Leadership Tools for Managing the U.S. Senate[†]

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Abstract

In recent Congresses, the leadership has made use of several procedural mechanisms with the apparent intent of managing the floor agenda – both in terms of what proposals reach the floor and the time required for their consideration. Our paper identifies and explains the most notable of these mechanisms and explicates their potential use as leadership management tools. The devices we address include (1) the way cloture is used on motions to consider measures; (2) the practice of moving to reconsider a failed vote on cloture; (3) filling the amendment tree on initial consideration; (4) filling the amendment tree in an exchange of amendments with the House; (5) unanimous consent agreements requiring 60 votes for agreement to a proposition; and (6) the expedited procedures governing action on budget reconciliation bills. Our central purpose is to indicate how the use of each device can potentially enhance leadership efforts to exercise greater control over the floor agenda.

[†]Paper prepared for delivery at the 2009 Annual Meeting of the American Political Science Association, September 3-6, 2009; Toronto, Canada.
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The Problem For Senate Leadership

The chief responsibility for managing the floor schedule and agenda of the Senate generally falls on the leadership of the majority party. This responsibility is not merely to maintain order and timeliness in Senate proceedings, but to arrange them in a way that achieves the goals of the party, including both enacting its legislative program and enhancing its public position for electoral purposes. But Senate procedure does not grant party leaders many formal resources — nor does Senate practice accord them many informal prerogatives — to meet their goals. Instead, procedure and practice afford extensive resources to individual Senators, the use of which often can be restricted only by a super-majority vote of the Senate. When Senators attempt to prevent a matter from coming to a vote, the party leaders may be able to fulfill their functions effectively only if they can assemble a super-majority of 60 for cloture. The lack of means for a simple majority to bring consideration of a matter to a close constitutes the core of the strategic problem perpetually faced by Senate leadership.

The challenge for Senate leadership, however, is not simply that of building a coalition of 60 or more Senators for cloture. Even when cloture is attainable, the process of getting to the point of a vote is not costless for the leadership. Senate Rules require that a cloture motion can be offered only on a question that is already pending before the Senate, receives a vote only on the second following day of session, and, if invoked, still does not result in any immediate vote on the question, but only limits further floor consideration to a maximum of 30 hours. For these and other reasons, when opponents of a matter are willing to accept the costs of preventing a vote, then even if the leadership commands the super-majority support necessary to ensure a vote, actually reaching that vote may require the expenditure of substantial time.

This possibility is important to the leadership's floor management goals especially because contemporary conditions of congressional workload make time a crucial — and inelastic — resource.[1] Before scheduling any piece of legislation for floor consideration, the leadership is compelled to consider not only the possible necessity of achieving cloture, but also the time (and other resources) that may have to be expended in the process, and the opportunity costs for other elements of its program of pursuing the effort.

Moreover, the problem for Senate leadership is not just the need to secure 60 votes and the time and effort required to reach a vote. Senate procedure and practice also afford the leadership little control over what proposals reach the floor for consideration. In practice, the Senate defers to the majority leader (or designee) to call up measures for consideration, by motion or unanimous consent, but neither rule nor practice places any general limits on senators' ability to bring proposals to the floor in the form of amendment. Only for certain narrowly specified classes of measure are amendments even required to be germane to the proposition they amend.

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[1] See Bruce I. Oppenheimer, "Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture," pp. 393-413 in Lawrence C. Dodd and Bruce I. Oppenheimer, eds, *Congress Reconsidered*, 3d ed. (Washington: CQ Press, 1985).

To control the amendment process, the chief resource available to the leadership is again the cloture rule. Under cloture, the Senate can entertain only amendments that both are germane and were filed previous to the cloture vote. Accordingly, leadership sometimes seeks cloture for this purpose as well as to secure limits on consideration. So for purposes of leadership regulation of the floor agenda, the cloture rule's supermajority requirement is a crucial obstacle.

In recent Congresses, the leadership has made use of several procedural mechanisms with the apparent intent of managing the floor agenda – both in terms of what proposals reach the floor and the time required for their consideration. Our paper identifies and explains the most notable of these mechanisms and explicates their potential use as leadership management tools. The devices we address include (1) the way cloture is used on motions to consider measures; (2) the practice of moving to reconsider a failed vote on cloture; (3) filling the amendment tree on initial consideration; (4) filling the amendment tree in an exchange of amendments with the House; (5) unanimous consent agreements requiring 60 votes for agreement to a proposition; and (6) the expedited procedures governing action on budget reconciliation bills. Our central purpose is to indicate how the use of each device can potentially enhance leadership efforts to exercise greater control over the floor agenda.

Few of these devices, of course, can offer a means of directly confronting the need for 60 votes to limit consideration, much less of transcending it. Most of them, instead, represent attempts to find enhanced means of navigating the flow of Senate proceedings in light of this rock in the river. They offer potential means for dealing with the other components of the leadership's basic challenge: managing the time consumed in transacting business and exercising a degree of control over floor access.

The Use of Cloture

It has been widely observed that the 112 cloture votes of the 110th Congress represented by far the highest level since the motion was first instituted in 1917, nearly doubling the previous high of 61, set in the 107th Congress (2001-2002). As Beth has more or less tried to build a career on insisting,[2] however, the number of cloture votes is not the most illuminating measure of its use. For one reason, pertinent to present concerns, it confounds the *breadth* of cloture use (how many items of business evoke cloture attempts) with its *intensity* (how often cloture is moved per item of business on which cloture is sought). Neither of these measures manifests as striking a change in the use of cloture as does the sheer number of cloture votes.

The intensity of cloture, in the sense just defined, could be taken as one indicator of the contentiousness of floor action. For it may naturally be interpreted as reflecting either how hard the leadership is pressing to move business forward or how hard opponents are inclined to resist doing so (or, most plausibly, some combination of both). In the 110th Congress, on measures on which any cloture motion was filed, a mean of 1.65 cloture votes occurred. This is far from a record level, having been exceeded five times in the period from the 92nd Congress (1971-1972)

[2] Richard S. Beth, "What We Don't Know About Filibusters," paper presented at the 1995 annual meeting of the Western Political Science Association, Portland, Oregon.

forward.[3] Nor does this measure show any strong tendency to increase over time during the period stated.

The 68 items of business on which cloture was attempted in the 110th Congress, on the other hand, do represent a historic high. They are nearly half again as many as the 47 items with cloture attempts in the previous (109th) Congress, which was itself a record, and they are 70% more than the earlier peak, of 40 items, set in the 102nd Congress (1991-1992). Although this rise is less extreme than the jump in cloture votes, it clearly constitutes a significant change in the breadth with which cloture is used. Inasmuch as cloture is usually moved by or in coordination with the leadership, its breadth of use has a natural interpretation as an indication of leadership readiness to use the motion as a tool of agenda management.

It will hardly be claimed, of course, that the increased breadth of cloture in the 110th Congress manifests any new accession to the arsenal of standard leadership tools, much less a procedural innovation. If any single point can be assigned at which cloture turned from a rare resort into a common means of agenda management, it came much earlier, in the 92nd Congress (1971-1972), when for the first time cloture was attempted on as many as nine items of business. In only two previous Congresses, both of them before the era of the modern Congress, had cloture been sought on more than four items.[4] A second clear breakpoint appears in the 102nd Congress: in each Congress from the 92nd through the 101st, cloture was moved on between nine and 24 items of business; in each Congress from the 102nd through the 109th, on between 30 and 47. If the new levels maintain themselves throughout the next several Congresses, we may come to regard the 110th Congress as signaling a third such breakpoint.

More pertinent to a consideration of the leadership's standard arsenal of procedural tools, however, are some of the specific ways in which the cloture motion was commonly used in the 110th Congress. Over time, the leadership has resorted to cloture not only more frequently, but also in a variety of increasingly complex ways, adapted to specific procedural situations and purposes. Several common uses of cloture in the 110th Congress represent specific attempts to facilitate floor proceedings and otherwise manage the agenda. The motion typically plays an essential role in filling the amendment tree, and in particular in the resolution of intercameral differences by amendment exchange. These uses of cloture are elaborated in their respective sections below. In addition, however, cloture was frequently attempted in the 110th Congress on motions to proceed to consider measures, and motions to reconsider were often used as means of obtaining a cloture vote. Both these proceedings can be discussed as potential means of facilitating floor proceedings.

Cloture on the Motion to Proceed

The motion to proceed to consider a measure is, in general, the only way a measure can come before the Senate for consideration if unanimous consent cannot be obtained. This motion

[3] From the 92nd through 110th Congresses (1971-2008), the intensity of cloture ranged between 1.00 (101st Congress, 1989-1990) and 3.00 (97th Congress, 1981-1982). Before the 92nd Congress, cloture situations were too few to yield meaningful averages.

[4] Cloture was moved on seven measures in the 69th Congress (1925-1927) and six in the 79th Congress (1945-1946). Beth, "What We Don't Know About Filibusters."

can be adopted by an ordinary voting majority, but is generally debatable (except on privileged matters, such as conference reports, and under certain other special circumstances). Consequently, opponents can attempt to filibuster it, in the sense that they can use debate and other parliamentary means to attempt to prevent the Senate from reaching a vote. This circumstance is a component of the leadership's challenge in managing the floor agenda, for it makes possible the so-called "double filibuster:" one filibuster on the motion to proceed and another on the measure itself, overcoming which may require cloture to be moved and invoked on each question separately.

Motions for cloture on motions to proceed to consider measures have been an occasional feature of Senate practice ever since 1949, when Rule XXII was amended to permit cloture on motions (including the motion to proceed) as well as on measures themselves. Through the 100th Congress (1987-1988), the last in which Senator Robert Byrd (D-WV) served as majority leader, it was not uncommon for debate on a motion to proceed to consider to occupy several days, in the course of which the leadership might seek cloture, sometimes more than once. Presumably because of the time and effort required, however, the leadership did not undertake this proceeding with great frequency. Through the 100th Congress, cloture was never moved on a motion to proceed in relation to more than seven measures in a single Congress.

In the 101st Congress (1989-1990), however, cloture on motions to proceed began to be used, apparently for the first time, in a different way. On at least three occasions, the new Majority Leader, George Mitchell (D-ME), moved to proceed to consider a measure, immediately moved for cloture on that motion, and then immediately withdrew the motion to proceed. Having withdrawn the motion to proceed, the leadership would then take the Senate onto other business until the cloture vote occurred two days later. If cloture was invoked, the Senate would automatically take up the motion to proceed under the restrictions of cloture, while if cloture was rejected, the chamber would continue with its other business.[5]

This way of proceeding allows the leadership to test whether sufficient support exists to bring a measure to the floor without expending days of valuable floor time over the matter. Except for the moment needed to offer the sequence of motions and the time for the cloture vote itself, this proceeding permits the leadership to continue to accomplish other business during the two days intervening between the cloture motion and vote, and, if cloture fails, thereafter as well. If cloture succeeds, on the other hand, the Senate at once has the matter in question before it without the necessity of any further proceedings. Often, indeed, once the vote demonstrates that sufficient support exists to invoke cloture on the motion to proceed, the leadership has been able to secure unanimous consent to proceed to the measure, so that no vote on the motion to proceed itself is actually necessary.

[5] These proceedings evidently depended on interpreting two provisions of the cloture rule as remaining applicable even when the question on which cloture was sought had been withdrawn: first, that a cloture vote occurs automatically on the second day of session after a cloture motion is filed, and that once cloture is invoked, the matter under cloture remains the unfinished business of the Senate until disposed of. We lack information about the point at which the Senate settled on these interpretations; they do not appear ever to have been embodied in rulings of the chair or explicitly stated on the floor. Whether or not they were established, or even proposed, before the 100th Congress, however, their implications appear never previously to have been pursued in practice.

In each case, whether cloture is invoked or not, this proceeding enables the leadership to carry on the business of the Senate more predictably and productively, in contrast to the previous practice of leaving the motion to proceed on the floor for debate pending action on the cloture motion. Even though this device can do nothing to circumvent the prospect of having to obtain 60 votes in order to bring a measure to the floor against opposition, it still affords the leadership more effective control of the floor agenda in certain other respects.

