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The Senate Powersharing Agreement of the 117th Congress (S.Res. 27)

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SUMMARY

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The Senate Powersharing Agreement

S.Res. 27: Key Features

In the 117th Congress, Senate membership is evenly divided between the two political parties, with 50 Republicans, 48 Democrats, and 2 Independents who caucus with the Democrats. This is often referred to as a "50-50 Senate." On February 3, 2021, the Senate approved S.Res. 27, a measure to provide the organizational basis for powersharing in the Senate when the parties are equally divided. Except for minor formatting changes, the resolution is identical to the one agreed to in 2001 when the Senate was most recently equally divided. The key provisions of the resolution are outlined below.

Committee Organization and Procedure

- All Senate committees "shall be composed equally of members of both parties."
- A full committee chair can discharge a subcommittee from further consideration of legislation and some other items of business if the subcommittee has not reported it to the full committee because of a tie vote.
- Budgets and office space for all committees are equally divided, "with up to an additional 10 percent to be allocated for administrative expenses … with the total administrative expenses allocation for all committees not to exceed historic levels."

Discharging a Committee from Consideration of Measures or Matters

- If a measure or matter is not reported because of a tie vote in full committee, the majority or minority leader (after consultation with committee leaders) may move to discharge the committee from further consideration of such measure or matter.
- This discharge motion may be debated for a maximum of four hours, equally divided and controlled by the majority and minority leaders. After the expiration (or yielding back) of time, the Senate will vote on the discharge motion, without any intervening action, motion, or debate.
- If a majority of the Senate agrees to the motion to discharge, the measure or matter will be placed on the appropriate Senate calendar to await possible further parliamentary action.

Agenda Control and Cloture

- No cloture motion can be filed on any amendable item of business during the first 12 hours of Senate debate. Motions to proceed to consider legislation are not amendable, so this restriction does not apply to motions to proceed.
- It is the sense of the Senate that both leaders shall "seek to attain an equal balance of the interests of the two parties" in scheduling and considering Senate legislative and executive business.
- The agreement states that the motion to proceed to any calendar item "shall continue to be considered the prerogative of the Majority Leader," but notes that "Senate Rules do not prohibit the right of the Republican Leader, or any other Senator, to move to proceed to any item."

Supplemental Colloquy

Just prior to Senate approval of S.Res. 27, the majority and minority leaders engaged in a colloquy concerning agenda setting in the Senate and the amending process. The majority leader stated his goal that Senators be able to offer more amendments in the 117th Congress than in previous Congresses. He also stated that he was opposed to "filling the amendment tree" to temporarily block amendment opportunities, except in response to dilatory tactics. The minority leader responded that given the assurances that Senators will be able to offer amendments, the need for a cloture process on a motion to take up a bill will likely decrease.

Contents

Contacts

Background and Introduction

After the November 2020 election, it was not clear which political party would have a majority of Senate seats in the 117th Congress. When the new Congress convened on January 3, 2021, there were 51 Republicans, 46 Democrats, and 2 Independents who caucused with the Democrats. Two Senate races in Georgia were not settled. No candidate in either Georgia race had secured the majority support required under state law to win, triggering runoff elections. One Georgia seat was therefore vacant at the start of the 117th Congress; the other Georgia Senator, a Republican, remained seated because she had been appointed to serve until the seat was filled.[1]

The results of the January 5, 2021, runoff elections in Georgia caused the Senate to be tied, with 50 Democrats (including the 2 Independents who caucus with Democrats) and 50 Republicans. The Georgia certificates of election were presented and the new Senators were sworn in on January 20. Article I, Section 3, of the U.S. Constitution provides that in the event of a tie vote in the Senate, the Vice President can vote to break the tie. Vice President Kamala Harris was sworn in on January 20, giving the Democrats a nominal majority in the Senate.[2]

The Senate was last equally divided at the start of the 107th Congress (2001-2003). In that instance, it was apparent immediately after the November 2000 election that the Senate would be evenly divided, and the two party leaders began negotiations about the organization of the Senate, although the results of the presidential election (and thus the party of the Vice President) were not known until December. Talks continued after the Senate convened on January 3, 2001, and proposals under consideration by the two leaders were discussed at meetings of the party conferences.[3] Two days after the 107th Congress convened, on January 5, 2001, the Senate agreed to S.Res. 8, a measure to provide the organizational basis for powersharing in the Senate when the parties were equally divided.[4]

