

The Forum

Volume 9, Issue 4

2011

Article 2

GOVERNING THROUGH THE SENATE

Through the Looking Glass, Darkly: What has Become of the Senate?

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Recommended Citation:

Binder, Sarah (2011) "Through the Looking Glass, Darkly: What has Become of the Senate?,"
The Forum: Vol. 9: Iss. 4, Article 2.

DOI: 10.2202/1540-8884.1484

Available at: <http://www.bepress.com/forum/vol9/iss4/art2>

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Through the Looking Glass, Darkly: What has Become of the Senate?

Sarah Binder

Abstract

Some twenty years ago, Richard F. Fenno, Jr. published “The Senate Through the Looking Glass” – a particularly illuminating and trenchant assessment of the state of the Senate. Listening to senators debate whether to allow television cameras into the chamber, Fenno concluded that the Senate was still capable of thoughtful deliberation and consensual decision-making. In this article, I take a Fenno-inspired peek through the looking glass at the contemporary Senate, using a recent parliamentary dispute to probe senators’ views about their institution. The view is unusually dark. Two decades after Fenno’s assessment, rising partisanship has made the Senate nearly ungovernable—leaving a chamber that struggles to fulfill its most basic constitutional duties.

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Some twenty years ago, Richard F. Fenno, Jr., in “The Senate Through the Looking Glass”, offered one of the most illuminating and trenchant perspectives on the state of the contemporary Senate. Fenno adroitly used the Senate’s debate over the introduction of television into the chamber to take the pulse of the upper body. As he concluded about the Senate of the late 1980s, “External pressures push it toward individualism, but internal concerns produce a countervailing communitarianism. The Senate is still looking for its place in the current U.S. political system” (Fenno 1989, 346).

In this article, I take a Fenno-inspired peek through the looking glass at a recent and controversial parliamentary dispute to try to make sense of today’s Senate. The view is unusually dark. Two decades after Fenno’s examination, the Senate has yet to find its place in the political system. Indeed, some might even argue that Senate dysfunction has meant the *loss* of its place in the political sphere. The rise of intense partisanship in the Senate has undermined both its communitarian and individualistic natures—leaving a chamber bereft of trust and barely able to fulfill its constitutional and legislative roles.

The Senate Fenno Saw

In 1989, Fenno saw a Senate well along in its transition from a communitarian past to an individualist present. The communitarian Senate of the 1950s and 1960s had been an inward-looking, committee-dominated body, in which norms of restraint and reciprocity governed senators’ behavior. As Huitt (1961) and Matthews (1973) observed, senators rarely exploited their advantages under the rules, lest they disrupt the small-town norms that were essential for making the chamber of informal practices and lax rules function. As Fenno (1989) noted, filibusters were in order only when senators wanted to signal that “the most intensely held interests were at stake” (316). Typically, that meant filibusters by southern conservatives, as the so-called Conservative Coalition sought to block majorities from adopting measures to advance civil rights.

By the late 1980s, an individualistic Senate had emerged, “markedly less self-contained and more outward-looking than the communitarian one” (Fenno 1989, 317). According to Sinclair (1989), the Senate had been transformed. By the 1970s, an emerging liberal Democratic majority inside the Senate and a newly combustible political environment outside had combined to remake the upper chamber. That transformation was evident in both the distribution of power within the chamber and in the changing procedural nature of the body.

Internal influence came to be distributed far more broadly, as senators became champions for groups and causes outside the institution. As Smith (1989) observed, the focus of legislating moved to the floor, undermining long-dominant, conservative committee chairs and weakening committee grasps on the institution.

Indeed, we see the Senate's first modern spike in obstructionism in the mid-1970s (Figure 1). Although the Senate's reliance on cloture in that period looks tame compared to recent years, the onset of individualism in the Senate was fully evident in senators' new-found willingness to exploit the rules of the game to block measures they opposed.

