



Procedures for Considering Changes in Senate Rules

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Summary

This report discusses procedures and related issues involved in considering changes to Senate rules. The Constitution empowers each house of Congress to determine its own rules. The Senate normally considers changes to its Standing Rules in the form of a simple resolution, which (like any ordinary measure) can be adopted by a majority of Senators voting, a quorum being present (“simple majority”). Like most measures, however, such a resolution is debatable. Senate rules place no general limits on how long consideration of a measure may last, and allow such limits to be imposed only by a supermajority vote for cloture. As a result, opponents may be able to prevent the resolution from coming to a vote by filibustering. For changes in Standing Rules, the supermajority requisite for cloture is two-thirds of Senators voting, with a quorum present. Except by unanimous consent, moreover, the Senate can normally take up a resolution changing rules (or any other measure) only by adopting a motion to proceed to consider. A simple majority can adopt this motion, but the motion is itself debatable, so that in order to reach a vote, it may be necessary to obtain a two-thirds supermajority to invoke cloture first on the motion to proceed, then also on the measure itself.

For these reasons, *in cases in which opponents are willing to filibuster*, it can become necessary, in practice, to obtain supermajority support in order to *bring the Senate to the point at which it can vote* on a proposal to amend Senate Rules, even though a simple majority can then adopt the proposal itself.

Changes to Standing Rules could also be included in other forms of resolution, or in bills, but any motion to consider a measure containing such provisions is still always debatable, and a two-thirds supermajority is still required for cloture. Procedural changes could also be established as standing orders, or as certain other kinds of procedural regulation. A motion to proceed to consider a measure establishing procedural regulations in any such form would also be debatable, but cloture on such a measure would require three-fifths of the full membership of the Senate.

Finally, the Senate may also change its procedures by establishing new precedents that interpret existing rules or other standards differently from before. This might be achieved either by a ruling that directly establishes an altered practice or by one that permits a simple majority to bring the Senate to a vote on a change in rules. If a point of order asserts a new interpretation, the chair will normally overrule it on the basis of existing precedents, but if that decision is appealed to the full Senate, a simple majority could establish the new interpretation by voting to reverse the decision. Appeals are normally debatable, however, so that opponents may be able to prevent any vote to overturn the ruling by filibustering the appeal, unless a supermajority would vote for cloture.

Proceedings that would permit the Senate to reinterpret rules without requiring a supermajority vote in the process have been called the “nuclear option,” or, if implemented through raising a point of order on constitutional grounds, the “constitutional option.” It is not clear that any such form of proceeding can be proposed that would not require violations of existing rules in the process of changing them. Some of the proceedings proposed would require the chair to make a ruling contrary to precedent, or else to submit to the decision of the Senate a settled procedural question on which the chair would routinely rule. Others would require the Senate to entertain a novel motion through which a simple majority could close debate, or would involve disposing of a motion through proceedings that would be in order only if the Senate were already to have approved the motion.

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Introduction

Recent interest in possible changes to Senate procedural rules, and the potential difficulty of accomplishing them, has fostered renewed discussion about the procedures under which the Senate could consider such changes. Current public discussions have often described some features of these procedures in incomplete, misleading, or even inaccurate ways. This report discusses the procedural rules that govern how the Senate may consider changes in those procedural rules themselves, with emphasis on complications that may arise when proposed changes are controversial, on ways of addressing those complications, and on special considerations bearing on action at the start of a new Congress.

Most of the recent interest in Senate Rules has focused on the “cloture rule” (Rule XXII paragraph 2),¹ which permits the Senate to restrict the time for considering an item of business, and other rules that affect possible filibusters. “Filibuster” is not a formal designation for any specific procedure provided for by Senate rules; rather, it is a term colloquially used to refer to attempts to prevent or delay favorable Senate action on an item of business through dilatory or obstructive actions on the Senate floor. Historically, extended debate has been thought of as the chief means of conducting a filibuster, but other procedural actions permitted by Senate rules may also be used for the purpose. Increasingly in recent years, the term “filibustering” has also been used more loosely to refer to explicit or implicit threats to engage in dilatory action of any kind, and even to threats to block a request for unanimous consent to take up an item of business.

A central issue in recent discussions has been that proposals to change Senate rules in ways that would restrict filibusters are, potentially, themselves subject to filibusters conducted consistent with the rules already in effect. This report, accordingly, focuses on the procedural mechanisms by which the Senate might accomplish a change in its rules. It does not address the content of recent proposals to change the cloture rule or associated procedures.² Nor does it elaborate on the specific features of Senate rules that may affect filibustering, or how these rules may be used for filibustering purposes, except as these rules bear on the consideration of proposals to change Senate rules.³

Forms of Senate Rule and Vehicles for Their Change

The Constitution gives each house of Congress plenary power over its own rules.⁴ For changes in its code of Standing Rules, the Senate has typically exercised this power through adoption of a Senate Resolution (S.Res.). This form of measure, called a “simple resolution,” is constitutionally

¹ The Standing Rules of the Senate may be found in U.S. Congress, Senate, *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*, prepared by Matthew McGowan under the direction of Jean Parvin Bordewich, Staff Director, 112th Cong., 1st sess., S.Doc. 112-1 (Washington: GPO, 2011), at Sec. 1-44. (Hereafter cited as *Senate Manual*.)

² For discussion of current proposals, see CRS Report R41342, *Proposals to Change the Operation of Cloture in the Senate*, by (name redacted) and (name redacted).

³ On specific ways in which Senate Rules affect filibustering, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by (name redacted) and (name redacted), and CRS Report RL30850, *Minority Rights and Senate Procedures*, by (name redacted).

⁴ Article I, Section 5.

appropriate for this purpose because it requires adoption only in the chamber where it originates, with no participation by the other chamber or the President. Largely by adopting simple resolutions in the exercise of its constitutional rulemaking power, the Senate has, at various points throughout its history, adopted, amended, and recodified its body of Standing Rules.

