts—the Senate as a bad set of rules and the Senate as misbehaving senators—miss a more important element of the story: Senators' policy preferences, dictated by their political circumstances and personal views, are sharply polarized by party. Such polarized parties mean two

things. First, *polarized policy preferences* means that are few centrist senators who can successfully demand a deliberative, consensus-building process involving most senators that produces constructive and successful compromises. Second, *partisan polarization* means the elected minority party leaders face few party colleagues who object to obstructionism. The result is that policy tends to be developed within the confines of the majority party offices, the minority party fully deploys its parliamentary weapons, and, the majority party attempts to minimize the harm of minority obstructionism to its agenda by restricting debate and amendments when possible.

As much as the majority party might like to change the rules when the parties are polarized, it is in just such times that the minority will take any measure to prevent the majority party from reforming Rule XXII. Moreover, it is just when the parties are polarized that misbehaving senators find few disincentives within their own party for their behavior. Rules cannot be changed and norms of inter-party civility break down. This was true in the Senate of the first decade of the 21st century as it was in the first decade of the 20th century.

What Reforms Have Been Proposed?

The most obvious way to reform Rule XXII is to reduce the threshold for cloture from three-fifths of senators duly chosen and sworn (or from two-thirds of senators present and voting for changes in the rules) to some lower number, such as 55 or a simple majority of either all senators or senators voting. There are compromises on that approach that have received considerable attention. One is the Harkin-Lieberman proposal, reintroduced in early 2010 by Harkin and Senator Jeanne Shaheen (D-NH), to ratchet down the number required for cloture from three-fifths (60) to 57, to 54, and finally to 51 in steps over a period of two or three weeks. Another is the approach recommended by former Majority Leader George Mitchell in which debate is limited on the motion to proceed and motions to go to conference so that super-majority cloture is restricted to the legislation itself. Other approaches, such as extending limitations on debate or providing for a lower cloture threshold for the executive calendar (nominations and treaties), appropriations bills, or other specific types of legislation, have been discussed.

A recent wrinkle is the proposal by Senator Jeff Merkley (D-OR) to approve reform of the rule but to make the reform effective at some future date (Klein 2009). Merkley argues reform will be possible only when neither party can predict whether it will be advantage or disadvantaged under the reformed rule. At this writing, the proposal has not been formally introduced as a Senate resolution and no other senators have publicly expressed views on this intriguing proposal.

Why Doesn't the Senate Majority Change Rule XXII?

The obvious answer—that the majority is blocked by a minority that will filibuster a change in the rule—is correct but incomplete. It is correct that there

have been several occasions in which a majority of senators sought to create or change the cloture rule and were blocked by a minority of senators who prevented a vote on the reform resolution (Binder and Smith 1997). It also is correct that judging whether a majority favors a change in the rules is difficult because a filibuster can block a vote that would confirm the existence of a majority for reform. But certainly it is not clear that cloture reform is always or generally favored by a Senate majority. Senators in the majority may fear minority status in the foreseeable future. It also may be true that some or many senators favor a super-majority cloture rule because it enhances their *individual* power to delay and obstruct. Certainly, both majority and minority senators exploit opportunities to speak at length and on any subject on the floor, to offer non-germane amendments, and to object to the consideration of legislation through holds or other means, all of which rests on Rule XXII.

Clearly, today's minority party would oppose immediate reform of Rule XXII. Whether today's majority party favors a simple majority threshold for closing debate is a more difficult question to answer. The 2005 "nuclear option" episode—the confrontation between the parties on judicial nominations—gave some clues about preferences about the rules. The issue was complicated by senatorial arguments that judicial nominations are a special category of legislative business (in fact, considered executive business in Senate nomenclature), but the episode gives some a few clues about the distribution of opinion in the contemporary Senate.

The 2005 episode ended when 14 senators—seven from each party—negotiated a truce among themselves that leaders of the two parties were compelled to observe. For the majority Republicans, who numbered 55, the seven Republicans in the Gang of 14 prevented them from using the reform-by-ruling strategy that required a Senate majority to table an appeal of the chair's ruling. For the minority Democrats, who numbered 45, the seven Democrats in the Gang of 14 prevented them from blocking cloture on all of the nominations at issue.³¹

At least for 2005 episode, then, we can categorize senators as follows. At most 48 majority party Republicans were prepared to use the reform-by-ruling strategy to circumvent Rule XXII for judicial nominations. At most 38 minority party Democrats were prepared to "go nuclear" by threatening chaos in the Senate if the Republicans proceeded with their strategy. Who were the members of the Gang of 14? Several of the Democrats and Republicans in the group were moderates who probably both did not appreciate the brinksmanship of their party leadership and stood to lose some influence if simple majority rule prevailed in the Senate. Others were more mainstream Democrats and Republicans who seemed to care more

³¹ A few Democrats later thought that it may have been wise to allow the Republicans to use their reform-by-ruling approach because it would have established a clearer precedent for a way to change Rule XXII without having to invoke cloture under the rule on a reform resolution.

about avoiding the nuclear scenario than any rules change they may have favored or opposed (Kane 2005).

The 2005 episode is enlightening for another reason. It might be inferred that, because a reform-by-ruling approach is available to, and has been used by, Senate majorities, but the approach has not been used for a full-scale reform of Rule XXII, we should infer that a Senate majority generally favors super-majority cloture (Wawro and Schickler 2004). In 2005, the minority has a response to the strategy that would have posed such costs on the Senate that the majority party leadership delayed its use and ultimately was stymied by failing to muster a majority for its use. All that we can say is that a majority did not exist for reform *under the circumstances*—that is, with the costs that could have been imposed by the minority.