It was in this context that Fenno viewed the Senate in the late 1980s as it struggled with whether and how television coverage might be introduced into the chamber. Senators were divided over whether to turn on the cameras. Others, including minority leader Robert Byrd, viewed the juncture as an opportunity for convincing senators to tighten the rules of debate as part of the move to bring television to the chamber. As Fenno (1989, 345) remarked about the television debate,

“It was a long, hard, thoughtful, and informative debate, conducted according to the ‘special traditions’ of a ‘great deliberative body.’ An intense minority was allowed every opportunity to make its case, and the eventual decision was a highly consensual one.”

Despite the transformation of the chamber, senators were able even in the late 1980s to work their way through a vexing institutional disagreement and reach a final vote. In fact, the vote on final passage drew the support of some senators who had found themselves on the losing end of key votes along the way to a final compromise. As Fenno observed, it was as if vestiges of the communitarian Senate still lived.

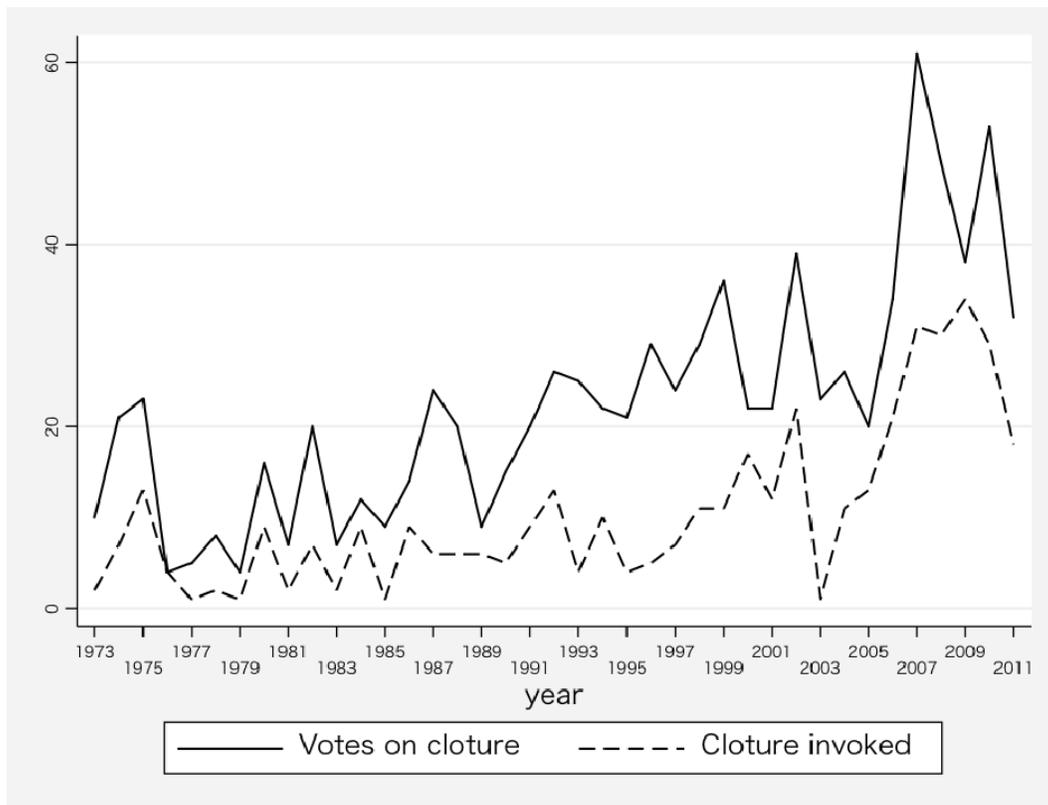
The Contemporary Senate

The Senate Fenno saw through the looking glass is hardly recognizable today. A quick glance at Figure 1 shows the path taken by the Senate over the two decades since Fenno wrote. In the 1980s, Senate leaders attempted cloture roughly 15 times a year; today, that number has doubled. Many other metrics show a similar explosion in leaders' reliance on cloture. Steven Smith (2010), for example, records an increase in the percentage of major measures subject to cloture votes over the past forty years—rising from roughly thirty percent when Fenno wrote in the late 1980s to over eighty percent in recent years.