In addition to its Standing Rules, the Senate also makes use of several other forms of procedural regulation, each of which is associated with its own typical means of adoption.⁵ (1) Those *standing orders* of the Senate that continue in effect unless altered or abolished have also usually been established by the adoption of simple resolutions.⁶ Many of these have procedural effects. (2) Other *standing orders*, effective only for the duration of the Congress in which they are adopted, are typically established, and renewed in each successive Congress, by unanimous consent when the Congress first convenes.⁷ (3) Some special procedures governing measures of specific kinds, known as *expedited procedures*, are contained in provisions of statute, which are nevertheless understood as having been enacted pursuant to the constitutional rulemaking power of the chamber to which they apply.⁸ (4) Finally, procedural *precedents* interpreting the import in practice of all these forms of procedural regulation are established by rulings of the chair and votes by the Senate on appeals from such rulings. The present report, however, begins from the presumption that proposed procedural changes are sought in the form of a simple resolution amending the Standing Rules of the Senate.

Consideration of Resolutions to Change Standing Rules

Several elements of the rules governing proceedings on a resolution to amend the Standing Rules of the Senate are especially important in determining how the Senate can consider such a resolution when it is controversial: (1) the Senate can adopt the resolution by a simple majority vote; (2) a supermajority vote may be needed in order to limit the time for consideration and ensure that the Senate can reach the point of voting on the resolution; (3) if this supermajority vote to limit consideration is adopted, amendments to the resolution will be limited to those that are germane and have been filed in advance; (4) a supermajority vote also may be required to limit the time for consideration of a motion to take up the resolution; and (5) in practice, the resolution could become available for consideration at all only if it had either been reported from committee or the order of business for its consideration was reached in a “morning hour.”

⁵ For further information on the possible use of these other forms of procedural regulation, see CRS Report RL32874, *Standing Order and Rulemaking Statute: Possible Alternatives to the "Nuclear Option"?*, by (name redacted).

⁶ These standing orders of the Senate appear in the *Senate Manual* at Sec. 60-139.

⁷ The Senate’s standing orders for a Congress can usually be found in the Senate proceedings of the first day of the new Congress in the *Congressional Record*. See, for example, Senator Harry Reid, “Unanimous Consent Requests,” remarks in the Senate and inserted material, *Congressional Record* (daily ed.), vol. 159, January 3, 2013, p. S7.

⁸ No single compilation of all the expedited procedures applicable in the Senate is available. Prominent examples include the procedures for considering congressional budget resolutions and reconciliation bills in Title III of the Congressional Budget Act (P.L. 93-344, 2 U.S.C. 631 through 644).

Simple Majority Vote Required

In most respects, the Senate considers simple resolutions changing the Standing Rules under the same procedures applicable to any other simple resolutions, or, indeed, measures of any form. Specifically, to begin with, the Senate can, in general, agree to any measure, including a simple resolution, by a majority of Senators voting, a quorum being present (standardly known as a “simple majority”). Under the Constitution, a quorum is a majority of all Senators.⁹

This requirement for a simple majority applies to all votes in the Senate, except as otherwise provided either by the Constitution or by any other procedural regulation of the Senate.¹⁰ Some have argued that the Senate has no authority to establish requirements for a supermajority vote in addition to those specified in the Constitution, but the Senate has, in practice, regarded its constitutional rulemaking power as extending to the power to establish additional supermajority requirements. Proponents of change, nevertheless, might contend that the Senate could not constitutionally require a standard higher than a simple majority for the adoption of rules. Any such higher threshold could be deemed to conflict with the constitutional grant of rulemaking power to the Senate, on grounds that, unless otherwise specified, the act of a majority of a quorum is the act of the body.¹¹

In fact, the Senate has often changed its Standing Rules with the support of less than a supermajority (and even by voice vote). On December 14, 1982 (97th Congress), for example, the Senate adopted S.Res. 512, repealing Senate Rule XXXVI, relating to limitations on outside earned income and honoraria, by a vote of 54 to 38.

Limiting Debate Requires Two-Thirds Vote

Among the conditions that apply to the consideration of resolutions to change the Standing Rules, three become salient especially if the proposed change is controversial. First, like any other measure under the general Rules of the Senate, a resolution to change Senate Rules is debatable. When a question is debatable, Senate Rules place no general, overall limits on how long it can be considered or how long individual Senators can hold the floor in debate. The Senate can agree to limit the time for considering a matter by unanimous consent, but in the absence of such consent, the only mechanism provided by Senate Rules for imposing such limits is the motion for cloture (Rule XXII, paragraph 2). If the Senate votes for cloture on any debatable question, further consideration of the question is limited to 30 additional hours, after which a final vote on that question would occur.¹²

Second, also as with any other measure, when a resolution to change Senate rules is under consideration, the Senate may amend it. When a measure is amendable, Senate Rules impose no general restrictions on the subject matter of amendments that may be offered; the Senate may

⁹ Although this requirement has lately come to be referred to as a “51-vote” criterion, it actually permits action by fewer than 51 votes. For example, a vote of 45 to 40 will suffice, or even 26 to 25, for in each case the requirement for a quorum is satisfied.

¹⁰ See CRS Report 98-779, *Super-Majority Votes in the Senate*, by (name redacted).

¹¹ This principle is enunciated in *U.S. v. Ballin*, 144 U.S. 1 (1892) at 6.

¹² Invoking cloture also imposes other restrictions. *Senate Manual*, Sec. 22.2. For discussion, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by (name redacted) and (name redacted).

impose such restrictions only by unanimous consent or through cloture. Under cloture, amendments may be considered only if they are germane to the matter on which cloture was invoked and were filed at the desk by a specified deadline in advance of the cloture vote.

Invoking cloture requires a supermajority vote. Senate Rules provide no means by which a simple majority can vote to bring consideration of a matter to a close or limit the amendment process. Even if a specific matter commands the support of a numerical majority of Senators, a minority of Senators may be able to prevent the Senate—either permanently or temporarily—from agreeing to the proposition by filibustering in order to forestall the Senate from ever reaching the point where a vote on the underlying question can occur.

