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Filibusters and Cloture in the Senate

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Summary

The right of Senators to speak on the floor at great length—and so to filibuster—is the single most defining characteristic of the Senate as a legislative body. The possibility of filibusters derives from the absence of any effective Senate rules that limit the number or length of floor speeches. The Senate's rules provide that, in most cases, a Senator who seeks recognition has a right to the floor if no other Senator is speaking, and that Senator then may speak for as long as he or she wishes. There is no motion by which a simple majority of the Senate can stop a debate and allow the Senate to vote in favor of an amendment, a bill or resolution, or any other debatable question. Almost every bill actually is subject to two potential filibusters before the Senate votes on whether to pass it: first, a filibuster on a motion to proceed to the bill's consideration; and second, after the Senate agrees to this motion, a filibuster on the bill itself.

Senate Rule XXII enables Senators to end a filibuster by invoking cloture on whatever debatable matter it is considering. Sixteen Senators initiate this process by presenting a motion to end the debate. The Senate does not vote on this cloture motion until the second day after the day on which the motion is made. Then it usually requires the votes of at least three-fifths of all Senators, or at least 60 votes, to invoke cloture. Invoking cloture on a proposal to amend the Senate's standing rules requires the support of two-thirds of the Senators present and voting.

The primary effect of invoking cloture on a question is to impose a maximum of 30 additional hours for considering that question. This 30-hour period for consideration encompasses all time consumed by rollcall votes, quorum calls, and other actions, as well as the time used for debate. During this 30-hour period, each Senator may speak for no more than one hour apiece (although several Senators can have additional time yielded to them). Under cloture, the only amendments that Senators can offer are amendments that are germane and that were submitted in writing before the cloture vote took place. The presiding officer also enjoys certain additional powers under cloture: for example, to count to determine whether a quorum is present, and to rule amendments, motions, and other actions out of order on the grounds that they are dilatory.

The ability of Senators to engage in filibusters has a profound and pervasive effect on how the Senate conducts its business on the floor. In the face of a threatened filibuster, for example, the majority leader may decide not to call a bill up for floor consideration, or to defer calling it up if there are other, equally important bills that the Senate can consider and pass without undue delay. Similarly, the prospect of a filibuster can persuade a bill's proponents to accept changes in the bill that they do not support but that are necessary to prevent the threat of a filibuster from becoming a reality.

In January 2001, the Senate agreed to S.Res. 8, adjusting the Senate's organization and procedures during the 107th Congress. Discussions of pertinent provisions of this resolution appear in italics.

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Filibusters and Cloture in the Senate

The right of Senators to speak on the floor at great length—and so to filibuster—is the single most defining characteristic of the Senate as a legislative body. This report discusses filibusters and the Senate's cloture rule for ending them. The report begins with a discussion of the Senate rules that make filibusters possible, and the rules and precedents that affect the conduct of filibusters. Next the report discusses provisions of the Senate's cloture rule, how cloture is invoked, and what effect cloture has on the process of floor debate and amendment. The report concludes with comments on the effects of filibusters, and the threat of filibusters, on how the Senate conducts its legislative business, and on recent developments affecting the use of both filibusters and cloture.

This report discusses the major aspects of the Senate's filibuster- and cloture-related procedures. However, it does not encompass every relevant precedent and every possible contingency and nuance. Authoritative information on cloture procedure can be found under that heading in *Riddick's Senate Procedure*.[1] Senators and staff also may consult the Senate parliamentarian on any question concerning the Senate's procedural rules, precedents, and practices.

The equal division of the Senate between Democrats and Republicans when the 107th Congress convened in January 2001 created a very unusual–almost unprecedented–situation. In response, on January 5, 2001, the Senate agreed to S.Res. 8, adjusting the Senate's organization and procedures during the 107th Congress. References to pertinent provisions of this resolution appear in italics.

The Right to Debate

The core rule of the Senate governing floor debate is paragraph 1(a) of Rule XIX, which states that:

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, and no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.

This is essentially all that the Senate's rules have to say about the right to speak on the floor, so the rule is just as important for what it *does not* say as for what it *does* say.

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[1]U.S. Senate. *Riddick's Senate Procedure*. Senate Document No. 101-28. 101st Congress, 2nd Session, 1992; pp. 282-334.

The Right to Recognition.

Several provisions of this paragraph combine to create the possibility of filibusters. First, "the presiding officer shall recognize the Senator who shall first address him." The presiding officer has no choice and no discretion. As a general rule, if a Senator seeks recognition when no other Senator has the floor, the presiding officer must recognize that Senator. The presiding officer may not decline to recognize the Senator, whether for reasons of personal preference or partisan advantage, or simply to enable the Senate to reach a vote on whatever question it has been debating.

Rule XIX directs the presiding officer to recognize whichever Senator is the first to seek recognition. By well-established precedent and practice, however, the Senate does not comply strictly with this provision of the rule. All Senators accept that the majority leader and then the minority leader should receive preference in recognition. This means that, if two Senators are seeking recognition at more or less the same time, and one of them is the majority or the minority leader, the Presiding officer recognizes the leader (and the majority leader in preference to the minority leader). The majority and minority floor managers of legislation the Senate is debating also generally are accorded preference in recognition after the two party leaders.

In this respect, Senators give up their equal rights to recognition under Rule XIX. They do so because they all appreciate that the party leaders must be able to secure recognition if they are to do some of the things the Senate expects them to do: to arrange the Senate's daily agenda and weekly schedule, and to make the motions and propound the unanimous consent agreements that are necessary for the relatively orderly conduct of business on the Senate floor. Bill managers also receive preference in recognition because they presumably are among the best-informed (and most influential) Senators on the pending legislation, so all Senators can benefit from hearing their opinions and considering their amendments and other motions.

The result is that, during debate on a bill, a Senator who does not hold one of these leadership positions cannot be sure that he or she will be recognized *promptly*, but each Senator can be sure that he or she will be recognized *eventually*. Because the presiding officer cannot refuse to recognize a Senator who seeks the floor, the Senate cannot vote on whatever debatable question is pending so long as any Senator wants to be recognized to debate it (barring a unanimous consent agreement to the contrary or a tabling motion, as discussed below).

The Right to Speak at Length and the Two-Speech Rule.

Once a Senator has been recognized, that Senator may speak for as long as he or she wishes (again, except when the Senate has agreed to limit debate, usually by unanimous consent). The record for the longest single speech remains the speech made by Senator Thurmond (R, SC) on August 28-29, 1957, which consumed 24 hours and 18 minutes.[2] A Senator who is speaking usually cannot be interrupted

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[2]U.S. Senate. Committee on Rules and Administration. *Senate Cloture Rule.* Committee (continued...)

without his or her consent. (There are some exceptions: for example, a Senator can be interrupted if he or she is violating the Senate's standards of decorum in debate or, what is more relevant for our purposes, if another Senator wishes to present a cloture motion.)

