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R STREET POLICY STUDY NO. 107
September 2017

A BEGINNER'S GUIDE TO THE SENATE'S RULES

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CONTENTS

INTRODUCTION

The overall structure of Senate procedure is derived from five primary sources: The Constitution; the Standing Rules of the Senate; statutory rules passed by Congress and signed into law by the president; standing orders; and informal precedents. It is the interaction of each of these component parts that forms the procedural architecture under which the decisionmaking process unfolds within the institution.

CONSTITUTIONAL BASIS OF SENATE RULES

The Constitution contains several provisions regarding the internal operation of the Senate. For example, the Senate Composition Clause sets membership qualifications, term lengths and gives each state two senators who vote per capita.[1] Article I, Section 3, Clauses 4 and 5 designate the vice president as president of the Senate (i.e., the presiding officer or chair) and authorize the Senate to choose a president pro tempore to serve as its presiding officer in the vice president's absence.[2] Additionally, the Presentment Clause establishes a process for considering presidential veto messages.[3] Of these constitutional provisions, the Rules and Expulsion Clause is the most important because it gives the Senate plenary power over its rules of procedure. The clause explicitly stipulates: "Each House [of Congress] may determine the Rules of its Proceedings."[4] With this authority, the Senate establishes both the informal and formal parliamentary rules that govern its proceedings.

The Supreme Court ruled in 1892 that under the Rules and Expulsion Clause, absent a clear constitutional provision stipulating otherwise, the House of Representatives and the Senate are free to make any rules they choose pursuant to their plenary power to determine their internal rules of procedure. Writing for the Supreme Court in *United States v. Ballin*, Justice David Brewer acknowledged that while "the Constitution empowers each house to determine its rules of proceedings," by their rules, the House and Senate could not "ignore constitutional restraints or violate fundamental rights."[5] Aside from this exception, the court held that the power to make rules is exercised by a majority of each chamber and cannot be limited by any rule other than those provided in the Constitution. According to the court's decision, the only requirement to change the rules stipulated therein is "the presence of a majority."

Consequently, a simple majority of senators is constitutionally empowered to change its rules whenever it chooses to do so. But such an ability does not necessarily imply that the practice has been historically acceptable with a bare minimum of senators. Indeed, the Standing Rules of the Senate have long included a provision that requires a three-fifths majority to end a filibuster and an even greater two-thirds

1. U.S. Const. art. I, § 3, cl. 1, 3.

2. Ibid., art. I, § 3, cl. 4-5.

3. Ibid., art. I, § 7, cl. 2.

4. Ibid., at art. I, § 5, cl. 2.

5. *United States v. Ballin*, 144 U.S. 1 (1892).

majority to end debate on proposals to change those rules. While there has been some erosion in support for these requirements in recent years regarding executive and judicial nominations, they continue to hold normative value when it comes to legislation.

STANDING RULES

There are currently 44 Standing Rules of the Senate that govern everything from noncontroversial issues like the oath of office (Rule III) and the committee referral process (Rule XXVII) to controversial ones, such as the process to end debate (Rule XXII). For the most part, the Senate's Standing Rules are very general and do not address circumstances that may arise in specific parliamentary situations. The Standing Rules total only 70 pages in length.

Due to the concept of the Senate as a continuing body, these rules remain in effect from one Congress to the next. Accordingly, Rule V stipulates: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[6] To that end, Senate Rule XXII requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to invoke cloture or to end debate on any "measure, motion, or other matter pending before the Senate [...] except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting."[7] It is thus difficult to change the Senate's rules, because the threshold to invoke cloture on proposals to do so (two-thirds, typically 67 members) is higher than that required to end debate on other measures (three-fifths, typically 60 members). In view of this, the super-majoritarian requirements to end debate in Rule XXII are generally viewed today as facilitating minority obstruction.[8]

The Standing Rules governing other aspects of the Senate's work allow significant interpretation of their meaning and application in the legislative process. For example, consider the rules governing the amendment process on the Senate floor. A 1914 volume of precedents compiled by the Senate's chief clerk observed: "Regarding amendments, pure and simple, the Senate rules have but little to say."[9] Those that do speak to the amendment process include rules XV, XVI and XXII.