This way of using cloture on motions to proceed swiftly became normal practice in the Senate, although it did not become the exclusive means of using cloture on motions to proceed. Its availability, nevertheless, also appears to have encouraged the leadership to seek cloture on motions to proceed more frequently. In the 101st Congress, cloture was sought on motions to proceed to consider at least 10 measures (42 percent of all matters on which cloture was moved); in the 102nd (1991-1992), on 28 (a full 70 percent of matters on which cloture was moved). Proceedings on 20 of the 28 cases in the 102nd Congress, furthermore, followed the new course just described. The leadership in the following Congresses did not rely as heavily on this approach, but in each of the Congresses from the 104th through the 109th (1995-2006), cloture was attempted on motions to proceed to consider between 10 and 21 measures, which represented from 28 to 61 percent of all matters in relation to which cloture was sought.

In the 110th Congress, however, cloture was sought on the motion to proceed to consider 53 measures, 78 percent of all items of business on which cloture was attempted. The device of withdrawing the motion to proceed immediately after moving for cloture remained in common use, appearing in 35 of the 53 cases. On the other hand, this device had by no means become the exclusive means for seeking cloture on motions to proceed, as shown by the 18 remaining cases. In 22 of the other 35 cases, as well, the Senate appears to have spent some time considering the motion to proceed even though it had technically been withdrawn. Nevertheless, the record of the 110th Congress suggests that not only the use of cloture on the motion to proceed, but also the device of withdrawing the motion to proceed in order to enable its disposition with less potential expenditure of floor time, appear now to be established as recognized standard elements of Senate practice.

Reconsideration of Cloture Votes

In most circumstances, the Senate permits a motion to reconsider a vote that disposes of a question. In relation to cloture votes, however, in earlier years the Senate apparently saw no occasion for entertaining such a motion, for when any cloture motion was rejected, supporters could readily continue to pursue cloture simply by filing another cloture motion.[6] From the 106th Congress (1999-2000) forward, however, motions to reconsider cloture votes have appeared with increasing frequency. These proceedings make use of special features of the motion to reconsider in ways that offer the leadership more flexibility in seeking cloture and, more generally, in orchestrating floor proceedings.

The motion to reconsider may be proposed only once in relation to a given vote; may be proposed only by a Senator who voted on the prevailing side; is debatable only if the question to be reconsidered is debatable; and may be either offered or entered at the time of the initial vote.

[6] Senate precedents do not permit reconsideration of a successful cloture motion.

If the motion is offered, the Senate proceeds to consider it, and if the Senate agrees to the motion, it proceeds to consider the question *de novo*. If the motion is entered, the proponent may move to proceed to its consideration at a later time, as long as the question to be reconsidered is still in the possession of the Senate.

The offering of a motion to reconsider most often occurs as part of a routine proceeding immediately after a vote. A Senator who voted on the winning side offers the motion, then immediately moves to lay it on the table. Agreement to the motion to table "locks in" the victory by disposing adversely of the only motion that might enable the Senate to reverse the outcome. When Senators enter the motion for later consideration, by contrast, they typically do so for strategic purposes. On occasion, Senators whose side is losing have their votes recorded on the side opposite their preference, thereby qualifying to enter a motion to reconsider that they hope to call up at some later point when they have secured additional support to reverse the outcome.

The potential advantages of moving to reconsider a cloture vote are illustrated by the first instance of such a proceeding that, apparently deliberately, fully capitalized on these features of the motion. On September 13, 1999 (106th Congress), when the Senate rejected cloture on an amendment to H.R. 2466, making appropriations for the Interior Department, the Majority Leader entered a motion to reconsider the vote. On the following day, the Senate apparently concluded all other consideration of the bill, but did not proceed to a final vote, instead laying the measure aside for other business. Nine days later, the Majority Leader moved to take up the motion to reconsider, and, on a series of three tallies of 60-39, the Senate agreed to take up the motion to reconsider, adopted the motion, and, upon reconsideration, invoked cloture on the amendment. It then proceeded to adopt the amendment, 51-47, and pass the bill, 89-10.[7]

If the Majority Leader had instead chosen to offer a second cloture motion, the requirements of Rule XXII would have bound the Senate to a vote on the motion two days later, which, in this instance, would apparently not have been sufficient time for supporters to assemble the requisite votes to carry the proceeding through. If he had waited to offer the second cloture motion until he was sure of his level of support, he would have had to bring the bill back before the Senate, make the amendment pending again, then file a cloture petition and wait two days for a vote. By entering a motion to reconsider instead, the Majority Leader not only avoided being bound to a two-day layover, but also gained the ability (at any point when sufficient support was available) to call up the motion to reconsider, bring the Senate to an immediate vote on cloture, and automatically bring the amendment back before the Senate under the restrictions of cloture.

It is true that invoking cloture by this means may require some significant investment of floor time, for it requires a series of three votes, all of them potentially by roll call. On the other hand, inasmuch as the cloture motion itself is non-debatable, all three votes are at least on non-debatable questions. Of the three questions, as well, only cloture requires a super-majority, so

[7] *Congressional Record* [daily ed.], vol. 145, p. S10773 (Sept. 13, 1999), S10793-S10847 (Sept. 14, 1999), S11277-S11329 (Sept. 23, 1999).

that if sufficient support exists for cloture, no difficulties should arise in prevailing on the full sequence of votes.[8]

Later use revealed another potential advantage of this proceeding for facilitating the management of floor proceedings. On June 11, 2002 (107th Congress), for example, the Senate rejected cloture on S. 625, a hate crimes bill, and the Majority Leader moved to reconsider the vote, after which the measure was returned to the calendar.[9] The Senate never subsequently returned to the consideration of the bill, presumably because leadership never became confident of sufficient support to invoke cloture and proceed to a final vote. Although this situation, in policy terms, represents an unsuccessful outcome for the leadership, in terms of managing proceedings on the floor it represents a gain from not having to expend floor time on a matter that lacks prospects of success. Unlike a cloture motion, if an entered motion to reconsider cloture appears unlikely to succeed, it need not be called up at all, yet it remains available for action if at some later point its success appears possible.[10]

The instance in the 106th Congress was not the first time Senators had ever made use of a motion to reconsider a cloture vote, but proceedings on the three earlier occasions did not appear to reflect a recognition of the full potential of the mechanism. On September 11, 1985 (99th Congress), the Senate rejected a second attempt to invoke cloture on the conference report on H.R. 1460, the Anti-Apartheid Action Act of 1985. The Majority Leader having announced his intention of turning the Senate to other business, the Minority Leader responded by voting against cloture and, when cloture was rejected, offering a motion to reconsider. Since the motion was offered rather than entered, however, proponents gained no opportunity to build support, and the Majority Leader successfully moved to table the motion.[11] A different result occurred on September 10, 1992 (102nd Congress), after the Senate rejected cloture on a (previously offered and withdrawn, but nevertheless debated) motion to proceed to consider S. 640, a product liability bill. The Majority Leader immediately offered a motion to reconsider the vote; the Senate agreed to the motion to reconsider, but then again rejected cloture, and the bill was taken down. Although a motion to table the motion to reconsider was offered, it was then withdrawn because, as dialogue on the floor makes clear, the object of offering the motion to reconsider was to obtain an immediate second vote on cloture.[12]

Earlier in the 102nd Congress, apparently for the first time, a motion to reconsider a cloture vote was entered, rather than offered, when the Senate rejected cloture on the committee

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[8] In addition — although the gain may be minimal — this proceeding also avoids the necessity of gathering the 16 signatures required in order to file a new cloture motion.

[9] *Congressional Record* [daily ed.], vol. 148, pp. S5325-S5337 (June 11, 2002).

[10] If a motion to reconsider cloture is called up and succeeds, it leads to another cloture vote, and in that respect can be treated as the equivalent of filing another cloture motion. If, on the other hand, the motion is never called up, no action equivalent to the filing of another cloture motion occurs. For this reason, it would be appropriate, in counting cloture motions, to include a successful motion to reconsider a cloture vote but not one that is entered but never called up. Following this practice, however, means that some occasions on which, in earlier times, a cloture motion would have been offered will now be ones on which a motion to reconsider will be entered instead. The count of cloture motions will accordingly be reduced below what it would otherwise have been by the number of motions to reconsider cloture entered but not called up. Data on cloture motions over time will in this sense understate the rise in frequency of proceedings involving cloture.

[11] *Congressional Record*, vol. 131, p. 23299 (Sept. 11, 1985).

[12] *Congressional Record*, vol. 138, pp. 24403-24404 (Sept. 10, 1992).

substitute for S. 250, the "motor voter" registration bill. In this instance, however, the potential formal consequences of the action remained implicit; the Senate later reached unanimous consent agreements limiting amendments and providing for the disposition of a nongermane amendment, and ultimately agreed to the committee substitute as amended, without the motion to reconsider being called up or any further cloture attempt being made.[13] This instance accordingly illustrates a further usefulness of a motion to reconsider cloture, as a spur to a negotiated settlement -- although in this respect the proceeding is arguably only equally useful with (and not more advantageous than) filing a new cloture motion.

The circumstances of these early motions to reconsider cloture suggest that the Senate reached no full awareness of the potential advantages of the proceeding until its use in developed form was demonstrated in the 106th Congress. Thereafter, however, it clearly developed into a standard tool of leadership floor management in less than a decade. After the Majority Leader implemented the procedure twice in the 106th Congress, the new Majority Leader (of the opposite party) made use of it eleven times in the 107th. In the following four years, after another switch in party control, the Majority Leader relied on the proceeding less extensively (a total of 10 times in the 108th and 109th Congresses, 2003-2006), but in the 110th Congress, after a further party changeover, the Majority Leader drew on it persistently, on a total of 24 occasions.

At this rate of use, moving to reconsider a cloture vote seems to have become routinized as a means for taking a contested measure off the floor while maintaining the possibility of returning to it if at some point its strategic situation improves. Of the 24 measures on which the Majority Leader took this course in the 110th Congress, he found himself able to bring six back to the floor by this means, of which four ultimately passed the Senate. Similarly, in each of the previous four Congresses, of the motions to reconsider cloture that were entered, the Senate ultimately considered some and proceeded to invoke cloture; others remained available, but were never called up for a vote.

Implications of Developments in the Use of Cloture

In important respects, entering a motion to reconsider a cloture vote parallels withdrawing a motion to proceed after moving cloture on it. Although neither proceeding enables the leadership to avoid the necessity of obtaining 60 votes for cloture in order to move forward against opposition, both enable it to arrange business more effectively in context of that necessity. Both afford the possibility of obtaining a cloture vote with minimal expenditure of time and effort on the floor and, if cloture succeeds, of bringing a measure under consideration under the constraints of cloture, while avoiding any efforts by opponents to achieve delay, as well as any other lengthy proceedings. If cloture fails, on the other hand, or seems likely to fail, these mechanisms permit the Senate to continue accomplishing other business with a minimum of disruption to its schedule.

Before the development and emergence of these procedures into common use, few comparable means were available to leadership for mitigating the potential for procedural

[13] *Congressional Record*, vol. 138, pp. 11003 (May 12, 1992),11705 (May 19, 1992), 11866 (May 20, 1992); Daily Digest, pp. D275, D281, D291-292, D297. See unanimous consent agreements of May 13, 1992, p. 11153, and May 14, 1992, p. 11450.

complications inherent in Senate rules. Accordingly, although we cannot demonstrate that these devices have been particularly effective in improving the leadership's rate of success in terms of policy outcomes, we can make a case for their potential usefulness in facilitating its management of the floor agenda. Recent majority leaders have been criticized for failing to "hold opponents' feet to the fire" by forcing them to conduct any obstructive or dilatory opposition at length in public session. The techniques of using the cloture motion discussed here highlight instead the benefits to the majority party of avoiding such time-consuming proceedings.

"Filling the Tree" on Initial Consideration of Legislation

Another challenge facing Senate leadership is the lack of rules restricting either the subject matter of amendments or even the number of amendments that can be offered over the course of consideration of a bill. Senate precedents do establish the type and form of amendments that can be pending simultaneously. These precedents reflect certain principles, such as that a Senator should be allowed to propose an improvement to text proposed to be stricken out before a vote is held on striking that text. The precedents are, however, somewhat complicated. In an effort to clarify what is in order in a given parliamentary situation, a Senate Parliamentarian diagramed the amendments that can be pending together before any one is disposed of, and these diagrams are known as "amendment trees." Any time a Senator offers an amendment, a slot on the diagram is considered filled. If another Senator wishes to offer another amendment of the same type and form, it is necessary to secure unanimous consent—permission from every other Senator—to "set aside" the amendment in that slot in order to offer another.

