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The Senate Syndrome

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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 2005, 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 that allowed neither party to follow through on its threats.

Since early 2005, majority leaders have taken steps to avoid or control debate and amending activity. The result is a Senate, long known for the flexibility and informality of its floor proceedings, that is more bound by formal rules and precedent than at anytime in its history. In today’s Senate, each party assumes that the other party will fully exploit its procedural options—the majority party assumes that the minority party will obstruct legislation and the minority assumes that the majority will restrict its opportunities. Leaders are expected to fully exploit the rules in the interests of their parties. The minority is quick to



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obstruct and the majority is quick to restrict. Senators of both parties are frustrated by what has become of their institution.

This obstruct-and-restrict syndrome is new to the Senate. In this paper, I report 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. 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.



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Essential Background

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's 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.

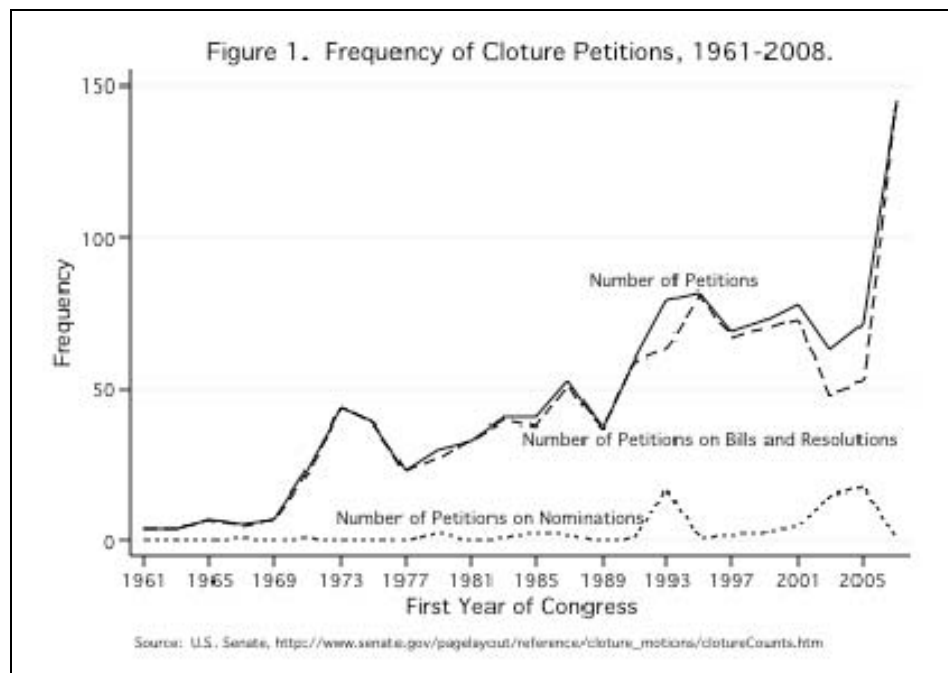
The Senate of the mid-20th century had settled into a fairly stable procedural pattern. The cloture rule, Rule XXII(2), was modified in 1949 to clarify that cloture may be applied to procedural motions (such as the motion to proceed), thereby making it possible to limit debate with the requisite number 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.

Rule XXII, with its cumbersome cloture process and super-majority threshold, forces floor leaders to rely on unanimous consent agreements to give some order to floor decision making. Over the years, in response to senators' demands and leaders' efforts to close loopholes, unanimous consent agreements became quite complex and required considerable attention from the floor leaders. But reliance on unanimous consent created opportunities for individual senators to delay Senate action. Holds and clearance practices emerged in tandem in the

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early 1970s (Smith 1989). Holds are requests to the floor leader asking that a measure not be considered on the floor. The practice became regularized in the 1970s as the leadership instituted informal clearance processes to avoid surprises on the floor. 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.

The 1970s witnessed an increase in the use of obstructionist tactics by Senate minorities, which is reflected in the more frequent use of cloture (Figure 1). Several temporally overlapping and mutually reinforcing developments contributed to the emergence of the Senate's new procedural condition. 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 individual senators and the minority party to exploit their procedural prerogatives amplified as the lobbying community expanded, electioneering pressures intensified, and time became scarce as the Senate agenda expanded 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, 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.



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).¹ 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.² 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.³ 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.

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.⁴ 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 but favored some reform, 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.