One of the goals of Rule XXII is to provide finality and transparency to the legislative process through the filing and publication of amendments. The cloture rule is based on the idea that senators should only agree to invoke cloture on legislation. In doing so, once they have created a known universe of amendments that can be adjudicated post-cloture, an eventual simple majority final-passage vote is all that is necessary.[10]

Finally, the Senate's Standing Rules impose germaneness requirements on amendments in certain circumstances. Specifically, Rule XXII states, "No dilatory motion, or dilatory amendment, or amendment not germane shall be in order" during post-cloture consideration of legislation.[11] However, the rule itself does not define what should be considered "germane." Rather, the very next sentence clearly states that the chair shall decide "questions of relevancy" without debate and that the full Senate will determine germaneness on appeal of the chair's ruling. Similarly, Rule XVI precludes nongermane amendments to general appropriations bills, as well as legislative amendments (i.e., amendments not strictly limited to spending money).[12] However, as with Rule XXII, Rule XVI also does not provide a definition.

STATUTORY RULES

Senate procedures may also be established pursuant to statutory rules created by bills passed by Congress and signed into law by the president. A super-majority vote is effectively required to create such rules, because the legislation that does so may be filibustered. A well-known example of a statutory rule is the Congressional Budget and Impoundment Control Act of 1974 (Public Law 93-344). The Congressional Budget Act created many of the procedures that govern consideration of budget-related legislation in Congress today. The impact of this statute on the decisionmaking process can be observed in the periodic consideration of budget resolutions, annual appropriations bills and reconciliation legislation in the Senate.

Regarding reconciliation, the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508) made permanent the prohibition on the inclusion of extraneous provisions in reconciliation bills. The so-called "Byrd Rule" is enforced by points of order that can only be waived with a super-majority vote. Similarly, the Budget Enforcement Act (BEA; Public Law 101-508) and the Budget Control Act (Public Law 112-25) established annual limits on discretionary spending. The

6. "Rule V: Suspension and Amendment of the Rules," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 4.

7. "Rule XXII: Precedence of Motions," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 16.

8. Wawro and Schickler describe the rise of relatively costless obstruction in the decades after the adoption of the cloture rule as a "great irony" in Senate history. See Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2006), p. 263.

9. Henry H. Gilfry, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate from the First to Sixty-Second Congress*, Inclusive 1789-1913 (Washington: Government Printing Office, 1914), p. 32.

10. The known universe of amendments is created by the filing deadlines for first- and second-degree amendments stipulated in the rule. "Rule XXII: Precedence of Motions," 16.

11. Ibid.

12. "Rule XVI: Appropriations and Amendments to General Appropriations Bills," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 11.

BEA and the Statutory Pay-As-You-Go-Act of 2010 (PAYGO; Public Law 111-139) placed limits on mandatory spending and revenue legislation through a PAYGO mechanism by which any increase in mandatory spending or decrease in revenues would be automatically offset. Both the spending caps and PAYGO provisions are enforced by points of order that require a super-majority to waive, as well as an annual sequestration procedure.

Periodically, Congress also has passed legislation to expedite consideration of trade agreements. For example, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Public Law 114-26) reauthorized Trade Promotion Authority (TPA). TPA established special fast-track procedures in the Senate (and House) by which Congress considers trade agreements submitted by the president. Amendments are precluded and debate time is limited. Such provisions make it difficult for a minority to obstruct trade measures in the Senate.

STANDING ORDERS

Senate procedures may also be created by standing orders, which have the same effect as the Standing Rules discussed above. There are two kinds of standing orders: permanent standing orders and temporary, or "routine" ones. Permanent standing orders are created by a simple resolution and remain in effect until repealed by the Senate, unless otherwise noted in the text of the order itself.[13] A super-majority vote is effectively required to pass a permanent standing order, because the resolution can be filibustered.

Examples of permanent standing orders include the oft-ignored requirement that senators vote from their desks during recorded votes (instead of while milling about on the floor); authorization of gavel-to-gavel coverage of the Senate's proceedings on radio and television; and the special process that grants expedited consideration of certain nominations subject to advice and consent on the Senate floor. The select committees on Ethics and Intelligence were created by permanent standing orders.

Standing orders are also utilized regularly whenever the Senate enters into unanimous consent agreements. Such orders remain in effect for the period of time specified and are listed in the *Congressional Record* on the day they are adopted. The Senate adopts several routine standing orders by unanimous consent at the beginning of each Congress that remain in effect for its duration.

13. The list of current standing orders is compiled each Congress in the Senate Manual under the heading, "Nonstatutory Standing Orders Not Embraced In The Rules, And Resolutions Affecting The Business Of The Senate."