Periodically, Senate majority leaders exercise one of their few formal powers afforded under Senate precedents—the right of first recognition—and "fill the amendment tree." To do so, the majority leader typically offers a series of amendatory motions, one after the other, until all amendatory motions in order under the rules are pending. When the tree is full, no other amendatory motion is in order until at least one is disposed of. Only by unanimous consent can senators offer further amendments. In this way, the majority leader can temporarily halt the amendment process on a bill.[14]

It is worth emphasizing that no single senator, not even the majority leader, can bring the Senate to a vote on the main question, and the majority leader therefore cannot block senators from offering amendments prior to passage of the bill. Filling the tree does not affect the right of senators to debate legislation at length. It does not bring the Senate any closer to final disposition of the legislation. Senators prevented from offering amendments in this situation can engage in extended discussion of the legislation indefinitely.

If, however, the majority leader can build a coalition of at least 60 senators (assuming no vacancies in the Senate) in order to invoke cloture, then he can fill the tree to block other

[14] The recognition priority accorded the majority leader may enable him to implement this strategy most readily, and may also enable him to block another senator's attempt to use it. Nevertheless, it is not only the majority leader who can frame votes, or more accurately gain negotiating leverage for a vote, in the fashion described. Just recently, a senator offered two amendments on two different slots of the tree in a way that precluded the offering of any other amendments. The actions resulted in a unanimous consent agreement on the amendment—not to allow alternative amendment, but setting up a vote on the amendment and requiring 60 votes for its approval (*Congressional Record*, daily edition, May 12, 2009, pp. S5349-S5350; S5353).

senators from having an opportunity to propose changes to the pending matter before a final vote. Furthermore, after cloture is invoked on a question, all amendments offered to that matter must be germane, and any pending amendment that has been offered prior to cloture being invoked will fall if the presiding officer rules that it is not germane. The majority leader can conceivably fill the tree to at least temporarily block amendments while he attempts to gain the support of 59 other senators to invoke cloture and thereby prevent non-germane amendments from being offered.

Based on data going back to the 99th Congress (1985-1986), it appears that the practice of filling the tree increased in recent Congresses. [15] Indeed, the majority leader in the 109th Congress (2005-2006) offered all the allowable amendatory motions on more occasions than any other leader since 1985, and the majority leader in the 110th Congress (2007-2008) offered more than his immediate predecessor. The 109th Congress also saw the first use, at least in recent history and possibly ever, of filling the amendment tree on a motion to dispose of amendments received from the House, and this practice increased in the 110th Congress. [16] (Filling the tree in this form is discussed in the next section.)

What are the effects of filling the tree? The main procedural effects are straightforward and explained above: a temporary halt to the amendment process that may, assuming 60 senators agree, preclude amendments entirely. But what other possible effects are there? To what extent can filling the tree be used as a tool to advance the goals of the majority party? To address this question, we examine the instances of tree filling in the last two Congresses under two different majority leaders.

The most virulent minority party complaints about filling the amendment tree concern its possible influence on policy outcomes. At the extreme, the majority leader is portrayed as forcing his view on the Senate, presenting the body with a take-it-or-leave it choice. In the words of formal theory, the fear is that the majority leader can use the tool to become the "agenda setter," inducing stability and determining the outcome in the otherwise chaotic environment of multi-dimensional decision-making. The procedural reality, as explained above, is that the majority leader cannot single-handedly end the decision-making process, and therefore cannot operate as the pure agenda-setter modeled in some formal theories. The influence of filling the tree on policy outcomes, if it exists, is much more subtle than that.

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[15] To identify trees, a full-text search was conducted of the *Congressional Record* and press accounts for the phrase "amendment tree"; these instances were then examined to see if they qualified as ones in which the majority leader or his designee deliberately filled the tree. In addition, all motions to commit or recommit offered in the Senate were identified through www.congress.gov, and each of these was examined to see if it was a possible filling-the-tree situation. (By offering a motion to (re)commit with instructions, and two degrees of amendment to those instructions, the majority leader has "filled the tree" because no other amendatory motions are in order until those motions are disposed of.)

[16] Precise numbers are not presented in this paper because they depend heavily on how a full tree is defined, and the discussion of different definitions consumes several pages and would bore the expected audience for this essay. Under one somewhat broad definition, in the 109th Congress the majority leader filled the tree six times on legislation and two more times on motions to dispose of House amendments. In the 110th Congress, the majority leader filled the tree nine times on legislation and seven times on House amendments. The next highest Congress in this time period appears to be the 106th Congress (1999-2000), when the majority leader filled the tree seven times on legislation.

In fact, a review of instances in which the majority leader filled the tree on a bill in the last two Congresses illustrates the limitations of its effectiveness in protecting a majority party policy proposal (Table 1). In the 109th Congress (2005-2006) and the 110th Congress (2007-2008), most of the time, the majority leader did not fill the tree, secure cloture, and bring the Senate to a vote on the underlying bill he had called up. In just over half of the cases (eight out of fifteen), either the bill was pulled from the floor, or the leader withdrew the amendments that had made up the tree, allowing other senators to offer (frequently nongermane) amendments.

The other seven cases identified in the table are suggestive of the nature of the legislative proposition on which this strategy is likely to expedite the legislative process. On each of these bills there was wide support not just for the proposal, but for the need to act quickly. In fact, on one—the war and Hurricane Katrina supplemental appropriations bill—the majority and minority party leadership worked together to fill the tree.[17] In several of these instances the measure faced some kind of deadline, either because they provided appropriations or they were extending expiring provisions of law. The two final instances listed in the top half of the table might illustrate the effect of political pressures to act. The two bills were both described by senators as modest in scope, but both addressed, albeit in a limited way, major issues on which there was popular concern and, in fact, that the Senate had attempted unsuccessfully to act on in a comprehensive fashion: immigration and energy. It is easy to imagine how amendments on either topic could have dismantled the coalition established for the passage of the focused legislation.

All of this is not to say that filling the tree cannot influence policy outcomes; it is to make the point that the influence is partly conditional on circumstances beyond the leader's control. The possibility for policy influence depends in part on the decision calculus of the senators who must decide whether to fight cloture in the hopes of gaining an opportunity to amend the bill. But given the requirement to achieve 60 votes, there are still potential opportunities to influence policy outcomes, or at least influence negotiations, by filling the tree.

One possible form of indirect influence is that the majority leader is able to prevent the offering of an amendment that a majority would agree to, as long as the underlying legislation enjoys super-majority support. Sometimes, for example, majority leaders claim to fill the tree to avoid so-called "poison pill" amendments: amendments that the Senate might agree to that would destroy the support for the bill (or at least the super-majority support to end debate on the bill). If an amendment is a known poison pill, then senators could vote strategically against an amendment they otherwise support, but a filled tree helps them avoid this always-uncomfortable dilemma. It was reported, for example, that in 2005 the majority leader offered first and second-degree amendments to a firearms manufacturers protection bill in order to prevent other amendments on topics such as child safety locks, background checks at gun shows, and the ban on semiautomatic weapons.[18] Amendments on these issues had been agreed to the previous year

[17] On H.R. 2206, 110th Congress, the minority leader explained to his conference that he agreed to fill the tree in order to move the measure forward quickly into negotiations with the House, where discussions would continue (*Congressional Record*, daily edition, May 15, 2007, p. S6117).

[18] Senators expressed frustration on the floor at not being able to offer amendments they wished (*Congressional Record*, daily edition, July 27, 2005, pp. S9090-S9091; S9093-S9094; S9104), and *Congressional Quarterly* reported that the majority leader filled the tree (see, for example, Michael Sandler, "Frist Employs Tough Tactics to Limit Democrats' Options on Gun Bill and Force a Vote," *CQ Today*, July 27, 2005). Technically, however, after

on a similar bill when the Republican majority was smaller, leading its original proponents to withdraw their support for the bill and to its eventual failure.[19]

But the amendment need not be a poison pill for the majority leader to want to prevent it from being offered. Perhaps the amendment would be agreed to, and the bill would still be able to get to a successful final passage vote. If, however, the majority leader (or the majority party, or maybe the majority of the majority party) would rather not have the amendment in the legislation, then the full tree could preclude it—providing, of course, that fewer than 40 senators are willing to risk the whole legislation for the sake of that amendment.

In 2006, for example, the majority leader filled the tree and secured cloture on the PATRIOT Act modifications bill,[20] which had the eventual effect of precluding amendments that some senators believed could have been approved. The bill itself was reported to be widely supported, and indeed the Senate voted 96-3 to end debate on the motion to take up the bill. Even though, by all accounts, the legislation as called up enjoyed overwhelming support, both Senator Patrick Leahy (D-VT), the ranking member on the committee of jurisdiction, and Senator Russell Feingold (D-WI) expressed their desire to offer relevant amendments. Senator Feingold claimed in fact that his proposals reflected the results of previous bipartisan negotiations, and indeed Senator Arlen Specter (then-R-PA), chair of the committee of jurisdiction, voiced support for some of the changes but introduced them as a stand-alone bill.[21] The filled tree prevented these amendments from being offered, and senators therefore only had the opportunity to vote on whether or not to bring the popular bill to a vote without change.

To be clear, we do not know the intent of the majority leader in filling the tree on the PATRIOT Act modifications bill. The majority leader claimed to be facing a filibuster, and certainly Senator Feingold did not hide his goal of stopping the legislation.[22] According to the minority leader, however, Senator Feingold and Senator Leahy said they would agree to be allowed to offer just two amendments, and the minority leader assured the majority leader that the amendments could be disposed of that day.[23] Another reason for filling the tree, however, could have been the belief that the bill, a product of bicameral negotiations, would not have passed the House if modified. Regardless of the intent of the majority leader, however, the effect

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Senator Frist offered the two amendments, two additional amendments were in order. In other words, opportunities existed for senators to offer amendments to the bill, although not of the form and type that they wished. As such, this bill (S. 397) is not included in the list of full trees in Table 1.

[19] Michael Sandler, "Liability Measure for Gun Industry Bumps Defense Bill From Senate Agenda," *CQ Today*, July 26, 2005. As the sponsor of the bill explained, ". . .opponents succeeded in attaching a couple of unrelated poison-pill amendments that ultimately caused the bill to fail" (*Congressional Record*, daily edition, July 27, 2005, p. S9088).

[20] S. 2271, 109th Congress (*Congressional Record*, daily edition, February 16, 2006, p. S1379). The motion to commit with instructions was not offered, and senators therefore had the opportunity to offer this motion and two degrees of amendment to the instructions. No senator attempted to offer the motion, and yet several complained of the tree being full (see, for example, pp. S1380 and S1381).

[21] *Congressional Record*, daily edition, February 26, 2006, p. S1495; *Congressional Record*, daily edition, February 28, 2006, p. S1520; Michael Sandler, "Congress Poised to Clear Anti-Terror Law Renewal; Specter Wants to Reopen Debate," *CQ Today*, February 27, 2006; Michael Sandler, "Cloture Vote Sealed, Senate Grinds Toward Final Vote on Anti-Terrorism Bill," *CQ Today*, February 16, 2006.

[22] *Congressional Record*, daily edition, February 15, 2006, pp. S1327-S1333.

[23] *Congressional Record*, daily edition, February 16, 2006, p. S1380.

was to preclude senators from offering related amendments that no one characterized as poison pills. With enough support behind the bill, the leader filled the tree and the final passage vote was held on the policy package as proposed.

Another possible way in which filling the tree might affect policy outcomes is its possible use to frame a specific vote as a question of one proposal versus the status quo, with the only opportunity for senators to offer third alternatives occurring *after* the vote on the first proposal. This can be done by offering an amendment to a bill, and then filling all the other available slots on the tree (sometimes with the same or very similar amendment text). The strategy is to force senators into a choice between one favored proposal and the status quo, keeping in mind that the choice they are going to make is a public one. The strategic response of a numerical minority to this behavior is, of course, to threaten to filibuster the amendment (and therefore the bill) unless granted an opportunity to offer a preferred alternative. Whether the majority leader will secure the planned vote on his proposal therefore depends again on the willingness of the opposition to hold up the whole bill.