For most matters, however, invoking cloture requires three-fifths of the full membership of the Senate (60 votes, if there is no more than one vacancy). For changes in the Standing Rules, cloture can be invoked only by vote of two-thirds of Senators voting, with a quorum present. (This majority is now often referred to as “67 votes,” implicitly assuming that all Senators are present and voting; if not all Senators vote, however, the votes required will be fewer, because the requirement is based on the total number voting.)¹³

For these reasons, the frequent recent assertion that a supermajority is required to amend the Rules of the Senate is imprecise. A precise statement would reflect this understanding: *in cases in which opponents are willing to carry on a filibuster*, it can become necessary to obtain supermajority support (by two-thirds of Senators present and voting) in order to *bring the Senate to the point at which it can vote* on a proposal to amend Senate Rules. An ordinary simple majority of Senators voting can then adopt the proposal itself.

Motion to Consider is Debatable; Layover Requirements

Other obstacles to a rules change resolution can arise in the process of taking it up for consideration, and even in the process by which it becomes available for consideration in the first place. The Senate can normally take up any measure for consideration in only two ways: by unanimous consent or by agreeing to a motion to proceed to consider. For controversial rules changes, unanimous consent could presumably not be obtained, and a motion to proceed would be necessary.

A simple majority can adopt a motion to proceed, but a motion to proceed to consider a proposal to change Standing Rules is always debatable,¹⁴ and therefore can itself be filibustered. In order for the Senate to be able to vote on whether to take up a measure for consideration, accordingly, it may become necessary for the Senate first to invoke cloture on the motion to proceed. Moreover, it appears that cloture on a motion to proceed to consider a resolution changing the Standing Rules would be held to require two-thirds of a quorum present and voting, just as does the resolution itself. As a result, it might become necessary to obtain a (two-thirds supermajority) vote to invoke cloture on the motion to proceed to consider a rules change resolution in order to reach a (simple majority) vote on that motion, and then to invoke cloture again (by a two-thirds

¹³ In principle, it would be possible for the Senate to invoke cloture on a resolution to change the Standing Rules by 34 to 17, since a constitutional quorum of 51 would be present. For cloture on any other measure, in contrast, the requirement is based on the total number of Senators, so the threshold of 60 votes remains constant no matter how many Senators are absent.

¹⁴ Senate Rule VIII paragraph 2, in *Senate Manual*, Sec. 8.2.

supermajority) to limit debate on the resolution itself (which can be adopted by a simple majority).

Under the present rules of the Senate, furthermore, the motion to proceed to consider a measure may be offered only on a measure that has been on the Calendar of General Orders for at least one “legislative day.”¹⁵ In practice, this means that at least one daily adjournment of the Senate must intervene between the time a measure is placed on the Calendar and the time the motion to proceed to its consideration is made. In addition, a Senate resolution normally reaches the Calendar in the first place by being reported from committee, and Senate committees are, in general, not required to report any measure referred to them. A Senate resolution, like any other measure, is normally referred to committee the day it is submitted. Accordingly, if a resolution is referred, the Senate will normally be unable to consider it unless and until the committee of referral chooses to report it back for consideration.¹⁶

The Senate could bring a simple resolution to the floor without going through the committee process only through an alternative procedure that involves difficulties of its own. At the point when a simple resolution is initially submitted in the Senate, the Senate may proceed to its immediate consideration, but only by unanimous consent. If a request for immediate consideration is made, and any Senator objects, the measure will be “laid over” for consideration on some subsequent legislative day.¹⁷ But on that subsequent day, a resolution that has been laid over in this way can be taken up for consideration only during a two-hour period at the beginning of the day called the “morning hour,” and only if the Senate finishes disposing of several other types of routine business before the end of this two-hour period. If the Senate does reach this point, the resolution that has been in this status longest comes up for consideration automatically, without need for any motion to proceed.¹⁸ The Senate may then consider it until the expiration of the two hours, after which, if consideration is not completed, it is placed on the Calendar of

¹⁵ A “legislative day” ends each time the Senate adjourns, and a new legislative day begins when the Senate next convenes. “Day” in in U.S. Congress, Senate, *Riddick’s Senate Procedure: Precedents and Practices*, by Floyd M. Riddick, Parliamentarian Emeritus, and Alan S. Frumin, Parliamentarian, rev. and ed. by Alan S. Frumin, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 714. (Hereafter cited as *Riddick’s Senate Procedure*.)

¹⁶ In principle, the Senate could take up a measure that remained in committee by discharging the committee from its consideration. Senate rules, however, permit discharge only by unanimous consent or by resolution. Consideration of a resolution to discharge a committee would be subject to the same difficulties as consideration of the original resolution to change the rules (except that cloture on the discharge resolution would presumably require only the generally applicable three-fifths of the full Senate, rather than the two-thirds of Senators present and voting required for rules changes themselves). “Discharge of Committees” in *Riddick’s Senate Procedure*, pp. 802-805.

¹⁷ The measures laid over are listed in the Senate Calendar under a special heading, “Laid Over, Under the Rule.” The language of this heading, which often occasions confusion, is meant to convey that the measures have been *laid over until a later day* for consideration, *pursuant to* the Rule. The “Rule” referred to is Senate Rule XIV paragraph 6, under which, together with Senate Rule VIII paragraph 1, the procedure takes place. “Over Under the Rule” in *Riddick’s Senate Procedure*, pp. 957-967.

A daily adjournment must occur between the submission and the consideration of a resolution laid over, under the rule, because the Senate interprets the reference to a “day” in this rule as a legislative day, as defined in note 15. If the Senate does not adjourn at the end of a calendar day of session, but recesses instead, it remains in the same legislative day when it next reconvenes. A “morning hour” occurs (except, potentially, by unanimous consent) only at the beginning of a new legislative day.