We see the rise as well over this period in leaders' use of cloture, particularly on the motion to proceed, which allows the majority leader to call up bills for consideration on the Senate floor. To be sure, minority leaders have objected to the expanding use of cloture, arguing that majority leaders often file for cloture simply to limit debate and amendments by the minority. In contrast, majority leaders since George Mitchell (D-Maine) in the early 1990s have argued

that the move to obstruct measures from coming to the floor – as opposed to launching filibusters only after bills had reached the floor-- necessitated more aggressive use of cloture by the majority.

Figure 1. Senate Cloture Trends 1973-2011



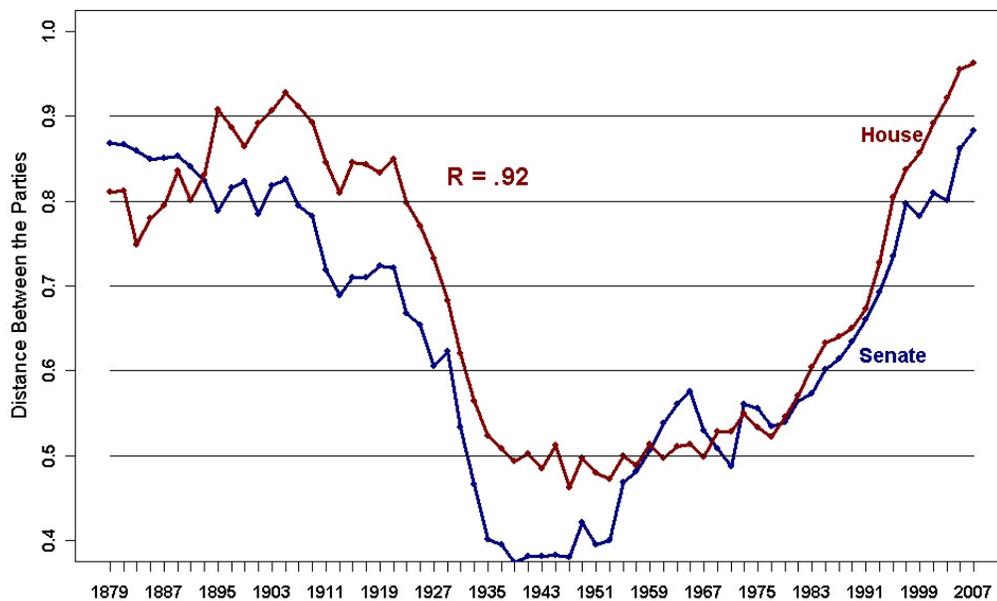
Source: Data compiled by author.

Smith (2010) has aptly captured the contemporary Senate dynamic, dubbing it the “Senate Syndrome”:

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 obstruct and the majority is quick to restrict.

The result has been a parliamentary arms race between the two political parties and their leaders. Whether measured by formal metrics or the informal interactions that take place between the party leaders on a daily basis, that arms race defines and structures the modern Senate. Both parties expect that the other party will fully exploit its procedural rights, leaving each side to take increasingly aggressive steps that anticipate and attempt to undercut the other party's tactics. Most recently, this anticipatory strategy is seen in majority leaders' willingness to "fill the tree"—to take up available amendment slots with placeholder amendments to prevent the minority from offering amendments to the underlying measure. Coupled with cloture, this maneuver grants majority leaders a modicum of advantage over the minority party—albeit at the expense of the ability of both parties' rank and file to fully debate and amend major bills.

Figure 2. Party Polarization 1879-2008
Distance between Parties First Dimension



Source: <http://www.voteview.com>

Fenno observed the transformation of a communitarian Senate into a chamber of one hundred senators, each eager to pursue their own policy and political agendas. This second transformation moved the Senate from individualism to a highly partisan legislative body. The key political development over the past two decades that has encouraged this transformation is the