In a somewhat recent example of filling the tree to get a vote on an amendment, the majority leader offered a hate crimes amendment to the defense authorization bill in 2007. After offering the amendment, filling the tree, and filing cloture on the amendment, the majority leader announced that he did understand there would be a minority-sponsored alternative amendment.[24] Indeed, by unanimous consent, the Senate later arranged for another amendment to be offered by a minority party senator. The senator apparently hoped the more limited amendment he drafted would take support away from the majority's proposal by, according to one press report, "providing senators an alternative way of expressing opposition to hate crimes."[25] Instead, the Senate invoked cloture on the majority leader's hate crime proposal by a vote of 60-39, and then agreed to the amendment and the minority alternative.

This example illustrates a way in which filling the tree can be used to gain leverage in negotiations. The minority party had an incentive to enter into a unanimous consent agreement in order to be able to offer an alternative amendment, particularly one they hoped would reduce the likelihood that the cloture vote would receive the necessary 60 votes. The majority leader might have had an incentive to allow a minority alternative because senators, particularly those in the minority party who favored the majority party amendment, would perhaps feel less pressure from their party brethren to vote against cloture if they indicated they would not vote for it unless another amendment was allowed.

Additional influences on policy outcomes are even less direct, and some might place them in the category of impacting electoral, rather than policy, outcomes. Senators who view elections as a means to better policy, however, might reject the distinction. Regardless, filling the tree on a bill that does not enjoy super-majority support, and that no one seems to expect to enjoy super-majority support, is occasionally done and presumably for a reason. The effect is to allow the majority leader to publicly present a policy proposal, but to shield it from modifications and even subject-changing amendments. Senators must either vote for or against

[24] *Congressional Record*, daily edition, September 25, 2007, p. S12023.
[25] Keith Perine, "Senate Adopts Hate Crimes Measure," *CQ Today*, September 27, 2007.

cloture, and the vote against can be characterized as a "filibuster" of legislation on a subject of interest to constituents.

Although sometimes regarded as less significant than achieving policy or even electoral goals, another related role of majority party leadership in the Senate is making the best use of time. Filling the amendment tree, even if it does not (and is not intended to) permanently prevent amendments, can help to structure the Senate schedule. Because senators can offer amendments to any part of the bill on any subject, conceivably at any time during consideration of a bill senators could be required to come to the floor and cast a roll call vote on a subject they and their staff have not examined. For the convenience of all senators, floor managers attempt to mitigate this situation, asking senators to file their amendments at the desk and even in some cases to wait to offer them until a time agreement structuring their consideration is reached. In the absence of such bipartisan accommodation, however, the majority leader can fill the tree for the purpose of temporarily blocking senators from offering amendments until the Senate is ready to vote.

In summary, it seems possible, based both on an analysis of the procedural circumstances and a review of recent instances, that one effect of filling the amendment tree could be the exercise of some influence over the content of the legislation that is approved. Although the majority leader is still constrained in that effectively the proposal must garner at least the support of 60 senators, some evidence suggests that, even if it is at the margins, there is a possibility for policy impact.

One potential use of this tool is that the majority leader, relying on his position of influence, presents a legislative package, and then fights off amendments by explaining he is not sure the package would pass with them. Senators are not sure either. Again, with perfect information, senators might choose to not vote for cloture if they knew that, if the tree was taken down, the bill could be improved from their perspective and still get the necessary votes to end debate. But senators are not sure what the effect would be of approving certain amendments. They rely on leadership to craft legislation as close as possible to their favored position given the need to build super-majority support. To some degree, the leaders have an informational advantage, having negotiated with senators, over the rank-and-file, who also communicate with other senators but not as extensively and not necessarily across the aisle. Introduce considerations other than policy into each senator's decision calculus, and the situation becomes even more complex: "I think we could pass an amendment to this if it were allowed, but how will this vote against cloture on this bill look to the people I represent?" "If I hold this up, how will it affect my pursuit of my amendment on the next bill to be considered next week?"

Although we observe that the potential for policy influence exists, it is clearly conditional, depending on the degree to which senators are willing to press their procedural rights and their willingness to vote strategically against their policy preferences in the hopes of securing a more preferred outcome. It also might depend on how much information senators have about their colleagues' willingness to press their positions. For example, if senators communicate to form a coalition against cloture, in the hopes of getting an opportunity to make changes to the matter on which the tree is filled, then the vote against cloture is less risky. If the matter is going to be approved anyway, regardless of how an individual senator votes,

presumably that senator would prefer to be on record in favor of a proposal he or she prefers to the status quo.

"Filling the Tree" on Motions to Dispose of House Amendments

Filling the amendment tree on a bill or resolution has long been in the majority leader's arsenal of procedural mechanisms for attempting to manage the floor. In recent Congresses, the majority leader has also offered a motion to dispose of House amendments, and then immediately offered all the available amendatory motions related to it as well. This process has also been referred to as "filling the tree," although no graphic depiction of these motions appears in the volume of Senate precedents. The procedural effect of filling the tree is that no Senator can propose an alternative method of acting on the House amendments until the Senate disposes of one of the pending motions.

When the House amends a Senate bill (or a Senate amendment) the amendment is transmitted or "messaged" to the Senate for action. The House message is privileged in the Senate, which means the question of bringing the House amendment before the Senate is not debatable. As noted earlier in the discussion of motions to proceed, the ability to take up an issue without debate can potentially make a difference to the majority leadership, because the Senate may need to take the steps necessary to end debate only on the question of disposition. The majority leader will still need to take the steps and build a sufficient coalition to invoke cloture if he intends to fill the tree to block other Senators from having an opportunity to propose other ways of disposing of House amendments, including perhaps the opportunity to propose Senate amendments to the House amendments.

In the 109th Congress, the majority leader filled this type of amendment tree only twice, and this appears to be the first use of this procedure. It certainly was not used with any regularity prior to 2006. In the 110th Congress, in contrast, the majority leader filled the tree on motions to dispose of House amendments eight times on seven different bills. All of the bills can safely be considered major pieces of legislation, as they include energy reform legislation, the housing and economic recovery act, a reauthorization of the children's health insurance program (SCHIP), the ethics reform bill, a rail safety improvement act, and two appropriations bills. In the 110th Congress, the procedure emerged as a viable alternative to conference committee for resolving differences with the House.

To be clear, the new leadership practice was filling the tree in connection with House amendments, not simply considering House amendments instead of appointing a conference committee. Since 1789, Congress has relied on the two formal means of resolving differences on House and Senate versions of legislation: conference committee and amendment exchange. Historically, conference committees have been used to resolve differences on major bills, where policy issues are complex and differences between the chambers are more likely to be greater. Amendment exchange was more likely to be used when differences between the chambers were comparatively small, although from time to time the chambers have used it to resolve their differences on major legislation as well.

In the 110th Congress, armed with the ability to fill the tree on motions to dispose of House amendments, lawmakers decided to use amendment exchange more frequently to reach bicameral agreement on major legislation. In fact, the use of conference committee dropped precipitously.[26] The ability to fill the tree is key from the majority's perspective, because only by filling the tree is consideration of a House amendment comparable to the consideration of a conference report. Conference reports are privileged for consideration, and they cannot be amended. Similarly, House amendments are privileged for consideration, but only if the majority leader then "fills the tree" are amendments precluded (at least temporarily).[27]

It is worth emphasizing that, regardless of the formal parliamentary mechanism chosen (conference or amendment exchange), in the contemporary Congress the chambers generally resolve their differences through informal, bicameral discussions that might resemble conference committee meetings even in cases when neither house has officially appointed conferees to consult over a bill. Once the interested legislators have negotiated an acceptable compromise through these discussions, the compromise can then be embodied in an amendment between the houses or, if conferees have been formally appointed, in a conference report. In this way, the difference between an amendment exchange and a conference committee is not necessarily in the way a policy compromise is reached, but in the formal parliamentary steps taken after the principal negotiators have agreed to a compromise.

Not surprisingly, senators disagree about why leadership chose to resolve bicameral differences through amendment exchange more frequently in the 110th Congress. Part of the explanation lies in the difficulty of arranging for a conference in the Senate. In the absence of unanimous consent, arranging to send a measure to conference committee has the potential to be very time-consuming. Three debatable motions must be separately considered and agreed to, and Senators can also offer an infinite number of debatable motions to instruct conferees. Senators sometimes object, or threaten to object, to unanimous consent requests to take the actions necessary to expeditiously send a bill to conference. Since the 107th Congress (2001-2002), leaders (from both parties) complained that the frequency of these objections appeared to be rising.

In some cases, Senate leadership responded to objections to sending a measure to conference by pursuing resolution of the chamber differences through informal negotiations, and then considered the compromise as an amendment between the houses. In fact, the first instance in which the majority leader filled the tree on a motion to dispose of a House amendment was in

[26] We are not implying that all measures that would otherwise have gone to conference were resolved through amendment exchange with the Senate majority leader filling the tree. In some instances, legislation that perhaps would have gone to conference was resolved through amendment exchange without a full tree; in other instances, one chamber simply considered a bill from the other that was the product of informal bicameral negotiations.

[27] Otherwise, if the majority leader proposed to agree to the House amendment, another senator could offer a motion to agree to the House amendment with a further Senate amendment. It would then be in order for a senator to move an amendment to that. This second-degree amendment is not an amendment between the houses, or a "round" in the amendment exchange; it is a Senate floor amendment proposed to a Senate amendment to a House amendment. The Senate might agree to several floor amendments to the Senate amendment to the House amendment. (Now you see why we put all this in a footnote.) Filling the tree temporarily prevents such floor activity, and if cloture is invoked on the underlying motion, then after the minimum 30 hours of debate, the motions in the tree would be voted on without an opportunity for senators to offer other proposals.

connection to a bill that the minority leader had objected to sending to conference committee.[28] The measure, versions of which had passed both chambers, concerned the transportation of minors across state lines to receive abortions. According to press reports, conservative interest groups had pressured the majority leader into bringing up the bill for a vote.[29] Unable to secure unanimous consent to arrange for a conference, party and committee leaders from both chambers met informally to negotiate the differences between the House-passed bill and the Senate-passed bill, and then drafted a third version that the House approved as a full-text substitute amendment to the Senate bill. Two days before the Senate adjourned for the 2006 midterm elections, the majority leader called up this House amendment, proposed that the Senate agree to the amendment, filled the tree, and filed cloture on the motion to agree. Two days later, the Senate failed to invoke cloture by a vote of 57 to 42.

On this and other occasions the majority leader appears to have used amendment exchange as a result of objections to arranging for a conference. But, as minority party senators sometimes pointed out, this was not the only procedural reason for avoiding a formal conference. Senate rules place requirements on conference reports that do not apply in an amendment exchange. Perhaps most prominently, amendments between the houses are not subject to the same constraints as conference reports with regard to their content. Implicit in the rules of both chambers is the requirement that conferees resolve the differences committed to them by reaching agreements within what is known as "the scope of the differences" between the House and Senate versions of the bill. Rulings and practices of the Senate allow the inclusion of matter in a conference report as long as it is reasonably related to the matter sent to conference in either the House or Senate versions of the legislation. This rule restricting the content of a bicameral compromise does not apply to amendments between the houses.

Furthermore, in the 110th Congress, the Senate changed the manner of disposing of points of order raised under this long-standing rule, effectively providing an opportunity for Senators to vote on whether to waive the rule and permit the inclusion of provisions not sufficiently related to the matter committed to conference. The opportunity for a separate vote in relation to matter outside scope does not exist when the Senate is considering a House amendment because the rule does not apply.

One example might help to illustrate the effect of the scope rule, and why the ability to avoid it can be viewed as a leadership tool. In the 110th Congress, the majority leader called up a conference report on the bill making appropriations for the departments of Labor, Health and Human Services, and Education (Labor/HHS bill). During the conference on the bill, committee and party leaders from both chambers had agreed to include in the conference report all the provisions from the bill making appropriations for military construction and the Veterans Affairs Department (Mil-Con). The intent of combining the appropriations measures, at least as reported in the media, was to make it more difficult to oppose the Labor/HHS bill. While the President

[28] On August 3, 2006, the minority leader objected to a unanimous consent request propounded by the majority leader to send the measure to conference (*Congressional Record*, pp. S8671-S8672).
[29] *CQ Today*, Sept. 28, 2006, "Frist Pleases Conservatives With Last-Minute Senate Vote on Abortion Bill" Keith Perine.

had threatened to veto the Labor/HHS bill, it was hoped he would not do so if the bill also contained the funding he supported for military construction and veterans.[30]

When the conference report was called up, however, a senator made a point of order against the conference report on the grounds that the Mil-Con provisions were not within the scope of the differences between the two chambers versions of the Labor/HHS bill. The majority leader moved to waive the point of order, but the motion failed to get the necessary three-fifths vote (normally 60 senators). As a result, the plan of combining a widely supported appropriations bill with a less popular appropriations bill failed, and the President did indeed eventually veto the Labor/HHS bill.