For a variety of reasons, the House and Senate moved to create omnibus bills with greater frequency in the 1980s (*CQ Almanac*, 1982, 1984, 1986, Sinclair 2000, Krutz 2001, LeLoup 2005, Hanson 2009). Large reconciliation bills, protected from unlimited debate and nongermane amendments in the Senate were

¹ Titles I-IX of the Congressional Budget and Impoundment Control Act of 1974.

² 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.

³ For background on the Byrd rule, including a review of points of order and waivers considered under the rule, see Keith (2008).

⁴ 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.

prominent, as were omnibus appropriations bills and continuing resolutions. 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 the necessity to keep agencies funded kept senators operating under severe time constraints. Moreover, 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

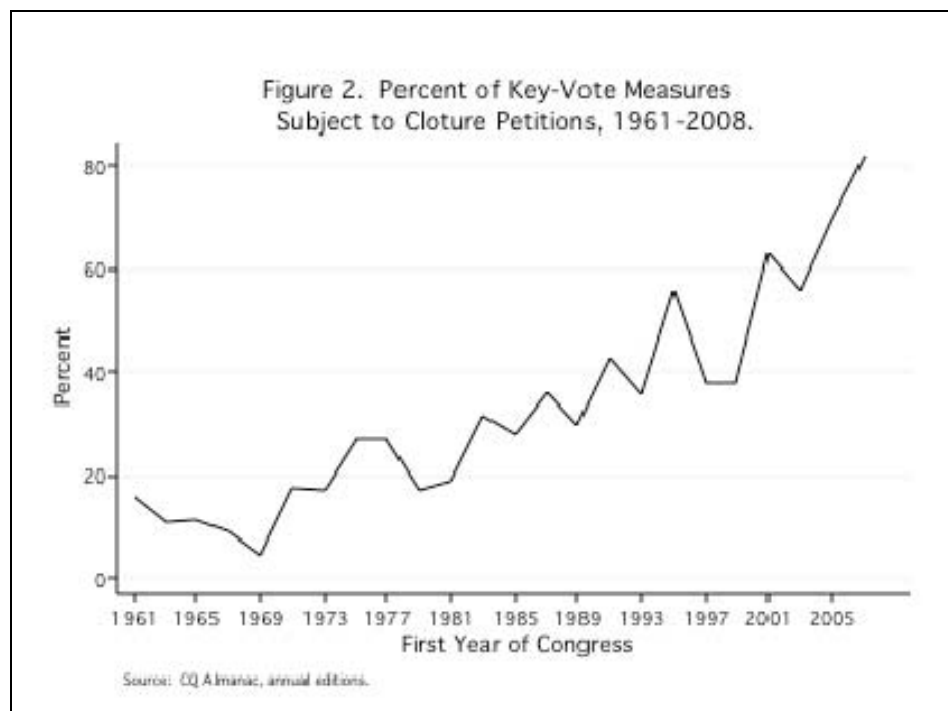
As the parties became more sharply polarized, Senate floor leaders became more centrally involved in negotiating the details of major bills, building the required floor coalitions to pass or block legislation, and shepherding legislation through negotiations with the House. Intense obstructionism by 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 elevated levels.

Intensifying Obstructionism

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. 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) subject to cloture

had been trending upward since the 1970s and continued to ratchet upward in the 1990s.

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).⁵ 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 confronting Byrd and Mitchell made it very difficult for the majority leaders to obtain unanimous consent to structure debate before a bill was brought up for. After a bill made it to the floor, the leaders battled, amendment by amendment, to gain time limits on debate, which yielded

⁵ 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.

Cloture on the motion to proceed now is the most common motion on which to file for cloture.

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 publicly announced reason.

Changing Cloture Practices

Like all leaders, Mitchell looked for ways to move legislative business while struggling with minority obstructionism. Mitchell was the first majority leader to frequently seek cloture on motions to proceed once he discovered resistance from the minority party to unanimous consent to bring up significant legislation (Hook 1990). 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 motion on which to file for cloture, 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.⁶

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

⁶ 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).

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.

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).⁷ Tax bills taken up as reconciliation measures, apparently sanctioned by the Republican appointed parliamentarian, Bob Dove, were vetoed by President Bill Clinton in 1999 and 2000.