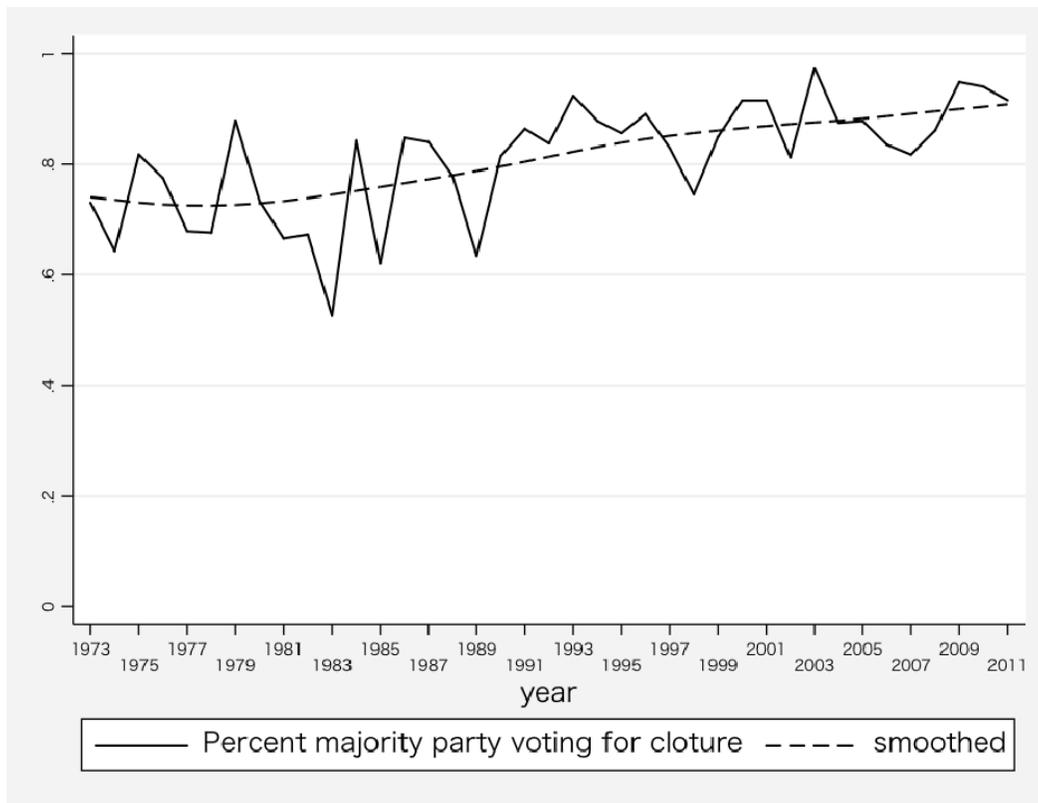
increasing polarization of the two major parties in Congress, as mapped by Keith Poole and Howard Rosenthal in Figure 2. Polarization has been underway at least since the early 1980s, when the Democrats' conservative base in the South began voting for Republicans and the GOP's moderate wing in the Northeast all but disappeared from the ranks of Congress. The emergence of polarization reflects increases both in the ideological gap between the two parties and in the exercise of partisan "team play" (Lee 2009).

The parties' disagreements, in short, are both ideological and strategic (Gilmour 1995). To burnish their party's brand name, the parties take opposite positions. As Rep. Jim Jordan (R-Ohio) noted about a House package to extend a payroll tax cut in December of 2011, "The fact that the president doesn't like it makes me like it even more" (Steinhauer and Pear 2011). So long as the two parties each have an opportunity to gain control of government, and so long as party control of government delivers different policy outcomes, each party in Congress has a strategic incentive to disagree with the other party (Fiorina 2006). Unified Republican control under George W. Bush delivered tax cuts opposed by most Democrats; unified Democratic control under Barak Obama delivered healthcare reform opposed by most Republicans. The proceeds of party control create and sustain additional incentives for strategic disagreement even as the parties oppose each other on ideological grounds.

As Smith (2010) has observed, polarization brought significant change to the Senate. Party leaders took on a central role in negotiating major bills, building coalitions for or against those bills, and usurping the role of committee leaders in negotiating agreements with the other chamber. Most importantly, as the parties polarized, rank and file members increasingly coalesced around party positions—meaning that the minority party quite often formed a solid bloc against the majority position on both measures and nominations alike. The impact of rising partisanship is seen clearly in Figure 3, which tracks mean support in the majority party for cloture over the past forty years. In the 1970s, roughly thirty percent of the majority party defected on cloture votes; four decades later, majority party defections dropped to a mere five percent.

