

Prepared statement of

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Before the
Committee on Rules and Administration
United States Senate
June 17, 2003

Mr. Chairman and Members of the Committee: I am pleased to have this opportunity to address the Committee on Senate Resolution 151, a resolution introduced by Senator Grassley for himself and others that would require public disclosure of notices of objections (or “holds”) to proceedings to motions or matters in the Senate. This resolution, also known as the Wyden-Grassley initiative, proposes a change in Senate Rule 7 to require senators to publicly disclose their holds in the *Congressional Record* not later than two days after placing a hold. Although I fully agree with the intent of this reform to end the secrecy that often accompanies senators’ holds, I have some reservations about the approach taken in the resolution. For the reasons offered below, I would favor a more forceful effort to limit the obstructive bite of holds—one that would temper the excesses of individualism in the Senate, yet preserve the right of a minority to conduct extended debate.

Background

As is commonly noted, the right of senators to place “holds” on legislative measures and executive and judicial nominations is not formally recognized in the standing rules of the Senate. Holds—or the ability of a single senator to block the majority leader from calling up legislative measures and nominations—arise in the Senate because of the chamber’s reliance on unanimous consent agreements and debatable motions to proceed to schedule business and organize debate on the Senate floor. Lacking a previous question motion, a simple majority is powerless under Senate rules (except under special conditions) to determine whether and when to proceed to consider a measure or matter on the Senate floor. By placing a hold on a measure, a senator is registering his or her intention to object when the majority leader seeks unanimous consent. Although nothing in Senate rules binds either the majority or minority leader to honor his colleagues’ holds, such objections typically delay action because leaders are loathe to upset colleagues whose cooperation will be needed in the future. Leaders can ignore holds, but to proceed in face of opposition they would customarily then have to pass a motion to proceed, which is subject to a filibuster.

As the weight of Senate business and ideological and partisan conflict over major issues have increased since the 1970s, holds have been transformed. Where previously holds were predominately used for senators to obtain advance notification before measures would be

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brought to the floor, by the 1980s holds had been turned into single-senator vetoes. Judge Richard Paez's four-year wait to be confirmed to a Ninth Circuit judgeship in the late 1990s attests to the consequences of such holds. Holds now are also often used to take measures or nominations hostage in exchange for concessions from fellow senators or the Administration. Just last week we learned that a senator had secretly placed a hold on literally hundreds of Air Force promotions and nominations, affecting officers from majors to generals. The target of the hold? Hundreds of officers had been taken hostage to force the Air Force to deliver a promised four new C-130 cargo planes for the Idaho Air National Guard. Although hostage-taking of such proportions is out of the norm, hostage-taking in general is a well-honed practice. No definitive data exist, but targets of such hostage-taking are typically presidential appointees awaiting confirmation.

Hazards of reform

Before examining S. Res. 151 in detail, let me offer a few thoughts on the hazards of reforming Senate rules, difficulties that ought to be kept in mind as your committee contemplates reforming holds.

Law of unintended consequences. Legislators fight hard over procedure because of the perceived consequences of the rules. If procedures did not matter, the stakes of procedural reform would be too low for legislators to care much about them. Still, changes in procedure typically bring both intended and unintended consequences. Because political institutions like the House and Senate contain layers of related rules and precedents, changing chamber rules is never a simple matter. The decision of the Senate in 1806 to do away with the previous question motion on the advice of Aaron Burr (who saw this as simple house-keeping for a messy rule book) is a prime example of unintended consequence. That rule change made possible filibusters, even if that was not the express intention of senators at that time. The invention of "tracking" on the Senate floor in the early 1970s to deal with a rise in obstructionism also brought unintended consequences: filibusters became much easier for obstructing senators to sustain and their numbers continued to climb.

Why worry about unintended consequences? I believe this is a particular problem in trying to reform holds. As I explore in detail below, the right of senators to place holds is not recognized in Senate rules. It arises simply as the (unintended) consequence of the chamber's move over the past decades to negotiate unanimous consent time agreements to bring some order to the Senate's floor agenda. I have no doubt that if procedural changes are adopted that create a formal recognition of senators' right to register holds, unintended consequences will ensue. In particular, it will be extremely difficult to change the rules again and likely impossible to eliminate holds in the future. In fact, as I argue below, it is possible that requiring senators to reveal their holds in the *Congressional Record* will increase senators' incentives to place holds. The difficulty of anticipating consequences of rule changes should be kept in mind as your committee evaluates reform proposals.

