Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)

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Summary

On January 25, 2013, the Senate approved two resolutions affecting the process for considering legislation and nominations. S.Res. 15 established two standing orders of the Senate that will apply only in the 113th Congress; S.Res. 16 made two changes to the standing rules of the Senate.

Section 1 of S.Res. 15 creates a special motion to proceed that could be approved by majority vote after four hours of debate. (Most motions to proceed are not subject to any limit on debate, and therefore a cloture process and three-fifths support may be required to reach a vote.) A bill brought before the Senate using this motion would be subject to an alternative amendment process intended to encourage the consideration of at least four amendments, two from each party. The four amendments would be considered sequentially (not simultaneously), alternating by party, beginning with the minority. With cloture, the opportunity to offer all four amendments is guaranteed if they are filed by times specified in the standing order. Unlike standard amendments, a non-germane priority amendment could be considered post-cloture, but would be subject to a three-fifths threshold for approval. Without cloture, the amendments are not subject to debate limitations, and considering all four would therefore likely require unanimous consent.

S.Res. 15 also accelerates the consideration of many nominations when at least three-fifths of the Senate has agreed to vote on their approval. If this standing order was not in effect, then after the Senate agreed to invoke cloture on a nomination, it could be considered for a maximum of 30 hours before the Senate would vote on its approval. The standing order reduces this 30 hour period to 8 hours for many nominations, and to 2 hours for U.S. district court nominations. It excludes some major executive and judicial nominations.

S.Res. 16 amends Senate Rule XXII to provide an expedited method by which three-fifths of the Senate can end debate on the question of taking up a bill (or other matter) on the initiative of both party leaders and a bipartisan group of 14 other Senators. More specifically, a cloture motion on a motion to proceed, signed by the two floor leaders as well as at least seven Senators from each party, will mature in one session day, instead of two. If such a cloture motion is successful, then the motion to proceed will not be subject to further debate, instead of being subject to a maximum of 30 hours of post-cloture consideration.

Finally, S.Res. 16 creates a motion that will consolidate the three steps necessary to arrange for a conference committee with the House, and expedites the cloture process on that motion. Prior to this rules change, it effectively required unanimous consent to arrange for a conference committee, principally because of the time that might be required to take each step separately in the face of opposition. Under this new provision of Senate Rule XXVIII, a compound motion can be made to arrange for a conference. If cloture is filed on this new motion, it would be subject to two hours of debate, after which the Senate would vote on cloture. If cloture was invoked by three-fifths of the Senate, a simple majority could approve the motion to arrange for a conference, and no further debate of the motion would be in order.

The Senate typically considers legislation and nominations under the terms of unanimous consent agreements, rather than by operating strictly in accordance with procedural authorities. The impact of procedural change is often realized not in identifiable actions on the Senate floor, but in negotiations about how or when to set aside the rules with the consent of all Senators.

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Introduction

On January 25, 2013, the Senate approved two resolutions affecting the process for considering legislation and nominations. S.Res. 15 established two orders of the Senate that will apply only in the 113th Congress. The first aims to allow a majority to more quickly begin consideration of a bill while encouraging an increase in amending opportunities. The second accelerates the consideration of some nominations supported by at least three-fifths of the Senate. The other resolution, S.Res. 16, made two changes to the standing rules of the Senate, establishing a bipartisan method to bring a bill before the Senate more quickly and altering the procedures that had effectively required the consent of all Senators to send a measure to a conference committee with the House.

The changes, discussed in detail below, seek to expedite proceedings while also preserving the long-standing Senate principle that a numerical majority should decide only after accounting for the intensity of individual and minority preferences. Most questions in the Senate, such as whether to pass a bill or approve a nomination, are decided by majority vote. But the Senate does not have a rule that allows a majority of Senators to end debate on a question when it is ready to vote on it. As a result of this and other features of the Senate, individual or minority groups of Senators can influence decisions by filibustering—debating or taking other actions to prevent a question from coming to a vote—or even by threatening to do so. The possibility of a filibuster allows a minority of Senators to delay or prevent a vote that they fear they would lose.

If proponents of a matter want to end debate when faced with a determined coalition in opposition, they must use the cloture process, which typically requires three-fifths of the Senate (60 votes, if no more than one vacancy) as well as approximately a week, in practice, to implement. For example, to end debate on a bill, a cloture motion can be presented as soon as the bill is taken up by the Senate, but the vote on the question of ending debate on the bill would not occur until two days of session later. Furthermore, if a sufficient number of Senators vote to invoke cloture, then consideration of the bill could still continue for a maximum of 30 additional hours. Only time in which the bill is actually being considered by the Senate counts toward the 30 hours, and after cloture is invoked on a matter, it takes unanimous consent to consider any other matter. In this way, three-fifths of the Senate can reach a vote on passage of a bill, but it requires unanimity to do so swiftly.

The new rules and standing orders do not eliminate the ability of Senators to filibuster and do not reduce the incentives of proponents of a matter to build a coalition larger than a simple majority. Instead, they reduce the time it might take to get to a final vote on certain matters, without eliminating the need for three-fifths of the Senate to agree to do so. They achieve this largely by altering the timing of the cloture process, or, in one instance, by reducing the number of successful cloture processes required to reach a vote on passage of a bill that would consequently be subject to an alternative amending process. The time required for a cloture process has generally been understood to give individual Senators influence over the Senate agenda, as the sheer number of items of business before the Senate likely makes processing each under the terms of the cloture rule impossible, and unanimous consent effectively required.

This report explains the provisions of each new standing order and rule. The impact of the changes, however, might be felt largely in negotiations about how or when to set aside the rules and standing orders with the consent of all Senators. The Senate usually does not find it efficient

to conduct business by following its rules as they are written. Instead, the Senate typically operates under unanimous consent agreements that reflect the rights Senators have under the rules, but that fix the terms of consideration to the benefit of all Senators. For example, after cloture is invoked on a question, the Senate often agrees by unanimous consent to allow overnight hours to count against the 30 hours of post-cloture time. Senators who wish to delay a vote benefit from this arrangement, because the vote is delayed without requiring them to take floor actions to consume as much of the 30 hours as they can. Senators who would like to vote as soon as possible also benefit because they do not need to dedicate floor time to post-cloture consideration or remain near the floor to make a quorum if required. In this way, the unanimous consent agreement reflects the rights of Senators under the rules, even as provisions of the rule are being waived. Senators decide whether or not to enter into unanimous consent agreements, or essentially to waive their right to delay proceedings, based in part on what they think they could achieve using the regular rules and procedures. To the extent the January 2013 changes have altered procedural opportunities or constraints, they can be expected to affect unanimous consent negotiations.

The recent procedural changes might also affect unanimous consent negotiations by altering expectations about the manner in which legislation and nominations are to be processed. When unanimous consent practices recur so commonly as to become standard, they foster expectations of their continued routine use, which may in turn affect Senators' decisions about whether to object to proposed unanimous consent agreements. To continue the previous example, the Senate often agrees to hold a vote on a question one day after cloture was invoked on it because that is expected and widely accepted, not because each Senator has explicitly weighed whether or not to attempt to cause the vote to be held sooner (or later), operating under the rules.[1] Senators decide whether or not to accept a consent agreement based in part on the potential costs their objection might bring to their colleagues and to their own future efforts to build coalitions. The cost of objecting is generally considered to be higher when doing so would be extraordinary, or contrary to the normal method of conducting business. Senate agreement to these resolutions in January, and the statements made regarding their intended operation, could both indicate and initiate changes in what most Senators believe the proper processes should be.

To assist Senators and staff in understanding the changes and their potential impact on Senate operations, this report describes each of the four changes below, in turn. Each section opens with a brief description of the change, identifying its key features and its general purpose. The overview is followed by a more detailed discussion of Senate practices related to the changes as well as the precise procedural mechanisms established by the new rules and orders. The procedural mechanisms are examined in detail not because there is an expectation that they will operate in the exact manner described, but to clarify the range of procedural options these mechanisms may open up in the Senate.

While this report attempts to explain the new procedures, and in some cases it indicates where their precise operation is unclear, consultation with the Senate Parliamentarian is strongly advised as specific procedural circumstances arise. No written rule or order could account for all courses of procedural action that could arise in the future. The Senate interprets its rules by establishing

[1] The concepts concerning the operation of the Senate and the effect of formal procedural change discussed in this paragraph are developed more fully in two CRS reports relating to previous attempts to change Senate rules. See CRS Report, *The State Of The Senate: Conditions, Proposals, and Prospects For Change*, by Stanley Bach, and CRS Report 93-854, *The Motion to Proceed to Consider a Measure in the Senate, 1979-1992*, by Richard S. Beth (out of print, but available from the author).

precedent through rulings of the chair, usually with the guidance of the Senate Parliamentarian, and occasionally through votes on appeals of such rulings. The Senate also interprets its rules to some degree through repeated practice, but again, even informal decisions regarding the specific implementation of procedures are usually made in consultation with the Parliamentarian.