Given the Senate's Rule 22 that requires sixty votes to overcome debate and given that recent majorities have rarely had sixty within their own party ranks, the polarization of the parties helps to produce stalemate on any controversial issue or nomination the minority chooses to oppose. Sixty votes has become the *de facto* threshold for legislative agreement. The ability of individual senators to place anonymous holds on measures and nominations has only fueled the perception that the Senate is broken—unable to fulfill even its most basic constitutional duty of dispensing advice and consent for the president's appointees.

Figure 3. Party Divisions on Cloture Voting, 1973-2011



Source: Data compiled by author.

Efforts amongst Democrats to tighten the rules of debate to make it harder for Republicans to block the majority went largely for naught in January of 2011 (Friel and Lesniewski 2011). Republican capture of the House took the wind out of the sails of many Democratic reform-minded senators and outside liberal groups that had trumpeted reform during Obama's first two years in office, who now saw little need to facilitate Senate action on the House's Tea Party-inspired priorities. No doubt the increased prospects of Republicans gaining control of the Senate in the 2012 elections also diminished enthusiasm amongst Democrats for revising the rules of the Senate.

Instead of formal changes to the Senate's Rule 22, Majority leader Harry Reid (D-Nevada) and Minority leader Mitch McConnell (R-Kentucky) shook hands on an informal agreement for both parties to refrain from fully exploiting the rules in the two congresses to come. Democrats would refrain from filling the amendment tree, and Republicans would refrain from blocking the motion to proceed when the Democrats moved to call up measures to the floor. Moreover, both parties promised not to change Senate rules over the coming four years by

“going nuclear”—a tactic through which a majority might attempt to change chamber rules by majority vote (thus circumventing Rule 22’s high barrier to cutting off debate on measures to change Senate rules). Few were convinced that this informal agreement could stem the tide of partisanship in the Senate (Friel 2011). And they were right.

Through the Looking Glass

One particularly bitter, partisan episode on the Senate floor in October of 2011 affords us the opportunity to listen in on senators as they expressed their frustrations with the state of the Senate and the impact of partisanship on its ways and means of doing business. To be sure, the floor debate pales in comparison to the deliberations observed by Fenno in the 1980s. But it is emblematic of both parties’ deep frustration with the way the Senate functions today. To understand why the incident sparked such consternation among senators, it is necessary first to go deep into the weeds of Senate procedure. Once we have our parliamentary bearings, we can take stock of the Senate through this institutional brawl.

In the evening of October 6, fireworks started on the floor of the Senate. Reporters watching the goings on started filing stories and tweets proclaiming that the Senate had “gone nuclear.” Majority Leader Reid and the Democratic majority had reportedly changed Senate rules by majority vote, restricting the rights of senators to offer amendments on the Senate floor.¹ In light of the leaders’ handshake earlier, the one that took the nuclear option off the table, Republicans and their staffers (likely fueling the after-hours headlines) began crying foul, arguing that the majority had undermined the Senate’s cherished right of extended debate and amendment.

A more careful look at what transpired on the Senate floor that evening belies GOP claims that Reid and the Democrats had gone Senate-nuclear. Some background on Senate rules will help to make this clear. The Senate’s rules prohibit non-germane (unrelated) amendments on the Senate floor after the chamber has voted to invoke cloture (by securing sixty votes to end debate on the pending measure) on a pending bill. In other words, senators are limited to offering germane amendments once debate has been limited on a bill—unless the Senate agrees by unanimous consent to allow unrelated amendments.

Over the course of considering a Chinese currency manipulation bill (on which a bipartisan majority had voted to invoke cloture), McConnell and Reid appear to have been negotiating an agreement that would have allowed Republicans to offer seven non-germane amendments post-cloture. Such an agreement—if no senator objected-- would have allowed the Senate to circumvent

¹ On the politics of going nuclear, see Binder, Madonna, and Smith 2007.

the post-cloture ban on non-germane amendments. Partisan disagreement over which amendments would be allowed had stalled movement on the bill in the post-cloture period.