¹⁸ If other resolutions stood ahead of the desired proposal in this Calendar status, the Senate could take up the desired proposal under this procedure only if it had previously disposed of those ahead of it (perhaps during a previous morning hour), or set them aside by unanimous consent. Under this procedure, as a result, the Senate would consider the desired resolution only if it was the one that had been laid over, under the rule, earlier than any other measure still in this status. “Over Under the Rule” in *Riddick’s Senate Procedure*, pp. 957-967.

General Orders. From that status, the resolution may be called up for further consideration in the ways already described, by unanimous consent or motion to proceed. As in the cases already discussed, as well, the motion to proceed would normally be debatable, so that both it and the resolution itself could be subjected to filibuster.

In present practice, however, the Senate normally gives unanimous consent on each day not to have a morning hour at all on the following day, so that typically, no morning hour ever occurs unless the majority leader arranges for it. Finally, even if a morning hour were to occur, experience has shown that it is often possible for opponents of a resolution that has been laid over to forestall the occurrence of the point when the measure could be called up, by engaging in delaying tactics until the full two hours allotted to the morning hour have expired.

In the case of a resolution proposing a change in Standing Rules, an additional restriction applies. Senate Rule V paragraph 1 requires that any “motion to ... modify ... or amend any rule, or any part thereof, shall be in order” only on “one day’s notice in writing.” The layover required by this Rule has been construed as a calendar day, not a legislative day.¹⁹ Nevertheless, it has the consequence that the Senate could consider a rules change resolution immediately upon its submission only if the required notice had been given on a previous day.

Procedure for Proposals in Other Forms

Supporters of a proposed change in Senate procedure might be able to avoid some, but not all, of the potential difficulties for their consideration just discussed by couching their proposal in some form other than as a change in the Standing Rules. First, a standing order may be established, just as may a change to the Standing Rules, by adopting a simple resolution. The requirement for a supermajority of two-thirds of Senators present and voting in order to invoke cloture, however, applies only to changes in the Standing Rules. For all other matters, including simple resolutions establishing standing orders, cloture requires a supermajority only of three-fifths of the full membership of the Senate (60 votes, if there is no more than one vacancy). If a resolution establishing new procedures were framed as a standing order, or other form of procedural regulation, rather than a change in the Standing Rules, it would be subject to a requirement for cloture that might be easier to meet. It also appears that the requirement for one day’s notice of a motion to modify or amend the rules would be applicable only to changes in the Standing Rules, and not to a proposal to establish a standing order.

In other respects, the procedure for a resolution establishing a standing order would be the same as for one changing the Standing Rules: it would be debatable and amendable, the motion to proceed to its consideration would be debatable,²⁰ and, if a request for immediate consideration when submitted met objection, the resolution either would have to be referred to committee (and available for consideration only if reported back), or would be laid over for consideration in a morning hour on a subsequent day, as discussed earlier.

¹⁹ “Day” in *Riddick’s Senate Procedure*, pp. 713-714.

²⁰ Motions to consider any measures other than those changing Standing Rules, including those proposing to establish any other form of procedural regulation, are normally debatable. Senate Rules provide one generally applicable exception, for motions to consider made during the “morning hour,” but under contemporary conditions, the use of this proceeding has generally been found impracticable. “Debate” in *Riddick’s Senate Procedure*, p. 733-735.

It might also be possible to frame a procedural change as a provision in a bill or joint resolution. If a provision in a bill or joint resolution directed a change in the Standing Rules, the measure as a whole (and, presumably, any motion to proceed to its consideration) would become subject to the requirement for two-thirds of Senators present and voting for cloture, but if the provision established some other form of procedural regulation, such as a standing order, the requirement of three-fifths of the full membership of the Senate would apply. If a proposal to change Standing Rules were offered as an amendment to a bill or joint resolution, no motion to proceed to consider the amendment would be required, although the requirement for one calendar day's notice of the proposal would still apply. This notice requirement would apparently not be applicable for an amendment proposing a standing order or other form of procedural regulation.

Like simple resolutions, bills and joint resolutions are normally referred to committee when introduced, and, if so referred, they could normally receive floor consideration only if and when reported back. Also like simple resolutions, bills and joint resolutions may be considered immediately when introduced, but only by unanimous consent. In addition, however, the Senate has a procedure (referred to as "Rule XIV")²¹ by which a bill or joint resolution can be placed directly on the Calendar of General Orders after being introduced, bypassing committee referral. This procedure has several steps that must (absent unanimous consent) take place on different legislative days, so that, at least when opposition is present, it typically takes two or three legislative days to bring the measure to the point at which it is placed on the Calendar. Once a measure reaches this point, however, it can be called up and considered under the normal procedures of the Senate (either by unanimous consent or through a motion to proceed to consider), as described earlier. Unlike a simple resolution, its eligibility for consideration (absent unanimous consent) is not restricted to occasions when the proper order of business is reached at the end of a morning hour.

Provisions changing Senate procedure also could be included in a concurrent resolution. Senate proceedings on concurrent resolutions, however, follow the same procedures as simple resolutions, including the possibility of being laid over to a subsequent day when submitted, and thereby of being prevented from consideration except at the end of a morning hour (or by unanimous consent). A concurrent resolution neither considered nor laid over when submitted would be referred to committee, and could probably then receive floor consideration only if the committee reported it.

As with a bill or joint resolution, if the concurrent resolution included provisions amending Standing Rules, the motion to proceed to its consideration would necessarily be debatable. The requirement for one calendar day's notice would apply, as well, to proposals amending the Standing Rules, but not to those establishing a standing order or other form of procedural regulation. Similarly, if the procedural proposal were to be offered as an amendment to a concurrent resolution, the notice requirement would apply to the amendment only if it proposed to change Standing Rules.