It was reported in early January 2021 that the 107th Congress powersharing agreement was expected to serve as the basis for leadership negotiations concerning committee organization and other procedural issues in an equally divided Senate.[5] The Senate Republicans held the majority of seats until January 20, but from January 7 to January 19 the Senate met only in *pro forma* sessions.[6] Because Senate committees are continuing bodies, Senators serving on panels in the 116th Congress retained their positions and roles when the 117th Congress convened. Several committee chairs did not return to the 117th Congress, however, leaving those committees without

[1] Senator Johnny Isakson retired at the end of the first session of the 116th Congress, and Senator Kelly Loeffler was appointed to fill the vacancy until it was "filled by election as provided by law" ("Certificate of Appointment," *Congressional Record*, daily edition, vol. 166 [January 6, 2020], p. S20).

[2] Kamala Harris was a Senator from California until she resigned on January 18, 2021; Senator Alejandro Padilla, who the governor appointed to fill the vacancy, was sworn in on January 20.

[3] Mark Preston and Paul Kane, "Senate Strikes Historic Deal," *Roll Call*, January 8, 2001, pp. 1, 15.

[4] When the 107th Congress convened on January 3, 2001, the incumbent Vice President, Al Gore, presided until Vice President-elect Dick Cheney was sworn in on January 20. On the opening day of the 107th Congress, the Senate adopted S.Res. 7, naming Democratic committee chairs on all Senate committees to serve as such through January 20 and naming Republican chairs to assume their posts at noon that day.

[5] Niels Lesniewski, "Rules of the Last 50-50 Senate Might Not Bind This One," *Roll Call*, January 11, 2021.

[6] The Senate often meets for a very short daily session, conducting little or no business, in what is referred to as a *pro forma* session, in order to prevent the occurrence of an adjournment for more than three days within an annual session, which requires the concurrence of both the House and the Senate. For more information, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*.

a chair.[7] In addition, newly elected Senators did not have committee assignments, affecting the ratio of Democrats to Republicans on the committees.[8] Nevertheless, while negotiations over a powersharing agreement continued after January 20, Senate committees held hearings and reported out nominations, even in instances in which the committee did not have a chair.[9] The Senate approved a resolution concerning the organization of the Senate on February 3, and the same day approved resolutions appointing members to committees.[10]

The Powersharing Agreement: S.Res. 27

On February 3, 2021, the Senate majority leader submitted and the Senate approved S.Res. 27, a measure to provide the organizational basis for powersharing in the Senate when the parties are equally divided.[11] Except for minor formatting changes, the resolution was identical to the one agreed to in 2001, which was in operation for five months.[12] The resolution affected committee organization and procedure, created a method for a Senate majority to discharge a committee from consideration of a matter in the event of a tie vote, and expressed the intent of the Senate regarding control of the floor agenda. The procedures established by S.Res. 27 are to be in effect in the 117th Congress unless either party attains a majority of the whole number of Senators.

Committee Organization and Procedure

S.Res. 27 provides that all Senate committees "shall be composed equally of members of both parties" for the duration of the 117th Congress, unless either party gains a majority of seats. If either party were to gain a majority—for example, due to retirement, death, or party-switching—the Senate might consider new resolutions appointing committee members. S.Res. 27 states that members "who were first appointed by the two leaders" to committees in the 117th Congress would no longer be members of the committees if one party were to gain control of the Senate.[13]

[7] The Agriculture, Nutrition, and Forestry Committee; the Budget Committee; and the Health, Education, Labor, and Pensions Committee did not have chairs at the start of the 117th Congress.

[8] From January 20 until committee assignment resolutions were agreed to on February 3, eight of the 16 Senate standing committees, as well as the Committees on Indian Affairs and Intelligence, had a majority of Republican Senators. An additional five standing committees were tied, and two had a majority of Democratic Senators.