By presenting a text negotiated by House and Senate leaders as an amendment between the houses, instead of as a conference report, the majority leader can avoid the scope point of order and the need to secure 60 votes to waive it. Of course, in the face of opposition, the support of 60 senators is still needed to bring the package to a vote. Some might believe that the same 60 senators who would vote to end debate on a matter would also agree to waive any points of order raised against it. While this might be true in some cases, it is important to keep in mind the nature of the question senators are voting on. In the case of a motion to waive, the vote may essentially be whether or not to include a specific provision in a package. Senators might be expected to vote based on their preferences regarding that provision (or would at least prefer not to have to vote contrary to their preferences). The vote to invoke cloture on the matter, however, is a vote on whether or not agreeing to that full package is better than taking no action at all. Particularly after separate action by each chamber and months of bicameral negotiations, the final product is often presented—frequently just before a recess—as the best that could be achieved. In the 110th Congress, the majority leader called up two appropriations measures using amendment exchange procedures, both of which would have been considered to contain provisions outside the scope of the matters committed to conference.[31]

The scope restrictions are not the only Senate rules that apply to conference reports, but not to amendments between the houses. The majority leader could potentially expedite the process of resolving differences by avoiding some of these other requirements. For example, formal conference committees are expected to hold at least one public meeting, and more documentation is required at the conclusion of conference negotiations than for amendment exchange. In addition, Senate rules require that a conference report, but not a House amendment, be made available to Members and the general public on a congressional, Library of Congress, or Government Printing Office website 48 hours before the vote on the report.

Amendment exchange, however, does not always have a timing advantage over conference committee. If, for example, the majority wishes to agree to a House amendment with a Senate amendment, the reading of the Senate amendment can only be waived by unanimous

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[30] David Clarke, "Senate Refused to Accept Combined Measures, Dealing Blow to Democrats," *CQ Today*, Nov. 7, 2007; Bart Jansen, "GOP Employs New Senate Rule to Force Everyone Off 'Mini-Bus,' *CQ Weekly*, Nov. 12, 2007.

[31] The majority leader offered the text of what would become a supplemental appropriations act as an amendment to a House amendment to a Senate amendment to a House bill that originally was making appropriations for military construction and the veterans affairs department, and filled the tree. On a later occasion, he presented a consolidated security and disaster assistance appropriations bill as a House amendment to a Senate amendment to a House bill that originated as a homeland security appropriations bill, and filled the tree.

consent; under a standing order of the Senate, conference committee reports are not required to be read. Furthermore, amendment exchange is more likely to involve consideration of multiple questions, and therefore might require filing multiple cloture motions.[32]

It bears emphasizing that these procedural differences are not the only factors that influence the decision on how to resolve differences between the chambers. Other differences between the two methods abound, and strategic decisions about how to resolve matters with the House take into account timing, the nature of policy disagreements, and the roles of likely negotiators, among many other factors. And it is important to remember that the House plays an equal role in deciding how differences will be resolved between the chambers, and House procedures can also influence the decision.[33]

In summary, in the 109th Congress the majority leader appears to have developed a new tool that was then used with some frequency in the 110th Congress: offering all the available motions in relation to the disposition of a House amendment and filing cloture. In contrast to filled trees on legislation, when the majority leader filled the tree in relation to a House amendment, cloture typically was successfully invoked without having to withdraw motions and negotiate further. This practice has at least two effects that have the potential to be used to serve the goals of the majority leader. First, filling the amendment tree on a House amendment allows the Senate to consider a policy proposal without agreeing to a motion to proceed and without considering amendments to it. Second, filling the amendment tree on a House amendment can be used as an alternative to convening a formal conference committee and meeting the requirements for conference reports specified in Senate rules.

Unanimous Consent Agreements Setting 60-Vote Thresholds

While the majority leader has tools at his disposal (e.g., filling the tree) to manage the uncertainty present in a complicated floor amending situation, there are other situations in which he can expedite the consideration of Senate business via a process that necessarily involves broader negotiations.

Clearly, Senate rules and practices are such that if all senators aggressively used the variety of procedural prerogatives available at each opportunity, the Senate would rarely agree to legislation of much consequence. Senators are cognizant of this reality and are therefore frequently willing to voluntarily waive their procedural rights under the rules (in regard to a particular measure) in the interest of allowing the Senate to dispense with matters more quickly or efficiently. Of course, individual senators often give up certain of these prerogatives on a daily basis by, for example, deciding not to take actions that could delay or prevent a vote. But the Senate as a whole does this more formally via the adoption of complex unanimous consent (UC)

[32] Under contemporary conditions, conference committee reports nearly always recommend that the chambers agree to a single amendment. The Senate therefore only takes a single action: approval or disapproval of the conference report. In contrast, if the House sends multiple amendments to the Senate, it will not always be possible for the Senate to take a single action to resolve differences with the House. See, for example, the consideration of H.R. 3221 and H.R. 2642 in the 110th Congress.

[33] For more information on the larger decision-making context, see CRS Report RL34611, *Whither the Role of Conference Committees: An Analysis*, by Walter Oleszek, especially pp. 23-31.

agreements, which are orally propounded on the floor, typically by the majority leader or his designee.

Through complex UC agreements, the Senate can (if no one objects) put parameters on the consideration of a measure. Unanimous consent agreements have been in use since the nineteenth century, and majority leaders have used them extensively in the post-WWII period; their use is a fundamental to the way the modern Senate operates.[34] In modern practice, the agreements are binding and enforced by the presiding officer and can only be modified by unanimous consent; a large body of Senate precedents governs their use and application.

By their nature, UC agreements are used for the purpose of expediting Senate consideration of a measure; they are sometimes known as "time agreements" because the Senate most frequently uses them so as to operate without the implications of extended debate. But they also are used to serve a variety of other purposes besides putting limitations on debate. For example, they often provide other limitations on the amending process or preclude the availability of certain motions or points of order against a measure.[35]

In the last couple of Congresses, one element of UC agreements – though not entirely new – appears to have become more attractive to Senate leadership (and since they are by nature negotiated broadly, presumably more attractive to individual senators, as well). Recently, UC agreements have sometimes included a provision that a matter (motion, amendment, bill, or nomination) must receive 60 votes (3/5 of the full Senate) to be adopted rather than the default majority (of those present and voting) necessary for almost all decisions other than cloture (or certain decisions that are constitutionally or statutorily subject to a higher threshold). When an agreement subjects an amendment to the 60-vote threshold, the agreement typically also provides for the withdrawal of the amendment if this supermajority threshold is not met.[36] This makes 60 votes the threshold for both positive and negative disposition.

It is difficult to say with any certainty when this practice began. We have identified one instance that seems at least a precursor to the current practice. In the 102nd Congress (1991-1992), the Senate – in a hurry to conclude consideration of a defense authorization bill – agreed by UC to consider an amendment adopted if 60 senators agreed to invoke cloture on the amendment.[37] While the UC agreement did not explicitly set a 60-vote threshold as today's cases typically do, it did have the same effect – that is, it set up a supermajority vote by which an

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[34] See Robert Keith, "The Use of Unanimous Consent in the Senate," in *Committees and Senate Procedures: A Compilation of Papers Prepared for the Commission on the Operation of the Senate*, (Washington: GPO, 1977), and CRS Report RL33939, *The Rise of Unanimous Consent Agreements* by Walter Oleszek, Mar. 14, 2008.

[35] For an analysis of development of UC agreements to include a variety of more individualized elements, see Steven S. Smith and Marcus Flathman, 1989, "Managing the Senate Floor: Complex Unanimous Consent Agreements since the 1950s," *Legislative Studies Quarterly*, vol. XIV (Aug.), pp. 349-374.

[36] One example (in relation to S.2248, legislation to amend the Foreign Intelligence Surveillance Act) included this language: "provided further, that the next 3 amendments listed be subject to a 60-affirmative vote threshold, and that if it does not achieve that threshold, then the amendment be withdrawn: Feinstein amendment No. 3919, 2 hours; Cardin amendment No. 3930, 60 minutes; Whitehouse amendment No. 3920, 60 minutes..." (*Congressional Record*, daily edition Jan. 31, 2008; p. S536).

[37] The UC agreement disposed with another elements required by Rule XXII – for example, it provided that the cloture motion be deemed filed. The amendment, offered by Senator Tim Wirth (D-CO) related to the availability of abortion services on overseas military bases. It ultimately received 58 votes.

amendment was agreed to (if, in this case, 60 senators voted to end debate on it). It appears plausible that this device may have evolved into the current practice by transferring the 60 vote requirement of cloture directly onto the final vote, enabling all explicit references to cloture to be dropped.

Due to the wide variety of ways that such an agreement could be worded when propounded on the floor (and the fact that roll call vote records do not consistently identify matters subject to the higher threshold), we cannot with certainty identify the first case of an agreement that explicitly sets a 60-vote threshold for adoption of a matter. Electronic sources prior to the 104th Congress (1995-1996) that record procedural floor steps/votes (e.g., www.congress.gov) are not very reliable, but we have thus far found no examples in the 103rd Congress (1993-1994). In the 104th, however, the majority leader propounded two such agreements with a 60-vote threshold (on two different motions to proceed to the Labor-HHS-Education appropriations bill). Sources of procedural steps are more reliable in recent congresses, and we are fairly confident that none occurred in the 105th (1997-1998) through 108th (2003-2004) Congresses.[38]

But in the 109th Congress, the majority leader negotiated such an agreement on multiple occasions; in that congress, we have found nine recorded votes on which a 60-vote threshold was required pursuant to a UC agreement.[39] Six of the nine votes were in regard to adoption of an amendment; the other three related to passage of a bill (each on the topic of stem cells). The six amendment votes were on three different underlying measures (a bankruptcy bill, an appropriations bill, and a major authorization bill).

In the 110th Congress (2007-08), the frequency with which the Senate included a 60-vote threshold in a UC agreement rose sharply. We have found 51 recorded votes that were subject (pursuant to a UC agreement) to a 60-vote margin in that congress; these 51 cases were associated with 24 different underlying matters (predominantly bills, as well as three resolutions and two other motions).[40]

As seen in Table 2, in both Congresses, the 60-vote agreements were more often applied to individual amendments than to final passage votes on bills or resolutions (or full-text

[38] Sources on roll call votes (e.g., the Senate's vote webpage, and CQ) have somewhat recently begun noting votes subject to a 60-vote margin, but they either do not extend prior to the 110th Congress, or do not consistently correctly identify each case. The explanation of bill status found on www.congress.gov, is also hit-or-miss on providing such information, and is increasingly unreliable going back in time. Searches of the *Congressional Record* to find possible instances include search for variations on the phrase "60 votes," and "subject to," among others.

[39] This and all other estimates of frequency do not include votes where 60 votes were already required for agreement to the question at hand – e.g., pursuant to a cloture motion or, for example, in relation to certain Congressional Budget Act point of orders for which 60 votes are required to waive – unless the agreement specified that as a result of receiving the required 60 votes, the motion or amendment was then deemed to be adopted. In addition, we do not include instances in which an amendment was eventually disposed of by a method other than a roll call vote (e.g., adopted by voice vote or withdrawn), even if the Senate at some earlier point had subjected its adoption to a 60-vote threshold.

[40] Thus far in the 111th Congress, the Senate has used the technique at an only slightly slower pace than in the 110th at this same stage. We have observed 11 instances of votes subject to this type of 60-vote threshold (including – for the first time in the period we've examined – two nominations), most of which have been on bill passage rather than on agreeing to an amendment. (By the first August recess in the 110th, we had seen 13 cases.)

substitutes to them); however, this technique was employed much more heavily on amendments in the 110th than in the 109th. But as to the extent to which votes subject to the supermajority threshold did in fact clear that hurdle, almost 82 percent of amendments were not agreed to; on the other hand, the handful of bills, full-text substitutes, and resolutions subject to the supermajority threshold were quite likely to be agreed to – all three in the 109th and nine of 11 in the 110th.