Although there is no limit on the length of individual speeches or on the number of Senators who may speak on whatever question is pending, Senate debate is governed by the provision of Rule XIX, quoted above, that is commonly called the *two-speech rule*. To reiterate, paragraph 1(a) of that rule states that "no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate." Therefore, each Senator is limited to making two speeches per day, however long each speech may be, on each debatable question that the Senate considers. Furthermore, a Senator can make no more than two speeches on that question during the same *legislative* day, even though that legislative day may extend over several or many calendar days.

Senators rarely invoke this rule because they generally do not believe that there is any need to do so. During filibusters, however, Senators may insist that the rule be enforced, in which case its effect can be stricter than some Senators may expect. A Senator does not have to speak for very long at all before that statement will be counted under the two-speech rule. According to the Senate's precedents, the Senate has rejected the position "that recognition for any purpose constituted a speech," and that "certain procedural motions and requests were examples of actions that did not constitute speeches for purposes of the two speech rule." These matters include such things as making a parliamentary inquiry and suggesting the absence of a quorum.[3] On the other hand, a substantive comment, however brief, on the pending question, may count as a speech.

Senators often can circumvent the two-speech rule by making a motion or offering an amendment that constitutes a new and different debatable question. For example, each Senator can make two speeches on each bill and on each first-degree amendment to the bill, but also on each second-degree amendment to each of those amendments.

The Motion to Table.

There is one way in which the Senate can, and often does, end debate on an amendment (or any other question) even though there may be Senators who still might want to speak on it. During the debate, any Senator who has been recognized may move to table the amendment, unless there is a unanimous consent agreement limiting the time for debate.[4] That motion is not debatable and requires only a simple

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[2](...continued)
Print. S. Prt. 99-95. 99th Congress, 1st Session; 1985; p 40.

[3]"Therefore, the two speech rule requires not a mechanical test, but the application of the rule of reason." *Riddick's Senate Procedure*, pp. 782-783.

[4]When one Senator is debating a question, for however long, another Senator cannot interrupt (continued...)

majority vote to be adopted. In the Senate, to table something is to kill it. So when the Senate votes to table an amendment (more formally, to lay the amendment on the table), the Senate disposes of the amendment permanently and adversely. Then it can go on to consider another amendment or to continue debate on the underlying bill. By this means, the Senate can prevent a debate from continuing indefinitely if a majority of Senators are prepared to reject the amendment, motion, or bill that is being debated. On the other hand, if the Senate votes against the tabling motion, the pending question remains before the Senate, and Senators can resume debating it. The Senate frequently disposes of amendments by voting to table them, rather than by taking what often are called "up or down" votes to agree to (or not agree to) the amendment itself.

Thus, the opponents of a question can prevail more or less at a time of their choosing by moving and voting to table the question. However, if the opponents constitute less than a majority of the Senate,[5] they may decide to extend the debate by conducting what supporters of the measure might well characterize as a filibuster.

The Conduct of Filibusters

Conducting a filibuster is simple, though it can be physically demanding. A Senator seeks recognition and, once recognized, speaks at length. When that first Senator concludes and yields the floor, another Senator seeks recognition and continues the debate. The debate can proceed in this way until all the participating Senators have made their two speeches on the pending question. Then it usually is possible to make a motion or offer an amendment in order to create a new debatable question on which the same Senators can make two more speeches.

There is no need for the participating Senators to monopolize the debate. What is important is that someone speak, not that it be someone on their side of the question. Although one purpose of a filibuster is to try to change the minds of Senators who support the question being debated, the purpose of delay is served by Senators speaking, no matter which side of the question they take.

The Germaneness of Debate.

More often than not, there is no need for the debate to be germane to the question being considered, with one important exception. Paragraph 1(b) of Rule XIX (often called the "Pastore rule" in recognition of former Senator John Pastore of Rhode Island) requires that debate be germane each calendar day during the first three hours after the Senate begins to consider its unfinished or pending legislative business. In other words, the time consumed by the majority and minority leaders, and any speeches during "routine morning business," at the beginning of a daily session is not included in this three-hour period. The Senate can waive this

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[4](...continued)
to move to table that question.

[5]Or, more accurately, less than a majority of the Senators who would be voting on the question, those Senators constituting a quorum.

germaneness requirement by unanimous consent or by agreeing to a non-debatable motion for that purpose.

Like the two-speech rule, the Pastore rule usually is not enforced because Senators do not see the need to enforce it. During filibusters, however, Senators may be called upon to comply with the germaneness requirement on debate when it is in effect. In practice, this does not put much of an extra burden on participating Senators, because most speeches made during filibusters today tend to be germane anyway. In earlier times, filibustering Senators were known to speak about virtually anything. In his 1940 study of filibusters, Franklin Burdette reported that Senator Huey Long of Louisiana "would dictate for the benefit of the Congressional Record recipes for cooking upon which his authoritative advice had been regularly in demand in Washington social circles....He then proceeded to tell the Senate at great length and in meticulous detail how to fry oysters. Nor did he omit a rambling discourse on the subject of 'potlikker.'"[6]

Although Senator Long's discourse was unusual during the 1930s, it would be even more unexpected in the Senate today, when Senators generally do not stray very far in their speeches from the subject at hand. It bears repeating, however, that the requirement for germane debate is in effect for only three hours on each calendar day.

Yielding the Floor and Yielding for Questions.

A Senator who has the floor for purposes of debate must remain standing and must speak more or less continuously.[7] Complying with these requirements obviously becomes more of a strain as time passes. However, Senators must be careful when they try to give some relief to their colleagues who are speaking. Senate precedents prohibit Senators from yielding the floor to each other. To gain the floor, a Senator must seek recognition from the presiding officer. Thus, if a Senator simply yields to a colleague, he or she has yielded (relinquished) the floor, however inadvertently. This is another one of those Senate procedures that often is not observed during the normal conduct of business on the floor. But during filibusters, Senators are much more likely to insist on it being observed.

A Senator may yield to a colleague without losing the floor only if the Senator yields for a question.[8] With this in mind, a colleague of a filibustering Senator may give that Senator some relief by asking him or her to yield for a question. The Senator who retains control of the floor must remain standing while the question is being asked. The peculiar advantage of this tactic is that it sometimes takes Senators quite some time to ask their question, and the presiding officer is reluctant to force them to state their question before they are ready to do so. In this way, participating Senators can extend the debate through an exchange of what sometimes are long

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[6]Franklin Burdette, *Filibustering in the Senate*. New York: Russell & Russell, 1965 (reprint of 1940 Princeton University Press edition), p. 4.

[7]*Riddick's Senate Procedure*, p. 755.

[8]Senators sometimes ask unanimous consent to yield to a colleague for something other than a question without losing their right to the floor. Any Senator can object to this request.

questions followed by short answers, rather than by relying exclusively on a series of long, uninterrupted speeches.

Quorums and Quorum Calls.

There are ways other than debate by which Senators can delay and sometimes even prevent the Senate from voting on a question that it is considering. For example, each amendment that is offered on the Senate floor must be read in full before debate on it can begin, although the Senate usually agrees by unanimous consent to waive the reading. In addition, quorum calls can be demanded not for the purpose of confirming or securing the presence of a quorum, but in order to consume time.