This report focuses on the procedural changes themselves and their potential consequences. For background information on the changes and other related proposals, including possible motivations for changing Senate procedures, see CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by Christopher M. Davis and Valerie Heitshusen. For an explanation of the process for changing Senate procedures, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth, and CRS Report R42928, *"First Day" Proceedings and Procedural Change in the Senate*, by Valerie Heitshusen, for a discussion of the specific processes and proposals in this Congress and the last.[2]

Standing Orders in the 113th Congress

Through the approval of S.Res. 15, the Senate made two procedural changes that, under the terms of the resolution, will expire at the end of the Congress. These two changes are considered "standing orders" of the Senate because they did not amend the Standing Rules of the Senate themselves. For the 113th Congress, however, these changes will have the same force and effect as rules. The form of a standing order might have been chosen because it was considered to be more appropriate for a temporary procedural change. In addition, agreeing to a procedural change in the form of a standing order can require a smaller coalition for approval than a change in the standing rules. To invoke cloture on a proposal to directly amend the Standing Rules requires a two-thirds vote of Senators present and voting, which can be as many as 67 Senators. To invoke cloture on a resolution affecting procedures but not directly amending the standing rules, such as S.Res. 15, would require only three-fifths of the Senate, typically 60.[3]

Four Hour Limit on Motion to Proceed and Guarantee of Minority Amendment Opportunity (Section 1 of S.Res. 15)

Brief Overview

In current practice, the Senate begins consideration of legislation either by unanimous consent, or by approving a motion to proceed to consider a bill or resolution (referred to simply as a "motion to proceed"). Most motions to proceed are not subject to any time limit on debate, and therefore a

[2] This report also assumes some familiarity with Senate floor procedures. See CRS Report 96-548, *The Legislative Process on the Senate Floor: An Introduction*, by Valerie Heitshusen and CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Valerie Heitshusen, for additional information on affected procedures.

[3] For more information, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth; CRS Report RL32874, *Standing Order and Rulemaking Statute: Possible Alternatives to the "Nuclear Option"?*, by Christopher M. Davis; and CRS Report RL30788, *Parliamentary Reference Sources: Senate*, by Megan S. Lynch and Richard S. Beth. Cloture was not required in the consideration of S.Res. 15 and S.Res. 16; rather, they were considered pursuant to a unanimous consent agreement under which S.Res. 15 would be subject to a 60-vote threshold for approval, and S.Res. 16 would require two-thirds of those voting for approval (Congressional Record, daily edition, vol. 159 (January 24, 2013), p. S270).

cloture process and three-fifths support may be required to reach a vote.[4] S.Res. 15, Section 1, creates a special motion to proceed that could be approved by majority vote after four hours of debate. A bill brought before the Senate using this new motion would be subject to an alternative amendment process intended to encourage the consideration of at least four amendments, two from each party. These four amendments (here called "priority amendments") would be considered sequentially (not simultaneously), alternating by party, beginning with the minority and ending with the majority. The standing order does not place any content restrictions on the four priority amendments, and they are protected from further amendment and from demands to divide and consider propositions within the amendment separately.

With a successful cloture process, the opportunity to offer all four amendments would be guaranteed, and the deadlines for submitting them to the journal clerk after cloture has been filed are progressively later for each one (1 p.m. for the first, then 3 p.m., 5 p.m., and 7 p.m., respectively, the session day after cloture is filed). The four amendments do not have to be germane to be considered, although if cloture is invoked on the bill, a non-germane priority amendment would be subject to a three-fifths threshold for approval. The opportunity to offer priority amendments post-cloture can be considered guaranteed because even if the 30 hours of post-cloture consideration has expired, a priority amendment could be offered and would receive up to an hour of debate. Without cloture, the priority amendments are not subject to debate limitations, and offering and voting on all four would therefore most likely be arranged by unanimous consent. The expectation of some Senators is that the expedited motion to proceed will only be used in instances in which amendment opportunities will be allowed.[5]

The standing order seeks to alter two Senate practices that have emerged over the past two decades, but may have become more common in recent Congresses. First, for any bill not expected to be swiftly approved, it has become the normal practice to begin its consideration through a cloture process, nearly week long, on a motion to proceed. Second, once a bill is before the Senate for consideration, it has become more common for the majority leader to "fill the amendment tree," a process that temporarily blocks other Senators from offering amendments, except by unanimous consent. The result of these two practices can be a floor process that is frustrating to many Senators, whether they are in the majority or the minority.[6]

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[4] Motions to proceed to measures or matters privileged for consideration are not debatable, including, for example, a motion to proceed to consider a conference report and motions to proceed to a budget resolution or a budget reconciliation bill. Other matters can be brought up without debate: House amendments, for example, can currently be laid before the Senate without debate. Nominations can be taken up without debate because a motion to enter into executive session to consider a specific treaty or nomination on the *Executive Calendar* is not subject to debate. In addition, under Senate Rule VIII, a motion to proceed made during the first two hours of a new legislative day (the "morning hour") is not debatable, although this has not been a practical option in recent decades. More information found in out-of-print CRS Report 93-854, *The Motion to Proceed to Consider a Measure in the Senate*, 1979-1992, by Richard S. Beth, pp. 13-15, available from the author.

[5] In a colloquy concerning the standing order, the majority leader said, " ... the amendment process set out in this order is not to be understood as establishing a ceiling for offering amendments, but instead setting a floor for offering them. The order sets out a structure for beginning the amendment process, not ending it." The minority leader replied, "I agree. The Senate works best when all Members have a reasonable opportunity to offer amendments and put forth the views of their constituents." *Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.

[6] For information on the increase in the practice of filing cloture on the motion to proceed beginning the 101st Congress, see Richard S. Beth, Valerie Heitshusen, Bill Heniff Jr. and Elizabeth Rybicki, *Leadership Tools for Managing the U.S. Senate*, American Political Science Association Annual Meeting, Toronto, Canada, September 3-6, 2009, pp. 4-6. For data concerning filing cloture on the motion to proceed since 1949, when it was first allowed under the rules, see CRS Congressional Distribution Memorandum, "Measures in Relation to Which Cloture Votes Occurred on Motions to Proceed," by Richard S. Beth, June 14, 2012 (available from the author). For information on the practice (continued...)

The central concept of the standing order, to allow a majority to quickly take up a bill in exchange for minority amendment opportunities, has been under discussion for some time,[7] but S.Res. 15 is the first effort to create a formal process that could be enforced on the floor. The Senate generally does not amend bills by operating strictly in accordance with rules, published precedents, and other procedural authorities; instead, ad hoc, unanimous consent arrangements are made that take into account the amending opportunities and constraints afforded by the rules. Such arrangements, typically facilitated by party and committee leaders, allow the Senate to proceed in an orderly and somewhat predictable fashion, to the benefit of all Senators.

For this reason, while it is possible that the Senate will attempt to consider legislation under the precise terms of the standing order, it may be more likely that Senators will negotiate unanimous consent agreements that reflect the terms of the new standing order or perhaps just its general intent. In this way, the standing order could affect Senate proceedings by altering expectations, regardless of the precise mechanisms designed. After all, the practices the standing order presumably seeks to change—a lengthy process for beginning consideration of a bill and the filling of the amendment tree—did not result from rules changes, but rather emerged as practices that sought to accommodate or account for the procedural powers of individual Senators under the rules.

The following discussion therefore proceeds in two stages. First, each provision of the standing order is explained in detail below for three stages of the legislative process (taking up a bill, offering an amendment, and disposing of an amendment) and for two features of the new standing order (special protections for the four priority amendments and the effect of a cloture motion). Many decisions regarding the specific implementation of the standing order have yet to be made; as a result, this description should necessarily be viewed as preliminary. In some cases, the discussion serves largely to illustrate the options Senators have for interpreting and applying the standing order. Second, the manner in which the standing order could influence practice is explained by presenting three examples of its operation in different contexts, chiefly distinguished by the size of the coalition supporting the process for considering the bill.