[9] The Committee on Agriculture, Nutrition, and Forestry did not have a chair at the start of the 117th Congress because the term of Senator Pat Roberts (R-KS) ended in the 116th Congress and he did not seek reelection. The Committee met on February 2, 2021, and voted to order reported the nomination of Thomas Vilsack to be Secretary of Agriculture, and the nomination was reported later that day by a Republican member of the Agriculture Committee.

[10] See S.Res. 28, appointing the majority party's membership on committees, and S.Res. 32, appointing the minority party's membership on committees.

[11] *Congressional Record*, daily edition, vol. 167 (February 3, 2021), p. S303.

[12] On May 24, 2001, Senator Jim Jeffords announced his intention to leave the Republican party, to become an Independent, and to caucus with the Senate Democrats. With Senator Jeffords's announcement, the Democrats held a numerical edge in the Senate. On June 5, 2001, Senator Jeffords met with Senate Democrats at their weekly conference meeting. On June 6, the Senate convened with the Democrats as the acknowledged Senate majority party. S.Res. 8 ceased to apply because the resolution specifically provided that if either party attained a majority of the whole number of Senators, the committee ratio would be adjusted "and the provisions of this resolution shall have no further effect."

[13] Section 1 of S.Res. 27 provided that the leaders could appoint the committees, although the Senate instead agreed to resolutions listing the membership of committees. The language authorizing the leaders to appoint committees is the same as in S.Res. 8 in the 107th Congress, and in that Congress the leaders appointed the committees (*Congressional Record*, daily edition, vol. 147 [January 25, 2001] pp. S558-559). In the event the Senate ceases to be equally divided in the 117th Congress, the Senate will have to determine if this provision applies to Senators appointed to committees for the first time by resolution.

The resolution further provides that budgets and office space for all committees are equally divided.[14] It allows up to an additional 10% to be allocated for administrative expenses, "to be determined by the Committee on Rules and Administration, with the total administrative expenses allocation for all committees not to exceed historic levels."[15] At the time the resolution was agreed to by unanimous consent, the minority leader announced it was the "expectation that the details of those arrangements will be negotiated and agreed to by the respective chair and ranking member, in consultation with other members of each committee."[16]

The only change to internal committee procedure concerns subcommittee tie votes. In the Senate and its committees, a question is rejected on a tie vote. S.Res. 27 grants the full committee chair of any committee the authority to discharge a subcommittee from consideration of "any Legislative or Executive Calendar item" that the subcommittee has not reported to the full committee because of a tie vote.[17] Without this provision, discharging a subcommittee could have required a vote by the full committee—and if the full committee tied on that vote, the matter would have had to remain in subcommittee.[18]

Not all Senate committees refer items to subcommittees for formal consideration. The public action of some subcommittees is limited to holding hearings. In addition, a Senate committee chair or majority might choose not to refer a matter to subcommittee if it is not expected to receive bipartisan support.[19]

[14] This provision is identical to one included in S.Res. 8, 107th Congress. Several press stories discussed the challenges associated with implementing the earlier equal budget and space agreement. See Paul Kane and Mack Preston, "Shelby Digs in Over Intelligence Battle," *Roll Call*, February 8, 2001, p. 3; and Andrew Taylor, "Senate Organization Settlement Leaves Much to Be Worked Out," *CQ Weekly*, January 13, 2001, pp. 127-128. See also U.S. Congress, Senate Committee on Rules and Administration, *Expenditure Authorizations and Requirements for Senate Committees*, committee print, 107th Cong., 1st sess., February 14, 2001, S.Prt. 107-10 (Washington: GPO, 2001).

[15] A provision providing an allocation of 10% for administrative expenses was also in S.Res. 8, 107th Congress, and such an allocation has been continued in subsequent committee reports and joint leadership colloquies. (For a discussion, see U.S. Congress, Senate Committee on Rules and Administration, *Authorizing Expenditures by Committees of the Senate*, report to accompany S.Res. 81, 112th Cong., 1st sess., March 31, 2011, S.Rept. 112-9 [Washington: GPO, 2011] pp. 2-3.)