Bills and joint resolutions are the forms of measure used to make law, which means that, under the Constitution, the process of enacting them requires the participation of the House and the President.²² A concurrent resolution takes effect if adopted in identical form by both Senate and

²¹ The pertinent provisions actually appear in Senate Rule XIV paragraphs 1-4. *Senate Manual*, Sec. 14.1-14.4.

²² For this reason, when such measures include provisions making changes in procedures, a statement is usually included declaring that those provisions are enacted as exercises of the constitutional rulemaking power, and therefore can be changed by subsequent action of the chamber affected, acting alone.

House; the President has no participation in its approval. In any of these cases, accordingly, unlike that of a simple resolution, approval by the Senate alone would not suffice to place into effect the procedural changes it contained. The change would become effective only when (and if) the measure ultimately received the kind of final approval requisite to its form.

Changing Procedure by Establishing Precedents

The preceding discussion indicates that the chief potential difficulty for consideration of a proposal to change Senate procedures is that opponents may filibuster it, and thereby make it necessary for supporters to secure a supermajority vote for cloture in order to permit the Senate to reach a vote on the proposal itself. In response to this situation, supporters of change have sought to find some alternative path for the Senate to act on proposed procedural changes that would avoid the potential necessity of achieving a supermajority vote in the process. These efforts have focused especially on establishing a new precedent, reinterpreting existing Senate procedural regulations in a way that would establish the desired interpretation. Such a proceeding might result either in a ruling that directly establishes an altered practice or in one that permits a simple majority to bring the Senate to a vote on a change in rules.

Changing the effective procedures of the Senate by establishing new precedential interpretations of existing rules has sometimes been referred to as the “nuclear option” for change, or, if the new interpretations rely on constitutional provisions as a basis, as the “constitutional option.” To be clear, there is nothing especially novel to Senate practice about altering its interpretations of its rules. Indeed, the Senate has always understood its capacity to determine the interpretation of its own rules to be an essential element of its constitutional power to say what its rules shall be. Historical experience suggests, however, that it is difficult to construct a way for the Senate to consider a procedural proposition that would allow a simple majority to establish the desired precedent in the face of a filibustering opposition, except through proceedings that would involve violations of Senate rules and practices already in existence. In this context, some would hold that what would render proceedings “nuclear” is not simply that they would establish new precedential interpretations of the rules, but that they would do so through proceedings that, in themselves, involve violations of procedural standards previously established and already in effect at the time the Senate is considering the proposed new interpretation.

This difficulty arises because any procedural claim that would support the desired result could become effective in regulating the actual proceedings of the Senate only if the Senate itself were to accept it as a standard governing its action. Given the constitutional power of the Senate over its own rules, this acceptance would presumably occur through a decision by the Senate on some procedural question that would establish the pertinent principle. Accordingly, the procedural question would have to be framed, and placed before the Senate, in a form that would allow the body to reach a vote thereon without itself being subjected to filibuster. Unless the procedural question is raised in a form in which its own consideration either is limited or can be limited by the vote of a simple majority, its consideration would simply reproduce, at a higher level, the difficulties already faced by consideration of the rules change proposal itself. Opponents would be able to filibuster the procedural question, potentially rendering the Senate unable to reach a vote by which a simple majority could establish the desired precedent unless a supermajority vote could be secured for cloture on the procedural proposition.

The “Continuing Body” Doctrine and the “Beginning of a Congress” Claim

These difficulties may be most readily illustrated through consideration of the form of “nuclear option” that has been most commonly addressed in recent discussions. The proposed proceeding would be based on the argument that, to make effective the constitutional power of the Senate to determine its own procedures, it is requisite that a simple majority be able to bring to a close the consideration of a proposal to establish or amend Senate rules. Usually, the procedural claim has been that this capacity for a simple majority of the Senate to act must exist at least at the opening of a new Congress.

Such claims are offered in response to the circumstance that the Senate treats its rules as remaining in effect continuously from one Congress to the next without having to be re-adopted. Under this practice, Senate rules are considered to remain perpetually applicable for the consideration of business, and specifically of proposals to alter those rules themselves. In 1959, the Senate explicitly incorporated this principle in what is now Rule V paragraph 2, which declares that “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”²³ Under this provision of Senate Rules, any proposed change in rules has to be considered under the procedures provided for by the rules already in existence—including, in particular, the consequence that if a filibuster arises against the proposal, it may be necessary to achieve a supermajority vote in order to overcome the filibuster and reach a vote on the proposal itself.

The principle that existing Senate rules remain continuously in effect is based on the premise that the Senate is a “continuing body” that never has to reconstitute itself afresh. This argument can usefully be viewed as involving two separate propositions. There is a straightforward sense in which the Senate is, unquestionably, a continuing body: namely, that even at the beginning of a new Congress, when the terms of one-third of the Senators have ended and their successors have not yet been sworn in, a quorum of the Senate (which, under the Constitution, is a majority of the Senate) remains in being and could, in principle, do any business within the power of the Senate. The conclusion that the rules remain automatically in effect, on the other hand, is not a necessary implication of the Senate’s being a continuing body in the sense that a quorum is continuously in being. It is, rather, a conclusion that the Senate has reached about the implications of that fact, although the Senate could, in principle, decide to draw a different conclusion. It is this conclusion that might properly be called the “continuing body doctrine,” as distinguished from the simple fact of the Senate’s being a continuing body.

The Senate’s decision to treat its rules as continuously in effect, however, has important implications for efforts to change those rules. In particular, it means that if the Senate considers any proposal to change the rules so as to make it easier to overcome filibusters, it will do so under procedures that permit opponents to filibuster in order to prevent the adoption of the proposal, at least unless a supermajority for cloture can be obtained. In this way, the Senate’s existing rules about limiting the time for consideration of a measure, together with the rule affirming the continuing character of Senate Rules, have a tendency to prevent changes in those same rules. In

²³ *Senate Manual*, Sec. 5.2.

this sense, it has been argued, the Standing Rules of the Senate “entrench” themselves against possible change.²⁴

This “entrenchment” is not absolute, for the Senate retains the power to adopt changes in its procedures by a simple majority vote, and it can always enable itself to reach such a vote, at least if it can muster the supermajority requisite for cloture on the proposed change. Supporters of change in Senate rules governing filibustering have, nevertheless, frequently advanced the argument that, by requiring a supermajority for cloture, the existing rules go too far in restricting the effective power of a simple majority of the Senate to exercise the constitutional power to determine the rules of the body, and that the Senate ought to be able make such decisions without having to face a possible need to obtain a supermajority in the course of such action.