Explanation of Provisions

Taking Up a Bill or Resolution

In the 113th Congress, a Senator can move to proceed to a bill pursuant to Section 1 of S.Res. 15. The Senate generally defers to the majority leader to make such motions affecting the agenda of the Senate. This special motion to proceed is debatable for four hours, equally divided and

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of filling the amendment tree, see Beth et. al., pp. 10-20, and "Measures on Which Opportunities for Floor Amendment Were Limited by the Majority Leader or His Designee Filling or Partially Filling the Amendment Tree, 1985-2010," CRS memorandum by Christopher M. Davis, in U.S. Congress, Senate Committee on Rules and Administration, *Examining the Filibuster*, 111th Cong., 2nd sess., May 19, 2010, S.Hrg. 111-706 (Washington: GPO, 2010), pp. 223-241 (hereafter S.Hrg. 111-706).

[7] During hearings conducted in the 111th Congress by the Senate Committee on Rules and Administration, there was some general discussion of possible arrangements under which, in exchange for limiting debate on the motion to proceed, Senators might be given increased opportunity to amend a bill (S.Hrg. 111-706, pp. 172, 601). At the start of the 112th Congress, the majority and minority leaders announced an agreement that members of the minority would infrequently threaten to filibuster the question of taking up a bill, and the majority leader would fill the tree less often (*Congressional Record,* daily edition, vol. 157 (January 27, 2011), p. S325).

controlled by a majority and a minority floor manager. Senators wishing to speak on the motion to proceed will be yielded time to do so from their manager.

At the conclusion of four hours of debate,[8] the Senate will vote on the question of taking up the bill. The motion can be approved by a majority of Senators voting, a quorum being present. A cloture process therefore will not be needed on this special motion to proceed. In most other cases, motions to proceed could require three-fifths support to receive a vote because they are subject to unlimited debate.

Offering a Priority Amendment

If the Senate agrees to the special debate-limited motion to proceed, then the standing order specifies four amendments, two minority and two majority, that must each be taken up and disposed of in turn before any other Senator can offer an amendment. The priority amendments are to be offered sequentially (not simultaneously), alternating by party, beginning with a minority party amendment and ending with a majority party amendment.

The standing order does not specify the precise time at which the first minority amendment will be offered, but presumably the first minority party member recognized by the presiding officer after the bill is called up would have the opportunity to do so.[9] Given current practices of the Senate, the Senator who offers the first amendment would be expected to be either the minority leader or the ranking minority member of the committee of jurisdiction, unless they both choose not to exercise their right of preferential recognition.[10] If neither of these two Senators offers the first amendment, they might nevertheless be expected to have influence in negotiations over which Senator will. Under regular Senate proceedings, the party leaders and floor managers enjoy preferential recognition, and therefore can offer the first amendment if they choose to. The standing order alters regular Senate proceedings by giving this first opportunity to the minority, instead of the majority.

Only one priority amendment can be pending at a time, and therefore the opportunity to offer any priority amendment (other than the first) will not occur until (and unless) the immediately preceding amendment is disposed of (see next subsection for a discussion of disposition). Again, the standing order does not specify precisely when the next amendment will be offered, but presumably floor leaders would negotiate who would seek recognition to do so, and when.

[8] Any time spent in quorum calls will be deducted from the side of the Senator suggesting the absence of a quorum, although by unanimous consent the time might be charged equally to both sides. Time spent on any votes would not subtracted from the four hours of debate. The Senate could determine that time spent on any debatable motions offered during consideration of the motion to proceed would be subtracted from the four hours.

[9] The standing order states, "if an amendment is not offered in its designated order under this paragraph, the right to offer that amendment is forfeited." The implication of this provision is not clear, but it is possible that, if a member of the minority party did not immediately gain recognition to offer an amendment as soon as the bill was before the Senate, that at some point the presiding officer would ask if a Senator from the minority was prepared to offer a priority amendment.

[10] During floor debate of S.Res. 15, the minority leader stated that, although an original version of the proposal stated the four amendments would be offered by the leaders and the bill managers, "The majority leader and I thought it important not to codify who would offer those amendments on each side of the aisle." (*Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.)

It is not clear how the Senate will treat any committee-reported amendments to a bill taken up pursuant to S.Res. 15. Under regular rules and procedures, committee-reported amendments are considered automatically pending when the measure is laid before the Senate. In other words, if a Senate committee reported out a bill with a full-text substitute, when the Senate agreed to take up the bill, the full-text substitute would be considered pending (and subject to amendment in two degrees). The Senate could interpret the standing order to allow committee-reported amendments to be considered automatically pending, but effectively held in abeyance and not subject to any action until the disposition of the four priority amendments, which would be offered to the underlying measure. Alternatively, committee-reported amendments could be pending as under the regular rules, and the four priority amendments could be offered to a full-text substitute. Amendments to full-text substitute amendments are considered to be first-degree amendments under Senate precedents, and therefore could be considered to qualify as priority amendments under the terms of the standing order. The manner in which any committee amendments are treated the first time a bill is taken up under the standing order could establish the practice to be followed for the rest of the Congress.

It is also possible that the Senate will determine how to treat committee-reported amendments on a case-by-case basis by unanimous consent. If, for example, the committee-reported substitute represents a bipartisan alternative to the bill as introduced (or as received from the House), Senators might be interested in treating that substitute as pending and offering the priority amendments to it. In the event that the Senate was to determine that the standing order prevented the consideration of a committee-reported substitute until priority amendments were disposed of, the Senate has other options for considering committee-recommended text for amendment under the standing order.[11]

Disposing of a Priority Amendment

Debate on the priority amendments is not limited (unless cloture is invoked). As a result, a priority amendment is not guaranteed to receive a vote; Senators opposed to the amendment or the bill could speak or take other actions to delay or prevent it from coming to a vote.

An amendment can be disposed of in the Senate through means of

- a vote on the question of approving the amendment; the Senate could reach such a vote only if every Senator were willing to allow the vote to occur (or through cloture);
- a vote on tabling the amendment; a simple majority could, without debate, vote to table the amendment, and this would permanently and adversely dispose of the amendment;
- a successful point of order; if, in response to a point of order, the Chair (or Senate) determined that the amendment violated a rule or other procedural authority, the amendment would fall;[12]

[11] A committee could report an original bill, instead of a bill with a full-text alternative. In addition, a new bill consisting of text recommended by the committee could be introduced and placed directly on the calendar through the Rule XIV process. The majority could also choose to offer the committee-recommended text as a priority amendment.

[12] Some points of order can be waived by three-fifths of the Senate and, while now unusual, the ruling of the presiding officer could be reversed on appeal. For more information, see CRS Report 98-306, *Points of Order, Rulings, and* (continued...)

- The withdrawal of the amendment by the sponsor.

Because the standing order provides that a priority amendment can only be offered after the amendment preceding it has been disposed of, and disposition is not guaranteed due to the possibility of extended debate on an amendment, an opportunity to offer the second, third, and fourth priority amendments is not guaranteed (except under cloture, as discussed below).

Protections Afforded to the Four Priority Amendments[13]

The standing order alters Senate procedures in several respects with regard to the four priority amendments. The provisions are generally intended to ensure that if the amendments receive votes, they will receive them in the form proposed by their sponsor.

First, the priority amendments are not subject to further amendment.[14] In other words, the Senate cannot agree except by unanimous consent to a change to the priority amendment, and, in that way, prevent a direct vote on the priority amendment as proposed. Under the regular rules of the Senate, several amendments to a first-degree amendment (or in relation thereto) could be offered and disposed of before the first-degree amendment would receive a vote. In practice, however, amendments offered in the Senate are most commonly framed as first-degree amendments (either to a bill or to a complete substitute amendment for a bill).

Second, the priority amendments cannot be divided into component parts for separate consideration. Under regular Senate rules, a Senator can demand that an amendment that contains multiple severable propositions be divided, except that a motion to strike out and insert is not divisible. In response to such a demand, the presiding officer determines whether each component of the proposed division is substantively independent, and if they are, then each portion of the divided amendment is considered and voted on separately. Senators generally do not demand the division of amendments. The prohibition in the standing order ensures any priority amendment will be voted on as a single proposal, even if it is composed of several, perhaps unrelated, provisions.

Third, if any of the priority amendments are agreed to, the amended text would be subject to further amendment. Under regular Senate procedures, if a passage of text has been amended, it is not in order to consider another amendment only to that same text. The standing order presumably contains this provision so that the approval of a priority amendment would not restrict what text could be changed by the next priority amendment, or by any other standard amendment offered after the disposition of all four amendments. Another effect of allowing amended text to be subject to further amendment is that the Senate could approve a priority amendment, but then also approve a subsequent amendment that would replace that amendment.

