



# Proposals to Change the Operation of Cloture in the Senate

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January 3, 2013

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R41342

**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

Paragraph 2 of Senate Rule XXII, also known as the “cloture rule,” was adopted in 1917. It established a procedure, amended several times over the intervening years, by which the Senate may limit debate and act on a pending measure or matter. Aside from unanimous consent agreements and statutory limits applying to certain types of legislation, cloture is the only mechanism by which the Senate can limit debate.

In recent years, some Senators have expressed renewed concerns over the way in which extended debate is conducted in the Senate and the operation of the cloture rule. Proposals for changing the cloture process include the establishment of new precedents on amending the rules, changes in the threshold necessary to invoke cloture, reductions in the time costs associated with certain cloture-related actions, and new or additional restrictions on debate in certain circumstances.

This report provides a brief history of the Senate cloture rule, explains its main features and the arguments made by supporters and opponents of these features, outlines a range of proposals to change its operation, and briefly explains the methods by which the Senate might change its rules or practices.

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## Brief History of the Cloture Rule

Proposals to limit Senate debate are as old as the Senate itself. Over the 224-year history of the body, numerous procedures have been proposed to allow the Senate to end discussion and act.<sup>1</sup> The most important debate-limiting procedure enacted was the adoption in 1917 of the “cloture rule,” codified in paragraph 2 of Senate Rule XXII. Under the current version of this rule, a process for ending debate on a pending measure or matter may be set in motion by a supermajority vote of the Senate.

Since the Senate’s adoption of the cloture rule in 1917, proposals have been advanced to repeal or amend it in almost every session of Congress.<sup>2</sup> At times, Senators of both political parties have debated the merits of the Senate’s tradition of free and unlimited debate. These debates have occurred at different times and under different sets of circumstances as Senators attempted, for example, to prevent filibusters of civil rights measures, pass consumer protection legislation, or secure the confirmation of judicial or executive branch nominations.

Debates on the cloture rule have frequently focused on whether the Senate must consider amendments to it under the body’s existing rules, including Rule XXII itself. This argument rests on the principle that the Senate is a “continuing body,” and relatedly, that its rules stay in force from one Congress to the next. A contrary argument contends that this principle has the effect of “entrenching” the existing rules against change, a situation which amounts to an unconstitutional limit on the power of the body to set the terms of its own operation. To overcome these difficulties, Senators attempting to change Rule XXII have employed various procedural tactics, including seeking to invoke cloture by majority vote, seeking opinions by the Vice President acting as presiding officer that the cloture rule itself is unconstitutional, and arguing that the Senate’s standing rules do not apply on the first day of a Congress.

Although many attempts have been made to amend paragraph 2 of Rule XXII, only six amendments have been adopted since the cloture rule was enacted in 1917: those undertaken in 1949, 1959, 1975, 1976, 1979, and 1986. Each of these changes was made within the framework of the existing or “entrenched” rules of the Senate, including Rule XXII.<sup>3</sup>

In 1949, the cloture rule was amended to apply to all “matters,” as well as measures, a change that expanded its reach to nominations, most motions to proceed to consider measures, and other motions. A decade later, in 1959, its reach was further expanded to include debate on motions to proceed to consider changes in the Senate rules themselves. The threshold for invoking cloture

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<sup>1</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress 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, 112<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 2011), p. 11.

<sup>2</sup> U.S. Library of Congress, Congressional Research Service, *Limitation of Debate in the United States Senate*, by George B. Galloway (Washington: December, 1956), p. 5; U.S. Congress, Senate, *Debate in the United States Senate: Extracts from the Journal of the United States Senate Pertaining to Limitation of Debate in the Senate of the United States* (Washington: GPO: 1917), pp. 1-10. Although repeal of Rule XXII has been proposed by some as a way to eliminate filibusters (see, e.g., S.Res. 249, 108<sup>th</sup> Congress), such an action would leave the Senate with no mechanism with which to end debate and would thus arguable have the contrary effect.

<sup>3</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress 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, 112<sup>th</sup> Cong. 1<sup>st</sup> sess. (Washington: GPO, 2011), pp. 183-225.

was lowered in 1975 from two-thirds present and voting to three-fifths of the full Senate except on proposals to amend Senate rules. In a change made in 1976, amendments filed by Senators after cloture was invoked were no longer required to be read aloud in the chamber if they were available at least 24 hours in advance.<sup>4</sup>

In 1979, Senators added an overall “consideration cap” to Rule XXII to prevent so-called post-cloture filibusters, which occurred when Senators continued dilatory parliamentary tactics even after cloture had been invoked. In 1986, this “consideration cap” was reduced from 100 hours to 30 hours.

## Features of the Present Cloture Rule

In its current form, which was adopted in 1986, Rule XXII provides that a cloture motion must be signed by 16 Senators and presented on the Senate floor. One hour after the Senate meets on the second calendar day of session after a cloture motion has been filed (and after a quorum has been ascertained), the presiding officer puts the question, “Is it the sense of the Senate that the debate shall be brought to a close?” The cloture motion is then subject to a mandatory yeas-and-nays vote.