[16] The minority leader also stated, "The resolution provides that the committee budgets and office space will be divided equally, subject to the customary set-aside for administrative expenses and nondesignated staff" (*Congressional Record*, daily edition, vol. 167 [February 3, 2021], p. S303). Overall funding levels for Senate committees for the 117th Congress were established in S.Res. 70. (See also CRS Report R40424, *Senate Committee Funding Requests and Authorizations, 106th-117th Congresses*, by Ida A. Brudnick.) Congressional clients may direct questions concerning committee funding and congressional staff to CRS's Ida A. Brudnick, Specialist on the Congress, whose contact information is available on CRS.gov.

[17] A "Legislative or Executive Calendar item" would include bills, resolutions, nominations, and treaties, but not other internal matters that some committees act on, such as subpoenas or "committee resolutions." Committee resolutions are used, for example, by the Environment and Public Works Committee to approve certain General Services Administration proposed projects (see 40 U.S.C. §3307).

[18] Some committees, by rule or practice, might allow the chair to discharge a subcommittee in certain circumstances. See, for example, Senate Agriculture Committee Rule 7, which allows the chair to withdraw a measure from subcommittee if it fails to report "within a reasonable time" (*Congressional Record*, daily edition, vol. 167 [February 12, 2021], p. S696).

[19] Senate rules do not require that legislation be referred to subcommittees, and practice varies among committees.

Discharging a Committee from Consideration of Measures or Matters

S.Res. 27 also created a procedure to allow a simple majority of the Senate to discharge a committee from consideration of a measure or matter in the event of a tie vote in committee. *Measures* refers to bills and resolutions, and *matters* is a more general term that includes both nominations and treaties.

Under the new procedure:

- If a measure or matter is not reported because of a tie vote in committee, the committee chair shall provide notice of the tie vote to the Secretary of the Senate, and the notice shall be printed in the *Congressional Record*.[20]
- The majority or minority leader (after consultation with committee leaders) may move to discharge the committee from further consideration of such measure or matter.
- This discharge motion may be debated for a maximum of four hours, equally divided and controlled by the majority and minority leaders. After the expiration (or yielding back) of time, the Senate will vote on the discharge motion, without any intervening action, motion, or debate.
- If the committee is discharged by majority vote of the Senate, the measure or matter will be placed on the appropriate Senate calendar to await possible further parliamentary action.

S.Res. 27 did not change the procedures for taking a measure or matter off of a calendar for consideration by the full Senate. Generally, a motion to proceed to consider an item placed on a calendar cannot be proposed immediately. Nominations must remain on the Executive Calendar for one calendar day, and most legislation must remain on the Calendar of Business for one legislative day.[21]

When a measure or matter is referred to committee, the full Senate cannot act on it so long as it remains in committee. To recommend that the Senate take action on an item, a Senate committee votes to order it reported to the full Senate. Senate Rule XXVI, paragraph 7, requires that a majority of the committee be physically present at the time of the vote to report.[22] If a vote to report fails, then the measure or matter remains in committee. Because a question is rejected on a tie vote, if the committee ties on the vote to report, that means the vote has failed. The committee cannot report the measure or matter until a majority votes to approve such a motion.

If a committee does not report a measure or matter, then the Senate would have to discharge the committee from consideration of that measure or matter before the full Senate could act on it.

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[20] For an example of such notice, see *Congressional Record*, daily edition, vol. 167 (March 10, 2021), p. S1457.

[21] For more information on the one-day layover rule for nominations, see Senate Rule XXXI, paragraph 1, and Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 943. For more information on the one-day layover rule for legislation, see Senate Rule XVII, paragraph 4(a), and *Riddick's Senate Procedure*, pp. 257-258.

[22] Because the committees are equally divided between the parties, to meet the quorum requirement, at least one member of the minority party will need to be present on the vote to report. For more information on the requirement that a majority of committee members be present, see CRS Report RS22952, *Proxy Voting and Polling in Senate Committee*.

Under regular Senate procedures, it is theoretically possible for the Senate to discharge a committee by motion, but, in practice, discharge occurs only by unanimous consent.[23]

Some expect the new discharge procedure created by S.Res. 27 to have a larger impact on the consideration of nominations than on the consideration of legislation for two reasons. First, Senate Rule XIV allows a single Senator to take actions to prevent referral of a bill or joint resolution to committee and instead have it placed directly on the Calendar, where it is eligible for consideration by the full Senate.[24] As a result, in the event that a committee could not report a bill or joint resolution due to lack of majority support, the same text could be introduced as a new bill and placed on the Calendar pursuant to the procedures of Rule XIV. Even when the Senate is not equally divided, it is common for the majority leader to take the actions prescribed by Rule XIV in order to place a measure directly on the Calendar.