Rising Obstructionism in a Polarized Senate, 2001-2010

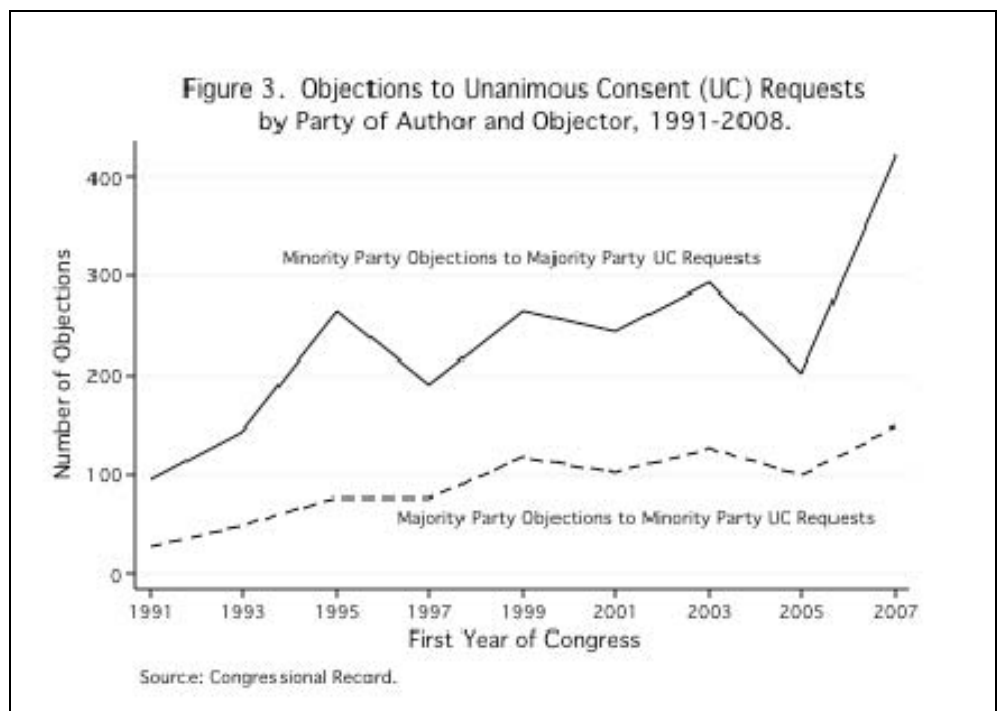
As sharply partisan as the 1990s turned out to be, the Lott-Daschle battle was mere child's play in comparison with what was to come in the first decade of the 21st century. As Figure 1 shows, more bills, including more minor matters, were subject to cloture petitions and votes. At the same time, a much higher proportion of major bills felt the sting of obstructionism (Figure 2).⁸ In the most

⁷ See Mann, Reynolds, and Ornstein 2009.

⁸ 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

recent years, the majority Democrats resorted to cloture for the vast majority of important measures.

The surge in obstructionism since the election of 2006, when the Democrats regained Senate and House majorities in the second midterm election of President George W. Bush, deserves special notice. Following the 2006 elections, Senate Democrats had a small 51-seat majority and lost half of the cloture votes. Republicans noted, correctly, that some of Majority Leader Reid's use of cloture was intended to block non-germane amendments or to set up opportunities for filling the amendment tree (see below). But Republicans openly stood in the way of the sizable Democratic agenda and forced Reid to find 60 votes for cloture on a wide range of bills on which the parties were divided—minimum wage, 9/11 Commission recommendations, immigration reform, energy, children's health insurance, domestic intelligence, climate change, and others.



Since the Democrats regained a majority in 2006, daily floor action has resembled hand-to-hand combat. As Figure 3 shows, the frequency of minority objections to majority party unanimous consent (UC) requests reached a high level in the new century. The number skyrocketed in the 110th Congress (2007-2008) when objections to majority party UC requests averaged more than one per

issues. Budget measures, which are subject to debate limits, and resolutions to reform Rule XXII are excluded from the count in Figure 2.

day when the Senate was in session.⁹ The new level of obstructionism continued into the 111th Congress (data not shown). The evidence seems to confirm the majority party complaint that they faced record levels of obstructionism. Combined with the record of cloture petitions and votes, the evidence certainly supports the claim that the Senate has reached a new plateau in the exploitation of procedural prerogatives.

