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Rules, Polarization, and the Future of the Senate

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All views and opinions expressed in this article are those of the author.

Changes to rules and practices within the Senate are common to students and observers of today's upper chamber. In the 115th Congress alone, we witnessed the nuclear option deployed to confirm Neil Gorsuch to the Supreme Court, budget reconciliation rules used in an attempt to repeal the Affordable Care Act, home-state senator approval for judicial nominations bypassed, an infant child brought on to the Senate floor for the first time, and a discussion of permanently reducing post-cloture debate times for nominees for only the second time in history. Majority Leader Mitch McConnell regularly filled the amendment tree on legislation and failed to bring other legislation to a vote. After the Senate Judiciary Committee favorably reported out a bill that would protect Special Counsel Robert Mueller, Leader McConnell stated "I'm the one who decides what we take to the floor" (Phillips 2018). Given some of these changes, some began to question how safe the legislative filibuster was, especially after numerous calls from President Donald Trump to eliminate it.

CHANGING SENATE RULES

In this work, I detail two unique cases observed during the 115th Congress and discuss what they represent for the current and future state of the Senate. Before doing so, it is necessary to outline the different means by which the Senate can alter its rules. Though some of these changes can take variable forms and paths to passage, rules changes generally come about in one of three ways: directly amending rules, creating additional provisions or exceptions to rules, and changing the interpretations of rules.

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Directly amending the rules takes the form of a Senate Resolution and explicitly states that a specific rule in the Senate Standing Rules is to be amended in some way. This type of legislation requires a two-thirds vote. Similarly, exceptions to rules take the form of a standing order. These are functionally equivalent to amendments, but do not directly change the relevant rule itself. Instead, they simply expand on the rule in some way. Additionally, this type of legislation only requires a three-fifths vote. Finally, changing the interpretation of a rule is what is commonly referred to as "going nuclear." This was the process employed by McConnell leading up to Neil Gorsuch's Supreme Court nomination. Once a cloture motion had been filed, and the original vote failed, McConnell raised a point of order arguing that a simple majority was sufficient to proceed. His point of order was not sustained, and he appealed the ruling of the presiding officer. Since the underlying question was not debatable, neither was the appeal, therefore eliminating any potential filibuster. From there, a simple majority to overturn the ruling was all that was needed to establish a new precedent.

RULE XXIII AND BABIES

Senate Rule XXIII governs the floor privileges of the Senate chamber, and controversy over who can and cannot obtain the floor is almost as old and storied as the Senate itself. The list of those with floor privileges has expanded and contracted over time. In 1859, the list was limited to simply senators and Senate officials, but it has since been amended to include numerous individuals from different branches and levels of government.[1] Despite this, floor privileges in the Senate are akin to sacred in the eyes of some, therefore resulting in a very exclusive list contained in Rule XXIII.

This rule has not been formally amended since 1975 with the passage of Senate Resolution 196, which added the Parliamentarian Emeritus to the list of those able to enjoy floor privileges. The rule was changed via standing order in 1997 with the passage of Senate Resolution 110. This measure allowed those who already enjoyed floor privileges to bring any necessary support services (including service dogs, wheelchairs, and interpreters) on to the floor. The most recent change prior to the 115th Congress came in 2007 when the Honest Leadership and Open Government Act was signed into law. A provision in this bill eliminated floor privileges for "former Members, Senate officers, and Speakers of the House who are registered lobbyists or seek financial gain" (PL 110–81).

Traditionally, senators seeking to obtain floor privileges for anyone who does not currently enjoy them would simply ask unanimous consent that the individual be granted such for a specified amount of time (usually the rest of the Congress currently in session). However, this is usually reserved for certain staff, and unanimous consent has never been used to grant floor privileges to a member of a senator's family.

Despite the contentious nature and history of who should be allowed on its chamber floor, the Senate passed Senate Resolution 463 with relative ease. Though a few senators expressed mild concern, there was not explicit objection to it (Kellman 2018). This was not a formal amendment to Rule XXIII, but instead a standing order that allows senators to bring their children on to the Senate floor to cast a vote so long as the child is under one year old. On April 9, 2018, Senator Tammy Duckworth made history by becoming the first senator to give birth while in office. The resolution was introduced on April 12, discharged from the committee on April 18, and passed by unanimous consent later that same day. The next day, Senator Duckworth was able to bring her 10-day-old daughter on to the floor to cast a vote on the nomination of Jim Bridenstine to lead NASA.

This case highlights two features of the 115th Senate that may seem unusual or surprising even. First, when willing and necessary, the "world's greatest deliberative body" can indeed enact change and do so quickly. Although there were reportedly some grumblings and reservations regarding allowing babies on the floor, this resolution was expeditiously dispensed with. Certain details were discussed in private prior to the legislation's introduction, but

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that does not underscore the fact that the Senate—increasingly known for accomplishing little and doing so in a slow manner—managed to make historical changes to its operation in under a week.

Second, bipartisanship is possible. Though this change may seem somewhat innocuous, floor privilege is a contentious topic as previously outlined. Similarly, it is not without policy consequences. This legislation represents a step towards making the Senate more working-family friendly and therefore setting an example for other industries. Doing so will assist single and working parents from being able to participate in the workplace, and potentially reduce the gender pay gap.