The difficulty of killing two birds with one stone. Holds raise two separate problems for the Senate. First is the impact of holds on legislative measures. Second is the impact of holds on the confirmation process. With regard to the first matter, holds can certainly delay major bills

from coming to the floor. However, the salience of major measures makes it difficult for senators to use anonymous holds to indefinitely delay such measures from coming to the floor. Eliminating the secrecy of holds is thus likely to rein in some of the more egregious holds on major issues. But eliminating the secrecy of holds is unlikely to reduce senators' use of holds to take nominees hostage for often unrelated policy or political demands. As documented over the past few years by the Brookings-AEI Presidential Appointee Initiative, such hostage-taking during the confirmation process exacerbates confirmation delay and diminishes the morale of appointees. Because most such nominations garner little public attention, eliminating the secrecy of holds on nominations is unlikely to take the bite out of such holds. Only the most egregious of such hostage-taking—such as those hundreds of Air Force officers—is likely to be diffused by eliminating the secrecy of holds.

What does this mean for the committee's consideration of holds reform? It is unlikely that a single reform will address both of the problems that have arisen from the use of holds. Killing two birds with one stone may make fun sport for some, but it is a tricky thing to do with Senate rules. Even the most direct route of restraining holds-- limiting debate on the motion to proceed-- is unlikely to ameliorate the impact of holds on nominees. Because the motion to proceed to executive session is not debatable, nominations blocked by holds would not be affected by a debate limit on the motion to proceed. Although critics of the hold are typically concerned about both its impact on legislation and nominations, a single reform is unlikely to secure change on both types of matters. The committee should bear in mind this wrinkle when evaluating the reach of potential reforms.

Strengths and weaknesses of S. Res. 151

With these caveats in mind, I turn to the reforms in detail. As noted by the Congressional Research Service, efforts to reform holds have been suggested repeatedly over the past thirty years. Some efforts are aimed at reducing opportunities for senators to place holds and making it easier for leaders to ignore their colleagues' lone objections. Efforts by both Democratic and Republican leaders over the past twenty years to limit debate on the motion to proceed fall in this category. Other efforts, such as the Wyden-Grassley initiative, leave in tact senators' opportunities to place holds, and target instead their anonymity. Both approaches would require changes in Senate rules, and none of the reform efforts have come near securing the two-thirds majority necessary to invoke cloture on resolutions changing Senate rules. Given senators' reluctance to alter the rules, majority leaders reaching back at least to the late 1970s have attempted more informal efforts to rein in the practice of holds-- particularly at the end of the congressional session. The most recent such effort-- in response to the Wyden-Grassley initiative-- was a joint memorandum from the majority and minority leaders in 1999 encouraging all senators to notify committee chairs of their legislative holds. Although undertaken with good intentions, such informal efforts have been plagued by loopholes and by the lack of an enforcement mechanism.

This brings us to the question of S. Res. 151. The resolution would amend Senate Rule 7 to require any senator who objects to a bill or nomination to disclose his or her hold in the *Congressional Record* within two session days. The direct impact of the rule change would be to eliminate the secrecy of the hold. As such, the reform does not aim to eliminate holds.

However, by making transparent the origin of the hold, clearly the intention is to *indirectly* make it harder for senators to unduly delay measures and nominations. Given that much of the delay caused by holds is due to the frequent inability of senators to determine who has placed the hold, knowing up front who is responsible would ostensibly facilitate negotiations with that senator. Much of the political chicanery involved in the secret hold would be eliminated, improving the prospects that disagreements over pending measures could be reconciled more quickly. Ending the secrecy of holds might also indirectly reduce senators' reliance on holds. If the transparency of holds convinces senators that some of their holds may be less sustainable, then eliminating the anonymity of holds might theoretically reduce the use of holds as well. This all assumes, of course, that senators will comply with the rules to disclose their holds in the *Congressional Record*. Because the new rule does not have any enforcement mechanism, it would presumably fall to the majority and minority leaders to enforce the rule should senators fail to comply. It is unclear from the resolution, however, how that might occur.

If S. Res. 151 had only intended consequences, I would strongly endorse it despite my concerns about its enforcement. My primary reservations, however, stem from the likely *unintended* consequences of the rule change. First, by changing the rules to require senators to publish their holds, S. Res. 151 would in effect formalize a procedural right that today does not exist in Senate rules. In other words, it would institutionalize into Senate rules what is now simply a practice of the Senate and its parties. Leaders today can conceptually ignore holds, on the precise grounds that leaders are only offering advance notification of what is coming to the floor. As such, leaders are formally not required to recognize their colleagues' objections. But once the right of a lone senator to block action is in effect endorsed by the disclosure requirement, I fear that leaders will lose what flexibility they currently have to ignore holds as their floor strategies demand.