The second reason relates to differences in the cloture process for nominations and legislation. Absent unanimous consent, the Senate often uses cloture to end consideration of a debatable question and bring the Senate to an up-or-down-vote on that question.[25] The ability of a simple majority to invoke cloture on a nomination means that the same majority that could discharge a committee could also eventually confirm the nomination.[26] In contrast, invoking cloture on other questions, including legislation, requires three-fifths support. Even if a committee were discharged from consideration of a piece of legislation by a simple majority, the likelihood of successful passage of a bill that did not receive any minority party support in committee is arguably low. The Senate might use the discharge motion in relation to legislation because it could be an opportunity to secure a floor vote concerning that bill. Once the bill was on the Calendar, a Senator could move that the Senate proceed to it, and could file cloture on the motion to proceed (which would require a three-fifths vote for approval). The impact of such action, however, is different than using the discharge process to reach final approval of a nomination (which does not require a three-fifths vote).

The discharge process in S.Res. 27 is identical to that in S.Res. 8 from the 107th Congress. The discharge process was used once in the five months that the powersharing agreement was in effect in 2001. The majority leader moved to discharge the Judiciary Committee from consideration of the nomination of Theodore Olson to be Solicitor General on May 24, 2001. After debate, which S.Res. 8 limited to four hours, the Senate, by unanimous consent, agreed to the motion to discharge and agreed that the Senate proceed immediately to a vote on the nomination. The Olson nomination was confirmed, 51-47. During the debate on the discharge motion, some Senators

[23] Senate rules do not prescribe a specific discharge process. Senate Rule XVII requires a motion to discharge a committee to lie over one day, and if there is objection to its immediate consideration it would, under Rule XIV, go "over, under the Rule," a parliamentary status for which there is a prescribed procedure. In current practice, there is not an opportunity in legislative session to reach any resolution laid "over, under the Rule" because the Senate seldom resorts to a formal morning hour. A Senate majority could agree to enter executive session to take up a discharge resolution for a nomination that had gone "over, under the Rule," but the resolution is debatable and the support of three-fifths of the Senate for cloture could be necessary to reach a vote to discharge. For more information, see CRS congressional distribution memorandum, "Discharging a Committee from Consideration of a Nomination: Current Procedure and Historical Practice," May 31, 2017, by Michael Greene and Elizabeth Rybicki, available to congressional clients upon request.

[24] For a full description of the Rule XIV process, see CRS Report RS22309, *Senate Rule XIV Procedure for Placing Measures Directly on the Senate Calendar*.

[25] For more information on the Senate cloture rule, see CRS Report RL30360, *Filibusters and Cloture in the Senate*.

[26] Since the Senate reinterpreted its rules in 2013 (and again in 2017), it has been possible to invoke cloture on any nomination with majority support. For more information, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings of November 21, 2013*.

explained that while they opposed the nomination, they would not attempt to prevent the Senate from reaching a vote on it.[27]

The experience with the discharge procedure in the 107th Congress might not be fully informative regarding its use in the 117th Congress. First, S.Res. 8 was in effect for five months of 2001; there was not much opportunity for its use. Second, in 2001, cloture on a nomination required three-fifths support; if a majority discharged a committee from consideration of a nomination, that same majority could not necessarily reach a vote on confirmation. Under current procedures, the same majority that can discharge a committee from consideration of a nomination can successfully invoke cloture on the nomination and bring the Senate to an up-or-down vote on confirmation.[28]

Agenda Control and Cloture

The 117th Congress powersharing agreement also contains provisions meant to encourage cooperation between the parties in deciding what measures to take up, as well as to encourage debate on measures once they are before the Senate. The resolution states that it is the sense of the Senate that both leaders shall "seek to attain an equal balance of the interests of the two parties" in scheduling and considering Senate legislative and executive business. It further states that the motion to proceed to any calendar item "shall continue to be considered the prerogative of the Majority Leader," although the resolution also notes that "Senate Rules do not prohibit the right of the Republican Leader, or any other Senator, to move to proceed to any item."[29]

The language of the resolution regarding agenda-setting in some sense reflects the procedural reality of a closely divided Senate. 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 as a "motion to proceed"). Most motions to proceed are not subject to any time limit on debate, and therefore a cloture process and three-fifths support may be required to reach a vote.[30] The Senate majority leader, by precedent, is recognized first in the Senate, and generally is the one to propose motions to proceed. The need for a cloture process, however, means that to begin consideration of legislation generally requires bipartisan support.

