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Filibuster, Cloture, Rules, the Constitution and the U.S. Senate*

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The structure of our federal legislative branch permits the U.S. Senate to be more deliberative and reflective than the House. The House members are constantly running for reelection. Once elected, the effort to be reelected immediately begins. Therefore, they are sensitive to the immediacy of any of their actions and the reaction they might have among their constituents.

Senators, on the other hand, can at least take a deep breath after election before running off to speak to the local Rotary Club. They don't even have to fly home every week. In addition, Senators represent an entire state and, therefore, generally have a greater number and diversity of voters whose views on an issue should be considered. It simply takes more reflection to absorb the greater range of views.

That lends itself to a different kind of atmosphere than in the House. That, in turn, leads to a parliamentary process different from what would be acceptable in the House. The Senate has adopted both rules and unwritten practices that permit it to conduct its business in a way that provides a framework for extended consideration of a matter, and something short of the rough and tumble way in which the House operates.

Unlimited Debate

Initially, the Senate operated under understandings that matters should be given serious consideration and when that had been accomplished, the matter should be put to a vote. Delaying its consideration by talking endlessly did not seem to be an approach adopted by the early Senates,[1] and

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

[1]See the excellent historical scan on the subject "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," Martin B. Gold and Dimple Gupta, Harvard Journal of Law & Public Policy, Vol. 28 pp. 206-271 (Winter 2005).

there was, therefore, little discussion of the need to support or oppose unlimited debate. As in most deliberative bodies, there was a provision in the early Senate rules that permitted one to call the previous question, and when debate had proceeded for a sufficient period (in the mind of a Senator), he had the right to call for a vote on the previous question. That was not a debatable motion and if he was supported by a majority of the Senators, then debate stopped and the previous question was put to a vote.[2]

That would have been sufficient to curtail excessive use of unlimited debate, but that rule was dropped twenty years after the Senate began operations as unnecessary and was not replaced with any other device to stop debate.

Over the years, the basic rule has continued to be that any one senator had the right to speak on the floor of the Senate to any length to express him or herself on the question before the body or any other significant question important to that Senator. So that is the bias of the body and has been almost from the beginning.

Of course, there must be some limitation on that, or procedural chaos would set in. Therefore, as part of the standing rules that the Senate has adopted over the years, there are rules that cover the manner and process in which debate on the floor should proceed.

The Standing Rules — Adopted Each Congress

The standing rules are adopted at the beginning of each session of Congress but may be amended at any time during the session. Herein lies many stories.

The U.S. Constitution says that "each House may determine the rules of its proceedings. . . " Art. I, sec. 5. It has been argued by a variety of Senators over the years that this means that when first assembled at the beginning of each session, the Senate operates under common law parliamentarian rules, and those rules (it generally is agreed) contain two important ingredients: (1) approval or disapproval of a measure shall be determined by majority vote, and (2) debate can be limited by an affirmative vote on a motion for the previous question.

[2]It is interesting that the revised Robert's Rules of Order requires a 2/3 vote to move the previous question.

That being the case, the Senate should not be bound by existing standing rules of previous sessions, particularly as that would permit previous Senates to bind the present Senate, a proposition that generally has no support among Senators.

The opposing argument is that the Senate is a continuing body as shown by the fact that two-thirds of its members are the same in successive Senates — net of retirements, deaths, etc. If the Senate is not a continuing body, it is argued, of what are existing Senators when the Senate goes out of existence.

This debate becomes important because it is the existing standing rules that provide protection for those that want to filibuster.

Rules V, XIX, and XXII and Their Implications

Three standing rules are particularly important.

Rule XIX, par. 1(a):

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, ...

Rule V, par.2, says:

> The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

Rule XXII says:

> Notwithstanding the provisions of ... any ... rule of the Senate, at any time a motion signed by sixteen senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer ... shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yes-and-nay vote the question.

