



Minority Rights and Senate Procedures

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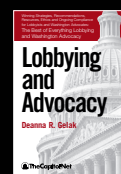


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Summary

The rules of the Senate emphasize the rights and prerogatives of individual Senators and, therefore, minority groups of Senators. The most important of these rules allows unlimited debate on a bill or amendment unless an extraordinary majority votes to invoke cloture. Senators can use their right to filibuster, and simply the threat of a filibuster, to delay or prevent the Senate from even considering a bill they oppose. The Senate's rules also are a source of other minority rights, including the right to propose non-germane amendments to most bills and to prevent bills from being referred to committees that might not consider and report them.

This report will be revised when necessary to reflect significant changes in relevant Senate rules, precedents, and practices.

Contents

The Nature of Senate Procedures	1
Opportunities to Delay	2
Influencing the Decision to Consider	2
Influencing the Process of Consideration.....	4
Other Opportunities	6
Recognition	7
Resolutions Coming Over, Under the Rule.....	7
Objection to Committee Referral	8
The Amending Process.....	8
Conclusion.....	9

Contacts

Author Contact Information	10
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The Nature of Senate Procedures

Every legislative body must decide how to balance the parliamentary rights and powers of majorities against those of minorities, determining what matters should require simple or extraordinary majority votes and how much control a simple majority should be able to exercise over which issues are debated and when decisions are made. In comparison with the House of Representatives, the Senate operates under a body of rules that offers effective leverage and important strategic advantages to individual Senators and, therefore, to numerical minorities in the Senate. These opportunities may be seized by the minority party, but they also are available to philosophical or individual minorities, without regard to party.

In part because of its smaller size, the Senate has been less concerned than the House with constructing its rules to promote efficiency and orderliness in the consideration of legislation on the floor. Instead, Senate rules historically have embodied the belief that wise policy is not determined simply by counting votes, but that it emerges from a process of free debate in which individual Senators enjoy great latitude and during which the intensity of minority interests can be weighed and accommodated. As a result, the Senate's rules define a legislative process that emphasizes the importance of compromise and that strains for consensus whenever possible.

To this end, minorities are able to raise issues of their choosing and prevent precipitant action by voting majorities. In fact, the Senate's rules offer so many opportunities and so much protection to individual Senators and minority groups of Senators that a strict adherence to its rules would make it difficult for the Senate to function, especially in view of its contemporary time and workload pressures. For this reason, the Senate frequently sets aside its rules, either by unanimous consent or by custom and practice.

The legislative process on the Senate floor, therefore, reflects a compromise between principle and pragmatism. The rules provide individual Senators and numerical minorities with impressive means to influence the Senate's agenda and decisions. Yet Senators rarely choose to take full advantage of these devices and opportunities. There are at least two reasons. First, Senators recognize that the rules they invoke today may be used against them tomorrow with equally powerful effect. The Senate is a continuing body in a human sense as well as a parliamentary sense. Senators who choose to be obstructive may succeed in reaching their immediate objectives, but only at the longer run cost of jeopardizing achievement of their own positive legislative goals. Second, Senators exercise self-restraint so that the Senate as an institution can operate with reasonable order and efficiency. Senators must work together in relative harmony if the Senate is to respond to policy demands and meet its constitutional responsibilities. And ultimately, the ability of Senators to achieve their individual goals is inextricably tied to the standing of the institution in which they serve.

Thus, individual Senators and groups of Senators can take advantage of significant parliamentary opportunities to delay or prevent actions they oppose, but Senators always recognize that in doing so they are balancing short-term benefits against longer-term potential costs, both personal and institutional.

Opportunities to Delay

The single most powerful weapon available to individuals and minorities in the Senate is the ability to delay. This power derives from the Senate's rules governing debate, and may be used not only to prevent action but also to extract substantive policy concessions from the majority, whether it is partisan or bipartisan.