Before the recent period, the majority leader, whip, or bill manager made most UC requests and objections, if any, were made by their minority counterparts. 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. At times, there have been dueling UC requests with each party trying to prove a point about the other side's partisanship. As Figure 3 illustrates, the result is that the minority UC requests spurred a corresponding increase in majority party objections.

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 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.¹⁰

Cloture petitions and objections to UC requests are like a geologic record.

⁹ The count in Figure 3 excludes objections under Rule XIV that place legislation on the Senate *Calendar*.

¹⁰ 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.

They are the formal record of more complicated interaction between the majority and minority parties, much of which does not get recorded. The need to create some kind of a schedule forces the majority leader to check with the minority leader on a regular basis. When the minority leader reports that there is a hold on his side or that he is not receiving timely responses from his party colleagues, the majority leader must either delay action on some matters or risk objection to a UC request to bring up a bill on the floor. These informal interactions and the record of cloture petitions and objections to UC requests reflects the expansive use of obstructionist strategy on the part of the minority party in response to the majority party agenda.

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. A year earlier, ANWR legislation was defeated on a cloture vote. The Republicans included a provision in the 2003 budget resolution that assumed future revenue from oil and gas leases. If approved, the provision would have allowed ANWR drilling provisions to be included in a reconciliation bill, also subject to debate limitations. An amendment to strip the provision from the resolution was approved with the support of Democrats and a handful Republicans (Goldreich 2003).¹¹

¹¹ 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.

The most spectacular procedural episode of the recent period was the 2003-2005 confrontation over judicial nominations.

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.¹² 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 cloture). The "Gang of 14" announcement diffused the situation and the senators on both sides backed away from the precipice. Frist appeared to be frustrated with the way the Gang of 14

¹² The term, "constitutional option," was borrowed from a law review article written by a former Senate Republican leadership aide (Gold and Gupta 2006).

pulled him away from triggering the nuclear option.¹³

The Syndrome Takes Hold: 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.¹⁴

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 of filling the amendment tree, but used it once. His successors, Frist and Reid, used the technique many times, usually by carefully pairing it with cloture.¹⁵ Reid observed in the summer of 2005 that Frist began to use the technique for the first time immediately following the nuclear option episode.

The Syndrome Intensifies: Place-Holding Amendments

The floor amendment process has changed in a fundamental way in recent Congresses. It has become common for a majority leader or bill manager, using their right to be recognized first, to offer a first-degree amendment to bill and leave the amendment pending. Another senator seeking to offer amendment

¹³ The technical feasibility of the reform-by-ruling strategy did not seem to be in doubt, but it would have represented the most radical use of the strategy and involved a constitutional ruling by the presiding officer, a matter usually left for the Senate to decide.

¹⁴ 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.

must gain unanimous consent to temporarily set aside the pending amendment, which gives the floor leader or bill manager the opportunity to object to the consideration of the amendment. This tactic gives the majority leader some leverage with colleagues who want to offer or vote for amendment while negotiating a unanimous consent agreement to structure the amendment process. Senators regularly complain that they cannot get their amendments considered.

At some point, of course, the Senate must dispose of the place-holding amendment to vote on the bill, which creates an opportunity for other amendments to be considered. By that time, the floor leadership hopes, a unanimous consent agreement can be negotiated to manage remaining amendments or cloture can be invoked. If a unanimous consent agreement can be negotiated, a 60-vote threshold for an amendment (see below) both guarantees the amendment sponsor a vote but, for the bill manager, effectively removes the threat of the adoption of the amendment. If cloture can be invoked, the 30-hour debate limit, the rule limiting senators to two amendments, and the possibility of filling the amendment tree give the majority leader even more bargaining leverage with amendment sponsors.

One consequence of the place-holding amendment strategy is that there is less need to exploit the motion to table an amendment. As Figure 4 shows, of motions to table have been used far less frequently in recent Congresses. With more amendments considered with the approval of the majority leadership or bill manager until a unanimous consent agreement is achieved or cloture is invoked, the efficiencies gained by quick, non-debatable motions to table are not as important.

