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The Rise of Senate Unanimous Consent Agreements

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The Rise of Senate Unanimous Consent Agreements

Summary

Unanimous consent agreements are fundamental to the operation of the Senate. The institution frequently dispenses with its formal rules and instead follows negotiated agreements submitted on the floor for lawmakers' unanimous approval. Once entered into, unanimous consent agreements can only be changed by unanimous consent. Their objectives are to waive Senate rules and to expedite floor action on measures or matters. Typically, these accords (sometimes called time-limitation agreements) restrict debate and structure chamber consideration of amendments.

Given their importance to chamber operations, it is worthwhile to understand the background, or origin, of unanimous consent agreements. The purpose of this report is to examine how and why these informal agreements became special orders of the Senate enforceable by the presiding officer. This report will be updated as circumstances warrant. Further information on unanimous consent agreements can be found in CRS Report 98-225, *Unanimous Consent Agreements in the Senate*, by Walter J. Oleszek; CRS Report RS20594, *How Unanimous Consent Agreements Regulate Senate Floor Action*, by Richard S. Beth; and CRS Report 98-310, *Senate Unanimous Consent Agreements: Potential Effects on the Amendment Process*, by Valerie Heitshusen.

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The Rise of Senate Unanimous Consent Agreements

Introduction

Unanimous consent agreements are special orders of the Senate that are agreed to without objection by the chamber's membership. Fundamental to the management of the contemporary Senate, these devices are typically employed to structure floor proceedings and to expedite the chamber's business. Two general types of unanimous consent permeate Senate operations: "simple" and "complex."[1] Both types set aside the rules, precedents, or orders of the Senate via the unanimous concurrence of all Senators. A simple unanimous consent request addresses routine matters, such as dispensing with quorum calls or requesting that certain staff aides have floor privileges. To be sure, there are occasions when a simple unanimous consent request can have policy consequences, such as an objection to setting aside an amendment or dispensing with the reading of an amendment. Simple unanimous consent requests have been used since the First Congress. For example, a Senate rule adopted on April 16, 1789, stated:

> Every bill shall receive three readings [prior] to its being passed; and the President [of the Senate] shall give notice at each, whether it be first, second, or third; which readings shall be on three different days, unless the Senate unanimously directs otherwise.

The focus of this report is on the complex variety: their historical origin, some benchmarks in their evolution, and how they came to be reflected in the Senate's rulebook.

Complex agreements establish a tailor-made procedure for virtually anything taken up by the Senate, such as bills, joint resolutions, concurrent resolutions, simple resolutions, amendments, nominations, treaties, or conference reports. As two Senate parliamentarians wrote:

> There is a fundamental difference between the Senate operating under a unanimous consent agreement and the Senate operating under the Standing Rules. Whereas the Senate Rules permit virtually unlimited debate, and very few

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[1] See Robert Keith, "The Use of Unanimous Consent in the Senate," in *Committees and Senate Procedure*, A Compilation of Papers Prepared for the Commission on the Operations of the Senate (Washington: GPO, 1977), pp. 142-148.

restrictions on the right to offer amendments, these agreements usually limit time for debate and the right of Senators to offer amendments.[2]

Senators generally accept the debate and amendment restrictions common to most unanimous consent agreements largely for two overlapping reasons: they facilitate the processing of the Senate's workload, and they serve the interests of individual lawmakers. Based on trust, and reached after often protracted negotiations, unanimous consent agreements are the equivalent of "binding contracts" that can only be changed or modified by unanimous consent.

Origins

It is not clear when the Senate actually began to employ unanimous consent agreements to limit debate or to fix a time for a vote on a measure. Perhaps the first instance occurred in the mid-1840s. On March 24, 1846, Senator William Allen, D-OH, stated that the Senate had been debating a joint resolution concerning the Oregon Territory for more than two months, and it was now time to proceed to a final vote on the matter. Noting that the Senate neither allowed for the previous question (a motion employed in the House to end debate) nor adopted resolutions directing that a vote should occur at a specific time, Senator Allen pointed out that it was the Senate's habit to have "a conversational understanding that an end would be put to a protracted debate at a particular time."[3] A Senate colleague suggested that Allen delay several days before making such a request.