Paragraph 1 of Rule XIX states that no Senator may speak more than twice on the same question on the same day, except by unanimous consent. The "question" may be a pending measure, amendment, or debatable motion; every Senator may make two speeches on the same day on each such question, including a series of amendments and motions that may be offered during floor consideration of the same bill or resolution. (For purposes of this rule, a Senator completes a speech when he yields or loses the floor after having been recognized in his own right.) The two-speech rule is enforced only under the most contentious circumstances because doing so could interfere with effective debate and impede the natural flow of discussion on the floor. Furthermore, it usually is not difficult to circumvent the rule: a Senator who already has made two speeches often can create additional opportunities to speak simply by proposing a new amendment or debatable motion.

More importantly, Rule XIX imposes no limit on the length of each speech or on the number of speeches that all Senators may make on any debatable question. If the Senate wishes to end debate on that question—whether it is a bill, an amendment, or something else—it can agree to a motion to table it (formally, to lay it on the table). But the effect of this motion is essentially negative; when the Senate tables an amendment, for example, it is equivalent to rejecting the amendment. Unanimous consent is required for the Senate to resume consideration of something that it has tabled.

The only other way to use the Senate's rules to end a debate is to invoke cloture. But this decision requires an extraordinary majority vote. Rule XXII provides that three-fifths of the entire Senate must vote to invoke cloture under most circumstances; on a proposal to amend Senate rules, the required majority is two-thirds of the Senators present and voting. Furthermore, invoking cloture does not assure an immediate or even prompt vote on the question that is being debated. After the Senate votes to invoke cloture on a question, there still can be roughly 30 hours of further consideration before the Senate votes on it. This time can be consumed not only by engaging in debate, but also by offering amendments, insisting on quorum calls, and obtaining rollcall votes. As a result, five working days or more can elapse between the time cloture is proposed on an amendment, for example, and the time when the vote on that amendment ultimately must take place.

The right to debate offers ample means to delay in the Senate. And a strategy of delay, even the threat of delay, can be used with telling effect to influence whether a measure will be considered or what happens to it while it is being considered.

Influencing the Decision to Consider

Confronted with a measure they oppose, a group of Senators may attempt to prevent the bill or resolution from reaching the floor for consideration. The right of extended debate applies in committee as well as on the floor, with one crucial difference: the Senate's cloture rule may not

be invoked in committee. Each Senate committee decides for itself whether or not to create its own rule by which it can limit or end debate. Thus, the opportunities for a filibuster in committee may be even greater than on the floor. Furthermore, Senate Rule XXVI requires that “[n]o measure or matter or recommendation shall be reported from any committee unless a majority of the committee were physically present.” So a sizeable minority of a committee’s membership may be able to prevent a measure from being reported simply by refusing to attend a committee meeting for that purpose.

The effectiveness of these tactics depends on such factors as the number of Senators opposing the measure or matter, its importance to the majority, the determination of its supporters and opponents, and the number of other measures competing for the committee’s time and attention. On relatively minor measures, extended opposition in committee may be sufficient to convince the committee’s leadership that the measure should be set aside, at least temporarily. On measures of greater import, the majority may be prepared to endure delay, but it also may be willing to make concessions to the minority in order to expedite action. And proponents of a measure have an additional recourse that is discussed later in this report; they can introduce another bill on the same subject and, taking advantage of Rule XIV, have it placed directly on the Senate’s legislative calendar, thereby bypassing committee consideration altogether.

Assuming a measure has been reported from committee, Senators may employ other strategies to delay or prevent its consideration on the floor. For example, Rule XVII requires that, under most circumstances, the committee report accompanying a bill must be available for one legislative day and for two calendar days (excluding Sundays and legal holidays) before it is eligible for floor consideration.¹ Any Senator can invoke this rule to the inconvenience of the committee chairs and party leaders who are charged with ensuring that there is a steady and timely flow of legislation from committees to the floor. And as deadlines draw near, insisting on strict compliance with the layover rules can have even greater effect. Toward the very end of a session or Congress, when there is much to do in a short period of time, a Senator may be able to prevent a measure from reaching the floor at all simply by demanding strict adherence to these requirements.