A Senator who has been recognized can "suggest the absence of a quorum," asking in effect whether the Senate is complying with the constitutional requirement that a quorum—a majority of all Senators—be present for the Senate to conduct business. The presiding officer normally does not have the authority to count to determine whether a quorum actually is present (which is rarely the case), and so directs the clerk to call the roll.

Senators usually use quorum calls to suspend the Senate's floor proceedings temporarily, perhaps to discuss a procedural or policy problem or to await the arrival of a certain Senator. In those cases, the clerk calls the roll very slowly and, before the call of the roll is completed, the Senate agrees by unanimous consent to call off the quorum call (to "dispense with further proceedings under the quorum call"). Because the absence of a quorum has not actually been demonstrated, the Senate can resume its business. Such quorum calls can be time-consuming and so can serve the interests of filibustering Senators.

During a filibuster, however, the clerk may be directed to call the roll more rapidly, as if a rollcall vote were in progress. Doing so reduces the time that the quorum call consumes, but it also creates the real possibility that the quorum call may demonstrate that a quorum in fact is not present. In that case, the Senate has only two options: to adjourn, or to take steps necessary to secure the presence of enough absent Senators to create a quorum. Typically, the majority leader or the majority floor manager opts for the latter course, and makes a motion that the sergeant at arms secure the attendance of absent Senators, and then asks for a rollcall vote on that motion. Senators who did not respond to the quorum call are likely to come to the floor for the rollcall vote on this motion. Almost always, therefore, the vote establishes that a quorum is present, so the Senate can resume its business without the sergeant at arms actually having to execute the Senate's directive.

This process also can be time-consuming because of the time required to conduct the rollcall vote just discussed. Nonetheless, the proponents of the bill (or other matter) being filibustered may prefer that the roll be called quickly because it requires unanimous consent to call off a routine quorum call, in which the clerk calls the roll very slowly, before it is completed. A filibustering Senator has only to suggest the absence of a quorum and then object to calling off the quorum call in order to provoke a motion to secure the attendance of absentees and (with the support of at

least 10 other Senators) a rollcall vote on that motion.[9] If this motion is likely to be necessary, one way or the other, it is usually in the interests of the bill's proponents to have the motion made (and agreed to) as soon as possible.

Rollcall Voting.

As the preceding discussion indicates, rollcall votes are another source of delay. Any question put to the Senate for its decision requires a vote, and a minimum of 11 Senators can require that it be a rollcall vote. Each such vote consumes at least 15 minutes unless the Senate agrees in advance to reduce the time for voting.[10]

The Constitution provides that the "yeas and nays" shall be ordered "at the desire of one-fifth of those present" (Article I, Section 5). Because a quorum is presumed to be present, the Senate requires at least 11 Senators (one-fifth of the minimal quorum of 51) to request a rollcall vote on the pending question.

When a Senator wants a rollcall vote, other Senators frequently support the request as a courtesy to a colleague. During a filibuster, however, the supporters of the bill or amendment sometimes try to discourage other Senators from supporting requests for time-consuming rollcall votes. Also, the proponents sometimes can make it more difficult for their opponents to secure a rollcall vote. When the request for a rollcall vote is made immediately after a quorum call or another rollcall vote, Senators can insist that the request be supported by one-fifth of however many Senators answered that call or cast their votes.[11] Since this is almost certainly more than 51 and, in practice, is much closer to 100, the number of Senators required to secure a rollcall can increase to a maximum of 20.

The time allowed for Senators to cast rollcall votes is a minimum of 15 minutes, unless the Senate agrees, before the vote begins, to a reduced time. When the 15 minutes expire, the vote usually is left open for some additional time in order to accommodate other Senators who are thought to be en route to the floor to vote. Thus, the actual time for a rollcall vote can extend to 20 minutes or more. During filibusters, however, a call for the regular order can lead the presiding officer to announce the result of a rollcall vote soon after the 15 minutes allotted for it.

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[9]However, when a Senator suggests the absence of a quorum, he or she loses the floor. Also, "[i]t is not in order for a Senator to demand a quorum call if no business has intervened since the last call; business must intervene before a second quorum call or between calls if the question is raised or a point of order made." *Riddick's Senate Procedure*, p. 1053. On what constitutes intervening business, see pp. 1042-1046.

[10]The Senate, unlike the House, does not use an electronic voting system.

[11]"[T] sufficiency of the number of Senators demanding a rollcall is based on the last preceding rollcall. The Chair, noting that 81 Senators had just voted, denied the yeas and nays when only 16 Senators responded to a request for a sufficient second. A demand for the yeas and nays immediately following a call of the Senate is seconded by one-fifth of those answering such call, or immediately following a yea and nay vote, seconded by one-fifth of those voting." *Riddick's Senate Procedure*, p. 1417.

Senators usually can secure two votes in connection with the disposition of bills, amendments, motions, and other questions. The first is the vote on the question itself or on a motion to table it. The second is the vote on a motion to r*econsider* the vote by which the first question was decided (or on a motion to table the motion to reconsider). With sufficient support, rollcall votes can be ordered on each motion. so that completing action on both of them consumes at least 30 minutes.

Scheduling Filibusters.

Contemporary filibusters usually are fairly courteous affairs. The Senate's daily schedule normally is arranged so that filibusters are not unduly disruptive or inconvenient to Senators. One way to make conducting a filibuster more costly and difficult is to keep the Senate in session until late at night, or even all night, requiring the participating Senators to speak or otherwise consume the Senate's time. During some contentious filibusters of the 1950s, cots were brought into the Senate's anterooms for Senators to use during around-the-clock sessions.

Today, all-night sessions are very unusual. The Senate may not even convene earlier or remain in session later when a filibuster is in progress than it does on other days. One reason may be that filibusters are not the extraordinary and unusual occurrences that they once were. Another may be that Senators are less willing to endure the inconvenience and discomfort of prolonged sessions. The latter point is important because late-night or all-night sessions put as much or more of a burden on the proponents of the question being debated than on its opponents.

The Senators participating in the filibuster need only ensure that at least one of their number always is present on the floor to speak. The proponents of the question, however, need to ensure that a majority of the Senate is present or at least available to respond to a quorum call or rollcall vote. If, late in the evening or in the middle of the night, a Senator suggests the absence of a quorum and a quorum does not appear, the Senate must adjourn or at least suspend its proceedings until a quorum is established. This works to the advantage of the filibustering Senators, so the burden rests on their opponents to ensure that the constitutional quorum requirement always can be met.

Invoking Cloture

The procedures for invoking cloture are governed by paragraph 2 of Rule XXII (which also governs procedures under cloture, as discussed later in this report).

The process begins when a Senator presents a cloture motion that is signed by 16 Senators, proposing "to bring to a close the debate upon [the pending question]." The motion is presented to the Senate while it is in session. When one Senator is speaking, another Senator may interrupt for purposes of presenting this motion. It is read to the Senate, but the Senate then returns to whatever business it had been transacting. The Senate does not act on the cloture motion in any way on the day on which it is submitted, or on the following day.