If three-fifths of Senators—60 if there is no more than one vacancy in the body—vote for the cloture motion, the Senate must take final action on the matter on which it has invoked cloture by the end of 30 total hours of additional consideration. Invoking cloture on a proposal to amend the Senate’s standing rules requires a higher threshold: approval by two-thirds of the Senators present and voting or 67 senators if there are no vacancies and all Senators vote. Once cloture has been invoked, the clotured matter remains the pending business of the Senate until it is disposed of, and no Senator may speak for more than one hour. Senators may yield all or part of their allotted hour to a floor manager or floor leader, who may then yield time to other Senators. Each floor manager and leader, however, can have no more than two hours in total yielded to him or her. As with most Senate procedures, any of these requirements may be waived or their operations altered by unanimous consent. The mandatory quorum call, for example, is almost always waived by unanimous consent.

After cloture has been invoked, no dilatory amendments or motions are permitted, and all debate and amendments must be germane.<sup>5</sup> Only amendments filed before the cloture vote (or still pending, if germane) may be considered, and a Senator may not call up more than two amendments until every other Senator has had an opportunity to do likewise. Printed amendments that have been available for at least 24 hours are not read when called up.

Time for votes, quorum calls, and other actions is charged against the 30-hour limit on consideration. This time limit may be extended by joint leadership motion if three-fifths of all Senators vote for a non-debatable motion to do so. Senators who have not used or yielded 10

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<sup>4</sup> *Ibid.*, pp. 123-124.

<sup>5</sup> The germaneness standard applied to amendments in the post-cloture period is more restrictive than relevancy. Application of the restriction depends on the unique characteristics of the case in question. For more detail, see Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure* (hereafter, *Riddick’s*) 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 289-295, 854-862.

minutes of their hour are guaranteed up to 10 minutes to speak. When all time expires, the Senate immediately votes on any pending amendments and then on the underlying matter.<sup>6</sup>

## **Issues Surrounding Extended Debate**

### **Arguments in Support of Extended Debate<sup>7</sup>**

Supporters of extended debate believe that the American system of government should safeguard certain rights of legislative minorities against the power of a majority. Further, they argue, obstruction is sometimes justified to prevent a majority from restricting the rights of a minority until a broad political consensus has developed on an issue. They note that the structure of the Senate was intended to protect the rights of smaller states, and assert that the diminishment of minority rights would undermine this intent.

Defenders of extended debate also contend that, in the long run, matters that are truly in the nation's best interest have not been permanently blocked by extended debate. Likewise, the Senate's tradition of debate has protected different political parties at different times in history. The cloture rule has been in effect for nearing 100 years with little ill effect, they contend.

Supporters of extended debate believe that the ability of any Senator to speak at length about virtually any topic at any time is a unique characteristic of the Senate that allows the chamber to play a vital role in the legislative process, serving to cool passions and force deliberation. Furthermore, supporters argue, this more deliberative approach was intended by the framers of the Constitution, differentiating the Senate from the House. Removed of this deliberative function, they believe the Senate would become a shadow of the larger House of Representatives, and would specifically surrender its unique role as a check on the executive branch through its role in executive business—that is, nominations and treaties.

### **Arguments in Favor of Strengthening Limits on Debate**

Supporters of restricting debate argue that it is undemocratic to allow a determined minority to prevent an institutional majority from working its will. They say that the current process gives too much power to the minority at the expense of the majority, contending that although the founders intended the Senate to be more deliberative than the House, they did not intend to create a chamber where the minority could stall or prevent all action. Further, they believe it undermines public accountability of a majority in its responsibilities to manage the chamber's policy agenda.

In addition, extended debate by one Senator or a small group of Senators expends valuable time and money, supporters of changing debate rules argue, and brings public disrepute because the Senate cannot act in a timely fashion on important issues. Much legislation and many qualified nominations have been delayed or defeated by extended debate, they contend.

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<sup>6</sup> For more information, see CRS Report 98-425, *Invoking Cloture in the Senate*, by Christopher M. Davis.

<sup>7</sup> Several arguments from this and the following section are drawn from U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States*, committee print, prepared by the Congressional Research Service, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1975), pp. 55-58.

Supporters of proposals to limit debate assert that their proposed changes would still provide those who oppose a bill or matter significant time to discuss the proposal, but would not allow them to block action on it if a majority of the Senate supported it. Proponents of additional debate limitations focus on the benefits of an up or down vote, regardless of the outcome.

## **Potential Changes to Rules Governing Limits on Senate Debate**

As noted above, the Senate has considered—and in some cases, adopted—changes to the cloture rule and associated procedures at various times in the past. In recent Congresses—and perhaps especially in the 112<sup>th</sup> (2011-2012) and 111<sup>th</sup> (2009-2010) Congresses—some Senators have expressed renewed concern over the effect of extended debate on the Senate’s capacity to act efficiently. Rather than list all (sometimes overlapping) proposals introduced in recent Congresses, the discussion below groups proposals into categories based on the procedural mechanism by which the change would be effected or the overall goal of the change.<sup>8</sup>

The first category addressed below includes proposals that provide a non-rule-based mechanism by which the Senate could change its rules or precedents, or both, without needing to surmount the supermajority hurdle present in existing rules; specifically, these proposals hinge on a novel ruling by the Senate’s presiding officer in relation to Senate rules on debate or the constitutionality thereof. The second category discussed focuses on changes to the rules that would alter the vote threshold by which cloture is invoked. A third group of proposals focuses on the time the Senate must expend in using the cloture process to end debate on a question. Fourth, the report discusses proposals to limit debate on only certain questions (e.g., on the motion to proceed, motions related to establishing a conference committee). The fifth and final category addressed includes proposals that would increase the procedural burden on those opposing an end to debate on a particular matter. This section of the report then concludes by addressing other proposals that have been discussed in the context of changing the cloture process.