Unable to reach agreement on which amendments could be offered, Reid offered the motion to suspend on behalf of Republican senator Tom Coburn (Oklahoma), and then moved immediately to raise a point of order that the motion to suspend in this context was dilatory. Under Senate rules, dilatory motions are not in order once cloture has been invoked. The parliamentarian advised the presiding officer to rule that the motion was in order, the presiding officer followed the parliamentarian's advice, and a vote ensued on whether or not to sustain or overrule the chair's ruling.

Appeals of the chair require only a simple majority vote to pass, and Reid mustered all the Democrats save Senator Ben Nelson (D-Nebraska) to vote to overturn the chair. In practice, this meant that the Senate had set a new precedent, by which we typically mean that a majority had endorsed a new *interpretation* of the Senate cloture rule: Under cloture, a motion to suspend the rules to offer a non-germane amendment could now be considered dilatory.

Did these procedural steps constitute going nuclear? Republican senators and staff argued that they did; many Senate watchers thought otherwise.² The Senate did move by majority vote to set a new precedent, but it was hardly a nuclear act. Presiding officers' rulings are not always upheld, and the Senate does periodically move by majority vote to establish new ways of doing business—even when that path is at odds with the parliamentarian's reading of precedent. More generally, the trend since the 1970s has been gradually to tighten post-cloture practices—both to limit the time allotted for post-cloture debate and to enhance the ability of the Senate to prevent back-door “post-cloture” filibusters.

From the majority leader's perspective, clamping down on efforts to offer non-germane amendments post-cloture was consistent with this general pattern of trying to make the Senate hew more closely to the intent of the cloture rule. Of course, from the minority leader's perspective, the whole chain of events on the floor during consideration of the currency bill was a violation of Reid's commitment earlier in the year to guarantee amending opportunities for the minority party. The minority was particularly aggrieved, given that the majority leader had filled the amendment tree before filing for cloture, foreclosing GOP opportunities to amend the currency bill during the period when both germane and unrelated amendments would have been in order.

Regardless of the technical merits of the two parties' arguments, the floor discussion that ensued tapped both majority and minority party frustrations with

² See for example the collection of views in this Monkey Cage blog post and in the comments that followed: <http://themonkeycage.org/blog/2011/10/07/did-the-senate-just-go-nuclear/> [Accessed December 15, 2011].

the state of the Senate. From the minority's perspective, the majority's strategy was a pure power grab by a party unwilling to cast politically charged votes. The majority leader had filled the amendment tree during consideration of the bill, blocking Republicans from offering controversial amendments. Reid simultaneously filed for cloture, in part to foreclose votes on politically charged amendments. And then, while the parties were still negotiating over which amendments could be offered post-cloture, Democrats moved forward with Reid's procedural gambit—shutting down an avenue for securing votes on unrelated amendments.

As McConnell noted on the floor before Reid moved to appeal the ruling from the chair,

“The good old days weren't that long ago. I can remember just a few years ago when my party was in the majority...making the point with great repetition...that the price for being in the majority is, you have to take votes you don't like in order to get legislation across the floor and finished ... So this is not ancient times we are talking about where the minority actually got votes, took votes, and were not shut out. I hope we can move back in that direction. I think it would be a lot better for the Senate.”³

McConnell was more pointed after the majority voted to overturn the chair's ruling:

I would say to my friend the majority leader—and this is nothing personal about him; I like him, and we deal with each other every day—we are fundamentally turning the Senate into the House....This is a free-wheeling body, and everybody is better off when we operate that way. Everybody is, whether you are in the majority or the minority, because today's minority may be tomorrow's majority, and the country is better off to have at least one place where there is extended debate and where you have to reach a supermajority to do things.⁴

Interestingly, McConnell appealed on the floor that evening to the interests of both the chamber (“...it would be a lot better for the Senate”) and its members (“...today's minority may be tomorrow's majority”). Moreover, McConnell's reference to the need for a supermajority made plain what is now taken for granted about the Senate: a *de facto* sixty-vote threshold to get anything

³ *Congressional Record*, S.6285, October 6, 2011.