An example of a temporary, or "routine," standing order is the provision for "leader time" on each day, which is under the control of the majority and minority leaders to discuss routine legislative business. Such standing orders are also utilized to structure decisionmaking on the Senate floor. These agreements are typically used to set the dates and times at which future votes will occur, schedule floor speeches and stipulate how much overall time can be used to debate a bill. They may also limit the amendments to legislation that can be offered.

PRECEDENTS

The Senate's daily operations largely function according to informal rules established pursuant to a collection of precedents. According to the late Sen. Robert C. Byrd, D-W.Va., "Precedents reflect the application of the Constitution, statutes, the Senate rules, and commonsense reasoning to specific past parliamentary situations."[14] Former Senate Parliamentarian Floyd M. Riddick argued that precedents embody the practices of the Senate pursuant to the Constitution, its Standing Rules and any relevant rulemaking statutes. These practices serve to "fill in the gaps" contained in these procedural authorities when they fail to address specific parliamentary situations.[15] In this sense, the impact of precedents on Senate procedures is like that of judicial decisions in case law. Both have the force of formal laws and thus are binding in the same way on future action.

Precedents are particularly important to fill in the gaps of the Senate's Standing Rules regarding amendments. For example, when considering amendments, the definition of "germaneness" utilized by the Senate today is largely a creature of precedent. As noted, Rule XXII makes only a passing reference to the question. Both the effect of the chair's rulings and any subsequent appeals create precedents that flesh out and define this germaneness standard. It is the cumulative outcome of these adjudicated questions of order that provides, in part, the definition of germaneness used in the Senate today.[16]

14. Robert C. Byrd, *The Senate, 1789-1989: Addresses on the History of the United States Senate* (Washington: U.S. Government Printing Office, 1991), p. 52.

15. Floyd M. Riddick, "Floyd M. Riddick, Senate Parliamentarian," *Oral History Interviews* (Washington, D.C.: Senate Historical Office, 1978; Eric D. Lawrence, "The Publication of Precedents and Its Effect on Legislative Behavior." *Legislative Studies Quarterly* 38:1 (Feb. 2013), 31-58.

16. Between 1965 and 1986, the Senate adjudicated 213 questions of order. During this period, 159 of these (74.6 percent) involved determinations as to whether particular amendments were in order for floor consideration. Of these, 15.5 percent determined the "germaneness requirement" of amendments proposed post-cloture or under unanimous consent agreements. See Stanley Bach, "The Appeal of Order: The Senate's Compliance with its Legislative Rules," Paper presented at the 1989 *Annual Meeting of the Midwest Political Science Association*, April (1989) 14-15.

The Senate majority leader has the right of first recognition pursuant to precedent.[17] This precedent serves as the foundation upon which the power of centralized party leadership is based in the contemporary Senate. Since any member technically can make a motion to consider legislation or a nomination under the Senate's rules, to a limited degree, being the first to do so enables the majority leader to set the schedule and control the agenda. Priority of recognition also allows the leader to block votes on undesirable amendments. The ability to be recognized first before other members enables the majority leader to "fill the amendment tree," or offer the maximum allowable number of amendments to legislation, and then file cloture on a bill before other senators have a chance to debate the measure and offer amendments.

The amendment process itself is governed by "general principles."[18] As with the Senate's germaneness standard, these principles have been established by precedent and not by the Senate's Standing Rules. Put simply, the amendment process followed in the institution today (and its restraints) have evolved over the years and are based on a continued interpretation of past parliamentary practice. Those precedents stipulate the nature of the amendments that may be offered at a particular point in time (i.e., first or second degree; perfecting or substitute). According to precedent, "Any senator recognized is entitled to offer an amendment when such amendment is otherwise in order, but he cannot offer an amendment unless he has been recognized or has the floor."[19] In this way, the process of filling the amendment tree follows precedent to block members from offering their own amendments.

Further exacerbating the ambiguity in situations where the Standing Rules are silent or unclear is the sheer number of precedents that have been created over the years. The first collection of Senate precedents, titled *A Compilation of Questions of Order and Decisions Thereon*, was prepared in 1881 by Chief Clerk of the Senate William J. McDonald. The compilation was organized alphabetically by topic and briefly covered the procedures that governed such issues as offering amendments, floor debate and voting. It was a short 25 pages in length. Another compilation followed in 1893 titled *Precedents Related to the Privileges of the Senate*. This 350-page volume was compiled by George P. Ferber, clerk of the Senate Committee on Privileges and Elections. Ferber's work was augmented in 1894 by Henry H. Smith, the clerk of the Committee to Investigate Attempts at Bribery, etc. This expanded collection of precedents totaled 975 pages in length and was titled *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States.*

The first collection of precedents that resembled the volume utilized in the contemporary Senate was published in 1908 by Chief Senate Clerk Henry H. Gilfry. Gilfry's compilation, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate*, was updated in 1914, 1915 and 1919. These volumes averaged around 700 pages in length. Like McDonald's earlier compilation, Gilfry's *Precedents* was organized alphabetically and served as a useful reference work for senators.