Second, my greatest fear is that requiring public notice of holds will inadvertently increase senators' incentives to use holds to pursue their policy and political agendas. To be sure, secret holds are odious to a legislative body in a representative democracy, and it is hard to argue that the anonymity of holds is essential to preserving senators' individual rights. But it is entirely possible that once holds are routinely made public, the Senate will simply adjust to the new reality. In fact, I would wager that instead of deterring senators from placing holds, public notice of holds will (perversely) *increase* demands on senators to exploit this procedural opportunity. Because holds will be visible to organized interests outside the Senate, my hunch is that such groups will begin to demand that senators place holds on measures and nominees they oppose. Holds, which today are primarily "inside baseball," would be transferred into a tool for position-taking, advertising, and credit claiming by senators responding to national and parochial constituencies. Hardest hit no doubt would be executive and judicial nominees—already subject to the whims of anonymous holds—who may face even more landmines (albeit no longer hidden) along the path to confirmation.

To make plain the possible impact of S. Res. 151, the analogy of tracking is again instructive. Senate leaders in the 1970s adopted tracking to help them manage rising levels of obstructive behavior. But the innovation only served to fuel more obstruction, as the costs of filibustering plummeted once their obstruction was sent down a different track. Similarly,

requiring public notice of holds may simply fuel more holds—an unintended consequence that the committee should bear in mind in considering S. Res. 151. The bottom line is that eliminating secrecy may do little to reduce senators' reliance on holds. So long as senators' political and policy incentives encourage them to exploit holds and so long as leaders' need unanimous consent to manage the floor, the use of holds will continue unabated particularly on less salient measures.

Additional reforms

Given these reservations, I want to encourage the committee to consider additional procedural reforms to take the bite out of holds.

Limits on the motion to proceed. Perhaps no potential Senate reform recurs more frequently on the Senate's agenda than the suggestion that the motion to proceed be subject to a two-hour debate limit (evenly divided between the majority and minority leaders). Support for this reform has come from both parties, and has been endorsed in the past by Senator Byrd, former Senators Boren and Domenici, and others. The bipartisan Joint Committee on the Organization of Congress endorsed such a change in 1993, as did earlier renditions of Senate reform panels in the 1980s.

The motion to proceed is today (outside the morning hour on new legislative days) a debatable motion and thus can be filibustered. By placing a hold on a measure, a senator is in effect threatening that he or she will likely contest any effort to take up the measure on the Senate floor. Although limiting debate on the motion to proceed would still allow a hold to block Senate action if the leaders are intent on securing a unanimous consent agreement, limiting debate on motions to proceed creates an alternative avenue for leaders wishing to call up legislative matters. As a Congressional Research Service report in 1993 made clear, "any procedure tending to enable the leadership routinely to secure floor consideration of chosen measures could hardly avoid diminishing the potential force of 'holds.'" The direct consequence of limiting debate on the motion to proceed outside the morning hour will likely be to take the bite out of holds. Unless an obstructing senator can secure the support of a majority of the Senate, the senator will be unable to exploit the hold as a single-senator veto. The CRS report concludes appropriately: "It seems unlikely that any attempt to limit the practice of holds can be highly effective if it leaves intact the present resources of individual Senators in this area."

To be sure, limiting debate on the motion to proceed reduces the number of opportunities within the legislative process for a minority to block measures with a filibuster. However, filibusters will still be possible on the bill, amendments, and conference motions, thereby preserving a minority's right under current rules to extended debate. Limiting debate on the motion to proceed leaves in tact the chamber's heavy reliance on supermajorities to amend and pass legislative and executive business. This reform, however, will not reduce the use of holds on nominations, as the motion to proceed to the executive session is non-debatable under today's Senate rules.

Less-than-unanimous consent. The Senate should consider making it harder for a single senator to object to a request by the majority leader to call up a measure or limit debate or

amendments. By requiring perhaps three to five senators to object to unanimous consent requests, the Senate would go a long way toward reducing the ability of a single senator to veto measures with a hold. This reform would not explicitly recognize the right of senators to place holds and would address the impact of the hold on both legislative measures and nominations. Moreover, the reform would hardly tamper with the right of a minority to extended debate, as an overwhelming majority would still be necessary to adopt time limitation agreements. The reform would, however, reduce the more personalistic uses of holds, as senators are less likely to secure their colleagues' support for such efforts.

To conclude, legislative scholars have watched debates about the hold with great interest, but also great frustration. Given the anonymity of the process, there is little available systematic evidence on the practice of holds and their impact on the legislative process. Although we are just learning more about holds from scholars studying the papers of former Majority Leader Howard Baker, most of what we know is gleaned from journalists', staff's, and senators' accounts of the internal politics of the Senate, as well as from surveys of nominees who have made their way through an often tortuous confirmation process. These impressions are solid and lasting: the hold indelibly affects the fate of legislative and executive business, often introducing unnecessary delay and parochial politics into the business of the Senate. For that reason, I encourage the committee to carefully review potential reforms, with an eye to addressing the excesses of the hold. But your committee should also tread carefully, lest reforms unintentionally do more harm than good. Ultimately, I believe reforms can be adopted that lessen the sting of some holds, but such reforms are unlikely to reduce senators' incentives to place holds and leaders' incentives to accommodate them.