## **Chair Ruling on a Rules Change or on the Constitutionality of Extended Debate**

### **Status of Senate Rules**

As noted earlier, the Senate considers itself to be a “continuing body.” This is because (1) the Constitution provides for overlapping Senate terms by which only one-third of the seats can theoretically turn over in each election (and therefore, two-thirds of the Senate continues to serve with no interruption), and (2) the number of Senators continuing their service exceeds the number constitutionally required (a simple majority) for a quorum. Thus, there is no point at the

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<sup>8</sup> Many of these proposals, as will be noted below, were included in Senate resolutions introduced in the 112<sup>th</sup> and 111<sup>th</sup> Congresses; this report explains a wider range of variations in proposed mechanisms that have also informally been discussed or formally proposed in recent years. Though legislative actions on these proposals are not discussed in this report, four of those proposed in the 112<sup>th</sup> Congress did receive votes on January 27, 2011. The Senate did not adopt S.Res. 8, S.Res. 10 (as amended), or S.Res. 21 (as amended), but did adopt one of the standing orders mentioned in this report: S.Res. 28 (addressing anonymous “holds”).

beginning of a new Congress at which the Senate could be said to lack the possibility of a quorum for processing chamber business.<sup>9</sup>

This principle has been interpreted to imply that the Senate is continuously organized across Congresses, as well. In other words, Senate rules continue to apply across Congresses with no action necessary from the body to readopt them.<sup>10</sup> The Senate did not readopt its rules at the beginning of the 2<sup>nd</sup> Congress (1791-1792), and standing rules changes have always been accomplished in the context of the procedures and precedents established by the standing rules as they existed at the time. In 1959, the Senate explicitly incorporated this understanding into the standing rules, which state, “The Rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules” (Rule V, paragraph 2).

Because of the continued application of Senate rules, it has been said that Senate rules are “entrenched” in the sense that action to change the standing rules is constrained by existing rules that provide limited mechanisms to end debate on most matters.<sup>11</sup> Thus, to change the rules requires (1) using procedures that may require a supermajority for certain steps, or (2) a departure from the principle that the existing system of procedure (and precedents in relation thereto) remains in effect.

## **Proposals for Overcoming Entrenchment**

In the past several Congresses, there has been increased discussion of what recently has been called by some a “nuclear” parliamentary option to end debate and vote. Under such a scenario, the chair, perhaps occupied by the Vice President serving as presiding officer or by the President pro tempore of the Senate, would set aside the existing provisions of Rule XXII and rule that cloture could be invoked by simple majority vote. Supporters of such an approach argue that if such a ruling were appealed by opponents or submitted to the Senate for decision, and then sustained by a majority vote, debate would end and the pending business could then be brought to a vote.

In another version of this scenario, a Senator might raise a constitutional point of order against the decision that cloture had not been invoked on a matter, and the same end achieved if the point of order were sustained by a majority vote of Senators. Supporters argue that this proceeding would be permissible because under the Constitution, the Senate has the express right to make, or change, the rules of its proceedings at any time. This has led some Senators to call this scenario the “constitutional option.” Under Senate precedents, however, constitutional questions are to be submitted to a vote of the full chamber for decision;<sup>12</sup> therefore, the chair also would have to act in contravention of the precedent that constitutional questions are submitted to the Senate (or the

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<sup>9</sup> The concept of the Senate being a continuing body was enunciated on the Senate floor as early as the mid-1800s and has been affirmed in a variety of contexts since. In contrast to the Senate, the House of Representatives has no members who continue to serve a term across an election cycle; that body, therefore, organizes itself anew at the start of each Congress.

<sup>10</sup> In addition, elected officers of the Senate have continued to hold their positions from one Congress until the next (although this was not the original practice with the President pro tempore), and in current practice, committees keep membership until replaced (though the Senate’s initial practice was to determine committee rosters anew annually).

<sup>11</sup> For more information, see CRS Report RL32843, “*Entrenchment of Senate Procedure and the “Nuclear Option” for Change: Possible Proceedings and Their Implications*,” by Richard S. Beth.

<sup>12</sup> *Riddick’s*, p. 685.



rule that submitted questions are debatable), perhaps by stating that the body has a right to “get to the question” at hand.

In the 108<sup>th</sup> and 109<sup>th</sup> Congresses, the focus of such proposals was on certain judicial nominations, not on other business.<sup>13</sup> Those concerned about filibusters on these questions in particular argued that the inability of the Senate to reach a final vote on a nomination represented an abdication by the Senate of a constitutional duty, that of advising and consenting to nominations.