A Powerful Majority Leader?

It might be tempting to infer that the tools of the majority leader—the right of first recognition, crafting unanimous consent agreements, motion to table, the amendment tree, the reconciliation process, conference reports, and so on—give him the power to set the agenda that is comparable to the agenda-setting power the speaker of the House. It is fair to observe that the Senate majority leader is not powerless. He has considerable tools that allow him to maneuver with the support of a Senate majority whenever a filibuster is not a serious threat or is ruled out by cloture or rule. He certainly takes the lead in determining the Senate's floor schedule and legislative agenda. The nondebatable motion to table is frequently used to kill amendments, appeals, and other unfriendly motions (Den Hartog and Monroe 2008). And the majority leader can use the new range of tools associated with the budget process and statutory debate limits.

Nevertheless, the Senate majority leader's influence over the agenda and outcomes is much more limited than the speaker of the House. The ability of a large minority of senators to block votes on motions to proceed, amendments, final passage, amendments from the House, and conference reports means that the majority leader and a simple majority cannot guarantee a vote on matters important to them. In fact, the minority's ability to obstruct can be, and often is, a hostage-taking device to give the minority bargaining leverage over a wide range of legislative matters. Moreover, the lack of a general germaneness rule for floor amendments and debate provides the Senate minority the opportunity to bring issues to the floor, if only to attract a motion to table. Consequently, the Senate majority leader's ability to get a vote on a matter (positive agenda power) is considerably weaker than the House speaker and his ability to block a vote on a matter (negative agenda power) is reasonably strong but subject to the leverage the minority exercises through the threat of filibuster (on types of power, see Cox and McCubbins 2005, Smith 2007).

Juxtaposed to the argument that the Senate majority leader has unappreciated power is the view that the majority leader makes it easy for the

minority to obstruct by observing holds and using tracking and other scheduling tactics to minimize the harm of obstructionism to the rest of their agenda. The argument continues that the majority should break these bad habits and, instead, should “break” the opposition by forcing the minority to debate around the clock and expose their obstructionism to the public. As majority leaders would privately confess, there is some truth to these observations, but they would be quick to argue that there are few instances in which the majority party would not be subject to more criticism than the minority for its unwillingness to compromise (the majority party is in the majority, after all) and move on to other important legislative business.

Concluding Observations

The Senate remains a procedurally fragile institution due to the inherent procedural contradictions associated with the dual simple- and super-majority thresholds built into its standing rules. While the Rule XXII requires two-thirds majority of senators voting for cloture on a measure that modifies the standing rules, a three-fifths majority of all senators can invoke cloture on a bill that creates a new procedure in statute. The Senate can, with a ruling of the chair backed by just a simple majority of senators, set a precedent that would undermine the plain intent of Rule XXII to require super-majority cloture for a change in the rules. And a simple majority could, by supporting a point of order, undermine a unanimous consent agreement, which is the majority leader’s primary method for structuring debate in the absence of cloture.

All of these potential contradictions have, from time to time, been settled in the interest of a simple majority, and yet Rule XXII remains in place and is observed without question in most circumstances. On occasion, only the personal appeals to colleagues—or, as in 2005, the handiwork of a pivotal group of senators—have brought the Senate back away from the precipice of undermining the unanimous consent and rule-making processes that are built on the foundation of Rule XXII. Both the Senate as a whole and the majority party have developed a range of strategies for circumventing and adapting to it. Statutory debate limits and the budget process are the most obvious institutional adjustments. The use of cloture, unanimous consent agreements, motions to table, the amendment tree, and conference reports are the most prominent majority party leadership adjustments.

The history of the Senate, both distant and recent, leaves reformers pessimistic about the chances of changing Rule XXII through means implied by the standing rules. The two-thirds majority threshold for cloture on a measure changing the standing rules is very high. Since the initial adoption of Rule XXII in 1917, the majority party in only five Congresses—four in the New Deal era when precedent held that the rule did not apply to the motion to proceed—exceeded two-thirds of the Senate’s membership. The other Congress with the 89th (1965-1966), in which the southern Democrats would not have supported reform of the rule.

Significant change seems likely only if a majority party expects to continue to benefit from reform, appears to have a mandate from the electorate, is backed by the president and vice president, and acts when little additional harm to its legislative agenda is possible. A far-fetched scenario would be something like this: The majority party makes a move in a lame-duck session at the end of a Congress in which the majority, suffering unending obstructionism from the minority, wins a large majority in the elections and has little business left to complete before adjourning. The majority leader offers a resolution to formally change Rule XXII and makes a point of order that only a simple majority is required to invoke cloture on the resolution. The majority leader argues that the super-majority threshold for cloture undermines the Constitution's presumption of simple majority rule, the grant of a tie-breaking vote to the vice president, and explicit provision for super-majority threshold in special circumstances (treaties, veto override). The presiding officer rules in favor of the point of order and is backed by a successful motion to table an appeal. The new rule takes effect immediately, but it opens the possibility of a reconsideration of the rules more generally at the start of the next Congress.

Why has this or a similar scenario failed to materialize? The strategy requires that several factors be in place. The vice president must be cooperative to get the desired ruling, which is possible only when the same party controls the White House and Senate. The Senate majority must see their procedural move as popular, which seems likely only when legislation has been blocked by a minority that seriously misjudged how popular the majority's legislative program was with the electorate. The Senate majority must see the "nuclear option" as survivable, as when the majority has given up on enacting its agenda in the current Congress and sees the next Congress as more promising. As fragile as the Senate's core institutional features seem to be, the odds do not look good for reformers.

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