Once a measure is eligible for floor action, the Senate must agree to consider it, which it usually does either by agreeing to a unanimous consent request or by adopting a debatable motion to proceed to its consideration (often simply called a “motion to proceed”). Whenever possible, the majority leader, who is primarily responsible for arranging and managing the floor schedule, prefers to take up measures by unanimous consent, but any Senator may object to such a request. In that case, the leader (or a committee chairman or other Senator acting with the leader’s concurrence) can move that the Senate proceed to consideration of the bill at issue,² but Senators are free to debate that motion at great length. So, in most cases, a measure is subject to the possibility of two filibusters, first on the motion to proceed to its consideration and then on the measure itself. Prolonging debate on the motion to proceed is hampered by the fact that it is not amendable, but a sizeable or loquacious minority still may compel the Senate to invoke cloture as the only way to bring the motion to an eventual vote. In light of the time pressures that the Senate

¹ The Senate does not require that a bill reported from committee be accompanied by a written report. So a committee can avoid these availability requirements simply by not preparing the report to which they apply. However, a Senate committee usually finds it very useful to write a report on each important bill it approves because of the report’s value in explaining and justifying the bill and in establishing the committee’s understanding of how its provisions are to be implemented.

² The Senate’s rules permit any Senator to make this motion. In normal practice, however, only the majority leader or his designee does so.

often faces, even the threat of extended opposition to the motion can be enough to convince the leadership that it should turn the Senate's attention to another measure instead.

There is one opportunity under Senate rules for making a non-debatable motion to consider a measure. It occurs at the beginning of a new legislative day, when the Senate convenes after an adjournment. Each new legislative day is to begin with a Morning Hour that actually can last for two hours. During the second hour, or after morning business has been concluded during the first hour, a Senator can make a non-debatable motion that the Senate proceed to the consideration of any measure on the calendar. If the Senate agrees to this motion, the measure is considered until the Morning Hour ends, at which time the unfinished business from the previous legislative day is laid before the Senate automatically, and the measure called up during the Morning Hour is returned to the calendar. If there is no unfinished business, however, the Senate can continue to consider the measure taken up during the Morning Hour.

More often than not, the Senate recesses from day to day, in large part to avoid the potentially complicated and time-consuming Morning Hour procedures. And when the Senate reconvenes after a recess, there is no Morning Hour. Consequently, the majority leader does not often make a non-debatable motion to proceed, though it remains available for him or his designee to use if and when the need and opportunity arise. Even if extended debate on the motion to proceed can be avoided in this way, however, the prospect of a filibuster on the measure itself encourages the leader to seek whatever accommodations are possible and necessary for him to be able to secure a unanimous consent agreement instead.

The practice by which a Senator can put a "hold" on a bill is an extension of the right to make a formal objection on the floor to any unanimous consent request for the Senate to consider that bill. In effect, a hold is a notice that the Senator will object to any unanimous consent request that the majority leader or anyone else makes for considering the measure. It also is a request that no one even propose such a unanimous consent agreement so that the Senator does not have to be on the floor to object to it in person. And by implication, a hold carries with it a threat to filibuster any motion to proceed to consideration of the bill in question. Whenever possible, the leadership of both parties will respect holds that are placed on measures by Senators of their party, and encourage negotiations in each case that will lead to the hold being removed. However, holds are an informal device; if necessary, the majority leader may announce that he will seek consideration of a measure, notwithstanding one or more holds, in order to expedite the flow of important Senate business.

Influencing the Process of Consideration

Once a measure is before the Senate for consideration, significant opportunities for delay remain. Most important, debate on the bill as well as on each amendment and debatable motion is limited only by the two-speech rule and the possibility of cloture.

The Senate cannot vote on final passage of the bill so long as any Senator is speaking or seeks recognition to speak. The same is true of the debate and vote on each amendment to the bill, except that any Senator who has the floor can make a non-debatable motion to table (that is, to kill) the amendment. Each provision in the bill is subject to amendment and Senators can continue to propose debatable amendments to it until that provision has been fully amended.

More generally, Senators can propose amendments to any portion of the bill that has not already been changed by amendment.³ Furthermore, most amendments also are subject to being amended. In fact, under some circumstances, Senators can offer as many as seven amendments or more before the Senate votes on any of them, and each of these amendments is a separate debatable question. In addition, there are some debatable motions, such as motions to recommit the bill to committee, that Senators also can make while the bill is on the floor.