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Appeals in the Senate, by Valerie Heitshusen.

[13] This section assumes some knowledge of the Senate amending process; for a comprehensive overview of these procedures, see CRS Report 98-853, *The Amending Process in the Senate*, by Betsy Palmer.

[14] The standing order could also prevent an amendment to any text proposed to be stricken by the fourth-offered priority amendment, if not "subject to amendment" is interpreted to encompass any amendments otherwise in order while a first-degree amendment is pending. Amendments to the text proposed to be stricken apparently are not in order while any of the first three priority amendments are pending, because the standing order states that the four priority amendments are the "first amendments in order to the measure or matter" and, furthermore, that a subsequent priority amendment cannot be offered until the one before it is disposed of.

The majority leader indicated during floor debate on the resolution, however, that "the majority will not use that last amendment to eliminate or remove any language that the minority was able to add to the underlying matter through the Senate adopting any of the minority's preceding amendments."[15]

Finally, the standing order precludes the offering of any motion to commit or recommit the bill while one of the four priority amendments is pending. If a motion to (re)commit is pending, no amendments are in order, and presumably this provision was included to ensure that the opportunity to offer a priority amendment could not be prevented, even temporarily, by the offering of this motion. In addition, under regular Senate procedures, while an amendment is pending, a motion to (re)commit with amendatory instructions is in order. The prohibition on motions to (re)commit thereby ensures that no other amendatory proposition can be offered while a priority amendment is pending.

Offering and Disposing of the Priority Amendments Under the Cloture Process

The standing order provides a means to quickly take up a bill and provides a structure for the start of the amending process. The bill and amendments, however, remain subject to unlimited debate; therefore, to reach a final passage vote on the bill, proponents might seek to invoke cloture on it. The standing order has several provisions that apply only if cloture is filed or invoked.

First, after cloture is filed, the standing order provides a series of deadlines for submitting each priority amendment, presumably to allow likely sponsors of priority amendments to review the text of the previous amendment before submitting their own. Under Rule XXII, when cloture is invoked on a measure, the only amendments in order are those that were submitted by 1 p.m. the session day after cloture was filed. Under the standing order, this deadline applies to the first priority amendment (minority), and continues to apply to any other standard amendments Senators might wish to offer after disposition of the four priority amendments. The second priority amendment (majority) must be submitted no later than 3 p.m. on the same day, the third priority amendment (minority) must be submitted no later than 5 p.m., and the final priority amendment (majority) must be submitted no later than 7 p.m. The deadlines are the latest time by which the amendments can be submitted, not the earliest. Amendments that are not submitted by their respective deadlines cannot be offered after cloture is invoked. To be clear, the filing deadlines affect amendments after cloture is invoked. It is possible that priority amendments will be offered and even disposed of before a vote on cloture.

Second, after cloture is invoked, the standing order imposes a 60-vote threshold for approval of any priority amendment that is not germane. Standard amendments that are not germane cannot be considered post-cloture under Rule XXII; if a point of order is sustained against a standard amendment for being non-germane, the amendment falls. In contrast, under the standing order, if a Senator raises a point of order against a priority amendment, the presiding officer would rule, with the advice of the Parliamentarian, whether or not the amendment was germane to the bill.[16] If it was not germane, the presiding officer would announce that it would require 60 votes to

[15] *Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.

[16] Although not common in practice, under Senate precedents, after cloture is invoked, the presiding officer could announce any pending amendment is not germane without a point of order being made (*Riddick's Senate Procedure,* p. 291).

approve the amendment. The 60 vote requirement would apply, of course, only to any non-germane priority amendments not already disposed of at the time cloture was invoked.

Finally, if cloture is invoked on a bill brought up through the special motion, an opportunity to offer all four priority amendments is guaranteed. Under Rule XXII, if cloture is invoked on a bill, opportunities to offer standard amendments before the vote on final passage of the bill are limited and could be completely precluded. This is because Senate rules limit the number and form of amendments that can be pending at one time, and all amendments in order under the rules might remain pending during the entire 30-hour period of post-cloture consideration (perhaps because the "amendment tree" has been filled by the majority leader). In such a situation, under Rule XXII, when the post-cloture time expires, votes would occur first on any amendments pending, and then immediately on the bill, without any opportunity to offer any further amendments.

Under the standing order, however, if the 30 hours of post-cloture consideration on a bill were to expire before all the priority amendments had been offered, then even after time had expired, a Senator could be recognized to offer a priority amendment in the prescribed order. The amendment, if offered after the expiration of post-cloture time, would be debated for one hour, equally divided and controlled. The amendment could not be tabled or fall subject to a point of order until the full hour of time had been used or yielded back. After all priority amendments had been disposed of, the Senate would then vote on passage of the bill. Under these conditions it would become impossible to offer any amendments other than the four priority amendments.

Potential Consequences for Senate Practice: The Standing Order in Operation

The previous section explained the provisions of the standing order, but evaluating the impact of the standing order on the Senate amending process likely requires understanding its operation in relation to regular Senate practices and procedures. In this section, three examples of possible proceedings are discussed and then outlined in bullet point form. The examples vary chiefly by the context in which consideration is assumed to begin, the principal distinction being the likelihood that the measure in question will gain support from a coalition large enough to invoke cloture.

Each example is deliberately designed to highlight procedural facets of the standing order and is *not* presented as a likely sequence of events. These possibilities serve an explanatory purpose, aiming to answer questions concerning what might be done with the consent of all Senators, what might be done with a coalition of three-fifths of the Senate, and finally what might be done with a coalition of a simple majority of Senators. In any of these situations, it is still likely that the consideration of a bill would be largely structured by unanimous consent agreements. The prospect that consideration might occur under the standing order, however, could affect unanimous consent negotiations regarding the amendment process, and it would likely do so in different ways in different contexts. Examining possible procedures in each of these contexts might assist in clarifying the options Senators have when negotiating unanimous consent agreements.

Possible Operation of S.Res. 15, Section 1, With a Broad Coalition in Support

Consistent with the manner in which the Senate generally considers legislation for amendment, proponents of a measure might attempt to negotiate unanimous consent agreements for particular bills, rather than to try to operate pursuant to the terms of the standing order. The advantage of

doing so is that it will allow additional predictability in the process: specific times for taking up the bill and the offering of amendments could be announced; votes on amendments could be scheduled and stacked in a series; the substance of amendments could be shared and discussed in advance and, if necessary, modified to build a sufficient coalition in support. Even if there is less than unanimous support for a bill or an amendment, the benefits to all Senators of ad hoc arrangements for floor consideration have historically led the Senate to proceed in this fashion.

Even if the Senate considers a bill largely pursuant to unanimous consent agreements, the existence of the standing order might be expected to influence these arrangements. As discussed above, Senators choose whether or not to consent to waive their procedural rights based in part on what they could do in the absence of consent. For example, Senators might consent to have a majority vote at a certain time on a motion to proceed offered pursuant to S.Res. 15, rather than whenever four hours of debate would end, because they know such a vote could be held at a less predictable or desirable time even without their consent. In a more complicated example, Senators might negotiate the disposition of the minority and majority priority amendments. Of course, in the absence of unanimous consent, a numerical majority could table an amendment, defeating the amendment and avoiding a direct vote on its approval. It is also true, however, that a numerical minority could filibuster an amendment, preventing a vote on the amendment and stalling consideration of the bill. A unanimous consent agreement providing, for example, that a minority priority amendment and a majority priority amendment each receive a vote, but be subject to a 60-vote threshold for approval, has benefits for both sides. Such an agreement would give the *minority* an up-or-down vote on its amendment and require at least some minority support to approve the majority amendment. At the same time, the agreement would give the *majority* a vote on its amendment without requiring a time-consuming cloture process, and it also would advance the consideration of the legislation, which otherwise might be filibustered.

If the Senate chose to take up, amend, and pass a bill under unanimous consent agreements crafted in response to the terms of the standing order, some of the procedural steps might be as follows:

- A unanimous consent agreement is reached providing that the Senate will vote on a motion to proceed to a bill after approximately four hours of debate, equally divided and controlled.
- At the time arranged in advance, the Senate approves the motion to take up the bill.
- A member of the minority party offers the first amendment.
- A unanimous consent agreement is reached providing that (1) a member of the majority party be recognized to offer an alternative amendment on the same subject as the minority amendment; (2) both amendments be voted on after a set period for debate; and (3) providing that both amendments be subject to approval by a 60-vote threshold.
- The first two priority amendments are disposed of pursuant to the unanimous consent agreement.
- A member of the minority party offers an amendment.
- Another unanimous consent agreement is reached providing for the consideration and disposition of the minority party amendment and the fourth and final

majority priority amendment, again including a 60-vote threshold for approval of each amendment.