These cases, taken together, provide some insight into the circumstances under which the Senate ends up agreeing to a supermajority threshold provision. It is quite clear that the main purpose of this technique is related to managing competing demands for floor access – notably in regard to time spent on each matter. While 60 united senators can eventually achieve policy goals in the Senate, the time involved when a determined minority (consisting of even just one senator) forces the use of cloture is quite significant, as explained in some detail earlier. Using a 60-vote adoption threshold can significantly expedite Senate business without asking opponents to give up the procedural rights that (if their numbers exceed 40) would allow them to prevent adoption. This logic is apparent even in the floor remarks surrounding the case from the 102nd Congress outlined above. Senator Daniel Coats (R-IN) outlined the advantages inherent in the UC agreement, saying, "I first of all want to thank the Senator from Colorado for his patience and his cooperation in arranging a procedure which allows us to debate this issue thoroughly but then to bring it to a vote of the Senate without the complication of asking our 100 Senators to sit through the evening and sit through the weekend deciding this issue. I think, given the fact that the Senate has debated and voted on this just a year ago and that Members are fully aware of the issue at hand, it is not necessary to go through that procedure."[41]

This type of UC could frequently be attractive for the political purposes of demonstrating that a proposal does have majority support – and would stand a chance at enactment – if only its opponents were not threatening a filibuster to prevent a vote. In the 110th Congress, a spokesperson for the minority leader referred to this purpose when he said, "It is a way that you can ensure that there is a vote on the substance of the bill. Both sides have an interest in either showing that a vote doesn't have support or that it could pass if it did have a chance."[42] Indeed, this is an attractive option when both sides want a direct vote on the substance – regardless of what the final outcome may be.[43] (On the other hand, this type of UC is not an attractive option when either party wants to avoid forcing its members to take a clear position in an up-or-down vote; in those instances, the majority party would generally prefer a motion to table as a way of disposing of the amendment by a majority vote, or might try to keep it off the floor altogether, such as by using a filled tree.) However, the data indicate that this tool is not frequently used simply to give senators an expeditious vote on a proposal of parochial interest as a way to establish that it "could pass if it did have a chance." Of the nine cases in the 109th Congress, only one unsuccessful matter received a majority of votes cast; in the 110th, 14 of the 51 votes reached that threshold. (Those 14 make up 42 percent of the 33 that did not reach the 60-vote threshold.)

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[41] *Congressional Record*, daily edition, Aug. 2, 1991; p. S11948.

[42] Jonathan Allen, "Agreement on Supermajority Vote May be Key to Reid-McConnell Relationship." *CQ Today*, Apr. 9, 2007.

[43] There can be clear position-taking benefits for both sides in this scenario. A illustrative example of this situation is consideration of the stem cell issue in the 109th Congress, in which the final passage votes on several bills were held to the 60-vote threshold (and about which the minority leader was speaking in the quote above).

Instead, these UC agreements are predominantly used on matters related to the must-do legislative agenda (at least from the perspective of the majority party – and in some instances, also include measures on which the majority of the minority party wants to see final passage). It is in these circumstances that the connection between this practice and those discussed earlier in regard to cloture and filling the amendment tree becomes clear.

Specifically, that a determined minority does not have the votes to successfully prevent a vote on a matter does not negate the advantages of waging a filibuster. The advantages of forcing a cloture process (on, for example, the motion to proceed, or on legislation) relate to the opportunity costs it imposes on the majority. If opponents can sufficiently raise the (time-related) costs of bringing a matter to the floor, proponents still have to weigh the costs of using up precious floor time to overcome the filibuster.

But consider the situation when the measure in question is of high enough salience to the majority that they would push the matter regardless of a filibuster threat and the additional time that invoking cloture would entail. Add to this the current context within which the majority leader can, as explained above, (1) withdraw a cloture motion immediately after cloture is filed on it (so as to use the intervening days on other matters), and (2) fill the amendment tree and (in combination with cloture), limit the number and/or type of amendments that may be considered. In this situation, opponents who could not win a cloture vote have every incentive to enter negotiations for a process that will allow votes on controversial proposals without requiring a full-fledged cloture process. Rejecting an agreement to specify allowed amendments (and subject them to a 60-vote threshold) may induce the majority leader to fill the tree and file cloture, thereby entirely precluding opportunities to offer certain kinds (e.g., non-germane) amendments. Mounting a filibuster on measures of this type also may bring to bear additional political costs associated with being labeled obstructionist. Certainly, these are situations in which a 60-vote UC agreement makes the most sense for all involved. Indeed, one could speculate that the increase in 60-vote UC agreements between the 109th and 110th Congress is related to the increased use by the majority leader of opportunities to fill the tree.

It does seem that the cases from the 109th Congress typically involved limited instances when two or more alternatives are subjected to a 60-vote threshold in order to allow votes on "dueling" propositions that when offered as amendments could delay an important bill (e.g., an appropriations bill or a defense authorization bill). For example, four of the six amendment cases involved alternative options for raising the minimum wage (one in each pair offered by the majority, and one by the minority).

On the other hand, situations in the 110th Congress involving amendments subject to the higher threshold typically involved very important or high profile legislation that qualified (at least for the majority party) as "must-do" – things like emergency action on the economy, regular and supplemental appropriations bills, major authorizations (the farm bill, defense, intelligence surveillance), and Iraq policy.[44] These are likely measures on which the majority leader would

[44] In the 110th Congress, of the underlying 24 matters on which a 60-vote UC was associated, only four did not pass the Senate. (These instances included the immigration reform bill (S.1348) considered in June, 2007; while the Senate ultimately did not complete action on the bill, the majority party clearly had hoped – and given the support of

have aggressively used the procedural tools available to expedite Senate action (including, perhaps, filling of the amendment tree).[45] Knowing this, senators could be inclined to think that a 60-vote UC agreement for specific amendments was most likely to offer the certainty of a vote on particular amendments.

It is worth noting that of the 60 cases in the 109th and 110th Congresses, only once did the Senate subject a motion to proceed to a 60-vote margin. Certainly (as noted earlier), there was no dearth of cloture motions filed on motions to proceed in these congresses, so theoretically, we might expect to see more 60-vote thresholds applied to motions to proceed since such a move would also seem to serve the time-saving purpose of such agreements. But as noted above, the Senate already engages in a practice that limits the time expended on a filibuster of a motion to proceed; the leader simply withdraws the motion to proceed after filing cloture so that the Senate can use the intervening days on other matters. Under this practice, a 60-vote threshold is not really necessary for time management purposes on motions to proceed.[46]

While we cannot conclusively identify the first UC agreement setting a 60-vote threshold, the Senate has clearly provided for this situation more frequently in the last two congresses, during which its use arguably became a standard option under consideration on a significant number of important measures. When asked about the mechanism's notable use (only months into the 110th Congress), the majority leader's spokesperson treated it as less than innovative, telling *CQ*, "In the end, anything remotely controversial needs 60 votes. This is just another way to structure the debate."[47] Even as far back as the 105th Congress (during which we have found no actual examples of its use), the 60-vote threshold by UC was clearly contemplated as an option. The minority leader said, when during debate on the transportation authorization, "We recognize that every amendment and the bill itself would be subject to the rules of the Senate which means you have to have 60 votes. It would seem to me that if you don't get 60 votes, you pull the amendment and would move on to another one. If we filed cloture on an amendment or required a 60-vote threshold, you could get through these amendments pretty quickly."[48]

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the President, perhaps expected – to do so. Another instance was a joint resolution calling for withdrawal of military troops from Iraq.) Of the 20 underlying measures the Senate did pass, 13 were ultimately enacted. One of the ultimately-enacted cases (the 2008 defense authorization bill) was vetoed, but later enacted via another legislative vehicle. In one additional instance, a presidential veto was not successfully overridden.

[45] Indeed, four instances of filled trees occurred on a bill on which there was also a 60-vote UC agreement on some associated action (an amendment, a motion to refer, or a motion to concur with an amendment).

[46] As noted earlier the (only) two cases from the 104th Congress involved 60-vote agreements on two motions to proceed – both to the Labor-HHS appropriations bill for FY1996. That situation was unusual in that the President had issued a veto threat against the bill and some senators supported completing action on the bill with the expectation of a veto – with the idea that they would then negotiate another vehicle anew. In this situation, Majority Leader Dole's UC request was clearly made in the interest of time management. He said, in part, "Let me first explain to all Senators that we have a problem here because we could not come together. There would have been a filibuster on a motion to proceed. In order to have a motion to proceed, it takes 60 affirmative votes to shut off debate so you can go to the bill. That also requires that you set up getting a cloture motion signed. Then it must be filed and there must be one intervening day of the Senate's session. We are within a couple of days of completing our work on the appropriations bills prior to the end of the fiscal year. It seems to me the agreement I will ask for in a minutes seems to achieve this 60-vote test without having to file cloture motions to comply with all other provisions of Rule XXII." (*Congressional Record*, daily edition, Sept. 27, 1995; pp. S14406-S14407).

[47] Jonathan Allen, "Agreement on Supermajority Vote May be Key to Reid-McConnell Relationship." *CQ Today*, Apr. 9, 2007.

[48] *Congressional Record*, daily edition, Oct. 23, 1997; p. S11018.

The Budget Reconciliation Process

Any discussion of procedural tool used by majority leadership must include coverage of the reconciliation process. From the outset of the 111th Congress, the health care reform debate has been permeated with the persistent threat to use reconciliation, a procedure sometimes simplistically portrayed as a way for the majority party to pass a bill in the face of an obstructive minority. Yet senators in both parties claim it cannot (or should not) be done: some argue that the result of the restrictive reconciliation procedures would be an incomprehensible health care reform bill; others argue reconciliation was not intended for such a wide-ranging policy initiative as health care reform.

The purpose of this section is to discuss the extent to which reconciliation is majoritarian. After briefly reviewing reconciliation procedures and its majoritarian elements, it presents some limited evidence from the roll call record suggesting that in recent years, in contrast to the first decade of its use, a simple majority has been able to achieve certain policy goals through the reconciliation process. This section concludes, however, with a discussion of certain procedural aspects of the reconciliation process that limit its effectiveness as a majoritarian tool.

Budget reconciliation is an optional two-step process Congress may use to make changes to existing law affecting mandatory spending, revenues, or the debt limit. The first step is that Congress includes reconciliation directives in a budget resolution directing one or more committees in each chamber to recommend changes in statute to achieve the levels of mandatory spending, revenues, or debt limit (or a combination thereof) agreed to in the budget resolution. The budget resolution itself is considered under expedited procedures, allowing a simple majority to initiate the budget reconciliation process.

Second, each instructed committee develops legislative recommendations to meet its reconciliation directives and either reports its legislative recommendations to its respective chamber directly or transmits them to its respective budget committee.[49] In the latter case, the legislative language recommended by committees is packaged "without any substantive revision" into an omnibus budget reconciliation bill by the House and Senate Budget Committees.

Once the reconciliation legislation is reported in the Senate, consideration is governed by special procedures. It is these procedures that, perhaps more than any other procedure discussed in this paper, have the potential to provide the majority party the ability to achieve its policy goals. The primary reason for such potential is the fact that debate on reconciliation legislation is limited to 20 hours on initial consideration and 10 hours on any conference report. As a result, individual senators, or even a determined minority of senators, cannot engage in indefinitely extended debate on reconciliation legislation. The practical effect of this debate limitation is that it is not necessary to build a coalition of at least 60 senators in order to invoke cloture and bring

[49] The Congressional Budget Act specifies two options for the submission of legislative recommendations to comply with reconciliation directives: (1) if one committee is instructed, the committee reports its legislative recommendations to its parent chamber directly; or (2) if two or more committees are instructed, the committees submit their legislative recommendations to their respective Budget Committee.

the debate on reconciliation legislation to a close. Furthermore, a reconciliation bill is privileged, which means the question to take up the bill is not subject to debate.

In addition, the Budget Act prohibits floor amendments that are not germane to the reconciliation measure. This germaneness requirement provides the reconciliation measure procedural protection from senators, or even a majority of senators,[50] attempting to add policies generally beyond the scope of the policies recommended by the instructed committees. With the debate limitation and the germaneness requirement, the reconciliation process effectively allows a simple majority of senators to initiate, consider, and pass policy proposals.