Additional time can be consumed by votes on or in connection with each amendment. First the Senate disposes of the amendment, either by voting for or against it or by voting to table it. Then the Senate has one opportunity to reconsider that decision. Immediately after the vote on the amendment, therefore, one Senator typically moves to reconsider that vote and another moves to table the motion to reconsider. The Senate also must vote on this motion to reconsider or, more likely, on the motion to table it. And 11 Senators usually can demand that any vote be taken by a roll call, a process that can be expected to consume at least 15 minutes. So the Senate may be required to devote 30 minutes or more to the votes necessary to dispose of each amendment and each motion.

There are other potent sources of delay during the process of consideration. When a Senator believes that some element of the Senate's procedures is being violated, he or she may make a point of order to that effect. After the presiding officer rules on the point of order, any Senator who disagrees with the ruling may appeal the ruling of the chair, and that appeal is a debatable question. Under some circumstances, the presiding officer does not rule on a point of order, instead submitting it to the Senate for it to decide, in which case the point of order itself is debatable. Although the Senate may dispose of a point of order or an appeal by tabling it, there can be two rollcall votes in connection with each tabling motion, and there are almost unlimited opportunities for Senators to make points of order, with or without good cause.

Senators also can delay the proceedings by suggesting the absence of a quorum. The Constitution requires that a quorum, or simple majority, of Senators be present when the Senate transacts business on the floor, but it is quite unusual for that many Senators to be present unless a rollcall vote is taking place. Any Senator who has the floor may suggest the absence of a quorum, to which the presiding officer usually must respond by directing the clerk to call the roll. If a majority of Senators fail to respond to the quorum call, which can consume as much time as a rollcall vote, the Senate can only adjourn or await the arrival of enough additional Senators to make a quorum. Once Senators have come to the floor to register their presence, some of them are likely to return to the meetings they had been attending, allowing the process to be repeated all over again.

Invoking cloture limits the effectiveness of such dilatory tactics by imposing a ceiling of 30 hours on the total amount of additional time that may be consumed in considering the matter on which the Senate has invoked cloture. But because cloture requires the votes of at least 60 Senators, a united minority party almost always can prevent it from being invoked. And even if the votes needed for cloture can be secured, the 30 hours available for post-cloture consideration is a large amount of the Senate's time for the majority leader to commit to any one matter (in addition to the time the Senate already devoted to it before the successful cloture vote).

³ If and when the Senate agrees to an amendment in the nature of a substitute—an amendment proposing a complete substitute for the entire text of the bill—then the amending process is ended because every portion of the bill now has been changed by amendment.

So tactics such as these can be successful in prompting a bill's supporters to offer policy concessions in order to expedite its final passage. The proponents of a measure may be prepared to sacrifice certain provisions of their bill in order to ensure that the Senate will be able to act on the remaining provisions without delay. Senators also have been known to employ such tactics during consideration of one bill in order to secure policy or procedural concessions concerning some unrelated bill or other matter that has not yet come to the floor. For example, Senators may withhold their consent to an agreement affecting consideration of one bill until they are assured that another bill in which they are interested will be taken up shortly thereafter.

With these possibilities in mind, the majority leader or a bill's majority floor manager often seeks to arrange unanimous consent agreements to minimize the possibilities for delay and obstruction. In the recent past, it was fairly common for the Senate to reach such an agreement on a bill before the bill was actually taken up on the floor. The agreement typically would impose a limit on the total time that Senators could spend debating each amendment and every other debatable question that possibly could arise during the Senate's consideration of the bill. Even under this kind of unanimous consent agreement, however, there is no limit imposed on the number of amendments that any or all Senators may offer. Thus, Senators could extend the process of consideration almost indefinitely by offering one amendment after another, unless the Senate also agreed by unanimous consent to set a time at which it would vote on final passage of the bill.

Complex unanimous consent agreements, also known as time agreements, in this form have become less common in recent years, perhaps reflecting different approaches taken by different majority leaders to managing the Senate floor, but almost certainly reflecting the autonomy that contemporary Senators may exercise. The more common practice, therefore, has become for the majority leader or the majority floor manager to seek unanimous consent agreements limiting debate on individual amendments to a bill and perhaps fixing the sequence in which the Senate will act on a series of amendments. In the case of a particularly important or controversial bill that the Senate already has been considering for some time, there ultimately may be a unanimous consent agreement that limits the additional amendments that Senators can offer to those listed in the agreement and that imposes individual time limits for debating some or all of them, and that perhaps also sets a date and time for the final vote on passing the bill.