Although this argument has been advanced in various forms, one prominent version rests on a claim that, for the Senate to be able to make effective exercise of its constitutional power over its own rules, it is necessary that the rules of a previous Senate not be regarded as binding a new Senate against being able to change them. Against the continuing body doctrine, such an argument contends that, at least at the opening of a new Congress, the Constitution requires that the body be able to adopt a proposal to change the rules without potentially being required to secure a supermajority in order to reach the point at which the simple majority vote can occur.²⁵

On several occasions since the middle of the 20th century, supporters of changes in Senate rules regulating the filibuster have advanced arguments of this sort during Senate floor consideration of proposals for change. The Senate has on some occasions appeared prepared to entertain such arguments, but has never ultimately endorsed such a conclusion.²⁶ At one point in the proceedings of 1975, the Senate actually voted in support of such a position, but later in the same proceedings, as part of a compromise that resolved the issue for that time, it reversed itself and affirmed the principle that rules changes must be considered under the procedures provided by the existing rules. Nevertheless, supporters of change sometimes refer to arguments offered and rulings made during this debate, and during similar proceedings in other years, as evidence that the continuing-body doctrine is not uncontested, and in fact has been questioned at numerous times in Senate history.²⁷

²⁴ See CRS Report RL32843, “*Entrenchment*” of Senate Procedure and the “*Nuclear Option*” for Change: Possible Proceedings and Their Implications, by (name redacted). The section of this report on “Practical Implications of Continuity” also notes other applications of the continuing body doctrine, such as for committee membership, tenure of Senate officers, and the continuity of standing orders. The question of entrenchment is comprehensively addressed also in Catherine Fisk and Erwin Chemerinsky, “The Filibuster,” *Stanford Law Review*, vol. 49, January 1997, pp. 181-254.

²⁵ Advocates of this consideration have argued that it may apply with special force at the beginning of a new Congress, on grounds that the point of transition presents a unique opportunity for reconsidering issues of organization and structure. Advocates of the claim also might propose to limit its application to the opening of a Congress, as a means toward avoiding the emergence of a state of affairs in which any temporary majority could continuously, and at any point, alter rules at will to suit its immediate convenience.

²⁶ Several examples of proceedings in which such a proposition was advanced are discussed in CRS Report RL32684, *Changing Senate Rules or Procedures: The “Constitutional” or “Nuclear” Option*, by (name redacted).

²⁷ Detailed procedural accounts of the 1975 proceedings, as well as corresponding proceedings in other years, appear in U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Senate of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, prepared by the Congressional Research Service, 112th Cong., 1st sess., S.Prt. 112-31 (Washington: GPO, 2011), pp. 199-208. These proceedings are also discussed in CRS Report RL32684, *Changing Senate Rules or Procedures: The “Constitutional” or “Nuclear” Option*, by (name redacted).

Effect of Previously Existing Rules at the Start of a Congress

The argument that special circumstances apply to consideration of rules changes at the beginning of a new Congress may be taken to imply not only that the rules of the Senate of the previous Congress cannot inhibit the incoming Senate from changing those rules, but that they cannot even be regarded as being in effect until the Senate takes some action (either affirmatively or by acquiescence) to accept them. This version of the argument, however, would raise a question of what rules the Senate is then to observe until it takes such action. Accordingly, advocates of this position sometimes implicitly argue, instead, that the only rules to be regarded as not being in effect are those that would inhibit a simple majority from exercising the Senate's authority to determine its own rules.²⁸

Although the cloture rule is clearly the outstanding instance of a rule whose applicability might be rejected on these grounds, the Senate's layover requirements for the consideration of resolutions give rise to issues of the same kind. The possible difficulty in this connection turns on the meaning of "the beginning of a Congress." Sometimes, when a new Congress has convened with the consideration of rules changes in prospect, the Senate has continued to recess its sessions from day to day, instead of adjourning, so that the Senate's first legislative day may continue for several weeks or more. This circumstance has been taken to support an argument that the Senate is still at "the beginning" of its new session.

As previously discussed, however, except when unanimous consent can be obtained, a resolution or concurrent resolution cannot be considered on the legislative day on which it is submitted, but must be laid over for consideration at the end of a morning hour on a subsequent legislative day. Correspondingly, the process of placing a bill or joint resolution, at its introduction, directly on the Calendar, from which the Senate could take it up for consideration, requires several steps that must take place on different legislative days. If any bill or resolution is, instead, referred to committee, it would normally become available for consideration only if the committee subsequently reports it. If reported, the measure would be placed on the Calendar, and a motion to proceed to its consideration would be in order only after it had been on the Calendar for at least one legislative day.

It therefore appears that under established procedures, and in the absence of unanimous consent, the Senate would never be able to take up a measure containing a proposal for change in its rules until it had adjourned at least once, creating a new legislative day. Yet if it is the continuation of the first legislative day through recesses that is held to keep the Senate at the beginning of its session, it could be argued that in bringing about a new legislative day, the Senate had brought the beginning of its session to an end, and thereby vitiated the argument that special conditions permitting changes in rules by a simple majority process were still in effect.

On some occasions, such as 1975, the Senate has moved to preserve the argument for special conditions at the beginning of a Congress by granting unanimous consent that any adjournment of the Senate did not affect any rights of Senators in relation to any proposals.²⁹ Alternatively, it might be possible to argue that the rules establishing the pertinent layover requirements, along with other rules that might interfere with action at the beginning of a Congress by a simple

²⁸ For example, see Senator Walter Mondale, "Resolution to Amend Rule XXII of the Standing Rules of the Senate," remarks in the Senate, *Congressional Record*, vol. 121, January 14, 1975, p. 12.