In the current context (as well as in some historical ones), these proposals are often intended instead to apply to all debatable questions, or, in some cases, at least to questions in relation to a rules change at the start of a new Congress.<sup>14</sup> Indeed, Senate floor proceedings at the start of the 112<sup>th</sup> Congress were conducted in light of this perspective, including actions that kept the Senate in the first “legislative day” beyond the initial calendar day of Senate session.<sup>15</sup>

Opponents have used the term *nuclear* to describe these scenarios, in part because they rely on steps that would contravene existing rules or precedents, or both, but also because of the belief that their use would destroy the comity and senatorial courtesy necessary in a body that operates overwhelmingly by unanimous consent. They further argue that such an approach might destroy the unique character of the Senate itself, making it more like the House of Representatives, where a majority has the ability to halt debate any time it wishes.

Observers point out that such a parliamentary proceeding is not unprecedented. On several occasions, Vice Presidents acting as the presiding officer (including Vice Presidents Richard Nixon, Hubert Humphrey, and Nelson Rockefeller) offered advisory opinions from the chair that the provisions of Rule XXII can be changed by a majority vote of the Senate at the beginning of a Congress.<sup>16</sup> In 1975, a ruling to this effect, submitted to the chamber by Vice President Nelson Rockefeller, was sustained by a vote of the Senate. The Senate later reversed itself by recorded vote, but whether this obliterated the precedent permitting cloture by majority vote has been a source of disagreement. For example, Senator Robert C. Byrd, the architect of the 1975 cloture amendment, observed that the reversal vote “erased the precedent of majority cloture established two weeks before, and reaffirmed the ‘continuous’ nature of Senate rules.”<sup>17</sup> Others argued that

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<sup>13</sup> See Geoff Earle, “‘Nuclear’ Option Retained to Break Filibuster,” *The Hill*, June 25, 2003, p. 1. Mike Allen, “GOP Plans ‘Marathon’ On Judges; Debate to Spotlight Blocked Nominees,” *The Washington Post*, Nov 8, 2003, p. A.01. Charles Hurt, “Senate GOP Fuzzy on Tactics to Handle Judicial Filibusters; Frist Dodges ‘Nuclear Option’ Query,” *The Washington Times*, September 7, 2003, p. A.06.

<sup>14</sup> S.Res. 396 (111<sup>th</sup> Congress) sought to address this issue and provide that Senate rules do not automatically apply on the first day of a new Congress. To provide for a rules change outside the operation of the current rules allowing extended debate on such a question, the resolution presumed expiration of the current standing rules (but did not provide a mechanism to implement or cause their expiration). The resolution did not provide a mechanism by which the Senate would end debate on a rules change. S.Res. 619 (112<sup>th</sup> Congress) more directly sought to establish that the Senate rules do not carry over from one Congress to the next and stated that if a motion to close debate was agreed to by a numerical majority, the Senate could go on to adopt new rules of proceedings.

<sup>15</sup> A new legislative day is only triggered by an adjournment of the Senate; if the Senate instead recesses from day to day, the legislative day remains the date the Senate met following the last adjournment, while the calendar day continues on.

<sup>16</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress 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, 112<sup>th</sup> Cong. 1<sup>st</sup> sess. (Washington: GPO, 2011), pp. 29-31.

<sup>17</sup> Robert C. Byrd, *The Senate, 1789-1989, Addresses on the History of the United States Senate*, vol. 2 (Washington: GPO, 1991), p. 132.

such a precedent was established and was not overturned. Senator Walter F. Mondale observed, “the Rule XXII experience was significant because for the first time in history, a Vice President and a clear majority of the Senate established that the Senate may, at the beginning of a new Congress and unencumbered by the rules of previous Senates, adopt its own rules by majority vote as a constitutional right. The last minute votes attempting to undo that precedent in no way undermine that right.”<sup>18</sup>

## **Reduce the Threshold Necessary to Invoke Cloture**

One element of the cloture rule that the Senate has changed on occasion is the voting threshold required for the invocation of cloture, which is currently three-fifths of the full Senate (60, assuming no more than one vacancy). Some have proposed changing this threshold to three-fifths of those *present and voting* (provided that a quorum—a simple majority—is present).<sup>19</sup> This change would lower the number of votes necessary to invoke cloture by only a few in some cases, but it could affect a handful of significant votes; in addition, for those voting against cloture, it would provide an incentive to be present and cast a vote because nonvoting Senators would have the effect of lowering the number of votes needed for cloture. (If only a quorum voted, then supporters would theoretically need as few as 31 of 51 votes—that is, three-fifths of a quorum.)

A related proposal would change Rule XXII to allow for multiple cloture votes in which the vote threshold to invoke cloture gradually drops lower with each successive vote (e.g., starting at 60, then dropping to 57, then 54, then 51). By implementing a change like this, supporters say, the Senate could allow a determined simple majority the ability to eventually work its will. In past Congresses, advocates proposed to apply this “ratchet” process only to nominations—premised on a distinction between executive business and legislative business—arguing that the existing supermajority vote requirement in pursuit of a vote on a nomination is not consistent with the constitutional provisions for Senate advice and consent. In the current context, however, this sort of change has been proposed to apply to all matters—including legislation—on which a cloture motion might be filed.<sup>20</sup> In these cases, there would be no guarantee that the Senate would actually debate the matter on which cloture has been filed during the days the cloture motion must lay over. In addition, because recent proposals along these lines would not allow for a subsequent cloture motion to be filed until after the disposition of the previous motion, this approach would require significant expenditure of floor time. (Currently, cloture petitions can be filed on successive days—or even on the same day—without first disposing of the previous petition, so that each motion can meet the layover requirement simultaneously.)