⁴ *Congressional Record*, S. 6317, October 6, 2011.

done. “When the Senate gets tired of the process,” McConnell put it squarely, “sixty people shut it down, and you move to conclusion.”⁵

From the majority’s perspective, the sixty-vote Senate had devolved into stalemate. As framed by Reid, the lack of restraint by the Senate minority had brought the chamber repeatedly to a standstill. In explaining, for example, why he had (partially) filled the amendment tree on the bipartisan currency bill, Reid offered this defense: “Why did I do that? I have found over the last Congress and nine months that when I try to have an open amendment process, it is a road to nowhere.”⁶ To be sure, Reid understood the position of the Republicans, acknowledging that “The Senate should function like the Senate.”⁷ But from the majority leader’s perspective, the GOP strategy of repeatedly offering “unending amendments that are not germane or relevant” had undermined the chamber’s capacity to legislate.

If the plethora of amendments had reflected individual senators’ efforts to stake out positions and force votes in pursuit of building their own reputations, the Democratic majority might not have eliminated the use of suspension motions to circumvent Rule 22’s post-cloture germaneness restriction. Members of both the majority and minority parties, after all, lost amending opportunities with the majority’s maneuver. In that context, an agreement between leaders might have been sufficient to rein in rank and file political ambitions. But today’s Senate has moved far beyond the world of individualism that Fenno observed in the Senate in the 1980s. Now, legislative tactics reflect partisan strategies, with both parties willing to exploit the rules of the game to secure their party’s electoral and policy goals.

Reid was not shy that evening about placing the blame squarely on McConnell’s shoulders, arguing that the Republicans were holding the Senate hostage to its partisan ambitions:

So we can do all of the make-believe that my friend the Republican leader is talking about, about what great things should happen around here... We can’t do that because my friend the Republican leader, as candid as he was, said his No. 1 goal is to defeat President Obama. That is what has been going on for nine months here, and this issue related to these dilatory tactics on these motions to suspend the rules is just part of that game that is being played. Let’s get back—I agree. I agree. Let’s get back to legislating as we did before the mantra around here was “Defeat Obama.”⁸

⁵ *Congressional Record*, S6318, October 6, 2011.

⁶ *Congressional Record*, S6316, October 6, 2011.

⁷ *Congressional Record*, S6317, October 6, 2011.

⁸ *Congressional Record*, S6318, October 6, 2011.

From the majority's perspective, the infusion of partisanship into the daily life of the Senate had made the place unworkable.

In many respects, none of these concerns by the Republican or Democratic leaders should come as a surprise. Indeed, the majority party's difficulties in managing the Senate were already underway when Fenno's Senate piece appeared. As Majority Leader George Mitchell (D-Maine) noted frequently in the early 1990s, Republicans were newly expanding their use of the filibuster to block motions to proceed to consideration of measures on the Senate floor. In other words, as early as the 1990s, leaders routinely had to secure sixty votes just to advance bills to the floor, increasing the minority's leverage in negotiations over whether, when, and how measures would be debated, amended, and voted on by the Senate. Reid's exasperation over the minority's tactics this past Fall in many respects echoed earlier leaders' laments.

That said, most disputes over management of the Senate chamber do not end in a majority creating a new precedent to guide the chair's interpretations of existing rules. Certainly Democratic frustrations with Republican tactics boiled over that evening, leading Reid to push a Senate majority to foreclose unrelated amendments post-cloture. Indeed it seems that the ever-rising partisan temperature in the chamber brought a glimpse of recognition from both parties that the Senate had devolved into dysfunction. From the minority, we hear Senator Bob Corker (R-Tennessee), who suggests that partisanship has had debilitating consequences for the entire Senate body: "I think Members on both sides of the aisle believe this institution has degraded into a place that is no longer a place of any deliberation at all."⁹ From the majority, we hear Charles Schumer (D-New York), who also suggests that the Senate has gone a step too far:

But it has gotten to the extreme. While my colleagues on the other side would say it got to the extreme because we always fill the tree, we would say it got to the extreme because you filibuster everything...including judges, appointments, and minor bills. If we are going to bring this place back to a place where we can legislate, both sides have to back off, and we are going to have to figure out how to do that, which we haven't done adequately yet.¹⁰

Even Reid (though not McConnell, at least not publically) seemed to recognize that evening that there was blame to go around: "Maybe there is blame to go around, and I think there probably is."¹¹

⁹ *Congressional Record*, S6316, October 6, 2011.