The Senate's majority leader and Senators acting as majority floor managers generally prefer to expedite floor action on a bill by arranging unanimous consent agreements when possible and resorting to cloture only when necessary. Senators can use negotiations over a unanimous consent agreement to achieve policy concessions in the bill that they could not achieve by majority vote on the floor. If unanimous consent cannot be reached, the bill's opponents retain their right to unlimited debate unless and until its supporters can secure the 60 votes needed to invoke cloture.

Other Opportunities

Either before or during the time the Senate is considering a measure, it may be delayed by motions, demands, or objections made to seemingly unrelated matters. For example, the motions to adjourn and recess enjoy the highest priority. Also, throughout the course of each day's meeting, unanimous consent requests are made for a variety of discrete, and usually routine, purposes. Any Senator may object to any such request, and without any need to provide a reason. Although these proceedings may not relate directly to the measure at issue, they can be used to delay the Senate in its attempts to reach the measure or to delay its consideration. Senators who object to a bill can use these tactics to emphasize the strength of their opposition and to convince

the Senate that considering the measure, or debating its consideration, would be a long and painful process that should be avoided if at all possible.

Beyond the potent power to delay the Senate's proceedings through debate or these other tactics, a Senator or a group of Senators can try to promote their legislative goals by taking advantage of other parliamentary rights and opportunities that are provided by the Senate's formal procedures and customary practices.

Recognition

One such opportunity, although of limited value in practice, derives from the Senate rule governing recognition. Rule XIX states that the presiding officer "shall recognize the Senator who shall first address him." By long practice, however, the presiding officer always accords priority in recognition to the majority and minority leaders and, to a lesser extent, to the majority and minority floor managers of the measure that the Senate is considering.

If none of these Senators is seeking recognition, any other Senator may be recognized for any purpose—to speak at length, of course, or to make a motion: to move, for example, that the Senate adjourn or that it proceed to the consideration of another bill or resolution. But in practice, the motion to adjourn and the motion to proceed generally are reserved to the majority leader or his designee. Another Senator may make such a motion, but he is likely to prevail only temporarily, if at all, unless the motion reflects the plans developed by the majority leader who, in conjunction with the minority leader, is delegated much of the responsibility for scheduling Senate floor activity.

Resolutions Coming Over, Under the Rule

There are two other devices by which Senators can attempt to bring a measure directly to the floor for consideration even if it is not supported by the committee of jurisdiction or by the majority party leadership. The first applies to Senate resolutions and rarely is used successfully. The second applies to bills and joint resolutions and has been invoked more often but with no assurance of ultimate success.

A Senator proposing a simple Senate resolution may ask unanimous consent for its immediate consideration. If another Senator objects, the resolution "goes over, under the rule," the rule in question being the provision of Rule XIV stating that a Senate resolution "shall lie over one day for consideration, if not referred, unless by unanimous consent the Senate shall otherwise direct." The first resolution on the calendar that has satisfied this requirement is laid before the Senate for consideration as the last item of morning business on the next legislative day. That resolution then may be considered until the end of the Morning Hour, although it also may be displaced by a non-debatable motion to consider another measure that also is on the calendar.

Although this procedure carries no guarantee that the Senate actually will vote on a resolution, it does afford an opportunity for a Senator to try to bring it before the Senate for debate, rather than allowing the resolution to be referred to a committee that is expected to let it die by inaction. However, this procedure is available only for considering Senate resolutions, not bills, and its utility is limited further by the tendency of the Senate to recess from day to day in order to avoid

Morning Hour proceedings, including morning business and resolutions that have gone “over, under the rule.”⁴

Objection to Committee Referral

There is no comparable procedure for bring most bills and joint resolutions directly to the floor without either a unanimous consent agreement or a vote on a motion for its consideration. However, Rule XIV does permit any Senator to place a Senate or House-passed bill or joint resolution directly on the calendar without first being referred to and then reported from committee.