Yet despite these procedures that grant the potential for a majority to work its will in the Senate, it is not the case that reconciliation measures always or even usually pass with less than a three-fifths vote. Although roll call votes are a limited and likely insufficient measure of the extent to which reconciliation is majoritarian, they remain suggestive of the nature of decision making under the reconciliation process. Since 1980, when reconciliation was first used in its current form,[51] the Senate has considered 22 measures under the expedited procedures (see Table 3). Of these 22 reconciliation bills, the Senate approved 13 with three-fifths or greater support, suggesting, perhaps, that the majoritarian procedures were not necessary (because cloture could have been invoked).

It does appear, however, that the use of reconciliation procedures to pass measures that could not garner 60 votes has increased. Since 1999, five of the seven reconciliation bills were approved with less than 60 votes. Since 1990, eight of the 13 reconciliation bills were approved with less than 60 votes. From 1980 to 1989, only one of the nine reconciliation bills was approved with less than 60 votes.

It is worth noting that in every case except one, when the Senate approved a reconciliation bill with less than 60 votes, the budget resolution that initiated its consideration was also approved with less than 60 votes. Although the budget resolution contains much more than reconciliation instructions, the votes nevertheless can be expected to reflect, in part, positions on the anticipated reconciliation bill. It appears, therefore, that in nearly all of these instances, the majority pursued the passage of policy proposals under reconciliation procedures in the face of known opposition numerically strong enough to defeat cloture.[52]

In four instances, however, the Senate approved the budget resolution with less than 60 votes, but approved the resulting reconciliation bill with 60 votes or more. This pattern could reflect that senators opposed the use of reconciliation when only broad parameters were known, but threw their support behind the implementing reconciliation legislation as the details became

[50] A motion to waive the germaneness requirement requires the affirmative vote of three-fifths of senators duly chosen and sworn (60 senators if there are no vacancies). Therefore, even a majority of senators would not be able to overcome the point of order.

[51] The Senate also debated a bill under reconciliation procedures in 1977, but the House did not consider the measure as a reconciliation bill. This is also the only time the Senate considered a reconciliation bill pursuant to instructions in a second budget resolution.

[52] In one instance (1990), the budget resolution received more than 60 votes and the reconciliation bill did not, perhaps suggesting that senators may have been endorsing a broad agreement on budget matters, but withheld their support when the details were implemented in the reconciliation measure.

known. Without further investigation, it is difficult to draw any definitive conclusions from the roll call data. The majority could have earned support from minority party senators through negotiations and compromise. On the other hand, the vote results could suggest that the majority party successfully framed the legislation as one that senators would rather be on record as for rather than against, regardless of the process by which it was considered.

The fact that sometimes reconciliation bills do enjoy supermajority support might suggest that it is other procedural features of the reconciliation process that are pertinent to the way it has (or can) be used. Like other potential leadership tools in the Senate, the reconciliation process has its limitations as a majoritarian tool. Indeed, if it did not have some constraints on its use, a majority in the Senate would likely use it for all its major policy initiatives.

First, current interpretation of the reconciliation procedures limits the number of reconciliation bills in any given year. As noted above, the purpose of reconciliation is to change existing laws affecting mandatory spending, revenues, and the debt limit. The budget resolution may initiate one reconciliation bill affecting all these budget components or three separate reconciliation bills, each affecting one component. The budget resolution cannot initiate multiple reconciliation bills affecting a combination of these components. That is, only one reconciliation bill dealing with multiple components can be considered each year. Thus, for example, the budget resolution can initiate one spending reconciliation bill, one revenue reconciliation bill, and one debt limit reconciliation bill, or one dealing with a combination of these components. In combination with the recently added requirement that a reconciliation bill cannot increase the deficit,[53] the majority is effectively limited to one reconciliation bill per year for any significant policy initiative that involves, in any way, federal spending and revenues.

Another constraint on this arguably majoritarian tool is that the reconciliation process requires committee involvement, which limits the ability of the majority leadership to dictate the content of reconciliation bills. In order to be considered as a reconciliation bill under the expedited procedures, the legislation must be reported by the Budget Committee (or by a single instructed committee, if provided by the budget resolution). An individual senator, even the majority leader, cannot introduce and make available for floor consideration a reconciliation bill.

In addition, Senate committees traditionally operate on a consensual basis, and the reconciliation process does not change committee procedures. In responding to reconciliation directives, a committee must mark up legislation and report it to the full Senate (or transmit it to the Budget Committee if more than one committee is involved). The vote to report (or transmit) requires a majority vote, a quorum being present, and only two Senate committees (Finance and Judiciary) have a means to bring debate to a close if some committee members wish to continue discussions on the legislation.

The role of committees in this process is further enhanced by the fact that reconciliation directives are extremely broad. The reconciliation directives contained in the budget resolution specify budget targets that must be achieved by fiscal-year time periods; they do not specify any particular policy changes. In fact, Senate precedents do not allow the reconciliation directives to

[53] Section 202 of S.Con.Res. 21, the FY2008 budget resolution (110th Congress), approved May 17, 2007.

specify the laws or "line items" a committee must change in order to achieve the budget targets.[54] Even though party leaders typically assume certain policy proposals will be a part of the reconciliation legislation, technically the instructed committee may recommend changes to any existing law under its jurisdiction to meet its budget targets. On occasion, committees develop reconciliation legislation that differs, sometimes in significant ways, from the policies envisioned by party leaders.[55]

Moreover, when the reconciliation measure is considered on the Senate floor, amendments must be germane.[56] The germaneness requirement under Senate precedents is quite strict, preventing senators from offering an amendment that would expand the scope of the bill, even if it concerns a relevant subject matter. Consequently, a committee's influence on the contents of any reconciliation legislation continues during floor consideration.

A third limitation on the majoritarian nature of the reconciliation process is that, unlike the cloture rule, "debate," rather than "consideration," is limited to 20 hours. What this means is that after the debate time has expired, senators may continue to offer amendments and motions to recommit with instructions, but they will not be debated. Instead, after each amendment or motion is offered, the presiding officer will immediately put the question to a vote, which can lead to a lengthy series of votes sometimes referred to as a "vote-arama."[57] Since 1990, senators have continued to offer amendments after debate time had expired during the consideration of every reconciliation measure except two. In fact, in at least seven cases, over half of the amendments to the bill were offered after debate time had expired.

Although we do not want to state this point too strongly, the lack of restrictions on the number of amendments that can be offered could have at least two effects on the ability of a majority to control consideration. First, senators retain the ability to offer and receive a vote on alternative policy proposals,[58] provided that any text in the bill remains unamended. Put another way, the reconciliation procedures do not have the same effect of restricting the amendment process as do filling the tree and invoking cloture on a measure. In addition, it is at least conceptually possible for a senator or determined minority to prolong the consideration of a reconciliation bill by continuously offering amendments—one could say, a filibuster by amendment. Although the Senate has never failed to reach a final passage vote on a reconciliation bill, the possibility of prolonged consideration of the bill has the potential to affect negotiations.

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[54] *Riddick's Senate Procedure: Precedents and Practices*, by Floyd M. Riddick and Alan S. Frumin, S.Doc. 101-28, 1992, p. 628.

[55] For a recent example, see: (1) Steven T. Dennis, "Senate GOP Split Over Plan That Would Reduce Cut in Medicaid Spending," *CQ Today*, Aug. 24, 2005; and (2) Kate Schuler and Joseph J. Schatz, "Search for Medicare, Medicaid Cuts Continues, With No Firm Answers Yet," *CQ Today*, Oct. 6, 2005.

[56] Amendatory instructions related to a motion to recommit are not required to be germane if a committee's legislative recommendations are not in compliance with its reconciliation directives (but still must be within the jurisdiction of the relevant committee).

[57] Even after debate time has expired, the Senate typically agrees by unanimous consent to allow for two minutes per amendment for explanation.

[58] The vote may be directly on the amendment or motion, or it may be on a motion to waive any applicable points of order.

Finally, and perhaps most significantly, reconciliation legislation is prohibited from containing "material extraneous to the instructions to a committee."[59] This restriction, known as the Byrd rule, limits the policy proposals for which the reconciliation procedures can be used. One reason this is such a significant restriction is that it applies to all stages of the legislative process. A point of order enforcing the rule may be made against provision contained in the reported bill, an amendment, or a conference report. In addition, unlike most points of order in the Senate, the Byrd rule point of order can be used to strike out the offending provision. When a point of order is sustained, instead of preventing the consideration of the bill, amendment, or conference report, the legislative text is appropriately modified to exclude the provision that violates the rule. As a result, the supporters of a proposal cannot protect a provision by including it with highly popular provisions or burying it in the bill.

Although it is widely recognized that its restrictions on content are substantial, it is extremely difficult to determine in advance what would violate the Byrd rule. What is extraneous to budget targets (i.e., changes in spending, revenues, or debt limit) is not clear, and so the Byrd rule defines what is considered extraneous, by providing six definitions of extraneous. A provision is considered extraneous if it: (1) does not produce a change in spending or revenue; (2) produces a spending increase or revenue decrease when the instructed committee fails to achieve its reconciliation instructions; (3) is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation legislation; (4) produces changes in spending or revenues which are merely incidental to the non-budgetary components of the provision; (5) would increase the deficit for a fiscal year beyond those covered by the reconciliation legislation; or (6) recommends changes in Social Security.

If the reader made it through those definitions, then it may not be necessary to state that interpreting the Byrd rule is not a simple task. We have no intention of analyzing the operation of this rule, discussing in depth what each definition means, or how each definition has been applied.[60] One significant point to make, however, is that the rule is not mechanically applied; there is no clearly defined standard on which to base any judgment on whether or not a provision violates many of the criteria of extraneous matter.

Take, for example, the first definition that a provision is considered extraneous if it does not produce a change in spending or revenues. The definition seems simple and straightforward: if there is no cost to the provision, it is considered extraneous. The definition, however, is a bit more complex by also including as a change those changes in spending or revenues that result from "changes in the terms and conditions." In other words, what might appear to not produce a change in spending or revenues on its face might actually be a change in terms and conditions that results in a change in spending or revenues. That, of course, depends on what qualifies as a term or condition, and that is not so clear.

Given that there is no clear standard that can be mechanically applied, understanding the process for determining what violates the Byrd rule is necessary for understanding the opportunities of the majority to achieve its policy objectives. It is not likely that such

[59] Section 313 of the Congressional Budget Act.

[60] For information regarding the history and Senate actions related to the rule, see CRS Report RL30862, *The Budget Reconciliation Process: The Senate's "Byrd Rule,"* by Robert Keith, July 8, 2009.

determinations will be based on the isolated judgment of the Parliamentarian. If the past is any indication, it is likely that determinations will be made only after lengthy discussions with majority and minority staff—from both party leadership and the committee of jurisdiction. The Parliamentarian, after all, must rely on the subject matter expertise of staff for information on the impact of various proposals.

Ultimately, it is not the presiding officer, on the advice of the Parliamentarian, who decides what could be included in a reconciliation bill, but the Senate itself, by a supermajority vote in many cases. That is because the Byrd rule may be waived, like many Budget Act points of order, by the affirmative vote of three-fifths of senators duly chosen and sworn (60 senators if there are no vacancies).[61] The Senate, then, will effectively vote on whether or not to include provisions. Since 1985, when the Byrd rule was established, the Senate has voted to waive the Byrd rule 10 times, choosing to retain or include certain provisions in reconciliation legislation that presumably would have been considered extraneous.[62] Two of these waivers occurred on reconciliation bills that passed by less than 60 votes. That is, on these two occasions, a number of senators were willing to vote to allow extraneous matter, even though they ultimately did not vote in support of the reconciliation measure. Therefore, while senators could behave strategically, and exercise all their procedural rights and vote against motions to waive the Byrd rule regardless of their preferences on the policy, some evidence suggests that this is not always how senators vote.

In summary, the reconciliation process does involve certain majoritarian elements, providing the majority with a procedural tool to overcome some impediments to achieving its policy goals. The key element is the debate limitation on a reconciliation bill. The procedural advantages, however, are tempered by certain limitations. The limit on the number of reconciliation bills each year, the involvement and practices of committees, the ability of senators to offer unlimited number of amendments during floor consideration, and perhaps most significantly, the Byrd-rule restrictions on the content of a reconciliation bill all give the majority the incentive to seek a certain degree of bipartisan consensus. In this regard, this arguably majoritarian process actually more closely resembles how the Senate operates under its regular rules.