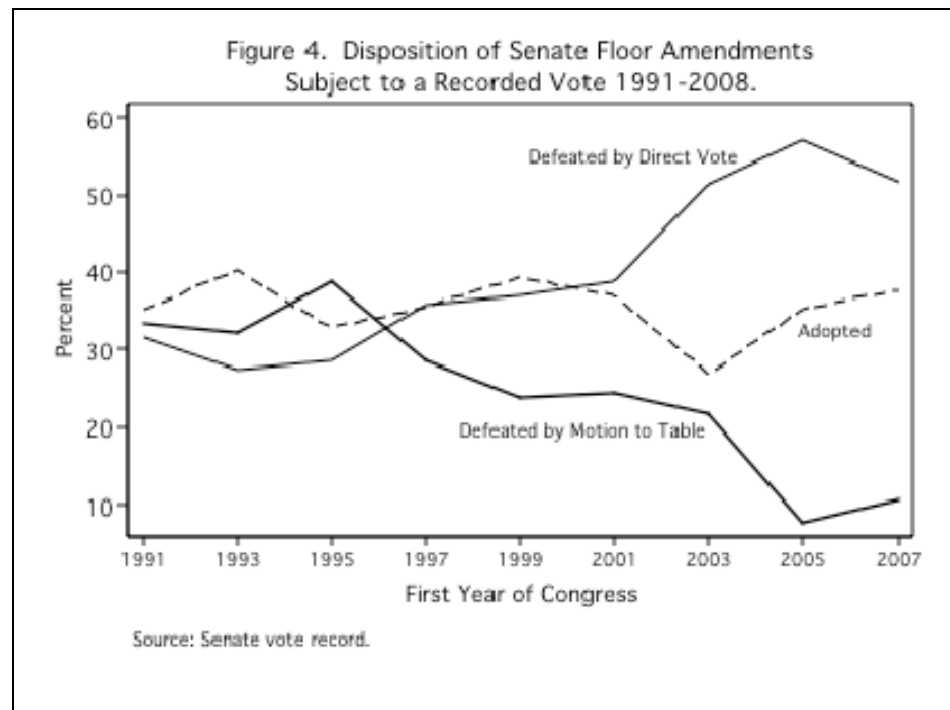
It bears observing that the majority party's amendment tactics have motivated minority party members to insist that they will more resolutely obstruct the majority. The majority party surely takes that threat into account. In the highly polarized context of recent Congresses, the majority leadership may correctly predict that the no additional votes for cloture are lost by this pre-cloture strategy. It is noteworthy that majority party members express frustration with this strategy, too, but, in most circumstances, they seem tolerant of an approach that suits the collective interests of their party.

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.¹⁵ This became a near-standard feature of Reid unanimous consent requests for major legislation.

¹⁵ 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.

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 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).¹⁶ 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.¹⁷

The Lott hearing produced no action on reform at that time, but a modified version was incorporated in the 2007 ethics reform bill.¹⁸ 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 in 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

¹⁶ See Hook (1993), Doherty (1998), Eisele and Kelly (1998), Friel (2007), and Pierce (2007).

¹⁷ 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).

¹⁸ The Honest Leadership and Open Government Act of 2007 (P.L. 110-81), Section 512.

for three decades.¹⁹ 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.

The 2007 rule has proven to be a failure. 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 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. 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.²⁰ 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).²¹ In May 2010, when over a hundred nominations were held up by holds, an effort by Democrats to call up the nominations and force objections yielded no additional official notices

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.²² Minority

¹⁹ For a review of ambiguities in the rules, see Oleszek (2008).

²⁰ 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).

²¹ 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>).

²² 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-

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, particularly 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 103rd 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 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 103rd 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).²³ Of course, this

cameral 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).

²³ In January 2007, the House of Representatives adopted a new rule that requires conference committees to be open to all conferees.

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 with 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.²⁴

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.

Unorthodox Appropriating—Exploiting the Conference Process

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

²⁴ 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.

In early 2010, a Google search of “dysfunctional Senate” returns 7,190 hits.

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 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).

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 often 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 to be 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. Selfishness, catering to outside interests, and mean-spirited partisanship are the problems, not the rules of the Senate. What we need, this argument goes, are public-spirited, problem-solving senators who will not let the rules stand in the way of getting the nation's work done.

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. There are few centrist senators who can successfully demand a deliberative, consensus-building process that produces constructive and successful compromises. Few minority party senators withhold support for obstructionist maneuvers and few majority party members resist efforts to limit amending activity and invoke cloture. Each party's leaders, guided by a consensus view among their fellow partisans, pursue strategies that perpetuate the obstruct-and-restrict syndrome of the modern Senate.