Senate Parliamentarian Charles L. Watkins and Assistant Parliamentarian Dr. Floyd M. Riddick prepared the most recent compilation of Senate precedents in 1954. The collection, *Senate Procedure: Precedents and Practice*, was updated in 1964, 1974 and 1981. Its most recent edition, *Riddick's Senate Procedure*, was updated in 1992 by Alan Frumin and is more than 1,600 pages. This lengthy tome contains more than 1 million precedents that govern the legislative process in the Senate today. A complete record of the precedents established in the years since 1992 has not yet been published.

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the presiding officer, or chair, on points of order against violations of the Senate's rules.[20] These rules are not self-enforcing and violations that do not elicit points of order do not necessarily create new precedents. Another example of the establishment of a precedent pursuant to a ruling of the presiding officer was the highly anticipated parliamentary maneuver that was never utilized in 2005, when Senate Republicans contemplated utilizing this method to change the institution's standing rules to end the minority's ability to filibuster judicial nominations. In this example, a senator would make a point of order that any further debate on a judicial nomination is dilatory and move that a final vote should be taken on the underlying question (i.e., whether the nominee should be confirmed). Even though such a point of order is explicitly not supported by the Standing Rules of the Senate, specifically Rule XXII, the presiding officer would sustain it and a simple majority of the Senate would then vote to table any appeal of the chair's ruling. Such action would have effectively established a new precedent that debate on a judicial nomination can be ended by a simple-majority vote.

The second method by which a precedent can be created is pursuant to a vote of the full Senate on an appeal of the presiding officer's ruling on a point of order. This method is referred to as the "nuclear option" when it is used to ignore, circumvent or change the Standing Rules of the Senate with

17. The Senate majority leader was first granted priority of recognition in 1937 because of a ruling made by Vice President John ("Cactus Jack") Nance Garner while presiding over the Senate. Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure* (Washington: U.S. Government Printing Office, 1992), p. 1098.

18. Ibid., p. 25.

19. Ibid., p. 45.

20. As, for example, in the germaneness question discussed above.

a simple-majority vote in direct violation of those rules. In 2013, a Democratic majority successfully utilized the nuclear option when it reduced the threshold to invoke cloture on all nominations, other than for the Supreme Court, from three-fifths of senators duly chosen and sworn to a majority vote. This eliminated the super-majority filibuster for most nominations. Most recently, in 2017, a Republican majority also went nuclear to eliminate the filibuster for Supreme Court nominations.

In each instance, to employ the nuclear option violated Rule XXII's requirement that a motion to invoke cloture, or end debate, on any "measure, motion, or other matter pending before the Senate" requires an affirmative vote of "three-fifths of the senators duly chosen and sworn."[21] Both parties simply ignored Rule XXII by exempting the nominations in question from such super-majority requirements. As a result, the nuclear option created a new precedent in each case that is inconsistent with Rule XXII's requirement for an "affirmative vote of two-thirds of the senators present and voting" to end debate on a proposal to change the Senate's Standing Rules. Rule XXII has not been changed. It still requires the aforementioned three-fifths vote to end debate on executive and judicial nominations. In short, the rules were not technically amended. In both cases, they were simply ignored.

Another example of the creation of a new precedent via this method was the disposition of an amendment in the 104th Congress offered by Sen. Kay Bailey Hutchison, R-Texas, to the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995 (Public Law 104-6), which established a precedent that superseded both the ruling of the chair and Rule XVI of the Standing Rules of the Senate. Specifically, the Hutchison amendment sought to change federal law regarding endangered species. Sen. Harry Reid, D-Nev., raised a point of order that the amendment violated Rule XVI, which the presiding officer subsequently sustained. Sen. Hutchison then appealed this ruling to the full Senate, which overturned the presiding officer by a vote of 57 to 42. The Hutchison amendment was subsequently adopted by voice vote. This action created a new precedent that legislating on an appropriations bill is allowed under the Senate's rules, even though the decision of the chair was technically correct and the Hutchison amendment was in direct violation of Rule XVI. At the time, members voted largely on the substance of the underlying amendment and not based on whether the measure violated Rule XVI. That the members did not fully appreciate the unintended consequences of establishing a new rule in this manner is evidenced by the vote to reverse this precedent in the 106th Congress.[22]