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<sup>18</sup> Walter F. Mondale, “The Filibuster Fight,” *The Washington Post*, March 18, 1975, p. A16.

<sup>19</sup> S.Res. 12 (112<sup>th</sup> Congress) and S.Res. 440 (111<sup>th</sup> Congress) included such a proposal. Under current rules, the “present and voting” standard applies to most other vote thresholds: e.g., the majority needed for adoption or passage of a matter, as well as the two-thirds vote needed to suspend the rules, invoke cloture on a rules change, or ratify a treaty. The three-fifths of the full Senate threshold applies to some situations other than cloture (e.g., motions to waive the Budget Act, appeals of chair rulings on motions with a three-fifths threshold, and motions to waive points of order against conference reports as provided by Rules XXVIII and XLIV). For more in-depth analysis of the procedural implications of the changes proposed in S.Res. 440, see CRS Congressional Distribution Memorandum, *Two Proposals to Change Senate Standing Rules: S.Res. 440 and S. Res. 465 (111<sup>th</sup> Congress)*, by Valerie Heitshusen (available on request).

<sup>20</sup> S.Res. 8 (112<sup>th</sup>) and S.Res. 416 (111<sup>th</sup>) both proposed just such a change. After one unsuccessful cloture vote, subsequent motions could be filed. On each subsequent cloture motion, the vote threshold by which cloture would be invoked would be three less than on the previous motion (until the threshold reaches a bare majority of Senators chosen and sworn).

Other proposals seek to change Rule XXII so as to allow a simple majority to invoke cloture on the first attempt, not just to allow for a gradual reduction in the vote threshold. Proponents argue that the existing cloture process (including the two-day layover of the motion and the possibility of 30 hours of post-cloture consideration) provides ample time for deliberation and debate, and that the supermajority requirement is too often used to block passage of a matter rather than subject it to due deliberation. Opponents of this idea note that the complexity of legislation and the need for careful deliberation and negotiation often requires more time, especially in situations in which policy proposals are brought to the floor with little or no committee consideration (a practice that some Senators assert is on the increase in recent Congresses).

Finally, some proposals would allow for a lower voting threshold to invoke cloture in only specific circumstances. Some, for example, have proposed applying a lower threshold for confirmation of nominees, on the argument that a President is entitled to some deference in his nominations.<sup>21</sup> Some advocates of this position support a lower threshold only for executive branch nominees, not for judicial nominees, due to the potential lifetime nature of appointments to the federal bench. Other proposals attempt to encourage more bipartisan agreement on decisions to end debate or at least to discourage filibusters characterized by strict party polarization; for example, a vote threshold of less than three-fifths might be required for cloture, but only in circumstances in which some majority party members oppose cloture or, alternatively, when minority party members support an end to debate.<sup>22</sup>

## **Reduce the Time Expended on Cloture and Ending Debate**

Other proposals focus on shortening the cloture process itself. As noted earlier, invoking cloture involves a two-day layover period once a cloture motion is filed, and then—if cloture is invoked—up to 30 additional hours of consideration of the matter. This means that even if a cloture motion is immediately filed on a matter on which three-fifths of the Senate will support cloture, the Senate could very well devote five days of floor time getting to a final vote. Due to this time-consuming process, some items of business are never considered on the Senate floor; the majority party has to decide which matters warrant the use of the extensive floor time that may be necessary to leverage the support of three-fifths of the Senate through a cloture process.

Proposals to shorten this process can focus on the pre-cloture layover period, post-cloture consideration, or both. In regard to shortening the two-day layover period, one recent proposal reduces the two-day layover period to a 24-hour layover period.<sup>23</sup> Others have proposed creating

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<sup>21</sup> See, for example, S.Res. 138 (108<sup>th</sup> Congress), which was reported by the Senate Committee on Rules and Administration and debated on the Senate floor. This resolution provided for the sort of “ratchet” proposal noted earlier (in which the vote threshold to invoke cloture declined by three on successive cloture motions), but applied it only to Senate consideration of nominations.

<sup>22</sup> S.Res. 440 (111<sup>th</sup> Congress) proposed a change along these lines in cases in which the Senate has failed to invoke cloture on a pending question on three successive attempts. Specifically, on the fourth and subsequent cloture motions, 45 of 100 Senators (rather than the 41 on earlier attempts) would have to oppose ending debate if either no majority party Senator opposed cloture or if only one majority party Senator opposed cloture and at least three minority party Senators supported it.