Implications

Many have observed that, during the past several decades, senators have become increasingly willing to fully exercise their procedural rights in attempting to prevent Senate approval of matters they oppose.[63] Over the same period, Senate leaders have made persistent efforts to develop and utilize rules, precedents, and practices that may afford them a means to move forward their legislative program (or at least to better facilitate Senate business and manage the floor agenda). These efforts may reflect majority party attempts to more aggressively control the floor – or, alternatively may indicate that the floor process has become more difficult to control exclusively though accommodative practices like unanimous consent. Of course,

[61] A three-fifths vote also is required to overturn, on appeal, the ruling of the presiding officer.
[62] *The Budget Reconciliation Process: The Senate's "Byrd Rule,"* pp. 20-29.
[63] The most thorough treatment of this change can be found in *The Transformation of the U.S. Senate*, by Barbara Sinclair (Johns Hopkins University Press, 1989).

frequent minority resistance to the majority agenda may also represent a response to more insistent pressure from the majority to efficiently prosecute its agenda. Given the likelihood that this process is mutually reinforcing, it seems fruitless to assign the impetus of the cycle to either the majority or the minority.

Of factors that may be driving this cycle, a change in the underlying logic of Senate rules that empower minorities is not one of them. The institutional reality has remained constant during this period. But in looking for external causes, some may speculate that recent decades have produced a heightened sensitivity among senators to the outside electoral context – or certainly less insulation from it – which may pressure both majority and minority to credibly demonstrate their commitment to supportive political interests in a more public way that is possible with a behind-the-scenes negotiated agenda process. Given the opaqueness of the negotiating process the Senate has more traditionally employed, individual senators (or party leaders) may need to more frequently resort to formal employment of procedural prerogatives if they wish to credibly demonstrate the intensity with which they are pursuing certain policy or political outcomes.

Aside from causes – about which we can only speculate – it seems quite clear that in the contemporary Senate, the majority leader's attempts to manage the floor agenda rely, in part, on certain procedural mechanisms, some of which appear only recently to have come into routinized use. Our point is not that these tools are more effective in driving a particular legislative outcome closer to what the majority party might prefer; this does not seem to be the case in a significant number of situations we have examined. Rather, what the tools we discuss have in common is their attractiveness as mechanisms to efficiently use the limited floor time available, and, when possible, to focus Senate attention on specific policy proposals that most effectively serve the majority party's policy and electoral interests. The latter impact – on agenda focus – necessarily involves both attempts to control what does come to the floor, as well as attempts to limit the extent to which other proposals gain access, as well.

As we note, several of the tools have been employed frequently enough that their potential use has now become an unstated context for the negotiations on many matters.[64] It is this reality that highlights a core principle of Senate leadership that we think is frequently overlooked, or at least underappreciated. Specifically, the influence of (and constraints on) the majority party leadership in the Senate can be very subtle. The ever present procedural concerns can structure the way in which senators try to pursue policy decisions (and perhaps also policy preferences). Specifically, each senator must weigh the costs of pushing for accommodation of his or her interests at every turn. For example, senators are imperfectly informed about the costs that the majority party is willing to bear to bring a particular measure to the floor; thus, senators may not know at what point demands for a longer and more unwieldy floor process will instead induce the majority to use procedural tools that set up a more restrictive process. Similarly, in

[64] We feel it is too early to draw conclusions – or even to speculate – as to the level of use of these techniques in the 111th Congress. (Leaders of each party have, however, publicly made statements linking an increased Democratic majority to a new negotiating context – in which, for example, the minority may be less frequently able to press their prerogatives and in which the majority may feel it less necessary to attempt to manage the floor process.) From our perspective, while the increase in majority margin is most assuredly a crucial change, the possibility of the majority leader using any of the techniques we've discussed will continue to directly affect the negotiations on a wide array of measures.

deciding when to use these tools to streamline the process, the majority also must be attuned to the costs of using these tools on the prospects of accommodation on that and future measures. The short-hand truism often applied to such situations is that "you have to pick your battles," and while the logic of the cliché is fairly clear, the strategic situation in which it applies to the decisions of senators and leaders in the Senate is uncommonly complicated.

In other words, we maintain that understanding the tools used to manage efficiency and agenda focus is not an "inside baseball" discussion only relevant to the mechanics for their own sake.[65] Instead, it is about understanding that when senators decide how to vote (or when to aggressively press their procedural prerogatives), their decision calculus may not be just based on a simple assessment of the policy proposal's relationship to the status quo, but instead is entangled with their not knowing precisely how any leadership-proposed limitations on an unfettered individualistic process connect to the achievement of policy and political goals. What Senate leaders may be doing (when using the tools we've identified) is trying to better leverage the uncertainty inherent in Senate legislating to serve majority party interests. As noted earlier, we may not be able to demonstrate a pattern of effects on policy outcomes per se, but we believe that the use of these tools may fundamentally alter the negotiating context within which senators operate – specifically, in a way that can bolster majority party goals. It is also clear that Senate leadership sees the advantages of these tools from this perspective.

From a broader perspective, it also seems worth considering the effects these techniques have on how the party's custodianship of the institution is viewed in the wider political context. As we note earlier, today's Senate party organizations are less insulated from popular demands than in the past. If the majority party can, through use of these tools, demonstrate that the institution is more engaged in addressing the issues of the day – by more expeditiously processing a wider (but focused) variety of legislative proposals – this may go a long way to convincing the party's supporters of its commitment to and competence in governing.

[65] This point is not meant to disparage the interest that many "inside baseball" discussions of Senate procedure hold for the authors of this paper (or, indeed, the "inside baseball" discussions of baseball that also sometimes draw our interest – typically for severe wont of discussion on baseball matters relating to team performance, which is not much on the minds of those of us living in our nation's capitol).

Table 1: Instances in Which the Majority Leader "Filled the Amendment Tree," 109th (2005-2006) and 110th (2007-2008) Congresses

Legislation Approved	
Congress and Bill	**Votes and Notes**
110th, H.J. Res. 20: Revised Continuing Appropriations Resolution, 2007	Cloture on bill invoked 71-26; passed Senate without amendment 81-15
110th, H.R. 1585: National Defense Authorization Act for Fiscal Year 2008	Cloture invoked on "hate crimes" amendment 60-39; cloture invoked on full text substitute 89-6 and bill passed with amendment 92-3
110th, H.R. 2206: U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007	Tree filled jointly by majority and minority leaders; Cloture invoked on full text substitute 94-1; bill passed Senate without further amendment by voice vote
110th, S. 3001: National Defense Authorization Act for Fiscal Year 2009	Tree filled while majority and minority floor managers worked together on a managers' package that was eventually objected to by a single Senator; cloture invoked on bill 61-32; passed Senate 88-8
109th, S. 2271: USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006[a]	Measure extended expiring provisions of PATRIOT Act; cloture invoked on measure 69-30; passed Senate with amendment establishing the enactment date 95-4.
109th, S. 3711: Gulf of Mexico Energy Security Act of 2006[a]	Cloture invoked on measure 72 – 23; passed Senate without amendment 71-25
109th, H.R. 6061: Secure Fence Act of 2006	Cloture invoked on measure 71 – 28; passed Senate without amendment 80 - 19
Amendments in Full Tree Withdrawn and Additional Amendments Allowed *or* Legislation Not Approved	
110th, H.R. 2419: Food and Energy Security Act of 2007 (Farm Bill)	Cloture not invoked on full text substitute 55 – 42; tree amendments withdrawn, other amendments (some not germane) considered; cloture invoked on full text substitute 78 – 12 and bill passed 79-14
110th, H.R. 2881: FAA Reauthorization Act of 2007	Cloture on full text substitute not invoked 49-42; measure returned to the calendar and not considered again
110th, H.R. 5140: Economic Stimulus Act of 2008	Cloture on committee amendment not invoked 58-41; tree amendments withdrawn, minor amendment agreed to and bill passed Senate with amendment 81-16
110th, S. 3036: Lieberman-Warner Climate Security Act of 2008	Cloture not invoked on full text substitute 48-36; measure returned to the calendar and not considered again
110th, S.3268: Stop Excessive Energy Speculation Act of 2008	Cloture on measure not invoked 50-43; majority leader entered motion to reconsider vote; measure not considered again
109th, H.R. 4297: Tax Increase Prevention and Reconciliation Act of 2005	Majority and minority floor managers explain filling the tree is done not to prevent amendments, but to control when they are offered. In fact, under reconciliation procedures, amendments could be offered after statutory debate time had expired; tree taken down and unanimous consent agreement reached regarding remaining amendments. Bill passed 66-31.
109th, S. 1955: Health Insurance Marketplace Modernization Act	Cloture on full text substitute not invoked 55-43; measure returned to the calendar and not considered again
109th, S. 2454: Securing America's Borders Act	Cloture on majority leader's motion to commit with instructions to report back a full text substitute not invoked 38-60; cloture on bill not invoked 36-63; measure not considered again

[a] This measure is included even though the majority leader did not offer the motion to commit with instructions, and therefore that motion remained available.

Source: To identify trees, a full-text search was conducted of the *Congressional Record* and press accounts for the phrase "amendment tree"; these instances were then examined to see if they qualified as instances in which the majority leader or his designee deliberately filled the tree. In addition, all motions to recommit offered in the Senate were identified through www.congress.gov, and each of these was examined to see if it was a possible filling the tree situation.

Table 2: Matters Receiving a Roll Call Vote on which 60-votes Were Required Pursuant to a Unanimous Consent Agreement

Congress	Number of amendments subject to a 60-vote threshold (by UC)			Number of bills, resolutions, and full-text substitutes subject to a 60-vote threshold (by UC)			Number of motions to concur with an amendment subject to a 60-vote threshold (by UC)			Number of other motions[a] subject to a 60-vote threshold (by UC)			Total
	Agreed to	*Not agreed to*	*Total*	*Agreed to*	*Not agreed to*	*Total*	*Agreed to*	*Not agreed to*	*Total*	*Agreed to*	*Not agreed to*	*Total*	
109	0	6	6	3	0	3	0	0	0	0	0	0	**9**
110	6	27	33	9	2	11	3	2	5	0	2	2	**51**

[a] The "other motions" in the 110th include a motion to proceed and a motion to refer.

Source: Based on data compiled from CQ Votes, www.congress.gov, and the *Congressional Record*.

Table 3. Senate Votes on Budget Resolutions and Budget Reconciliation Measures

	Budget Resolution		Budget Reconciliation	
Year	**Measure**	**Final Vote[a]**	**Measure**	**Final Vote[a]**
1980	HConRes 307	61-26	HR 7765	83-4
1981	HConRes 115	76-20	S 1377/HR 3982	80-14
1982	SConRes 92	51-45	HR 4961	52-47
			S 2774/HR 6955	67-32
1983	HConRes 91	Voice	HR 4169	67-26
1985	SConRes 32	67-32	S 1730/HR 3128	78-1
1986	SConRes 120	Voice	S 2706/HR 5300	61-25
1987	HConRes 93	53-46	S 1920/HR 3545	61-28
1989	HConRes 106	63-37	S 1750/HR 3299	Voice
1990	HConRes 310	66-33	S 3209/HR 5835	54-45
1993	HConRes 64	55-45	S 1134/HR 2264	51-50
1995	HConRes 67	54-46	S 1357/HR 2491	52-47
1996	HConRes 178	53-46	S 1956/HR 3734	78-21
1997	HConRes 84	76-22	S 947/HR 2015	85-15
			S 949/HR 2014	92-8
1999	HConRes 68	54-44	S 1429/HR 2488	50-49
2000	HConRes 290	50-48	HR 4810	60-34
2001	HConRes 83	53-47	HR 1836	58-33
2003	HConRes 95	51-50	S 1054/HR 2	51-50
2005	HConRes 95	52-47	S 1932	51-50
			S 2020/HR 4297	54-44
2007	SConRes 21	52-40	HR 2669	79-12
2009	SConRes 13	53-43		

[a] Final vote occurred on a conference report, an amendment between the Houses, or, in one case (reconciliation legislation in 1983), the House version without change.

Sources: CRS Report RL33030, *The Budget Reconciliation Process: House and Senate Procedures*, by Robert Keith and Bill Heniff Jr., and www.congress.gov.