Two days later Senator Allen again asked that the Senate informally agree to fix "a definite day on which the vote might be taken."[4] The Senate, he said, should simply refuse to adjourn until there is a final vote. No action occurred on Allen's recommendation. On April 13, 1846, however, a consensus developed among Senators that a final vote on the joint resolution should occur three days later. Finally, after spending around 65 days debating the matter, the Senate on April 16 enacted the joint resolution. Indeed, if this was the first time that the Senate employed something like a unanimous consent agreement to end debate and precipitate a vote on a measure, there is little question that these accords became both more commonly used and more sophisticated in their procedural features.

By 1870, noted two scholars, unanimous consent agreements "were being used with some frequency." These early unanimous consent agreements were, "as they are today, time-limitation agreements that provided for the disposal of a measure by a specified time."[5] An April 24, 1879, exchange illustrates the practical use of these

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[2] Floyd M. Riddick and Alan Frumin, *Senate Procedure: Precedents and Practices* (Washington: GPO, 1992), p. 1311.

[3] *Congressional Globe*, vol. 15 (Mar. 24, 1846), p. 540.

[4] Ibid., p. 553.

[5] Gerald Gamm and Steven S. Smith, "Last Among Equals: The Senate's Presiding Officer," in *Esteemed Colleagues: Civility and Deliberation in the U.S. Senate*, Burdett A. Loomis, (continued...)

accords for limiting debate and setting the time for a vote. The exchange is reminiscent of what occurs in today's Senate.

> *The President pro tempore*. The Chair will once more state the proposition and again ask the Senate whether there be any objection to it. The proposition is, that at three o'clock to-morrow, all debate on this bill shall cease, and the Senate shall then proceed to vote upon the pending amendment or amendments that may be offered, and finally on the bill itself without debate.
>
> *Mr. Conkling*. That is right.
>
> *The President pro tempore*. Is there objection to that understanding. The Chair hears none, and it is agreed to.[6]

Bill managers apparently took the initiative in propounding unanimous consent agreements. Their increasing use in subsequent decades led one Senator, Roger Mills, D-TX, to complain that the Senate "reaches its vote on all questions like the historic Diet of Poland, by the unanimous agreement of the whole, and not by the act of the majority."[7] Other issues associated with these early accords also sowed confusion among the membership. Many of the complaints stemmed from the fact that the early unanimous consent agreements were often viewed "as an arrangement simply between gentlemen" and could, as a president pro tempore once said, be "violated with impunity by any member of the Senate."[8] To reduce the confusion, the Senate adopted a new rule.

The 1914 Senate Rule (Rule XII)

The fundamental objective of Rule XII was to clarify several uncertainties associated with these senatorial contracts. In the early 1900s, the Senate took modest steps to reduce some of the confusion associated with unanimous consent agreements, such as requiring these accords to be submitted in writing to the desk, read to the chamber, and "printed on the title page of the daily calendar of business as long as they were operative."[9] More changes were in the offing, however. Two overlapping factors explain why the Senate agreed to a formal rules change to govern these accords. First, there were a couple of ambiguities associated with these accords that continued to arouse contention and confusion. Past precedents simply did not adequately address these recurring problems. Second, a riveting event — a Senator was caught by "surprise" when a unanimous consent agreement was entered into — underscored the need for a formal rule (Rule XII) to clear up issues associated with these "gentlemen's agreements."

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[5] (...continued)
ed. (Washington: Brookings Institution Press, 2000), p. 124.

[6] *Congressional Record*, vol. 9 (Apr. 24, 1879), p. 815.

[7] George Galloway, *The Legislative Process* (New York: Thomas Crowell, 1953), p. 554.