<sup>23</sup> See S.Res. 12 (112<sup>th</sup> Congress). In addition, at the end of the 112<sup>th</sup> Congress, another proposal for changing the operation of cloture was publicly-announced by Senator Levin and Senator McCain. A description of this proposal is available at <http://www.levin.senate.gov/newsroom/press/release/bipartisan-proposal-to-reform-senate-procedures>. This informal proposal seeks, among other things, to shorten to two hours the layover period for (1) certain cloture motions on motions to proceed (specifically, those cloture motions signed by both party leaders and at least five additional Senators from each party), (2) for a cloture motion on a proposed compound motion to set up a conference committee, (continued...)

a non-debatable motion that may be made after a cloture motion has been filed, which would reduce the layover period to some specified amount of time. Such a motion could be subject to a supermajority vote threshold, so that only on matters with broad support could the period be reduced.<sup>24</sup> Alternatively, some proposals instead provide a mechanism by which the majority leader under certain circumstances could move the Senate to an immediate vote on cloture before the layover period has expired.<sup>25</sup>

Other proposals seek to potentially reduce floor time expended by the Senate during the period *after* cloture has been invoked. One recent proposal applies this idea only to consideration of nominations by eliminating all post-cloture consideration after a successful cloture vote.<sup>26</sup> Another proposed a two-hour post-cloture debate limit on nominations.<sup>27</sup> Another recent proposal sought to limit post-cloture consideration of nominations and motions to proceed by allowing the majority leader, if no one sought recognition on the floor to speak during the 30 hours of post-cloture debate, to move the Senate to an immediate vote on the nomination or motion to proceed on which the Senate had voted for cloture.<sup>28</sup> Alternatively, some have proposed altering the existing non-debatable motion in Rule XXII by which three-fifths of the Senate can extend the 30-hour period such that it could also be used to reduce the 30-hour period,<sup>29</sup> while another sought to divide the 30 hours of post-cloture time for control by each party (which could allow for some time to potentially be yielded back).<sup>30</sup>

## **Restrict Debate on Certain Questions or Limit the Questions Subject to Extended Debate**

Rather than attempting to reduce the use of floor time associated with the cloture process in general, some proposals instead focus on providing new debate limitations on only certain motions or matters, such that a cloture process would not be necessary in some circumstances.

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(...continued)

and (3) for cloture motions on nominations.

<sup>24</sup> S.Res. 440 (111<sup>th</sup> Congress) included a version of such a proposal, establishing a potentially layover-shortening motion and subjecting it to a two-thirds (chosen and sworn) vote.

<sup>25</sup> S.Res. 9 (112<sup>th</sup>) and S.Res. 465 (111<sup>th</sup>) both included a similar provision that would allow the majority leader to move immediately to the vote on cloture if the first degree filing deadline has passed and *only if no Senator sought recognition* on the floor. This latter proviso was aimed at not only reducing the time the Senate expends on a pending cloture motion, but also providing cloture opponents an incentive to engage in debate. This latter goal of some proposals—in regard to encouraging debate—will be addressed in more depth below. The effect of the proposed rule change on the second-degree amendment filing deadline was not addressed by the resolutions. For more in-depth analysis of the procedural implications of the changes proposed in S.Res. 465, see CRS Congressional Distribution Memorandum, *Two Proposals to Change Senate Standing Rules: S.Res. 440 and S.Res. 465 (111<sup>th</sup> Congress)*, by Valerie Heitshusen (available on request).

<sup>26</sup> See S.Res. 12 (112<sup>th</sup> Congress).

<sup>27</sup> See S.Res. 10 (112<sup>th</sup> Congress).

<sup>28</sup> S.Res. 465 (111<sup>th</sup> Congress) includes such a proposed change to Senate rules.

<sup>29</sup> S.Res. 440 (111<sup>th</sup> Congress) includes this provision, but would allow the Senate to reduce the 30 hour period if three-fifths of Senators *present and voting* agree (a threshold that may, under some circumstances, be more easily achieved that one premised on the number of Senators *chosen and sworn*, as under the existing rule).

<sup>30</sup> See S.Res. 12 (112<sup>th</sup> Congress). The above-referenced informal Levin-McCain proposal in the 112<sup>th</sup> Congress also seeks to eliminate all post-cloture time on certain motions to proceed (those for which the cloture motion was signed by both leaders and by at least five Senators of each caucus) and on nominations. It also proposes an informal agreement among Senators that post-cloture limits on debate time for each Senator be more frequently enforced.

Some recent proposals along these lines—addressed below—have focused on the motion to proceed, motions to go to conference, certain amending situations, and new limits in relation to debate on a pending nomination.

## **Debate on the Motion to Proceed**

The motion to proceed to a matter, under most circumstances, is subject to debate.<sup>31</sup> Those opposed to Senate consideration of a matter, therefore, typically may subject it to extended debate, thereby requiring the invoking of cloture to end debate on the motion to proceed. The only other alternative for bringing a measure to the floor for consideration is via unanimous consent (or as a proposed amendment to another measure). Therefore, many measures that face opposition in the Senate may be subject to at least two cloture processes (on the motion to proceed and on the measure itself), which even if supported by three-fifths of the Senate, requires the expenditure of significant time (during the layover period for the cloture motion, as well as during the use of any post-cloture debate time).<sup>32</sup>

One way to hasten Senate action on a matter would be to eliminate or curtail the floor time spent considering the motion to proceed. Such a change would not remove the ability of opponents to prevent passage of a measure with a coalition sufficient to block cloture because the measure itself—and amendments to it—would still be subject to extended debate, theoretically requiring a cloture process and the support of 60 Senators to end debate and allow a vote on the matter. In addition, it could be argued that the two-day layover required for a cloture motion is necessary when filed on a *measure* because those days are used for the drafting and filing of amendments that may be proposed post-cloture; these activities are not relevant, however, for cloture on a motion to proceed to consider. Changing Senate rules such that all (or some additional) motions to proceed could be non-debatable could have a significant effect on the time the Senate spends on each matter it considers.