¹⁰ *Congressional Record*, S6319, October 6, 2011.

¹¹ *Congressional Record*, S6320, October 6, 2011.

But note that Reid was not willing to let the GOP off the hook: “Frustration builds upon frustration and as a result of that, we have situations such as this.” Reid was willing to say that it was time for both parties to “gird up our loins and try to do a better job of how we try to get along,” but there was no doubt that the majority leader laid much of the blame on McConnell’s and his colleagues’ shoulders for allowing partisan goals to undermine the Senate’s capacity to legislate. The debate ended that evening with Reid raising the prospects of a bipartisan caucus to “let a little air out of the tires.” When the first session of the 112th Congress concluded in late December, no such joint meeting had taken place.

Taking Stock of the Senate

With the Senate floor today rarely a venue for true debate or deliberation, legislative deal-making remains in the hands of party leaders. For most major measures, party leaders and their staffs negotiate legislative bargains—which typically come to the Senate floor without opportunity for amendment. Consider, for example, the series of bargains negotiated over the course of 2011: Spending agreements for fiscal years 2011 and 2012, a summer agreement for raising the debt ceiling, and an end of the year deal on extending the payroll tax cut. Had the Joint Committee on Deficit Reduction (otherwise known as the Super Committee) been able to produce a bill under the Budget Control Act in the Fall of 2011, there would have been no surprise that the bill would have been fast-tracked for Senate consideration, without opportunity for amendment or filibuster. Allowing party leaders to negotiate such bargains has made the legislative process on the Hill barely functional. For those matters on which the House plays no role—namely judicial and executive branch nominations—the legislative process has barely worked in recent years. Roughly half of judicial nominees are left in limbo each Congress, with the minority often unwilling to allow votes on even non-controversial or minor nominees. Other times, the minority has voted lock-step against nominees—whose credentials seemingly made them strong candidates for the bench. The rise of polarized parties has moved legislative deal-making off of the Senate floor and has left the chamber often incapable of completing legislative priorities—even sometimes those with bipartisan support.

When Fenno observed the Senate in the 1980s, he concluded that the body was oscillating somewhere between its communitarian and individualistic modes. External forces pulled the Senate towards individualism, while internal forces could sometimes re-create the communitarian nature of its past. As Fenno concluded, the Senate was “still looking for its place in the current U.S. political system” (Fenno 1989, 346). That uneasy state between individual and institutional obsessions has been derailed over the ensuing two decades by an intense and

rising partisanship. Both sides are distrustful of the other's intentions, with each side likely to play tit-for-tat to counter the other's strategic tactics.

In such a Senate, institutional reforms intended to make the Senate work better seem only possible when informally agreed to by a handshake. Still, such informal understandings in a period of intense ideological and partisan disagreements are fragile, as evidenced by GOP claims that the Democrats had gone nuclear in an effort to shut down the minority and to gain advantage. My sense is that the Senate cannot return to either its communitarian or individualistic past in face of such electorally driven polarization. Although we hear senators on both sides of the aisle share concerns about the degradation of the Senate and its capacity for deliberation, it is hard to fathom how the Senate (at least in the short term) reverses course.

The growth of polarization in the Senate has meant the disappearance of moderates who might have demanded a center-seeking legislative process. Absent a centripetal pull, leaders and their rank and file are free to pursue party-based agendas. And so long as the parties disagree fundamentally about the role of government and plausible solutions to national problems, the legislative process in the Senate is likely to remain dysfunctional—particularly in periods of divided party control. The Senate, besieged by its members' and leaders' partisanship, seems barely up to the task of solving vexing national problems, let alone the easy ones.

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