- The amending process continues, with floor managers negotiating unanimous consent agreements about which amendments will be offered and the terms of their disposition.
- The Senate reaches a final vote on the bill, either through a unanimous consent agreement or the cloture process.

Of course, it might not be possible for proponents of a bill to successfully negotiate such unanimous consent agreements. After all, a single Senator threatening to object, or remaining present on the floor to actually object, could prevent proceeding in this fashion. The options for proceeding in the absence of unanimous consent might be expected to influence a Senator's decision to object. The next two examples serve to illustrate what a coalition of three-fifths could do under the standing order and, importantly, what a coalition of less than three-fifths cannot do under the standing order.

Possible Operation of S.Res. 15, Section 1, With a Three-fifths Coalition

Proponents of a measure might wish to bring a bill up using the procedures of the standing order in situations when they are fairly certain the bill has, or will have, the support of three-fifths of the Senate to bring debate to a close. Absent unanimous consent, the standing order becomes the fastest way to bring a measure before the Senate.[17] Furthermore, some Senators might indicate that their support for cloture is contingent upon there being amendment opportunities. If that is the case, the procedures of the standing order might be well-suited for the consideration of the bill.

An additional reason proponents of a measure might choose to use the standing order when three-fifths support is expected is that it could also expedite the disposition of a non-germane majority amendment. Under these circumstances, the use of the standing order could reduce the time needed to reach final disposition of a bill. Under regular Senate rules, it is often necessary for cloture to be invoked first on an amendment (often a full-text substitute amendment), and then on the underlying bill only after the amendment is disposed of, because if cloture were invoked first on the bill, the amendment would fall as non-germane. As a result, again under regular cloture proceedings, cloture can mature simultaneously on both a bill and an amendment, but up to 30 hours of consideration each can be consumed first on the amendment and then on the bill. Under the standing order, however, the invoking of cloture on the bill also ensures the disposition of a non-germane priority amendment (subject to 60 votes for approval), with no second cloture process on the amendment being required. Use of the priority amendment process, accordingly, could reduce the overall time needed to pass legislation supported by a three-fifths coalition.

If the Senate did choose to take up a measure using this special motion and then later secured three-fifths support to bring it to a vote, some of the procedural steps might be as follows:

[17] Reaching a vote on a motion to proceed offered under the general rules may take two days to obtain cloture plus 30 hours consideration post-cloture. Under another rules change, discussed later in this report, even if a bipartisan cloture motion was filed on a motion to proceed, the vote could occur on the motion to proceed only on the following day. Under the standing order, a vote could occur after four hours of debate.

- The motion to proceed to a bill is offered on a Monday.
- After a maximum of four hours of debate, the motion to proceed is agreed to by majority vote.
- The majority leader files cloture on the bill.
- A member of the minority party offers an amendment that may or may not be related to the bill.
- After some debate, the Senate permanently and adversely disposes of the minority amendment through a non-debatable motion to table.
- Still on Monday, the majority leader offers a full-text alternative amendment to the bill, which reflects the results of bipartisan negotiations among committee members and other Senators.
- On Tuesday, the Senate debates the bill and the full-text substitute; no other amendments are yet in order.
- Amendments Senators would like to offer to the bill post-cloture must be submitted by 1 p.m. on Tuesday, except the remaining two guaranteed amendments, which must be filed by 5 p.m. (minority) and 7 p.m. (majority), respectively.
- On Wednesday morning one hour after the Senate convenes, cloture is invoked on the bill by a three-fifths vote.
- A point of order is raised against the majority leader's full-text amendment on the grounds that it is non-germane.
- The presiding officer rules the amendment is not germane. The presiding officer announces that when the Senate votes on the amendment, it shall be subject to a 60 vote threshold for approval.
- The Senate considers the bill and the pending amendment for 30 hours, either staying in session overnight or reaching unanimous consent to allow the hours spent in recess to be counted toward post-cloture consideration. No other amendments are in order during this time.
- At the expiration of the 30 hours on Thursday afternoon, the Senate agrees to the majority leader's amendment with at least 60 votes.
- A member of the minority party then offers the next amendment in order, which is subject to one hour of debate, equally divided between the parties.
- The minority party amendment is rejected, and a member of the majority party offers an amendment, which is disposed of after one hour of debate, equally divided between the parties.[18]
- The Senate passes the bill, as amended, by majority vote.

[18] Presumably, if the majority was interested in saving time, they could also coordinate to ensure no majority party Senator offered an amendment, thus forfeiting the right and moving to final passage.

This example, as stated above, is not presented as a likely sequence of events, but that the possibility of this occurrence could affect unanimous consent negotiations. In practice, as discussed above, both leaders have indicated that the four priority amendments are to be a floor, not a ceiling, on the number of amendments that may be offered. While this announcement of course carries no procedural enforcement mechanism, if proponents of a measure attempted to preclude amendment, a possible response of Senators would be to oppose cloture. In such a case, at least in the 113th Congress when the majority party holds 55 seats (including two independents who caucus with the Democrats), only a bipartisan coalition of at least three-fifths could limit the total number of amendments offered to four.

Nevertheless, the spartan procedural outline above serves to illustrate how a coalition of 60 in the 113th Congress could take up and dispose of major legislation in five days, a process that, assuming a non-germane full-text substitute amendment, would take at least ten days under regular procedures (even assuming all night sessions and 1 a.m. cloture votes to consume the 30 hours in as few calendar days as possible).

Possible Operation of S.Res. 15, Section 1, Without a Three-fifths Coalition

For several reasons, it is also possible that Senators might wish to use the standing order to attempt to begin consideration of a bill, even before it has the three-fifths support necessary to end consideration and reach a final vote. First, proponents might believe that once the measure is before the Senate, and amendments are agreed to, it will command sufficient support (three-fifths) to eventually end consideration. Second, proponents might believe that the lack of supermajority support at the start of the process reflects not policy disagreement, but process disagreement: as long as they (or their colleagues) are afforded opportunities to propose changes, they might be more willing to support cloture, even if the Senate does not agree to all the proposed changes. Finally, proponents might believe that having a measure on the floor will increase the salience of the issue and affect the voting decisions of Senators.

Proponents of a measure also have reasons to *not* begin its consideration using the debate-limited motion to proceed. Perhaps most significantly, beginning consideration of a bill when there is not yet a three-fifths coalition to end consideration could result in using floor time that could be more productively spent on other legislation. Sometimes the Senate begins consideration of a bill but never passes it, and this occurs even in instances in which cloture was invoked on the motion to proceed to a bill. On issues on which a three-fifths coalition cannot be formed on the motion to take up the bill, it might be even more likely that the bill never receives a final vote. In addition, the value of using the debate-limited motion to proceed to draw attention to an issue might be less if, as soon as the Senate took up a bill, the minority could quickly change the subject by offering an irrelevant amendment. Furthermore, Senators would be potentially allowing possible votes on amendments on any topic without a guarantee that the underlying measure would reach a final up-or-down vote.

If the Senate did choose to take up a measure using this special motion before a three-fifths coalition supported ending its consideration, the procedural steps might be as follows:

- The motion to proceed is offered.
- After a maximum of four hours of debate equally divided, the motion to proceed is agreed to by majority vote.

- A member of the minority party offers an amendment that may or may not be related to the bill.
- No other amendment is in order until the first amendment is disposed of, and the amendment is subject to unlimited debate.
- After the minority amendment is disposed of, perhaps through a nondebatable motion to table, a member of the majority party offers an amendment that may or may not be related to the bill.
- No other amendment is in order until the second amendment is disposed of. Debate of the amendment is not limited; a simple majority cannot close debate in order to reach a vote to approve it.
- Senators attempt to negotiate a unanimous consent agreement or a policy proposal capable of receiving three-fifths support. If unsuccessful, the Senate turns to other business.

The above example illustrates how consideration of a bill might begin under this standing order. This proceeding would differ from those hitherto available in that the bill would be taken up quickly by majority vote and a vote would occur in relation to a minority party amendment on any subject. But it might be considered similar to existing procedures in that, perhaps after a vote on a motion to table the first minority party amendment, the amendment process might be at least temporarily halted as Senators seek to arrange for amendments to be offered by unanimous consent. No further amendment would be in order under the standing order, and the Senate could not reach a vote to approve the majority amendment, absent cloture or unanimous consent.