S.Res. 27 also contains a procedural restriction on when cloture can be filed on legislation (or on an amendment or amendable matter). Specifically, the resolution provides that no cloture motion can be filed on any amendable item of business "during its first 12 hours of Senate debate." The

[27] See, for example, the remarks of the ranking member of the Judiciary Committee: "We had a divided vote in the committee, and with a divided vote in the committee, because of the procedures of the Senate, I am sure we could have either bottled it up for some time in committee or for some time here. I do not want to do that. I think there should be a vote one way or the other. We have had too many examples in the past few years of nominations being bottled up that way" (*Congressional Record*, daily edition, vol. 147 [May 24, 2001], p. S5582).

[28] The 117th Congress used the discharge process for the first time to discharge the Finance Committee from consideration of the nomination of Xavier Becerra to be Secretary of Health and Human Services (*Congressional Record*, daily edition, vol. 167 [March 11, 2021], p. S1484).

[29] For more information on existing procedures and practices regarding the motion to proceed, see CRS Report RS21255, *Motions to Proceed to Consider Measures in the Senate: Who Offers Them?*

[30] 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, by precedent, 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.

resolution does not specify exactly how this 12 hours is to be counted.[31] Motions to proceed to consider legislation are not amendable, so this restriction does not apply to motions to proceed.

If a Senator attempts to file a cloture motion on an amendable item of business that had not been pending before the Senate for at least 12 hours, another Senator could make a point of order that the terms of S.Res. 27 are being violated. The presiding officer would rule on whether the terms of the powersharing agreement were being violated and, if they were, would prohibit the filing of the cloture motion.[32]

This provision of S.Res. 27 was included in the powersharing agreement in 2001 and was intended to address concerns that the majority leader would file cloture immediately after the Senate agreed to take up a bill. As then-Minority Leader Tom Daschle explained at that time, "We wanted to ensure that there would be an opportunity for debate before cloture was filed."[33]

It is often the case that, when the Senate takes up a bill with the intent of considering multiple amendments to it, cloture is not immediately filed. Negotiations about which amendments might be debated on the floor, which ones will receive roll call votes, and which ones might be bundled together and agreed to without a roll call vote, are often continuing even after the Senate has formally begun debate on the bill. In such circumstances, the 12-hour delay on filing cloture imposed by S.Res. 27 might not have a significant impact, since it has already been the practice to delay the filing of cloture.

The impact of this provision in the Senate might be more significant in situations when a coalition of 60 or more Senators seeks to move swiftly on a proposal. For example, in recent Congresses major legislative proposals have sometimes been taken up in the form of an amendment between the houses (in part because amendments between the houses are privileged for consideration in the Senate, and can be taken up without debate).[34] Under regular Senate procedures, cloture can be filed immediately on a motion to dispose of a House amendment (such as a motion to concur in the House amendment with an amendment). Under the provisions of S.Res. 27, however, absent unanimous consent, it appears that a Senator could not file cloture on such a motion until it had been pending before the Senate for 12 hours.[35]

Supplemental Colloquy

Just prior to Senate approval of S.Res. 27, the majority and minority leaders engaged in a colloquy on the floor to share additional information regarding their intentions for floor

[31] One option would be to count the 12 hours in similar manner as how time is counted after cloture is invoked pursuant to Senate Rule XXII. In that case, the 12 hours would be considered to begin once an item is formally before the Senate for consideration, and all time that the Senate is in session and the item is the pending question would count toward the 12 hours (regardless of whether or not debate is occurring). As another alternative, the Senate might decide that time spent in quorum calls or time spent voting while the item is pending does not count toward the 12 hours.

[32] Rulings by the presiding officer are subject to appeal. For more information, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*.