Under Rule XIV, bills may be referred to committee only after having been read twice by title. In most cases, the two readings are dispensed with when the bill is introduced, and it is routinely referred to committee without the Senate taking any formal notice of it, or action on it, on the floor. Instead, however, a Senator may introduce a measure and ask unanimous consent for its immediate consideration. The bill then is read for the first time and, if a Senator objects to its immediate consideration, it is held at the desk to await its second reading when the Senate convenes on the next legislative day. After that second reading, the sponsor of the measure or any other Senator may object to “further proceedings thereon,” which would be referral to committee. The effect of this objection is to have the measure placed directly on the calendar in precisely the same parliamentary status it would have if it had been considered in committee and then reported back to the Senate.

By this means, an individual Senator can avoid the possibility that a bill or joint resolution may be held indefinitely, and ultimately killed, by an unsympathetic committee. The same procedure may be used when a committee fails to act on a bill that has been referred to it. In that case, a Senator may introduce a second, identical bill and have that one placed directly on the calendar while the first bill remains trapped in committee. However, this procedure only succeeds in getting a measure to the calendar; it does not ensure that the bill or joint resolution ever will be brought up for consideration on the floor. A measure placed on the calendar in this way still must be taken up by unanimous consent or by a motion to consider it.

The Amending Process

A much more common and potent approach is for a Senator to bring a policy proposal directly to the Senate floor in the form of a non-germane amendment that the Senator offers to another bill, even if the amendment is totally unrelated to the subject of that bill. Senate rules require that amendments be germane only when offered to general appropriations and budget measures or when offered under cloture. At other times, the Senate may impose a germaneness requirement on itself, but only by unanimous consent. So a Senator who is unable to obtain floor consideration of a measure he or she supports may offer part or all of its text as a non-germane floor amendment to some other bill.

⁴ When the Senate does convene after a recess, the majority leader usually requests unanimous consent that there be a period for transacting routine morning business. Resolutions coming over under the rule are not considered during these periods.

Senators may oppose a non-germane amendment not only on its merits but also on the grounds that it deserves preliminary consideration in committee and that it will be unacceptable to the House, which does require that all amendments be germane. Nonetheless, such arguments are not always compelling, in part because non-germane amendments have become such a recognized and regular part of the Senate's legislative procedures. The Senator offering a non-germane amendment has the option of pressing the issue to a vote (which may come first on a motion to table the amendment) or of withdrawing the amendment if, for example, the Senator receives assurance that the committee of jurisdiction will act promptly on the issue that the amendment addresses.

Finally, the amending process offers other strategic opportunities. The likelihood that the Senate will pass a measure sometimes depends on how the Senate amends it before the vote on final passage takes place. So an opponent of a measure can try to promote its defeat by offering or supporting amendments that may be attractive individually but that collectively may undermine majority support for the bill, or that might inspire defeat in the House or a presidential veto. Thus, Senators sometimes have found themselves in the anomalous position of voting for propositions they personally opposed in order to encumber a measure with amendments, germane or not, that could cost the measure necessary congressional or presidential support. Conversely, Senators who support a measure may feel compelled to oppose amendments they would favor under other circumstances in order to protect the bill's chances for passage and enactment. Of course, when Senators oppose a bill that is almost certain to pass, they also may offer amendments in an attempt to make it more palatable and reduce the undesirable consequences of its enactment.

Conclusion

These, then, are some of the means by which individual Senators or a minority of Senators can use the Senate's legislative procedures to their advantage. Undoubtedly, there are others that also could be discussed; the very flexibility of Senate practice makes it difficult to identify all the possibilities systematically. When combined with strategic planning and an acute sense of timing, the Senate's procedures give small groups of Senators a potential influence over what the Senate does, and when, that is far out of proportion to their numbers. But most Senators find it advisable to exercise restraint in using the rights and opportunities available to them. Comity and cooperation are at least as important to the Senate as any of its formal rules. A Senator who takes full advantage of his or her prerogatives at every opportunity is almost certain to discover that they are a double-edged sword—helpful today but damaging tomorrow.

This report was written by Stanley Bach, formerly a Senior Specialist in the Legislative Process at CRS. Dr. Bach has retired, but the other listed author updated the report and can respond to inquiries on the subject.

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