S.Res. 8, which the Senate adopted on January 5, 2001, adjusted Rule XXII for the 107th Congress by precluding cloture motions from being filed as soon as, or

soon after, the Senate begins debating an amendable question. In Sec. 3, the resolution provides that it shall not be in order "for any cloture motion to the made on an amendable item during its first 12 hours of Senate debate...." The purpose, according to the resolution, is "to insure that any cloture motion shall be offered for the purpose of bringing to a close debate...." All other provisions of the cloture rule remain unchanged.

The Senate acts on the cloture motion "on the following calendar day but one"—that is, on the second day after it is presented. So if the motion is presented on a Monday, the Senate acts on it on Wednesday. During the intervening time, the Senate does not have to continue debating the question on which cloture has been proposed. When the time arrives for voting on the cloture motion, the presiding officer presents it to the Senate for a vote, regardless of what the Senate may be considering at that time.

One hour after the Senate convenes on the day the cloture motion has "ripened" or "matured," the presiding officer is required to direct that an actual (or "live") quorum call take place. (The Senate often waives this quorum call by unanimous consent.) When the presence of a quorum is established, the Senate proceeds, without debate, to a rollcall vote on the motion: "the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?'"[12] Notice that the rule requires there to be a rollcall vote on the motion.

Invoking cloture usually requires a three-fifths vote of the entire Senate—"three-fifths of the Senators duly chosen and sworn." If there are no vacancies, therefore, 60 Senators must vote to invoke cloture. In contrast, most other votes require only a simple majority (that is, 51 percent) of the Senators present and voting, assuming that those Senators constitute a quorum. In the case of a cloture vote, the key is the number of Senators voting for cloture, not the number voting against. Failing to vote on a cloture motion has the same effect as voting against the motion: it deprives the motion of one of the 60 votes needed to agree to it.

If the Senate does vote to invoke cloture, that vote may not be reconsidered. On the other hand, it is in order to reconsider the vote by which the Senate voted against invoking cloture.

There is an important exception to the three-fifths requirement to invoke cloture. Under Rule XXII, an affirmative vote of two-thirds of the Senators present and voting is required to invoke cloture on a measure or motion to amend the Senate rules. This exception has its origin in the recent history of the cloture rule.

The majority needed to invoke cloture has changed from time to time. Before 1975, two-thirds of the Senators present and voting (a quorum being present) was required for cloture on all matters. In early 1975, at the beginning of the 94th Congress, Senators sought to amend the rule to make it somewhat easier to invoke

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[12]Rule XXII, paragraph 2. The Senate sometimes agrees by unanimous consent to change the date or time (or both) for conducting a cloture vote.

cloture. However, some Senators feared that if this effort succeeded, that would only make it easier to amend the rule again, making cloture still easier to invoke. As a compromise, the Senate agreed to move from a maximum of 67 votes (two-thirds of the Senators present and voting) to a minimum of 60 votes (three-fifths of the Senators duly chosen and sworn) on all matters except future rules changes, including changes in the cloture rule itself.[13]

Matters on Which Cloture May be Invoked.

There usually can be at least two filibusters on bills and resolutions that the Senate considers: first, a filibuster on the motion to proceed to the measure's consideration; and second, after the Senate agrees to this motion, a filibuster on the measure itself. If the Senate cannot agree to take up a measure by unanimous consent, the majority leader's recourse is to make a motion that the Senate proceed to its consideration. This *motion to proceed*, as it is called, usually is debatable and, consequently, subject to a filibuster.[14] Therefore, the Senate may have to invoke cloture on this motion before being able to vote on it. Once the Senate votes in favor of the motion and begins consideration of the measure itself, a filibuster on the measure then may begin. Threatened filibusters on motions to proceed once were rare, but have become somewhat more common in recent years. Conference reports are not subject to such a double filibuster because they are privileged matters, so motions to proceed to their consideration are not debatable.[15]

A cloture motion can be filed on a question only when it is pending before the Senate. For example, it is not in order for a Senator to present a motion to invoke cloture on a bill that the Senate has not yet agreed to consider or on an amendment that has not yet been offered. On the other hand, it is not necessary for the Senate to continue debating a question between the time a motion to invoke cloture on it is presented and the time the Senate votes on the motion. During this period, the Senate can turn to other business because, when the time comes for voting on the motion, the presiding officer interrupts the proceedings for purposes of the mandatory quorum call and the rollcall vote on the cloture motion.

Any debatable question that the Senate considers can be filibustered and, therefore, may be the subject of a cloture motion, unless the time for debate is limited by the Senate's rules, by law, or by a unanimous consent agreement. Consequently, Senators may present cloture motions to end debate on bills, resolutions, amendments, conference reports, and various debatable motions. Sometimes, in fact, it can be necessary to invoke cloture on an amendment to a bill and then to invoke cloture again on the bill itself. The reason lies in the fact that amendments that the Senate

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[13]U.S. Senate. Committee on Rules and Administration. *Senate Cloture Rule,* pp. 119-121.

[14]*S.Res. 8 of the 107th Congress reiterates that, "in keeping with the present Senate precedents, a motion to proceed to any Legislative or Executive Calendar item shall continue to be considered the prerogative of the Majority Leader," while confirming that "the Senate Rules do not prohibit the right of the Democratic Leader, or any other Senator, to move to proceed to any item."*

[15]A nomination also is subject to only one filibuster, because no debate is allowed on a motion that the Senate go into executive session to consider a particular nomination.

considers under cloture must be germane (as discussed in the section of this report on the effects of invoking cloture).

Filing Successive Cloture Motions.

There often has been more than one cloture vote on the same question. If and when the Senate rejects a cloture motion, a Senator then can file a second motion to invoke cloture on that question. In some cases, Senators even have anticipated that a cloture motion may fail, so they have filed a second motion before the Senate has voted on the first one. For example, one cloture motion may be presented on Monday and another on Tuesday. If the Senate rejects the first motion when it matures on Wednesday, the second motion will ripen for a vote on Thursday. (If the Senate agrees to the first motion, there is no need, of course, for it to act on the second.) There have been instances in which there have been even more cloture votes on the same question. During the 100th Congress (1987-1988), for example, there were eight cloture votes, all unsuccessful, in connection with a campaign finance reform bill.

The Effects of Invoking Cloture

Invoking cloture on a bill (or on any other question) does not produce an immediate vote on it. The effect of invoking cloture is only to guarantee that a vote will take place eventually.

The Time for Post-Cloture Consideration and Debate.

Rule XXII imposes a cap of no more than 30 additional hours for the Senate to consider a question after invoking cloture on it. This 30-hour cap is a ceiling on the time available for post-cloture *consideration*, not just for *debate*. The time used in debate is counted against the 30 hours, but so too is the time consumed by quorum calls, rollcall votes, parliamentary inquiries, and all other proceedings that occur while the Senate is operating under cloture. The 30-hour period can be increased if the Senate agrees to a non-debatable motion for that purpose. Adopting this motion also requires a three-fifths vote of the Senators duly chosen and sworn.