What Reforms Have Been Proposed?

Three dimensions to "filibuster reform" deserve notice: the *threshold* for cloture, the *motions* with debate limits, and the *measures* with debate limits. Rules affecting any of three may be modified to alter the advantage between the majority and minority. From the majority's perspective, any change that saves time for its agenda is a step in the right direction.

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. I favor such reform. 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. While a bill could still be blocked by filibuster, a majority leader with the required number of votes could more rapidly dispose of a measure and reduce the harm of obstructionism to his larger agenda. It is fair to assume that Senate

First, the majority must consider whether forced filibustering is likely to persuade at least some senators, or perhaps the leadership of the whole minority party or faction, who have already decided to oppose cloture to change their minds.

minorities have recognized that filibusters and threatened filibusters gain some of their effectiveness by the collateral damage that delays cause for majorities' larger agenda.

Finally, limitations on debate might be adopted for specific categories of legislation. The executive calendar (nominations and treaties), appropriations bills, and tax measures have been mentioned as categories that majority parties and president might be especially interested in protecting from obstructionism. In the case of appropriations and tax bills, it might be feasible to add them to the Budget Act's provisions that limit debate on budget resolutions and reconciliation bills.

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.

Force "Real" Filibusters?

One of the most commonly proposed solutions to the problem of obstructionism is to force the minority to take the floor and conduct extended debate. After all, it is noted, failure of minority senators to seek recognition leads to a vote on the motion at hand. Allowing a minority to keep a bill off the floor altogether makes obstructionism painless for the minority. Moreover, the argument continues, exposing a filibustering minority to the C-SPAN audience will pay a price in public opinion for its obstructionism. If the majority would increase the cost of obstructionism, obstructionism will melt away.

This argument is appealing, but, unfortunately for Senate majorities, the promise of this approach as a strategy for generally reducing obstructionism is limited. We must consider the calculations of both the minority and majority.

First, the majority must consider whether forced filibustering is likely to persuade at least some senators, or perhaps the leadership of the whole minority party or faction, who have already decided to oppose cloture to change their minds. They usually conclude that it will not. In most cases, minority senators already have decided that obstructionism is popular at home. And, while there is a chance the some voters will think ill of an obstructionist minority party, there is little evidence that voters' view of the minority procedural moves have an effect on vote intentions independent of their policy views. Moreover, minority senators can conduct extended debate one senator at a time with little inconvenience to themselves. It is true that a filibuster may delay action on other legislation favored by some members of the minority, but minority senators bet, usually correctly, that the majority wants action on the backlogged legislation

even more than they do.

Second, the majority—especially a majority party—pays a high price for truly extended debate. A lengthy debate forces the majority party to produce a quorum on the Senate floor and makes it difficult for senators to conduct business in committees or at home during the filibuster. Inevitably, the majority party is subject to criticism by its opponents and commentators for its unwillingness to compromise with the minority, whether or not the minority is willing to consider compromise, and for its misplaced priorities as other legislation—important reauthorizations, essential appropriations—is held up. Inevitably, some majority party or faction members, facing a cohesive minority, begin to demand that the leaders move on to other matters.

Finally, filibusters gain real bite at the end of session or Congress when must-pass legislation and election campaigns are awaiting senators' attention. The price of failing to pass essential measures or attend to campaigns makes the advice of forcing real filibusters seem foolish. The minority knows this and obstructs more often and with greater effect as time constraints intensify.

In fact, history is not kind to majority leaders who insist on real filibusters. The last time a majority forced extended “real” filibustering was in 1987 when a Democratic majority wanted to pass campaign finance reform. Majority Leader Byrd interrupted consideration of a defense bill—also subject to a filibuster for most of that summer—to bring up the campaign finance bill and kept the Senate on the campaign finance bill for nearly two weeks. He forced seven cloture votes. Despite the fact that Byrd had at least a five-vote majority for the bill and showed remarkable determination, the largest vote in favor of cloture came on the first vote, with absentees diminishing his count on subsequent votes. Byrd set aside the campaign finance bill when another important measure was ready for floor consideration.

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

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non-germane amendments, and to object to the consideration of legislation through holds or other means, all of which rests on Rule XXII.

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 many members of the majority party (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. This is most likely in a lame duck session or at the start of a new Congress. The next opportunity for action appears to be January, 2011.

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