Reduced Post-Cloture Consideration for Nominations (Section 2 of S.Res. 15)

Brief Overview

The second standing order accelerates the consideration of some nominations when at least three-fifths of the Senate has agreed to vote on their approval. If this standing order was not in effect in the 113th Congress, then after the Senate agreed to invoke cloture on a nomination, it could be considered for a maximum of 30 hours before the Senate would vote on its approval. The standing order reduces this 30 hour period to eight hours for most nominations, and to two hours for U.S. district court nominations. The specific nominations affected and excluded are listed in **Table 1.**

The standing order responds to concerns in recent Congresses related to the process of approving nominations. Although many factors are understood to contribute to the length of time required for processing nominations,[19] one complaint relates to the ability individual Senators have under

[19] For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; CRS Report R42732, *Length of Time from Nomination to Confirmation for "Uncontroversial" U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion; CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus; and CRS Report R40119, *Filling Advice and Consent Positions at the Outset of a New Administration*, by Henry B. Hogue and Maureen Bearden.

current rules to delay approval of a nomination that, if brought to a vote, would be approved by a large margin.[20] The leverage individual Senators have derives in part from the time that could be required for a cloture process on each of the hundreds of nominations the Senate receives from the President. Altering the timing of the cloture process could reduce this leverage, and perhaps facilitate reaching unanimous consent agreements for the disposition of the nominations. Under the standing order, the Senate could take up widely-supported nominations and approve them with a day or less of floor consideration, even in the absence of unanimous consent.

Explanation of Provisions

Section 2 of S.Res. 15 expedites the cloture process for nominations to most executive branch positions and to some federal courts. Cloture cannot be filed on a nomination until it is before the Senate. The Senate typically takes up nominations by unanimous consent, but in the absence of unanimous consent, it can begin consideration of any nomination on the Executive Calendar[21] by agreeing to a non-debatable motion to enter into executive session to consider a particular nomination.

The standing order does not affect the time it takes for a cloture motion to mature; a cloture motion filed on a nomination would still be voted on two days of session later. For many nominations, however, if cloture is invoked by three-fifths of the Senate, the maximum number of hours the nomination can be considered before a vote on approval is reduced. The maximum number of hours of post-cloture consideration for most nominations will be reduced to eight hours; for U.S. district court judges it is reduced to two hours. The standing order excludes some high-level executive and judicial nominations. These nominations will continue to be subject to the 30-hour limit on post-cloture consideration under Rule XXII. More specifically, in the 113th Congress, post-cloture consideration of nominations will be limited in the manner presented in **Table 1.**

In several respects, procedure under this standing order contrasts with procedure on nominations under Rule XXII. The hours for post-cloture consideration under Rule XXII are not equally divided, but under the standing order they are divided "in the usual form." When time is divided in the usual form, a manager from each side controls half the time, and yields portions of time to members on his or her side.[22] It is most likely, however, that the terms of consideration for a nomination will be established by unanimous consent, and that Senators who wish to speak on a nomination will therefore negotiate within their party, within the confines of the new overall limits. The time used for quorum calls will presumably be charged to the side that suggests the absence of a quorum, unless arranged to be charged equally by unanimous consent.

[20] See, for example, *Congressional Record*, daily edition, vol. 158 (July 30, 2012), p. S5654, and (December 13, 2012), pp. S3011-S3013.

[21] Nominations are placed on the Executive Calendar after a committee reports a nomination or is discharged from considering it. Under a standing order of the Senate approved in the 112th Congress, certain nominations might also be placed in this status on the Executive Calendar after certain informational and time requirements are met. For more information, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

[22] For information on the usual form, see Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure* (hereafter, *Riddick's*), 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 1367-1368.

Table 1. Maximum Number of Hours of Post-Cloture Consideration of Nominations

113th Congress, pursuant to S.Res. 15 and Senate Rule XXII

Nomination	Maximum Consideration
U.S. district courts	2 hours
Courts with fixed terms, such as the court of claims, the tax court, and presumably the territorial courts	8 hours
All executive branch positions except 21 high-level positions	8 hours
21 high-level executive branch positions, including the head of each executive department.[a]	30 hours
The Supreme Court, the U.S. Circuit Court of Appeals, and the U.S. Court of International Trade	30 hours

Source: S.Res. 15, Section 2.

a. The standing order excludes positions "at level I of the Executive Schedule under section 5312 of title 5, United States Code," which, in addition to the 15 heads of departments (14 Secretaries and the Attorney General), includes the United States Trade Representative; the Director of the Office of Management and Budget; the Commissioner of Social Security, Social Security Administration; the Director of National Drug Control Policy; the Chairman of the Board of Governors of the Federal Reserve System; and the Director of National Intelligence.

Potential Consequences for Senate Practice

The standing order is expected to facilitate the consideration of nominations by unanimous consent.[23] The leverage an individual Senator has in delaying consideration of a nomination arises in part from the floor time it could take to approve a nomination, even if 60 or more Senators support it. Under the existing Standing Rules of the Senate, absent unanimous consent, proponents can quickly take up a nomination and the leader can file cloture on it. While the cloture motion matures, the Senate can turn to other business. Once cloture is invoked, however, only time in which the nomination is actually being considered by the Senate counts toward the potential 30 hours of post-cloture consideration time, and the Senate cannot, except by unanimous consent, consider any other business. Each Congress, the Senate receives hundreds of civilian nominations requiring its advice and consent, and it cannot devote substantial floor time to each one. Proponents of a nomination might choose to attempt to negotiate a unanimous consent agreement, and delay consideration until agreement is reached, rather than to attempt a cloture process. The practice of placing "holds" on nominations evolved in response to these circumstances. In other words, to accommodate the procedural power of an individual or small group of Senators under the formal rules explained above, an informal practice developed through which a Senator could communicate with his or her leader that a nomination should not go forward, and then no action would occur due to the time that would be required to act without unanimous consent.

Section 2 of S.Res. 15 could allow three-fifths of the Senate to accelerate the consideration of nominations on the floor. For example, under this proposed rule, the majority leader could file

[23] The majority leader stated that "it is our expectation that this new process for considering nominations as set out in this order will not be the norm, but that the two leaders will continue to work together to schedule votes on nominees in a timely manner by unanimous consent, except in extraordinary circumstances." (*Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.)

cloture on 10 individual U.S. district court nominations on a Monday.[24] Assuming the Senate meets on Tuesday, and then meets on Wednesday at 9 a.m., the Senate would vote at 10 a.m. on whether to close debate on the first nomination on which cloture was filed. If the cloture vote was successful, the vote to advise and consent to the nomination would occur approximately two hours later.[25] A cloture vote on the second nomination on which cloture was filed would immediately follow and, if successful, the approval vote would occur, at most, two hours after that. If Senators used all available time for consideration of each nomination, and including 15 minutes for each cloture vote and each approval vote, by 10:30 p.m. the Senate could have approved five of the 10 nominations. The Senate could continue to meet overnight, or convene on Thursday morning to consider the remaining nominations.

The standing order is more likely to influence negotiations regarding consideration of widely-supported nominations, rather than lead to an increase in the number of cloture motions filed or a day or two of serially processing district court nominations as just described. The ability to accelerate the consideration of nominations on the floor will perhaps facilitate unanimous consent agreements to approve nominations with little or no floor debate. The practice of honoring holds on nominations could be affected as well, and not just because the new procedures would allow supporters to threaten long floor sessions and a series of votes. It could be affected because approval of the standing order, and statements made on the floor during its consideration, could indicate intent by the Senate to change practice. As discussed more generally in the "Introduction" to this report, if most Senators believe the standing order should stop a single Senator from preventing the consideration of widely-supported nominations, it might be more difficult for a Senator to withhold consent to quickly approve such a nomination. Senators might not be able to communicate their opposition to acting quickly on a nomination and assume that their leader will take any necessary parliamentary actions to prevent approval on their behalf. The majority and minority leader did announce, however, that the standing order will not affect the Senate practice of consulting home-state Senators on certain judicial nominations.[26]

Changes to the Standing Rules of the Senate

The second resolution the Senate approved on January 24, 2013, S.Res. 16, made two changes to the standing rules. These changes will remain part of the standing rules and will be in effect in future Congresses, unless the Senate agrees to amend its rules.[27]

[24] Filing cloture motions on a series of nominations could take time if 11 or more Senators were willing to demand roll call votes on several questions. A nomination must be pending before the Senate before cloture can be filed on it. The motion to go into executive session for the consideration of a specific nomination is not debatable; however, once in executive session, a motion to proceed to a nomination is debatable. As a result, the Senate would need to move out of and return to executive session each time it wished to take up a nomination on which cloture was considered necessary, in order to avoid having to obtain cloture on a motion to proceed to consider the nomination as well as on the nomination itself. These two motions (to go out and to go in) could be subject to roll call votes (taking approximately 10-15 minutes each) if one fifth of a quorum (11 Senators) demand the yeas and nays on each vote.