Other proposals to limit the time spent on motions to proceed include ideas that limit debate without eliminating it entirely. For example, the Senate could instead expand the number of questions for which the motion to proceed is not debatable beyond the existing circumstances. Alternatively, the Senate could allow debate on these motions to proceed, but limit it to a certain number of hours.<sup>33</sup>

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<sup>31</sup> Motions to proceed made during the morning hour are not subject to debate; conference reports, House amendments, and—pursuant to statute—certain other measures (e.g., a reconciliation bill), under current rules, can be brought up for floor consideration in the Senate without debate. In addition, a motion to move to executive session to consider a specific executive or judicial nomination on the *Executive Calendar* is not subject to debate (though the nomination itself is).

<sup>32</sup> In current practice, the two-day layover for the cloture petition may not require the expenditure of floor time since the majority leader often withdraws the motion to proceed after filing cloture on it so that the Senate may spend floor time on other matters until the cloture vote. (The motion continues to “ripen,” even after the withdrawal of the motion to proceed.) Only the post-cloture 30 hours requires the expenditure of actual floor time on the motion to proceed. However, the two-day waiting period after cloture has been filed still may delay Senate action on the underlying matter.

<sup>33</sup> S.Res. 10 (112<sup>th</sup> Congress) proposed a two-hour debate limit on all the motions to proceed that are currently subject to debate, and S.Res. 12 (112<sup>th</sup>) proposed to limit all debate on all motions to proceed to four hours (except a motion to proceed to a change to the standing rules). The Levin-McCain informal proposal referenced earlier limits to four hours debate on certain motions to proceed (which then would result in a modified amending process). S.Res. 440 (111<sup>th</sup> Congress) proposed an elimination of debate on all motions to proceed except on those to consider a change in Senate standing rules. Other past proposals would have established a two-hour debate limit on most motions to proceed (except, for example, to a rules change proposal). Such proposals often specified that since a motion to proceed can be (continued...)

Finally, the Senate could instead establish a new non-debatable motion to limit debate on a pending motion to proceed, if made by the majority leader. This change, supporters argue, would allow the Senate to make a decision about the length of debate on the motion to proceed on a case-by-case basis. Of course, the Senate could make such a motion to limit debate subject to a simple majority vote, but even subjecting the motion to a supermajority threshold could serve to limit the time spent on motions to proceed. Certainly, a majority threshold would prove an easier hurdle to clear in deciding whether to subject a certain motion to proceed to extended debate. However, even a supermajority threshold of three-fifths for such a vote could also provide the Senate a faster way of bringing the measure to the floor; while the 60 votes necessary likely would be the same as the 60 votes necessary to invoke cloture on a motion to proceed, allowing this motion to limit debate could still allow the Senate to immediately agree to the motion to proceed rather than spend the multiple days necessary to invoke cloture and conclude consideration of a motion to proceed.<sup>34</sup>

### **Debate on Motions to Go to Conference**

By precedent, the three actions the Senate must take when arranging to send a measure to conference with the House are all separate: disagree to a House amendment (or insist on a Senate amendment); request (or agree to) a conference; and grant the presiding officer the authority to appoint conferees. In addition, Senators can offer motions to instruct conferees, and various other motions are in order during the consideration of motions to disagree (or insist) and motions to request (or agree to) a conference committee.

The Senate normally takes all three required actions en bloc by unanimous consent. If a Senator objected to such a unanimous consent request, however, debate could occur separately on each of the three required actions; under current procedures, the floor manager may not offer one motion to take all three actions. Although cloture could be invoked on each of the three actions, the requirement to do so separately on each has made the threat of a single Senator to obstruct the process at this stage extremely potent.<sup>35</sup>

Some Senators have suggested that Senate rules be amended to allow these motions to be combined, thus permitting a single motion to facilitate arranging for a conference committee.<sup>36</sup>

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(...continued)

made by any Senator, any new limit on debate on the motion be made to apply only to motions made by the majority leader. This would conform with the custom in the Senate that the majority leader is expected to take responsibility for setting the floor agenda.

<sup>34</sup> In current practice, the Senate commonly—by unanimous consent—sets supermajority thresholds on certain votes as a way to protect the rights of a numerical minority that exceeds 40 while allowing the Senate to expedite consideration of a matter by avoiding the time-consuming cloture process. See CRS Report RL34491, *Unanimous Consent Agreements Establishing a 60-Vote Threshold for Passage of Legislation in the Senate*, by Megan S. Lynch.

<sup>35</sup> *Riddick's*, pp. 454-455. As an additional hurdle, Senators may offer motions to instruct conferees immediately before they have been appointed (in other words, just after the second of the three steps identified above have been taken); the number of motions to instruct conferees is unlimited, and each is debatable (though each is also subject to a non-debatable motion to table).

<sup>36</sup> S.Res. 12 (112<sup>th</sup> Congress) proposed one compound motion for going to conference that would be limited to four hours of debate. The Levin-McCain informal proposal referenced earlier also seeks to create a compound motion to take the Senate steps necessary for conference, and proposes a modified cloture process thereon. (The layover period for a cloture motion would be only two hours, and no post-cloture consideration would occur prior to a vote, if cloture was successfully invoked.)