[8] *Congressional Record*, vol. 21 (Aug. 26, 1890), p. 9144.

[9] Gamm and Smith, p. 127.

The Ambiguity Factor

On the matter of ambiguity, there were two principal issues. First, could these agreements be changed or modified by another unanimous consent agreement? Second, could the presiding officer enforce these accords? Today, both principles are accepted as procedural "givens." Not so several decades ago. For example, on March 3, 1897, Senator George Hoar, R-MA, stated: "I think it is very serious, indeed, under any circumstances, to set the precedent of revoking a unanimous-consent agreement by other unanimous-consent agreements."[10] As another example, one of the Senate's institutional leaders, Henry Cabot Lodge, R-MA., argued: "If it is to be supposed that unanimous-consent agreements are to be modified, we shall soon find it impossible to get a unanimous-consent agreement. I think nothing is more important than the rigidity with which the Senate preserves unanimous-consent agreements."[11] Or as Senator Joseph O'Gorman, D-NY, stated: "Has it not been established by the precedents of this body that a unanimous-consent agreement could not be impaired or modified either by another unanimous-consent agreement or by an order of the Senate?"[12] To be sure, other Senators contended that these compacts could be modified by another unanimous consent agreement.

As to the enforcement of these accords, presiding officers took different positions. As one presiding officer observed, "it has been the universal ruling of the Chair that the Chair can not enforce a unanimous-consent agreement, but that it must rest with the honor of Senators themselves."[13] On another occasion, the president of the Senate asked: "[W]hat is the pleasure of the Senate, whether he shall enforce the agreements entered into by unanimous consent or not?" Senator John Sherman, R-OH, replied that the chair should "enforce the agreement with respect to the bill under consideration." The chair then asked, "In similar cases, what is the pleasure of the Senate?" Senator Eugene Hale, R-ME, provided this answer: "We'll cross that bridge when we reach it."[14] Contrarily, "Vice Presidents Charles Fairbanks and James Sherman were not timid about enforcing [unanimous consent agreements] at times."[15]

Sundry other issues were also associated with these compacts. For example, Senators argued about whether a motion to recommit a bill violated a unanimous consent agreement to vote on the bill.[16] Some Senators said that if they were not present when a unanimous consent agreement was proposed, colleagues could object for them. In response, Senator Thomas Martin, VA, the ostensible Democratic floor leader, stated: "When unanimous consent is asked, unless objection is made from the

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[10] *Congressional Record*, vol. 29 (Mar. 3, 1897), p. 2729.

[11] *Congressional Record*, vol. 42 (Jan. 10, 1907), p. 878.

[12] *Congressional Record*, vol. 49 (Dec. 6, 1913), p. 353.

[13] *Congressional Record*, vol. 29 (Mar. 3, 1897), p. 2730.

[14] *Congressional Record*, vol. 21 (June 17, 1890), p. 6167.

[15] Gamm and Smith, p. 126.

[16] *Congressional Record*, vol. 23 (July 1, 1892), p. 5707.

floor of the Senate by a Senator who is present, he can not leave his vote here to be recorded against it. The Senate can not do business by proxy that way."[17]

The "Surprise" Factor

Senator Reed Smoot, R-UT, was caught off-guard when a unanimous consent agreement he opposed was agreed to. The issue involved a 1913 bill (S. 4043) to prohibit interstate commerce in intoxicating liquors. A unanimous consent agreement was properly made and announced by the presiding officer. Senator Smoot, who was present in the chamber, had planned to object but was momentarily distracted and failed to lodge a timely dissent. For the next two days the Senate debated the legitimacy of the unanimous consent agreement and whether it could be modified by another unanimous consent agreement. In the end, the presiding officer submitted the question of legitimacy to the Senate, which voted 40 to 17 (with 37 Members not voting) to instruct the chair to resubmit the unanimous consent agreement to the Senate. When this was done, Senator Smoot objected to the accord. Quickly, another unanimous consent agreement on the liquor bill was propounded by Senator Jacob Gallinger, R-NH, and it was accepted by the Senate.[18]