During the period for post-cloture consideration, each Senator is entitled to *speak* for a total of not more than one hour. Senators may yield part or all of their time to any of four others: the majority or minority leaders or the majority or minority floor managers. None of these Senators can accumulate more than two hours of additional time for debate; but, in turn, they can yield some or all of their time to others.[16]

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[16]Hypothetically, therefore, one Senator could control a maximum of 13 hours for debate. This would require eight Senators to yield all of their time to the four designated party leaders and floor managers (two Senators yielding their time to one of the four), giving each party leader and floor manager control of three hours apiece. If the four designated Senators then yielded all of their combined 12 hours to a fifth Senator, who controls one hour in his or her own right, that Senator would control 13 hours.

Note that there is insufficient time for each Senator to use his or her hour for debate within the 30-hour cap for post-cloture consideration. This disparity results from a recent amendment to the cloture rule. Before 1979, there was no cap at all on post-cloture consideration; the only restriction in Rule XXII was the limit of one hour per Senator for debate. The time consumed by reading amendments and conducting rollcall votes and quorum calls was not deducted from anyone's hour. As a result, Senators could (and did) engage in what became known as post-cloture filibusters. By offering one amendment after another, for example, and demanding rollcall votes to dispose of them, Senators could consume hours of the Senate's time while consuming little if any of their allotted hour for debate. In reaction, the Senate amended Rule XXII in 1979 to impose a 100-hour cap on post-cloture consideration. In theory, at least, this time period could accommodate the one hour of debate per Senator (but only if Senators used all of the 100 hours only for debate). Then, in 1985, the Senate agreed, without significant dissent, to reduce the 100 hours to 30 hours, while leaving unchanged the allocation of one hour for each Senator to debate.

The result is that there is not enough time available under cloture for each Senator to speak for an hour.[17] In principle, 30 Senators speaking for one hour each could consume all the time for post-cloture consideration. However, Rule XXII does provide a limited protection for all Senators by providing that, when the 30 hours expire, "any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only."[18]

There is one other notable difference in the Senate's debate rules before and after cloture is invoked. As discussed above, Senate floor debate normally does not have to be germane, except when the Pastore rule applies. Under cloture, debate must be germane. This requirement derives from the language of Rule XXII that allows each Senator to speak for no more than one hour "on the measure, motion, or other matter pending before the Senate...." Senate precedents make clear that Senators should not expect the presiding officer to insist on germane debate at his or her initiative. Senators wishing to enforce the requirement that debate be germane can do so by making points of order from the floor.

Offering Amendments and Motions Under Cloture.

There are four key restrictions governing the amendments that Senators can propose under cloture that do not apply to Senate floor amendments under most other circumstances. The last of these restrictions also applies to other motions that Senators may offer under cloture.

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[17]When one Senator yields to another for a question, the time required to ask the question comes out of the hour controlled by the Senator who yielded.

[18]When a Senator has consumed all of his or her hour for debate, that Senator may continue to offer amendments, but has no time to explain them. At the end of the 30 hours for post-cloture consideration, no further amendments may be offered.

Germane Amendments Only. First, only germane amendments are eligible for floor consideration under cloture.[19] This germaneness requirement applies to the amendments that Senators offer after cloture is invoked, and the requirement applies as well to any amendments that were pending (that is, amendments that were offered but not yet disposed of) at the time that the Senate votes for cloture. Thus, immediately after a successful cloture vote, the presiding officer may announce at his own initiative that one or more amendments that were pending when the vote began now must "fall" because they are not germane to the matter on which the Senate just invoked cloture.

Because of this germaneness requirement, the Senate could have to invoke cloture on an amendment to a bill, and then invoke cloture again on the bill itself. It is quite common for a Senate committee to report a bill back to the Senate with an amendment in the nature of a substitute—a complete alternative for the text of the bill as introduced. The Senate almost always adopts this substitute immediately before voting to pass the bill as amended by the substitute. However, it also is not unusual for the committee substitute to be nongermane to the bill in some respect. Thus, if the Senate invokes cloture on the bill before it votes on the committee substitute, the substitute falls as nongermane, so the Senate cannot agree to it. To protect the committee substitute (or any other nongermane amendment that the Senate is considering), the Senate can invoke cloture on the amendment. Doing so limits further consideration of the amendment to no more than 30 more hours. After the Senate votes for the committee substitute, cloture no longer is in effect, so Senators can filibuster the bill as amended unless they again vote to invoke cloture, this time on the bill as amended.

With respect to amendments offered after the cloture vote, the presiding officer may wait for a Senator to make a point of order against an amendment before ruling that it is not germane. Sometimes, however, the presiding officer has taken the initiative to rule amendments out of order as nongermane. In fact, "when obviously nongermane the Chair may rule the amendment out of order even before it has been read or stated by the clerk."[20] (Similarly, presiding officers have taken the initiative to rule amendments out of order—sometimes even before they were read—because the amendments sought to change a bill in two or more noncontiguous places.)

Any Senator can appeal the chair's ruling that a certain amendment is nongermane, allowing the Senate to overturn that ruling by simple majority vote. However, the Senate is unlikely to take this action because doing so could fundamentally undermine the integrity and utility of the cloture procedure. In a sense, the decision to invoke cloture constitutes a kind of treaty by which Senators relinquish their right to filibuster in exchange for a guarantee that no nongermane amendments will be offered under cloture that some of those Senators would want to filibuster. Unless a Senator could be confident that, under cloture, his colleagues could not offer amendments on unrelated subjects that the Senator would insist on filibustering, that Senator would have serious qualms about ever again voting for cloture.

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[19]On what constitutes a germane amendment, see *Riddick's Senate Procedure*, pp. 291-294.

[20]*Riddick's Senate Procedure*, p. 291.

Although there are some Senate rules that Senators sometimes choose not to enforce when enforcing them would be inconvenient, the requirement for germane amendments under cloture is not one of them. On some occasions when a Senator did appeal a ruling of the chair under cloture that an amendment was not germane, Senators who may have supported the amendment on its merits nonetheless voted to sustain the ruling of the chair with the long-term viability of the cloture procedure in mind.

Amendments Submitted in Writing. Second, to be in order under cloture, amendments must be submitted in writing (and for printing in the *Congressional Record*) before the cloture vote takes place.[21] There are different requirements for first-degree amendments (amendments to change the text of a bill or resolution) and second-degree amendments (amendments to change the text of a pending first-degree amendment). Under Rule XXII,

> Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree.

Senators sometimes submit a large number of amendments to a bill for printing in the *Congressional Record* even before a cloture motion is presented. This often is intended and understood to be a clear signal that the Senators who submitted the amendments for printing are contemplating a filibuster.

In practice, the deadline in Rule XXII usually gives Senators most or all of a day after cloture is proposed to draft germane amendments to the bill. Senators then usually have most or all of the next day to review those first-degree amendments and to decide what second-degree amendments, if any, they might offer to them. In this way, Senators can be fully aware of all the amendments they may encounter under cloture before they vote on whether or not to invoke cloture. (Submitting an amendment in writing does not exempt that amendment from the restriction that only germane amendments are in order under cloture.)

One result of these requirements is that Senators and their staffs must decide whether they need to prepare amendments whenever cloture is proposed. When the Senate has voted to invoke cloture on a bill, it is too late for a Senator then to think about what amendments to the bill he or she might want to propose. When a cloture motion is filed, Senators often conclude that they need to proceed with drafting whatever amendments they might want to offer on the assumption that the Senate will approve the motion two days later. One result is that there often are more amendments submitted for printing in the *Record* than Senators actually offer after cloture is invoked.