REINSTITUTING THE "REID RULE"

Rule XXII defines the ways in which the Senate may bring debate to a close, known as invoking cloture. Once cloture has been invoked, consideration of a matter is limited to up to 30 hours of debate. In 2013, then-Majority Leader Harry Reid reduced post-cloture debate time for certain nominations that require Senate confirmation. Citing immense obstruction from Republicans in the minority, Reid felt changing the rules for the remainder of the Congress was the best course of action. By 2017, Senator James Lankford argued that the Senate was wasting too much time waiting out nominations that were being confirmed by large margins. Therefore, he introduced Senate Resolution 355, which would permanently reinstitute the "Reid Rule" of limited post-cloture debate time. Since 1986, all nominees are subject to 30 hours of post-cloture debate. (Prior to this, post-cloture debate time included one hour for each senator for a total of 100 hours.) Under this resolution, lower level executive branch nominees would only require eight hours of post-cloture debate and District Court nominees would only require two hours. Post-cloture debate time would remain at 30 hours for Supreme Court Justices, Circuit Court nominees, and all cabinet secretaries.

This issue was highly polarizing as Republicans repeatedly accused Democrats of obstructing the business of the Senate. Meanwhile, Democrats accused Republicans of pushing through unqualified nominees for important positions in government. Members of both parties cited pieces of evidence to support their respective arguments. Republicans cited the record number of cloture motions filed on Trump nominees. Democrats in turn cited the record number of confirmations to circuit court judgeships. When Republicans remarked that this same resolution passed with bipartisan support in 2013, Democrats were quick to detail the changes that have occurred since then and subsequently argue that the comparison is not a fair one. When faced with accusations that they were trying to block out any minority input, Republicans simply argued that they were following the lead of former Democratic leader Reid. Both sides stuck to their talking points and seemed unpersuaded by their opponents. This ultimately culminated in the resolution being reported out of committee on a 10–9 party line vote.

This proposed change was drafted as a standing order and therefore only required a three-fifths vote to pass. However, the majority Republicans only held 51 seats and were routinely left with only 50 votes in the chamber as Senator John McCain received medical treatment back in his home state of Arizona. Therefore, given the highly polarized nature of the issue, the resolution did not have a clear path to passage on the floor.

This case highlights the aspects of the Senate that observers are more familiar with. Neither side seemed willing to entertain the arguments of the opposition, much less compromise or seek out some mutually beneficial outcome. Members seem more willing to contest issues that may have previously not been seen as worthy of contestation, which serves to further exacerbate the differences between the two parties.

POLARIZATION IN THE SENATE

What does all of this mean for polarization and our understanding of it? Before considering this, it is important to think about the role of parties in government. A party's primary objective is to move policy in its preferred direction. And to maximize the benefits accrued to its members, a party will likely seek to produce a minimum winning coalition as well. As such, in a relatively small body such as the Senate, each individual vote can carry significant weight in deciding the outcome.

Therefore, it becomes important to reconsider what we mean when discussing polarization. Specifically, what exactly is driving the parties apart? As the Duckworth resolution demonstrates, there is the possibility for quick and meaningful action. And, as the Omnibus bill passed early in 2018 after numerous continuing resolutions shows, there is an appetite for mutually advantageous legislation as well. Especially in an election year where ten Senate Democrats sought reelection in states won by the Republican presidential candidate in the last cycle, we might have expected to see those members at least try to close the perceived gap between them and their Republican counterparts. Ideological differences are undoubtedly a significant factor contributing to polarization, but I would contend that agenda control is also playing a substantial role.

It is well known that things passed by unanimous consent or voice votes cannot be used to inform our ideological estimates of where senators stand. However, another dynamic not being captured in observing non-roll call votes is the vote margin. On more contentious issues, with narrow margins (such as the two-seat advantage held by the Senate Republicans during the 115th Congress), the opportunity and willingness to cross party lines is severely dampened.

This is where the Senate rules become incredibly important. By lowering the threshold necessary to confirm nominees (as Reid did in 2013 and McConnell in 2017) and by reducing post-cloture debate time on those nominees (as Reid did in 2013 and Lankford proposed in 2017) the stakes have been drastically raised on each subsequent vote. Strong partisans are likely to routinely fall in line on these votes, but this puts immense pressure on more moderate members. Moderates may want to support a nomination on principle but be whipped into opposing it by leadership or convince themselves to oppose it for the good of the party and the party brand. This produces one lingering question: Has the center truly disappeared, or have recent developments and strategies (primarily from party leaders) eliminated the possibility of centrists from behaving as such?

CONCLUSION

In short, these two cases demonstrate that Senate rules can be used and exploited in a variety of ways to move policy in a given direction. However, if the rules are being manipulated to avoid compromise, then it necessarily follows that compromise will be impossible to come by. Unless future leaders elect to ignore the examples established by current predecessors, we can expect to see similar (or higher) levels of polarization within the chamber and more and more issues devolve into contentious partisan

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battles. As Thomsen (2017) points out, ideologically moderate candidates are less likely than more extreme candidates to run for a seat in Congress. Among moderates who do run and win, they do not stay in Congress as long as their more extreme counterparts. This trend is likely to continue.

The evolution of this continuing body may become even more unrecognizable in future congresses if this pattern continues. As Josh Huder, Senior Fellow at the Government Affairs Institute recently wrote, the changes witnessed in the 115th Senate are unprecedented, and at this rate, the Senate may soon resemble the majoritarian House (Huder 2017). ■

NOTES

1. For a brief history of Senate floor privileges, see: https://www.senate.gov/artandhistory/history/minute/Floor_Privlieges.htm

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