Rule XII

In short, uncertainties and controversies influenced the Senate on January 16, 1914, to adopt a formal rule to govern unanimous consent agreements. There was relatively little debate on Rule XII. The major controversy involved whether these compacts could be modified by another unanimous consent agreement. Unsurprisingly, Senator Lodge argued against the new rule on the ground that to permit any subsequent changes to unanimous consent agreements would only lead to delays in expediting the Senate's business. Senator Charles Thomas, D-CO, responded: "It seems to me the most illogical thing in the world to say that the Senate of the United States can unanimously agree to something and by that act deprive itself of the power to agree unanimously to undo it."[19]

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[17] *Congressional Record*, vol. 48 (July 10, 1912), p. 8812. Scholars disagree as to when a Senator began to serve as his party's floor leader. See Walter J. Oleszek, "John Worth Kern: Portrait of a Floor Leader," in *First Among Equals: Outstanding Senate Leaders of the Twentieth Century*, Richard Baker and Roger Davidson, eds. (Washington: CQ Press, 1991), pp. 8-10. It is notable that the adoption of Senate Rule XII in 1914 corresponds to the general time period when the position of floor leader formally emerged in the Senate. Rule XII provided the floor leader with an important procedural tool to manage the chamber's business.

[18] *Congressional Record*, vol. 49 (Jan. 10 and 11, 1913), pp. 1324-1329, 1354-1357, 1388-1395.

[19] *Congressional Record*, vol. 51 (Jan. 16, 1914), p. 1757.

By a vote of 51 to 8, the Senate adopted Rule XII.[20] Two critical portions of the rule stipulate that (1) unanimous consent agreements are orders of the Senate, which means that the presiding officer is charged with enforcing their terms; and (2) the Senate, by unanimous consent, could change a unanimous consent agreement. As orders of the Senate, unanimous consent agreements are now printed in the *Senate Journal*. (They are also printed in the Senate's daily *Calendar of Business*, as noted earlier, and the *Congressional Record*.)

Modern Practice

In subsequent decades, the Senate witnessed increasing use of unanimous consent agreements. The contemporary Senate regularly operates via the terms of unanimous consent agreements. They are used on every type of measure or matter that comes before the Senate, and at least since the post-World War II period, all party leaders and floor managers have extensively relied on them to process the chamber's business. During the majority leadership of Senator Lyndon Johnson, D-TX (1955-1960), unanimous consent agreements were often comprehensive in scope (e.g., identifying when a measure is to be taken up, when it is to be voted upon for final passage, and what procedures apply in-between these two stages).

Conclusion

Today, in a period of heightened individualism and partisanship, unanimous consent agreements tend to be piecemeal, such as establishing debate limits on a number of discrete amendments without limiting the number of amendments or specifying a time or date for final passage of the legislation. Still, compared with the compacts promulgated during the early 1900s, today's accords are often broader in scope, more complex, and involve more procedural detail. A large body of precedents has even evolved to govern "how [unanimous consent agreements] are to be interpreted and applied in various situations."[21] In short, unanimous consent agreements are essential to the processing of the Senate's workload and protecting the procedural prerogatives of individual senators.

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[20] The relevant part (clause 4) of Senate Rule XII states: "No request by a Senator for unanimous consent for the taking of a final vote on a specified date upon the passage of a bill or joint resolution shall be submitted to the Senate for agreement thereto until after a quorum call ordered for the purpose by the Presiding Officer, it shall be disclosed that a quorum of the Senate is present; and when a unanimous consent is thus given the same shall operate as the order of the Senate, but any unanimous consent may be revoked by another unanimous consent granted in the manner prescribed above on one day's notice."

[21] Riddick and Frumin, *Senate Procedure*, p. 1312.

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