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[21] A Senator can call up an amendment that another Senator had submitted in writing, though Senators rarely do so. Also, a Senator may recall amendments that he or she submitted in writing before a cloture vote. By recalling an amendment, the Senator removes it from potential consideration under cloture.

Under cloture, a Senator may not modify an amendment that he or she has offered. Permitting modifications would be inconsistent with the principle implicit in the cloture rule that Senators should be able to know what amendments may be offered under cloture before the Senate decides if it will invoke cloture. Rule XXII permits only one limited circumstance in which Senators are allowed to change the amendments they offer under cloture. If a measure or other matter is reprinted for some reason after the Senate has invoked cloture on it and if the reprinting changes page and line numbers, amendments that otherwise are in order will remain in order and can be reprinted to make conforming changes in page and line numbering.

Multiple Amendments. Third, Rule XXII states that "[n]o Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise." The evident purpose of this provision is to prevent some Senators from dominating the Senate's proceedings under cloture. This restriction, which Senators have rarely if ever chosen to enforce, does not create a significant problem for those wishing to consume the time available for post-cloture consideration. From their perspective, what is most important is that amendments be offered, not who offers them.

Dilatory Amendments and Motions. Fourth, and finally, Rule XXII provides that no dilatory motion or amendment is in order under cloture. Furthermore, the Senate has established precedents that empower the presiding officer to rule motions and amendments out of order as dilatory without Senators first making points of order to that effect from the floor. Presiding officers rarely have exercised this authority. On occasion, however, and whether at their own initiative or in response to points of order, presiding officers have ruled amendments and various kinds of motions to be dilatory and, therefore, not in order.[22] For example, motions to adjourn, postpone, recess, and reconsider have been held to be dilatory. There also is precedent supporting the authority of the presiding officer to rule that a quorum call is dilatory. In extraordinary circumstances, even appeals from rulings of the chair have been ruled out of order as dilatory.[23]

The Authority of the Presiding Officer.

It bears emphasizing that the Senate's presiding officer has powers when the Senate is operating under cloture that he or she does not have under the Senate's regular procedures. As already noted, the presiding officer may rule amendments and motions out of order at his or her own initiative, without waiting for Senators to make points of order from the floor, and even without waiting for the amendments to be read. Under the Senate's precedents, "[o]nce cloture has been invoked, the Chair is required to take the initiative to rule out of order dilatory amendments, and the Chair

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[22]Amendments that only express the sense of the Senate or the sense of Congress (and, therefore, would not have the force of law if enacted) have been considered dilatory *per se* under cloture. No other type of amendment has been held to be dilatory *per se* under cloture.

[23]In 1982, the presiding officer stated that "the right to appeal is a basic right of each Senator and would be held dilatory only in the most extraordinary circumstances." *Riddick's Senate Procedure*, p. 312.

makes the determination regarding dilatory intent." Also "under cloture, the Chair has taken the initiative to rule out of order amendments that were dilatory, nongermane or improperly drafted as each was called up and before the amendment could be reported."[24]

There is one other potentially important authority that the presiding officer exercises after the Senate votes to invoke cloture. Under normal Senate procedure, the chair is not empowered to count whether a quorum is present on the floor. When a Senator suggests the absence of a quorum, the chair's only response is to direct the clerk to call the roll. Under cloture, however, the presiding officer can count to ascertain the presence of a quorum.

Other Procedural Changes Under Cloture.

Three other noteworthy changes in Senate floor procedure are triggered when the Senate votes to invoke cloture:

- Under normal Senate procedure, each amendment that is offered must be read before debate on it may begin, unless the reading is waived by unanimous consent, as it usually is. Under Rule XXII, however, the reading of any amendment automatically is waived if it "has been available in printed form at the desk of the Members for not less than twenty-four hours." This requirement usually is satisfied because amendments considered under cloture must have been submitted for printing before the cloture vote.

- Under normal Senate procedure, any Senator can demand that an amendment be divided into two or more component parts if each part could stand as an independent proposition (but amendments in the form of motions to strike out and insert are not divisible). Under cloture, however, a Senator cannot demand as a matter of right that an amendment be divided.[25]

- Under normal Senate procedures, appeals from rulings of the chair usually are debatable (though they also are subject to tabling motions). Under cloture, however, appeals are not debatable.

The Impact of Filibusters

Obviously, a filibuster has the greatest impact on the Senate when a 60-vote majority cannot be assembled to invoke cloture. In that case, the measure or other matter that is being filibustered is doomed unless its opponents relent and allow the Senate to vote on it. Even if cloture is invoked, however, a filibuster can significantly affect how, when, and even whether the Senate conducts its legislative and executive business. In fact, it is not an exaggeration to say that filibusters and the prospect of filibusters shape much of the way in which the Senate does its work on the floor.

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[24]*Riddick's Senate Procedure*, p. 287.

[25]An amendment that was offered and divided before the cloture vote continues to be considered as divided after cloture is invoked.

Impact on the Time for Consideration.

In principle, a truly determined minority of Senators usually can delay for as much as two weeks the time at which the Senate finally votes to pass a bill that most Senators support.

First, assume that the Senate had not adopted S.Res. 8 which, as noted earlier, provides that, during the 107th Congress, it is not in order to file cloture on "an amendable item during its first 12 hours of Senate debate...." Assume also that a motion to proceed to the bill's consideration is made on a Monday (Day 1). If a filibuster on that motion is begun or is anticipated, proponents of the motion and the bill can present a cloture motion on the same day. However, under Rule XXII, the cloture vote on the motion to proceed does not take place until Wednesday (Day 3). Assuming the Senate invokes cloture on Wednesday, there then begins the 30-hour period for post-cloture consideration of the motion. If the Senate is in session for eight hours per day, Monday through Friday, the 30-hour period, if fully consumed, would extend over almost four full days of session, or at least until the end of the Senate's session on the following Monday (Day 6). If, at that time, the Senate votes for the motion to proceed, the bill's opponents then may begin to filibuster the bill itself, requiring another cloture motion, another successful cloture vote (on Day 8), and the expiration of another 30-hour period for post-cloture consideration. Rule XXII would require that the vote on final passage occur on what would be the 11th day of consideration, or the 15th calendar day after the motion to proceed was made.

To summarize this hypothetical example:

SENATE ACTION	*NUMBER OF DAYS CONSUMED*	
	Days of Session	*Calendar Days*
Motion to proceed made	1	1
Cloture motion filed on motion	1	1
Vote on invoking cloture on motion	3	3
Vote on motion to proceed	6	8
Cloture motion filed on measure	6	8
Vote on invoking cloture on measure	8	10
Vote on final passage of measure	11	15

Now consider the impact of S.Res. 8 for the 107th Congress, which permits cloture to be filed only after the "amendable item" being considered has been under debate for at least 12 hours. A motion to proceed is not amendable, so the resolution does not preclude Senators from filing cloture on the motion as soon as it is made. Assuming, however, that the matter to be considered is amendable (which is true of most matters except conference reports), compliance with S.Res. 8 might well add as much as two days of session, and at least as many calendar days, to the number of days shown in the example above.