²⁹ *Ibid.*, p. 199.

majority to change the rules, do not apply until re-adopted, either affirmatively or by acquiescence, the provisions of Rule V to the contrary notwithstanding.³⁰ By raising such an argument, however, supporters of rules changes might only bring back the question of how to bring about Senate acceptance of the proposed procedural principle.³¹

Implementing a “Nuclear” or “Constitutional” Option

Under the line of argument described in the preceding sections, supporters of change in the rules would pursue a “nuclear option” during the beginning of a new Congress by raising some point of order whose settlement would permit a majority to close debate on a pending rules change proposal (or on a pending motion to proceed to its consideration), perhaps on the basis that the Constitution requires that this action be possible. A sympathetic chair would rule in favor of the point of order, opponents would appeal the ruling of the chair, and supporters would move to lay the appeal on the table. The motion to lay on the table is itself non-debatable, so that it could immediately be adopted by a simple majority, and its adoption would have the effect of overruling the appeal and affirming the ruling of the chair,³² thereby establishing the desired interpretation of the rules.

This account overlooks that, under fundamental principles of Anglo-American parliamentary law, the chair in a deliberative assembly is not supposed to make procedural rulings according to the individual preferences and discretion of its occupant, but rather is to rule in accordance with existing rules and their established precedential interpretations.³³ If the chair rules in favor of a point of order asserting a new interpretation of rules, the ruling will presumably run contrary to existing precedential interpretations, and in that sense will itself constitute a violation of established procedure. Yet such a ruling by the chair is an essential element of the proposed proceedings, for it is only if the chair rules in a way favorable to the proposed new interpretation that it becomes necessary for opponents of change to take the appeal, which, in turn, makes it possible for supporters to establish their new interpretation by agreeing to the non-debatable motion to lay the appeal on the table.

By contrast, if the chair rules, in conformance with existing precedent, against the point of order embodying the new interpretation, it is supporters of change who would have to appeal the decision. There is little likelihood that they could be prevented from doing so, for the right of appeal is understood to be an essential element of the power of the Senate to determine its own rules. The Senate could then potentially overturn the old precedent, and establish the new interpretation, by a simple majority vote on the appeal. Doing so would violate no parliamentary principle, for the constitutional power of the Senate over its own rules is understood to entail the power to alter its interpretation of the meaning of those rules.³⁴

³⁰ “The rules of the Senate shall continue from one Congress to the next Congress ...” as discussed above under “The ‘Continuing Body’ Doctrine and the ‘Beginning of a Congress’ Claim.”

³¹ The requirement for one calendar day’s notice of proposing a change in the Standing Rules need not lead to any similar difficulty, inasmuch as the calendar day could elapse while the Senate was still in its first legislative day and therefore was arguably still at the beginning of a new Congress.

³² Senate Rule XX paragraph 1. *Senate Manual*, Sec. 20.1.

³³ This principle might be considered to apply with special force in cases in which, as in the United States Senate, the constitutional presiding officer of the body is not even a member thereof, nor accountable to it.

³⁴ “Appeals” in *Riddick’s Senate Procedure*, p. 145; “Points of Order” in *ibid.*, p. 987.

Under existing Senate practice, however, appeals are, in general, debatable. In these circumstances, as a result, opponents of change could attempt to prevent the establishment of the new precedent by filibustering the vote on the appeal. In this situation, supporters of change could obtain no benefit from moving to lay the appeal on the table, because if the motion to table were to win, the appeal would be rejected, meaning that the old precedent would be reaffirmed, and if the motion to table were to lose, the appeal would remain before the Senate in a debatable condition, so that the filibuster could continue.

In this situation, supporters of change might be unable to secure their desired result unless they could find some means by which a simple majority could limit consideration of the appeal. (Cloture may be moved on an appeal, but a supermajority would still be required to invoke it.) This situation, accordingly, would simply reproduce, at a higher level, the difficulties supporters of change were originally trying to overcome. Supporters might attempt to deal with such a situation by raising some further procedural claim under which either the appeal would be deemed non-debatable, or a simple majority could limit its consideration. Yet it might remain impossible to resolve the situation in a way favorable to procedural change unless the new claim could itself be settled by a simple majority vote; that is, without itself being subject to filibuster. It is not clear in what kind of parliamentary situation such a settlement by a simple majority might be possible.³⁵

A further obstacle to successfully changing Senate practice by procedural means arises if the justification offered for the procedural claim is constitutional. Under Senate precedents of long standing, if any procedural question is raised that involves a constitutional question, the chair is not to rule at all, but is instead to submit the question to the Senate for decision.³⁶ If the question is submitted to the Senate, it could establish the proposed new interpretation by a simple majority vote, but a procedural question submitted to the Senate is debatable. In this case too, accordingly, opponents might be able to prevent the occurrence of the vote that would establish the desired interpretation by filibustering, unless supporters could obtain a supermajority vote to invoke cloture on the submitted point of order.

The key to successful procedural change through precedential action, then, is to place a question before the Senate that, if agreed to by a simple majority, would result in limiting or closing debate on the rules change proposal (or the motion to proceed to consider it, etc.). Supporters of change might, for example, simply move that the chair immediately put their proposal to a vote. They

³⁵ Appeals are not debatable if cloture has already been invoked on the matter under consideration, but a post-cloture situation would arise only through an earlier supermajority vote. The Senate recently was able to reverse a previous interpretation of Senate Rule XXII regarding motions to suspend the rules on October 6, 2011, because cloture had been invoked on the matter under consideration, S. 1619, the Currency Exchange Rate Oversight Reform Act of 2011. *Congressional Record* (daily ed.), vol. 157, October 6, 2011, pp. S6314-S6320.