Yet another example was the "FedEx precedent" established during the 104th Congress. During consideration of the Conference Report for the Federal Aviation Reauthorization Act of 1996 (Public Law 104-264), Majority Leader Trent Lott, R-Miss., raised a point of order that the conference committee created to resolve differences between the House and Senate versions of the legislation exceeded its scope by including provisions that related to FedEx Corp. Doing so violated Rule XXVIII of the Standing Rules of the Senate. The chair subsequently sustained the point of order. In response, Lott appealed the ruling and the Senate overruled the chair by a vote of 56 to 39.[23] Consequently, the FedEx precedent superseded the provisions of Rule XXVIII that prohibit any extraneous matter from being included in conference reports. This had the effect of significantly increasing the power of conferees to include provisions in conference reports that were not in the original House- or Senate-passed measures.[24]

In the two previous examples, the precedents established did not address a parliamentary situation in which the rules were silent. Instead, they specifically circumvented those rules. This point has significant implications for the 2013 and 2017 precedents, which have not yet been reversed by a subsequent majority. Rather than acquiesce to a new rules regime, future majorities will continue to break the current Standing Rules of the Senate every time they choose to follow the precedent established by the nuclear option instead of the existing process required by Rule XXII. For example, whenever the presiding officer determines that cloture was invoked by a simple majority, the Senate essentially decides whether it would like to continue to ignore the Standing Rules based solely on that majority's preference.

Had the nuclear option instead been employed in 2013 or 2017 to amend the rules to permit simple-majority cloture, the Senate would be complying with those amended rules

21. "Rule XXII: Precedence of Motions," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 16.

22. Senate Majority Leader Trent Lott, R-Miss., introduced a resolution (S. Res. 160) to reverse this precedent in the 106th Congress. The Senate passed S. Res. 160 on July 22, 1999 by a vote of 53 to 45. This action brought Senate practice back into compliance with its Standing Rules.

23. Cong. Rec. S12,232 (1996) (Vote to reverse the chair following the Lott appeal of its ruling that Section 1223 of the Federal Aviation Administration Reauthorization Act of 1996 did not exceed the scope of conference).

24. The Senate restored Rule XXVIII during the 106th Congress. Specifically, the Department of Commerce and Related Agencies Appropriations Act of 2001 (HR 5548) included the following provision that reversed the precedent established during the 104th. See Elizabeth Rybicki, "Senate Decisions Concerning the Authority of Conferees (Rule XXVIII)," *Congressional Research Service*, Feb. 28, 2006, 1-11. This provision was eventually included in the Conference Report to accompany the District of Columbia Appropriations Act for fiscal year 2001 (Public Law 106-553), which was signed into law on Dec. 21, 2000. Additionally, an identical provision was included in the Consolidated Appropriations Act of 2001 (Public Law 106-554), which passed the Senate on Dec. 15, 2000 and was also signed into law by the president on Dec. 21. These actions brought Senate practice back into compliance with the Standing Rules.

every time it invoked cloture with less than 60 votes, but more than a simple majority. However, because of the way it was employed, there is no first act of rule-breaking that legitimizes all subsequent departures. Rather, as currently written, an explicit violation of the Senate's Standing Rules occurs every time senators choose to adhere to the precedent established by the nuclear option instead of its own Standing Rules.[25]

CONCLUSION

The Senate establishes the parliamentary procedures that govern its internal decisionmaking process pursuant to the authority provided by the Rules of Proceeding Clause of the Constitution (Article I, section 5). Standing Rules, and to a lesser extent statutory rules, set the general parameters within which the legislative process unfolds. Precedents and temporary, or routine, standing orders provide structure to the chamber's daily deliberations. A precedent can be created or changed by a simple-majority vote, whereas a super-majority effectively is required to create or change new Standing Rules, statutory rules and standing orders.[26]

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25. Responses by the presiding officer to parliamentary inquiries may also create new precedents. While such responses are generally treated as nonbinding on the Senate, over time, they do gain precedential value to the extent that parliamentary inquiries provide future senators with insight into past parliamentary practice. In *Riddick's Senate Procedure*, the word "*see*" designates precedents that result from parliamentary inquiries.

26. Technically, a simple majority is required to approve any new rule in the Senate. However, in practice, the controversial nature of rules reform, coupled with the ability to filibuster such proposals, creates a super-majority threshold to approve any new rule.