There are many factors that can shorten or extend this hypothetical timetable. Is cloture proposed as soon as the motion to proceed is made, and then again as soon as possible after the Senate takes up the bill (after having agreed to the motion to proceed)? Can the bill's supporters secure the 60 votes needed to agree to the first

cloture motion on the motion to proceed, or is more than one attempt necessary before the Senate votes for cloture on the motion? Similarly, does the Senate adopt the first cloture motion on the bill itself, or is cloture invoked on the bill only on the second or third or fourth attempt? Can the Senate agree by unanimous consent to expedite the process by providing for votes on cloture before the time specified in Rule XXII? Are the bill's opponents willing and able to consume the entire 30-hour period for post-cloture consideration of the motion to proceed, and also the same amount of time for post-cloture consideration of the bill? After the Senate invokes cloture, for how many days, and for how many hours per day, is the Senate in session to consider the bill? Does the Senate meet late into the evening, or all night, or on the weekend, in order to consume both 30-hour periods more quickly than it otherwise would?

The answers to questions such as these affect how long a filibuster can delay final Senate action, even when there are 60-vote majorities to invoke cloture. Although the actual time consumed varies from case to case, clearly filibusters can create significant delays. How much delay the Senate experiences depends in part on how much time the Senate, and especially its majority party leadership, is prepared to devote to the bill in question. If the bill is particularly important to the nation and to the majority party's legislative agenda, for example, the majority leader may be willing to invest the days or even weeks that can be necessary to withstand and ultimately end a filibuster.

Another consideration is the point in the annual session and in the biennial life of a Congress at which a filibuster takes place. In the first months of the first session, for example, there may be relatively little business that is ready for Senate floor consideration. In that case, the Senate may be able to endure an extended filibuster without sacrificing its ability to act in a timely way on other legislation. Toward the end of each session, however, and especially as the Senate approaches *sine die* adjournment at the end of the second session, time becomes increasingly scarce and precious. Every hour and every day of floor time that one bill consumes is time that is not available for the Senate to act on other measures that will die if not enacted into law before the end of the Congress. Therefore, the costs of filibusters increase because the damage they do to the legislative prospects of other bills becomes greater and greater.

Even at early stages of a Congress, 30 hours for post-cloture consideration is a long time for the Senate to devote to any single matter. In fact, the Senate never has actually consumed the entire 30-hour period for considering any measure or motion under cloture. As noted earlier, the Senate voted in 1985 to reduce from 100 to 30 hours the time permitted for considering a matter on which cloture has been invoked. This change in Rule XXII provoked little if any controversy, probably because the Senate had never even come very close to consuming the entire 100 hours. Cutting that time by more than two-thirds was not expected to have much practical effect on the ability of Senators to delay final floor votes.

There is one other provision of Rule XXII that affects the consequences of a filibuster for other legislative and executive business that the Senate could conduct. The cloture rule provides that once the Senate invokes cloture, "then said measure, motion or other matter pending before the Senate, or the unfinished business, shall be

the unfinished business to the exclusion of all other business until disposed of." In other words, if the Senate invokes cloture on a bill, the Senate must continue to consider that bill until it completes action on it. It requires unanimous consent for the Senate to set the bill aside, even temporarily, in order to consider other matters, even if those other matters are of an emergency nature and are far less contentious.

Thus, a filibuster can affect not only the fate of the matter that provokes it, but also other matters that the Senate may not be able to consider (or at least not as soon as it would like) because of the filibuster.

The Prospect of a Filibuster.

However much effect filibusters have on the operations of the Senate, perhaps a more pervasive effect is attributable to filibusters that have not taken place—at least not yet. The prospect of a filibuster often affects when or if the Senate will consider a measure on the floor, and how the Senate will consider it.

Holds. Fundamentally, for example, when a Senator places a *hold* on a bill or resolution, the Senator is implicitly registering his or her intention to object to any unanimous consent request for the measure's consideration, and then perhaps to begin a filibuster on the measure itself. The Senator also is requesting that the majority leader not even try to call up the measure for consideration, at least not without giving advance notice to the Senator who has placed the hold.

A Senator who does not want the Senate to take up a certain measure, whether temporarily or permanently, can monitor the Senate floor and then object if and when the majority leader proposes to call up the bill for consideration. However, the practice of placing holds on measures has developed informally as a way for Senators to interpose such an objection in advance and without having to do so in person on the floor. In turn, the majority leader and the measure's prospective floor manager understand that a Senator who objects to allowing the bill or resolution to be called up by unanimous consent is threatening to filibuster a motion to proceed to its consideration. So recent majority leaders have tended to honor holds both as a courtesy to their colleagues and in recognition that if they choose not to do so, they may well confront filibusters that they prefer to avoid.

In this way, the threat of a filibuster often is sufficient to prevent a bill from coming to the Senate floor. At a minimum, the bill's supporters may discuss with the Senators making the threat (frequently but not necessarily by placing a hold on it) whether the bill can be amended in a way that satisfies their concerns and removes any danger of a filibuster. Even if the bill's proponents are satisfied that they could invoke cloture on the bill, they still may be willing to accept unwelcome amendments to the bill in order to avoid a protracted process of floor consideration. In fact, depending on the importance of the bill and the other measures that await floor action, the majority leader may be reluctant to schedule the bill unless he is assured that the Senate can complete action on it without undue delay.

Leverage. As noted above, sometimes a filibuster or the threat of a filibuster can affect the prospects of other bills simply by compelling the Senate to devote so much time to the filibustered bill that there is insufficient time available to take up all the

other measures that it otherwise would consider and pass. Senators also have been known to use their rights under Rule XXII to delay action on one bill as leverage to secure the action (or inaction) they want on another, unrelated measure.

Suppose, for example, that a Senator opposes S. 1, but knows that he or she lacks the support to filibuster against it effectively. A Senator in this situation may not have enough leverage to prevent Senate floor consideration of S. 1 or to secure satisfactory changes in the bill. So the Senator may seek to increase his or her leverage by delaying, or threatening to delay, the Senate's consideration of other bills that are scheduled for floor action before S.1. By threatening to filibuster S. 2, S. 3, and S. 4, for example, or by actually delaying their consideration, the Senator may strengthen his or her bargaining position by making it clear that more is at stake than the prospects and provisions of S. 1. In this way, Senators' opposition to one bill can affect the Senate's floor agenda in unexpected and unpredictable ways.

Consensus. More generally, the possibility of filibusters creates a powerful incentive for Senators to strive for legislative consensus. The votes of only 51 Senators are needed to pass a bill on the floor. However, it can require the votes of 60 Senators to invoke cloture on the bill in order to overcome a filibuster and enable the Senate to reach that vote on final passage. Knowing this, a bill's supporters have good reason to write it in a way that will attract the support of at least three-fifths of all Senators. Since 1980, neither party has ever held 60 percent of all the seats in the Senate. Thus, as long as this situation persists, every bill that the Senate passes must enjoy at least a minimal degree of bipartisan support.