[25] Presumably, because the time is controlled by each side, it could be yielded back even absent unanimous consent. In other words, if proponents wished to expedite consideration, they could yield back their entire hour.

[26] For more information, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

[27] For more information, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth.

Expedited Bipartisan Cloture Process on a Motion to Proceed (Rule XXII, paragraph 3)

Brief Overview

S.Res. 16 created an expedited method by which three-fifths of the Senate can end debate on the question of taking up a bill (or other matter) at the initiative of a bipartisan group of 16 Senators, including both party leaders. Under Rule XXII, all cloture motions require 16 signatures to receive a vote. The new paragraph in the rule provides that a cloture motion on a motion to proceed, signed by the majority and the minority leader as well as at least seven Senators affiliated with each party,[28] will mature in one session day, instead of the two session days required for all other such cloture motions. Furthermore, if such a cloture motion is successful, then the motion to proceed will not be subject to debate, in contrast to being subject to a maximum of 30 hours of consideration post-cloture.

Potential Consequences for Senate Practice

This procedure introduces a process in the Senate through which measures enjoying wide, but not universal, support can be brought up in the Senate more expeditiously. In modern practice, the Senate begins consideration of a matter either by unanimous consent, or through a motion to proceed to consider it. The motion to proceed can be adopted by a simple majority, but it is debatable in most circumstances and therefore is subject to filibuster.[29] To reach a vote on a motion to proceed, therefore, a cloture process might be necessary, which takes a supermajority of three-fifths of the Senate (typically 60). Prior to this rules change, in the absence of unanimous consent, taking up most measures on the floor required not just a coalition of 60 Senators but also, in practice, four to five days of session.[30] The rules change will allow bipartisan, leadership-supported supermajority coalitions to take up a measure in two days of session.

The full effect of this change on Senate practice might not be clearly observable. Some bipartisan cloture motions might be presented under the new rule, and legislation might be brought before the Senate using this particular process. It is also likely, however, that the option of using this procedure will influence behind-the-scenes negotiations over the Senate agenda. The ability of a bipartisan group of Senators to more quickly take up a bill might facilitate the policy and procedural negotiations among those who wish to take action on that topic. In the face of a small but determined group in opposition, proponents of a measure will no longer have to weigh as heavily whether it is worth dedicating considerable floor time—and the time of Senators who would have to remain at or near the floor to make a quorum—to the consideration of the question of taking up a bill (which would necessarily prevent the consideration of other matters). The

[28] The rule specifies that in addition to the majority and minority leader, the signatures of "7 additional Senators not affiliated with the majority, and 7 additional Senators not affiliated with the minority" are needed. The "not affiliated" language allows any Senator to sign such a cloture motion, including a Senator who does not affiliate with either major political party. In the 113th Congress, all Senators are affiliated with either the majority or the minority party, as the two independents have chosen to caucus with the Democrats.

[29] Some matters can be taken up in the Senate without a debatable motion to proceed. For more information, see footnote 4, and CRS Report 98-836, *Calling Up Measures on the Senate Floor*, by Christopher M. Davis.

[30] CRS Congressional Distribution Memorandum, "Days Between Offering of a Motion to Proceed and Its Disposition in the 112th Congress (to July 30, 2012)," by Elizabeth Rybicki, available from the author.

interests and concerns of those who do not yet wish to take up the bill could still likely be addressed, perhaps within internal party negotiations, because the consent of seven fellow party members as well as the leader is needed to use the new expedited process. In many cases, however, negotiations of this kind might lead not to the use of this bipartisan cloture motion, but rather to instances in which a bill is brought up by unanimous consent that otherwise would have been taken up after invoking cloture on a motion to proceed, or would not have been taken up at all due to time constraints. It is also possible that the rules change will increase the incentive of proponents of a measure to engage in policy negotiations and to modify proposals, because a bipartisan three-fifths coalition could be viewed as possibly achievable while unanimity might be viewed as unreachable.

Expediting the Process for Arranging for a Conference Committee with the House (Rule XXVIII, paragraph 2)

Brief Overview

S.Res. 16 creates a motion to take the three steps necessary to arrange for a conference committee with the House and expedites the cloture process on that motion. Prior to this rules change, it effectively required unanimous consent to arrange for a conference committee, principally because of the time that might be required to take each step separately in the face of opposition. Under the new rule, a coalition of three-fifths of the Senate can quickly agree to send a bill to conference. If cloture is filed on the new motion to arrange for a conference committee, the consolidated motion would be subject to two hours of debate, after which the Senate would vote on cloture. If cloture was invoked by three-fifths of the Senate, a simple majority could approve the motion to arrange for a conference, and no further debate of the motion would be in order.

Explanation of Procedure

For the two houses to reach the point at which a conference committee can be formed, it is first necessary for one house to pass a measure of the other, with amendments reflecting its own position. (In current practice, the changes proposed usually take the form of a full-text alternative amendment.) After this point has been reached, each chamber must take three parliamentary actions to formally establish a conference committee.

First, each chamber has to agree to disagree with the other chamber's version of the measure, which in parliamentary language is called reaching the "stage of disagreement." The chamber that passed the bill with amendment(s) *insists* on its amendment(s); the chamber that first passed the bill *disagrees* to the amendment(s) proposed by the other. Second, both chambers have to agree to send a measure to conference, and the exact form of the parliamentary action depends simply on the order in which the chambers act: the Senate is either the first to propose a conference (in which case, the parliamentary action taken is a *request for a conference*) or it is not (in which case, the parliamentary action taken is to *agree to the House request for a conference*). The third and final parliamentary action is that the conferees are appointed.

S.Res. 16 added a paragraph to Senate Rule XXVIII to create a single motion to accomplish all three parliamentary steps.[31] Specifically, through this new motion the Senate can

1. Reach the stage of disagreement by either insisting on its own amendment(s), or disagreeing to (a) House amendment(s).
2. Agree to create a conference committee, by either requesting a conference or agreeing to the House request for a conference.
3. Authorize the presiding officer to appoint conferees.[32]

The motion is not subject to division, meaning that no Senator can demand that each parliamentary step be considered separately; the proposal to arrange for a conference will be considered and dispensed with as a single proposition. Motions to instruct conferees could still be offered after the Senate had approved the motion, but before the presiding officer appointed conferees.[33]

The motion to arrange for a conference is in order (1) after the House has sent an amendment to the Senate or (2) after the House has disagreed to a Senate amendment and returned it to the Senate. If the Senate has taken up a House-passed bill for consideration (such as "H.R. 100"), then under current practice conference is frequently arranged after the Senate has passed the House bill with an amendment. The new motion to go to conference, however, could not be made as soon as the Senate has passed the House bill with an amendment(s). In the absence of unanimous consent to arrange for a conference, the Senate could send the House bill with an amendment back to the House. The House could then disagree to the Senate amendment (perhaps requesting a conference), and return the bill and amendment to the Senate. At that point, the message from the House disagreeing to the Senate amendment could be laid before the Senate, and the compound motion to arrange for a conference would be in order.

If the Senate considers its own bill (such as "S. 100"), after passage the Senate would send the bill to the House, and the House could amend the bill. At that point, the Senate, once it has received the bill back from the House, could use the new motion to agree to a conference. This would also be the earliest point the Senate could arrange for a conference by unanimous consent. Alternatively, after the Senate considers its own bill, it may, by unanimous consent, lay aside its own bill, take up a House-passed measure, and agree to an amendment consisting of the text of the Senate bill. Then the Senate could send the bill back to the House, and once it was returned conference could be arranged on the House-passed bill as described in the previous paragraph. The new rule does not allow the consolidated motion to include a provision accomplishing the

[31] The House amended its rules in 1965 to create a privileged motion to disagree to Senate amendments (or insist on House amendments) and request (or agree to) a conference. The motion is privileged only when offered by direction of the committee of jurisdiction. No motion to authorize appointment of conferees is necessary in the House, because the Speaker has that authority under House Rule I, clause 11.

[32] The new rule appears to allow the conferees to be directly appointed in the motion by naming them, by stating this third portion of the motion could be "a motion to appoint conferees." Appointing conferees by motion has not been the practice of the Senate previously, and it is not clear that the new motion would normally be used for this purpose.