> "Is it the sense of the Senate that the debate shall be brought to a close?" And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting – then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

This presents the dilemma for those who want majority votes rather than super majority votes to prevail. A Senator may speak without interruption once recognized by the presiding officer and the presiding officer has no discretion over whether or not to recognize a Senator who seeks recognition. The rules of the Senate continue from Senate to Senate, and they require a three-fifths majority to bring debate to a close. To change those rules requires a two-thirds majority of those present and voting. The rules seem to block those supporting majority voting.

The Constitutional Option (i.e., the nuclear option)

Those that want to overcome the protections afforded the filibuster must maneuver the process in a way that permits a majority of the votes to trump the standing rules. The first and most discussed way to do so would be to challenge the argument that each Senate is bound by rules adopted by the previous senate. In light of the Constitutional language, there is a decent argument that the U.S. Supreme Court would uphold a decision by the presiding officer to permit a majority vote at the beginning of a session to determine rules for a Senate that were not identical to those that existed in the previous Senate.[3]

This in brief is the constitutional option, the option that has been described as the nuclear option.[4]

It is the nuclear option because it would change dramatically the way

[3]While generally the Court avoids interfering with the determination by either House of Congress how to proceed, if a constitutional question is presented, the Court could well decide it.

[4]Other options including points of order for dilatory speech, Standing Orders, etc., have also been considered. The constitutional option, however, is the one most frequently discussed.

the minority in the Senate has protected itself from the "tyranny of the majority." When presented as a possible option by then Majority Leader Frist to then Minority Leader Reid, Leader Reid threatened to stop the Senate in its tracks with a variety of parliamentary maneuvers should Leader Frist bring the option to a vote.[5] Leader Frist did not and the Democrats were able to continue their obstructionism (viewed from the lens of the Republicans) or their protection of basic rights (viewed from the Democrat's perspective).

There are a variety of Senate practices that have grown up around the filibuster. Seldom, for example, do we see an extended speech or series of speeches such as the 23 hour speech by Sen. Strom Thurmond in a filibuster to prevent a vote on a civil rights act. Jimmy Stewarts (Nee Sen. Smith going to Washington) don't show up any more — they don't have to. Now any Senator for any reason can simply say to his or her Leader that he or she does not agree to a time limit on debate on a particular matter, and the Leadership that controls the Senate calendar sets aside the matter until the hold can be freed. And when cloture is filed, it continues to run the clock on a separate track from other business being conducted by the Senate. In other words, the Senate has found ways to work around it, but cannot find a way to deal with the inability to get majority voting on such things as nominations.[6]

The constitutional option has been debated on the floor of the Senate a number of times, and generally has not been pushed to a final vote with the consequences that might follow.[7] When it has been threatened, the general result has been a loosening of the cloture rules to require the affirmative vote of a fewer number of Senators to close debate.

Is There a Right Answer?

There may be an argument that on many issues the Congress should make decisions that reflect a firm conviction that a particular decision is

[5]Now, of course, Sen. Reid is Majority Leader and finds himself faced with the same 60 vote requirement on measures that frustrated Leader Frist; a vote total that requires Leader Reid to attract Republican as well as Democrat votes. As would any other Leader, I suspect he would like the constitutional option to be used when his party is in control, but not when the other party is.

[6]See "Filibuster and Cloture in the Senate," Richard Beth, Valerie Heitshusen, and Betsy Palmer, Congressional Research Service, February 22, 2011.

[7]See Gold, op cit.

correct. That would suggest that a one vote majority of the Senators is not reflective of such an agreement, and should not serve as the way to make important decisions. However, when over a period of time it appears that the country as a whole has reached a considered opinion on an important subject, then it seems unreasonable that a minority should prevent that decision from being made.

The ability of a minority to prevent a majority to pass legislation without considering the views of the minority, however, does seem to be reasonable. Unfortunately, the minority in the two Houses does not seem to have the opportunity as they once did to have its voice heard. Parliamentary maneuvers by those controlling the calendars have muted the voice of the minority (the minority may represent almost half of the country's population), and removing the filibuster would mute it even more. The filibuster should generally move the sides to greater compromise.

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