[33] *Congressional Record*, daily edition, vol. 147 (January 5, 2001), p. S33.

[34] For more information, see CRS Report R41003, *Amendments Between the Houses: Procedural Options and Effects*, pp. 4-5.

[35] Motions to concur in a House amendment with an amendment are amendable in the Senate. For this reason, the 12-hour waiting period could apply, since S.Res. 27 states it applies to an "amendable item." Furthermore, with a motion to concur pending, a motion to concur with an amendment can be offered, and this could mean that the Senate will determine that a motion to concur is an "amendable item" as well. In general, because there is little precedent, the Senate might need to determine what qualifies as an "amendable item" pursuant to S.Res. 27.

operations in the 117th Congress. The statements made by the leaders are not binding on the Senate in any procedural sense. They reflect the goals of the leaders, but there is no formal action Senators can take if they believe the Senate is not acting in accordance with the colloquy.

The colloquy concerned two Senate practices that have become more common in recent Congresses. First, it has become common for the majority leader to "fill the amendment tree," a process that temporarily blocks other Senators from offering amendments, except by unanimous consent. Second, for any bill not expected to be swiftly approved, it has become the normal practice in the Senate to begin its consideration through a cloture process on a motion to proceed.[36]

Amending Process

Regarding the amendment process, the majority leader announced in the colloquy:

> I am a strong supporter of the right of Senators to offer amendments and commit to increase dramatically the number of Member-initiated amendments offered in the 117th Congress. I am also opposed to limiting amendments by "filling the tree" unless dilatory measures prevent the Senate from taking action and leave no alternative.

In 2001, the leaders also entered into a colloquy regarding floor amending procedures. The statements concerning filling the amendment tree in the 117th Congress were different from those announced through a colloquy in the 107th Congress. In 2001, the majority and minority leaders announced that neither leader, nor their designees, would "offer consecutive amendments to fill the amendment tree so as to deprive either side of the right to offer an amendment." During the five months that the powersharing agreement was in effect in the 107th Congress, neither leader filled the amendment tree.[37]

The practices of the Senate with regard to the amending process have changed since 2001, however, so any differences in amending practices in the 107th and in the 117th Congress cannot be attributed solely to the difference in the colloquy. Furthermore, it is not only the practice of intentionally filling the amendment tree that can restrict amendment opportunities in the Senate. If Senators offer amendments, but agreement cannot be reached regarding their disposition, then the offered amendments block other amendments from being offered in the same way as when the leader intentionally fills the tree.

Motion to Proceed and Cloture

On the subject of beginning consideration of legislation with a cloture process on the motion to proceed, the minority leader announced in the 117th Congress:

> I think many times cloture has to be filed on a motion to proceed because Members want to ensure they are given the right to offer amendments. Given the assurances regarding the ability of Senators to debate and amend legislation in this Congress, that should help in

[36] For information on this Senate practice, 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 and 10-20.

[37] "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.

> alleviating that practice. Also, when we are proceeding to bills with broad bipartisan support, it is my hope that we will not need to have lengthy debates on motions to proceed.

The leadership colloquy concerning the motion to proceed and the amending process reflected an idea that has been under discussion in the Senate for some time: allowing a majority to quickly take up a bill in exchange for minority amendment opportunities. At the start of the 112th Congress (2011-2012), 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.[38] Similarly, in the 113th Congress (2013-2014), the Senate agreed to a temporary standing order that sought to both expedite the process for taking up a bill and encourage the consideration of amendments.[39]

The February 2021 colloquy, concerning the amending process and the need for cloture on the motion to proceed, once again expressed the goal that the Senate could begin consideration of legislation more quickly if Senators are given an opportunity to offer amendments. The colloquy, however, did not establish any formal restrictions, and, unlike provisions of S.Res. 27, cannot be enforced by raising a point of order on the floor.

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[38] *Congressional Record*, daily edition, vol. 157 (January 27, 2011), p. S325.

[39] Specifically, the standing order created 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 motion would be subject to an alternative amendment process intended to encourage the consideration of at least four amendments, two from each party. The process created by the standing order was never used. For more information, see CRS Report R42996, *Changes to Senate Procedures at the Start of the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*.