Some have suggested, also, that a non-debatable appeal could be brought about through the use of provisions of Senate Rule XX that prohibit debate on an appeal that arises while an appeal of a previous ruling is already pending. See CRS Report RL32843, *“Entrenchment” of Senate Procedure and the “Nuclear Option” for Change: Possible Proceedings and Their Implications*, by (name redacted). It appears, however, that any course of action through which this suggestion might be implemented might be too complex for practical feasibility. At least in recent memory, moreover, Rule XX has been little used, and it is not clear that it would be interpreted, in practice, in such a way as to permit the result proponents would seek.

³⁶ The chair is considered to have authority to interpret Senate rules (conformably to existing precedent), but to possess no corresponding authority with respect to the Constitution. “Amendments” in *Riddick’s Senate Procedure*, pp. 52-54; “Points of Order” in *ibid.*, p. 989. See CRS Report R40948, *Constitutional Points of Order in the Senate*, by (name redacted).

might then, themselves, raise a point of order that their motion is out of order because existing Senate rules recognize no such motion. Normally, of course, on the basis of existing precedents, the chair would uphold this point of order, holding the motion out of order, leaving supporters no option but to appeal the ruling. Given that the appeal would itself be debatable, supporters would then still be faced with their original dilemma.

If the point of order attacked the motion offered by advocates of procedural change, on the other hand, but a sympathetic presiding officer chose not to rule on the point of order, and instead to submit it directly to the Senate for decision as involving a constitutional question, the situation would be reversed. Even if no constitutional question were involved, Senate Rule XX paragraph 2 accords the chair discretion to submit any procedural question directly to a vote of the Senate. In the past, the chair has sometimes exercised this discretion in cases in which previous precedential interpretations were lacking, although current practice reflects a strong presumption that the settlement of points of order will proceed on the basis of an initial ruling by the chair.³⁷

If the chair does submit a procedural question to the Senate for decision, the question is debatable, and would, accordingly, potentially be subject to filibuster. It would also, however, be subject to a motion to lay on the table. When a submitted point of order is tabled, the effect is the same as overruling the point of order, and thereby also holding the challenged action to be in order. In this way, a simple majority vote (on the non-debatable motion to table the point of order), by admitting the motion to proceed to a vote on the pending rules change proposal, might enable a simple majority to bring about a vote on the proposal itself.

This decision of the Senate on the submitted point of order could have the broader consequence of establishing precedent for a procedure under which the Senate could change its rules without having to face the potential that a supermajority vote would be required in the process. Even proceedings of this kind, however, would involve departures from established Senate practice in the process of approving procedural changes, at least insofar as the potential exercise of the chair's discretion in submitting the point of order (if it was not based on a constitutional question) would run counter to currently accepted expectations.

Self-Disposing Motions

The Senate's consideration of cloture rule changes in 1975 appears to have involved proceedings of essentially the form just described (although, as noted earlier, the Senate later voted to reverse the precedent set though those proceedings). Part of the reason for the reversal is that the motion originally held in order was a compound motion, involving several questions. Essentially, the motion proposed, first, that the Senate proceed to consider a rules change proposal; second, that the chair immediately put to a vote the question of ending debate on this motion to proceed; and third, that if the Senate voted to end debate, the chair also put to a vote the motion to proceed itself.

Arguably, such a motion might have been held out of order on the grounds that separate motions cannot be "chained" in a single proposition. An argument might also be made that the motion was out of order as purporting to provide for its own disposition, on grounds that the directive specifying how the Senate would dispose of the motion could have no authoritative force until the

³⁷ *Senate Manual*, Sec. 20.2. See "Points of Order" in *Riddick's Senate Procedure*, pp. 991-992.

Senate had already disposed (favorably) of the very motion whose disposition was being directed. Occasionally, however, the Senate has admitted other motions that appeared to be subject to one or both of these objections.

Neither of these arguments was advanced in 1975. Instead, the compound motion was held in order, by virtue of the Senate's laying on the table a point of order that was raised against the motion and submitted to the Senate by the chair. Opponents, however, then took advantage of the compound nature of the motion to demand that it be divided for debate and voting. If a question consists of several independent, separable propositions, any Senator may demand that it be divided, and the chair in this instance admitted the demand. After the question was divided, the Senate proceeded to consider the first division of the motion (the motion to proceed to consider the rules change resolution). Inasmuch as the Senate had not acted on the second division of the motion (directing that the question on the whole motion be immediately put), the first division of the question was held to be debatable, and extended debate took place thereon. As a result, the Senate was never able to reach a vote on the question of whether it should vote without debate on the motion to proceed. It was in this situation that a compromise resolution of the issue was negotiated.³⁸ It is not clear that a version of this approach could be devised that did not involve a compound motion or one purporting to provide for its own disposition.

Author Contact Information

(name redacted)
Specialist on Congress and the Legislative Process
-redacted-@crs.loc.gov, 7-....

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Drafts of this report were reviewed by (name redacted), specialist on Congress and the Legislative Process, (name redacted) and (name redacted), analysts on Congress and the Legislative Process, and (name redacted), section research manager, in the Legislative and Budget Process Section of the Government and Finance Division, Congressional Research Service. The Office of the Parliamentarian of the Senate provided guidance on several crucial points.

Key Policy Staff

Area of Expertise	Name	Phone	E-mail
Senate floor procedure; Senate rules	name redacted	x78667	redacted@crs.loc.gov
Senate floor procedure; Senate rules	name redacted	x70656	redacted@crs.loc.gov
Senate floor procedure; Senate rules	name redacted	x78635	redacted@crs.loc.gov
Senate floor procedure; Senate rules	Walter Oleszek	x77854	redacted@crs.loc.gov
Senate floor procedure; Senate rules	name redacted	x70644	redacted@crs.loc.gov

³⁸ See Senate Committee on Rules and Administration, *Senate Cloture Rule*, pp. 199-208.

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