[33] The intent of the rules change was not to preclude motions to instruct, and therefore even if direct appointment of conferees was accomplished through motion, presumably motions to instruct would still be permitted. For more information on motions to instruct in the Senate, see CRS Report RS20209, *Instructing Senate Conferees*, by Richard S. Beth.

"hookup" process of a Senate-approved text with a House-passed bill; it could be done quickly only by unanimous consent.[34]

In addition, under the new paragraph, if cloture is filed on the motion to arrange for a conference, the motion will thereafter be subject to only two hours of debate, equally divided between the majority and minority leaders, or their designees.[35] A Senator wishing to speak during this time would be yielded a portion of an hour from his or her floor manager. After all time for debate has been used (or yielded back), the Senate will vote on the cloture motion. If three-fifths of the Senate (usually 60 Senators) agrees to invoke cloture, the question on the motion to arrange for a conference would not be subject to further debate under the new rule. If cloture is never *moved* on the motion, presumably it would be subject to extended debate under the regular rules of the Senate. If cloture is not *invoked*, presumably the motion would remain pending before the Senate and remain subject to extended debate.

Potential Consequences for Senate Practice

Prior to this rules change, unanimous consent was effectively required to send a measure to conference, because the parliamentary actions needed for this purpose could take considerable time to complete if Senators attempted to delay further action on the measure. Even in instances when three-fifths or more of the Senate was prepared to go to conference, substantial time could be required (1) for invoking cloture separately on each parliamentary action (and perhaps on additional motions of higher precedence); (2) potentially, for the election of conferees by motion and the complications that could arise in the process; and (3) for disposing of a theoretically unlimited number of motions to instruct conferees.[36] If a single Senator objected, or threatened to object, to a unanimous consent request to take the actions to send a bill to conference, it could become necessary to take each parliamentary action separately and, potentially, to obtain cloture to limit debate on each in sequence. The Senate rarely found it practical to pursue this route to conference, although, on some occasions, continued negotiations about matters such as the composition of the conference committee or the policy issues in disagreement would lead eventually to the formation of a conference committee. Sometimes, however, it appears the Senate did not send a measure to conference due to the time that would be necessary to do so in the face of opposition.

In recent Congresses, perhaps in part because of the procedural challenge of arranging for a conference in the Senate, the chambers have more often relied instead on amendment exchange

[34] At least in the case of revenue measures, which under the Constitution must originate in the House, the new rule might therefore further increase the incentive for the Senate to begin consideration of a House-passed measure, rather than expect unanimous consent could be reached to hook up with a House-passed bill after consideration of a Senate bill in the manner described.

[35] As with other changes discussed earlier, the time used for quorum calls presumably will be charged against the side of the Senator suggesting the absence of a quorum, unless unanimous consent is granted to charge the time equally. Furthermore, although this is not stated in the rule, the Senate might interpret the new rule to limit consideration not only of the motion itself, but also of all other motions and appeals in connection therewith, to a total of 2 hours. Alternatively, the Senate could decide either that (1) other motions in relation to the House or Senate amendment are not in order while the new motion was pending, or (2) that they are in order and subject to debate under the regular rules of the Senate.

[36] For a full discussion of the procedures before the recent rules change, see CRS Report RS20454, *Going to Conference in the Senate*, by Elizabeth Rybicki.

procedures to resolve their differences on a bill.[37] The informal, bicameral discussions that Congress uses to arrive at a resolution of the substantive differences between House and Senate versions of a measure are similar whether the final compromise is embodied in a conference report or in an amendment between the houses. Furthermore, the agreement reached through informal negotiations can be presented to each body and considered under terms that, in important respects, resemble the terms for considering a conference report. In contrast to conference committee procedures, however, the amendment exchange procedures do not require identification of the negotiators, do not mandate even one public meeting, and do not restrict the authority of the negotiators to the matter submitted to them. [38] Senators from both parties have recently expressed a desire to increase the use of conference committees,[39] and this sentiment may have contributed to the decision to change the rules.

The rules change is clearly intended to address what had been viewed as a significant roadblock in Senate procedure. It is likely to ease the path for conference, because even though three-fifths support is still required for cloture, the previous procedures effectively required unanimous consent. The rules change, perhaps combined with the acknowledgement that the alternative is amendment exchange, might increase the number of conference committees formed. The decision of how to resolve differences between the chambers, however, is affected by many other factors as well.

The rules change could alter Senate practices when arranging for a conference in another respect. The Senate might be more likely to debate the question of arranging for a conference on the Senate floor. Generally, the question has not been discussed in the past, but instead simply propounded as a unanimous consent request and agreed to without objection. Even if the Senate continues to arrange for a conference committee pursuant to a unanimous consent request, the terms of the rule could lead Senators in some of these cases to request time for debate on the question.

Relatedly, another consequence could be an increase in the offering of motions to instruct conferees, again perhaps under the terms of a unanimous consent agreement. Motions to instruct, even if approved, are not binding on conferees, such that if the conference report does not comply with the instructions, no point of order will lie against the conference report on that ground.[40] Such motions are infrequently offered in the Senate, although in recent Congresses motions to instruct conferees have been offered on legislation on which debate and amendment opportunities had been limited. For example, motions to instruct have been offered after consideration of budget reconciliation bills the Senate considers under expedited procedures outlined in the Congressional Budget Act of 1974 (P.L. 93-344, as amended, 2 U.S.C. 621 et. seq.).[41]

[37] See CRS Report RL34611, *Whither the Role of Conference Committees: An Analysis*, by Walter J. Oleszek.

[38] For a comparison of conference committee and amendment exchange procedures, see CRS Report R41003, *Amendments Between the Houses: Procedural Options and Effects*, by Elizabeth Rybicki.

[39] See, for example, *Congressional Record*, daily edition, vol. 159 (January 2, 2013), pp. S8659-S8659 and *Congressional Record*, daily edition, vol. 158 (July 24, 2010), pp. S5272-S5273.

[40] See CRS Report RS20209, *Instructing Senate Conferees*, by Richard S. Beth.

[41] CRS Report R40686, *The Budget Reconciliation Process: Motions to Instruct Conferees*, by Robert Keith. In recent practice, motions to instruct have also been offered in relation to budget resolutions, and see also H.R. 4173 (111th Congress), the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Furthermore, if the Senate finds it necessary to rely on the motion to arrange for a conference committee, then conference committees might be arranged at a later parliamentary stage than under current practice. This could affect which chamber acts first on any resulting conference report. It is most common, in current practice, for the Senate to amend a House bill, insist on its amendment, and request a conference. The chamber that asks for the conference traditionally acts last on the resulting conference report; this is not a rule of either chamber, but simply the general practice of both. As described above, however, the new compound motion would not be in order immediately after the Senate passed a House bill with an amendment. Therefore, the conference would be arranged only after House action. If the House, upon receiving a Senate amendment to a House bill, disagrees to the Senate amendment and requests the conference, then under the usual congressional practice it would be the House that acted last on the conference report.[42]

In addition to affecting negotiations as to whether to form a conference committee and the floor consideration of the question of arranging for a conference, the change might affect negotiations regarding the ratio of majority to minority conferees. Generally, conferees are appointed from the committee of jurisdiction through a selection process led by committee and party leaders. When unanimous consent was effectively required to arrange for a conference before, individual Senators potentially had leverage over conference committee composition (although a Senator not on the committee of jurisdiction rarely chose to withhold his or her consent unless appointed to the conference committee). Leverage regarding the conferee ratio will continue to exist for the minority party, assuming it holds at least 41 seats, but the leverage of an individual Senator seeking inclusion on the conference committee will be reduced, in the absence of party support.

A final potential consequence concerns the long-term implications of the rules change. The new provision of Senate Rule XXVIII creates a method to end debate that is unprecedented in its speed. The rule effectively creates a two-hour "layover" period for a cloture motion and eliminates post-cloture debate. It preserves the three-fifths threshold to end consideration of the question, but to end debate essentially at once with three-fifths is arguably quite different from doing so only after guaranteeing time for each opponent to express his or her views. The rules change reflects recent unanimous consent practices of shortening or eliminating a cloture process while preserving the three-fifths vote threshold. In this way, the rules change is grounded in Senate practice. Yet changing the rules eliminates the need for unanimous consent, and it shifts, at least in theory, some of the negotiating leverage from an individual Senator to minority coalitions of Senators.

[42] The House could simply disagree to the Senate amendment, without requesting the conference, and if the Senate then requested the conference the order of acting on the conference report would not be affected. For more information on the process for arranging for a conference in both chambers, see CRS Report 98-696, *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*, by Elizabeth Rybicki.

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