What is more, there often are more bills that are ready to be considered on the Senate floor than there is time available for acting on them. Under these circumstances, the majority leader may be reluctant, especially toward the end of a Congress, even to call up a bill unless he can be assured that it will not be filibustered at all. As detailed earlier, even an unsuccessful filibuster can consume most of two weeks of the Senate's time, if the bill's opponents are numerous and determined. So the threat of a filibuster may be enough to convince the majority leader to devote the Senate's time to other matters instead, even if all concerned agree that the filibuster ultimately would not succeed in preventing the Senate from passing the bill.

In such a case, a bill's supporters may not be content with securing the support of even 60 Senators. In the hope of eliminating the threat of a filibuster, the proponents may try to accommodate the interests of all Senators, or at least to convince them that a good faith effort has been made to assuage their concerns. At best, opponents can become supporters. At worst, opponents may remain opposed, but may decide against expressing their opposition through a filibuster. While true consensus on major legislative issues may be impossible, the dynamics of the Senate's legislative process do promote efforts to come as close to consensus as the strongly held beliefs of Senators permit.

Recent Developments

Since 1917, when the Senate first adopted a cloture rule, that rule has been the single most controversial element of the Senate's legislative procedures. Until recent decades, however, cloture was not sought very often and rarely was invoked. From

1919 through 1960, there were a total of 23 cloture votes on the Senate floor, of which five were successful. In at least 24 of those years, there were no cloture votes at all, and the Senate did not invoke cloture even once throughout the 1950s.[26] More recently, cloture votes have become a much more common phenomenon in the Senate. During the 105th Congress (1997-1998) alone, the Senate voted on 53 cloture motions and invoked cloture 18 times.[27]

Filibustering often is associated with the intense and sometimes dramatic debates over civil rights legislation during the 1950s, in large part because the issues at stake were so important and because the tactics employed were so unusual. In the contemporary Senate, by contrast, there is widespread agreement that threatened and actual filibusters, as well as cloture votes, have become much more commonplace. Senators today are thought to be more likely than their predecessors to filibuster or threaten to filibuster, and to do so on a wider range of issues, not all of which have been of the greatest national importance. One consequence has been the increase, cited above, in the number of attempts to invoke cloture. There is less agreement, however, as to whether the increase in cloture votes has been an appropriate and proportional response to the increase in filibusters.

In the view of some Senators, the Senate has become a more partisan institution in which less effort is made to accommodate the interests and opinions of Senators with differing views on major legislation. In this view, it is only natural that Senators have resorted to extended debates as the best means available to them to influence the Senate's decisions. In the view of others, the filibuster has become trivialized. Instead of reserving filibusters as the tactic of last resort, Senators have become more prone to engage in deliberate delay on almost any legislation with which they disagree, regardless of its importance. Both Senators and observers of the Senate have asserted that it now requires 60 votes (the majority required for cloture) for the Senate to pass almost any significant legislation.

While this may be an exaggeration, it certainly is true that the threat of filibusters seems more pervasive than it ever has been before. One prominent manifestation of this change is the increasing number of cloture motions filed on motions to proceed. Seventeen cloture motions were filed on such motions during the Congresses of the 1970s (1971-1980), compared with 47 during the five Congresses of the 1980s (1981-1990). By comparison, Senators filed 44 cloture motions on motions to proceed during only the first two Congresses of the 1990s. Not only were more bills on a wider array of issues becoming the subject of cloture motions, so too were motions to begin consideration of those bills.

These data may be misleading, however. Some Senators, especially those in the majority, argue that the increasing number of cloture motions and votes is a necessary response to the increasing number of filibusters. Other Senators, however, and

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[26]Norman Ornstein, *et. al.* (eds.), *Vital Statistics on Congress*. Washington: Congressional Quarterly, Inc., 1998, p. 171. Rule XXII made it somewhat more difficult to invoke cloture during the 1950s than it is today.

[27]*Congressional Quarterly Almanacs* for 1997 (p. 1-5) and 1998 (p. 1-4). Washington: Congressional Quarterly, Inc., 1998 and 1999.

especially those in the minority, respond that cloture motions have been filed prematurely and sometimes unnecessarily. When filibusters were much less frequent than they have become, the general practice of the Senate was to allow the debate to proceed for a considerable period of time, perhaps several days or longer, before a cloture motion was presented. As filibusters and the threat of filibusters have become more common, Senators now are not waiting as long before filing cloture motions.

In fact, it no longer is unusual for a bill's proponents to file a cloture motion as soon as possible after the Senate begins considering the bill—before a filibuster has begun, but in anticipation of a filibuster that the proponents believe will ensue. *S.Res. 8 addressed this tendency by preventing Senators, during the 107th Congress, from filing a cloture motion on a debatable question during the first 12 hours the Senate is debating it. However, the resolution does not affect the right of Senators to submit cloture motions immediately on motions to proceed.*

Critics of the tendency to propose cloture quickly argue that it sometimes seeks to solve a problem that does yet not exist and that may not arise. These Senators argue that, in view of the central importance of the right to debate in the Senate, Senators should at least demonstrate their intent to debate at length before the effort begins to invoke Rule XXII against them. Furthermore, the cloture procedure sometimes has been used in recent years not to end a filibuster, but to prevent Senators from securing rollcall votes on nongermane amendments.

Suppose that a majority of the Senate is prepared to pass a bill that the majority party leadership is reluctant to schedule for floor consideration. Perhaps the best option available to the bill's proponents is to offer the text of that bill as a nongermane amendment to another bill that the majority party leadership is anxious to bring up and pass. If this nongermane amendment is offered, its opponents can decide to file a cloture motion on the bill and then prolong the debate on the bill and the pending nongermane amendment until the time comes for voting on the cloture motion. If the Senate votes to invoke cloture, the presiding officer announces that the nongermane amendment falls. In this way, its opponents can dispose of it adversely without ever having to vote on it, or even on a motion to table it—but only, of course, if they can mobilize three-fifths of the Senate to vote for cloture.

This possibility, which is more than hypothetical, illustrates that not every cloture vote takes place to break a filibuster that is in progress. Some cloture votes are intended to preempt filibusters that only are anticipated, and still others are primarily for the purpose of triggering the requirement that only germane amendments are in order under cloture, not the debate limits that invoking cloture imposes. *Senators evidently had this last possibility in mind when they adopted S.Res. 8 in January 2001. The resolution stated that the purpose of prohibiting cloture motions during the first 12 hours of debate on an amendable question was "to insure that any cloture motion shall be offered for the purpose of bringing to a close debate...."*

The number of cloture votes exaggerates the number of filibusters that Senators have begun, and even the number of filibusters that Senators have threatened to begin. What some might call filibusters have been described by participating Senators with characterizations such as educational debates; the difference is in the eye of the

beholder. For these and other reasons, it is exceedingly difficult to measure the frequency of filibusters in ways that all observers would accept. However, these difficulties do not affect the more general and ultimately more important conclusion that both actual and threatened filibusters, and the cloture procedure for responding to them, are at least as central to the life and work of the Senate today as they have been at any other period of its history.