Leaving the unified motion debatable could still require a cloture process, but it would require only one, whereas the current rules may require three.<sup>37</sup>

The Senate may also seek to resolve differences with the House using amendment exchange (sometimes called “ping-pong”). Because of the availability of this option, those who may prevent the Senate from going to conference do not necessarily prevent the Senate from resolving its differences with the House. The amendment exchange process may be structured to limit the input of those opposing a conference, thus undermining their goals. Given this alternative, proposals that may expedite Senate actions necessary for conference may attract support from those who believe that amendment exchange process is even less likely to result in attention to their policy concerns.<sup>38</sup>

### **Limit Debate on Measures Subject to Multiple Cloture Motions**

An alternative proposal aims to reduce the need to invoke cloture multiple times on the same policy proposal. Even if the Senate does not need to invoke cloture on the motion to proceed to a measure, it frequently must invoke it twice (or more) during consideration due to the application of certain principles of the amending process under cloture; specifically, it is common practice for the Senate to consider, and agree to, an amendment in the nature of a substitute to a bill that may have been proposed by a committee or offered on the floor as a policy option negotiated after the bill’s introduction or pendency. Because Rule XXII prohibits non-germane amendments from being offered after cloture is invoked on a bill—and because an amendment in the nature of a substitute frequently includes provisions that are not germane to the underlying bill it seeks to amend—the Senate must invoke cloture on this substitute amendment before invoking it on the underlying bill. (Otherwise, the substitute amendment would fall as non-germane once cloture was invoked on the bill.)<sup>39</sup>

This means that the Senate must go through the time-consuming cloture process twice on almost all bills on which an amendment in the nature of a substitute is offered, even though the Senate is, in effect, invoking cloture twice on the same text (because if the substitute was agreed to, the second vote is on invoking cloture on the underlying bill, as fully amended by the substitute). To avoid this “double” cloture process, some have proposed allowing no debate on an underlying bill or resolution once the Senate has agreed to an amendment in the nature of a substitute.<sup>40</sup> Such a change would avoid the additional floor time expended in the final cloture process, which proponents of a change deem an unnecessary use of time because the pending text of the underlying measure does not now differ from the amendment on which cloture was already invoked.<sup>41</sup>

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<sup>37</sup> In addition, although motions to instruct conferees in the Senate are rare, the threat to delay action by offering multiple debatable motions to instruct could be reduced by limiting the number of such motions that are in order or limiting debate on the motions and amendments thereto.

<sup>38</sup> For more detailed analysis of the procedural implications of using amendment exchange to resolve differences between the chambers, see CRS Report R41003, *Amendments Between the Houses: Procedural Options and Effects*, by Elizabeth Rybicki.

<sup>39</sup> The interpretation of germaneness in the post-cloture environment is quite narrow; it is thus not uncommon for a substitute amendment—even on the same topic as the underlying bill—to be non-germane.

<sup>40</sup> See S.Res. 12 (112<sup>th</sup> Congress), for example.

<sup>41</sup> Others have offered alternative proposals for achieving the same goal—e.g., a rules change that would deem any committee substitute amendment *per se* germane under cloture so that the initial cloture process (on the substitute (continued...))

## **Broaden Application of Two-speech Rule to Nominations**

As an alternative means of restricting debate in certain circumstances, some have suggested broadening the scope of Senate Rule XIX, paragraph 1, to apply its provisions to a subset of Senate business known as “executive business” (i.e., treaties and nominations). The rule says, in part, “no Senator shall speak more than twice upon any one question in debate on the same legislative day, without leave of the Senate, which shall be determined without debate.” Enforcement of this limitation has generally not been useful to those seeking to bring a measure to a vote, because each Senator may make two speeches on any “question.” Many such separate questions are routine when considering legislation, such as debating a first degree amendment, or a second degree amendment (to the first degree amendment), or any procedural question. Each Senator would get two speeches on each of those questions, each of unlimited length, and, therefore, a determined opposition would have numerous opportunities to block a final disposition of the matter at hand.

The same is not true, however, for nominations. No amendment is in order when considering nominations, and the Senate may not attach any conditions to the confirmation of a nomination, so the number of “questions” that would arise would necessarily be more limited than during consideration of legislation. Senate precedents, however, would need to be re-interpreted in order to apply the two-speech rule to executive business. The key phrase in the rule as applied to nominations is “the same legislative day.”

There are several methods the Senate uses to keep track of passing time. One is a calendar day, where time is measured based on the calendar system and is not altered; one day, under this system, is a calendar day.<sup>42</sup> The Senate in other contexts, however, measures time in legislative days: the time elapsed since the last adjournment (rather than recess) of the Senate. A new legislative day is triggered only by an adjournment of the Senate. When the majority leader chooses to recess the Senate from day to day, the legislative day remains the date the Senate met following the last Senate adjournment, while the calendar day continues on. It is possible, therefore, for the Senate to be meeting on the calendar day of May 20, while recording the legislative day as May 8. After an adjournment, the legislative day resets to the current calendar day, but the two only remain the same as long as the Senate continues to adjourn each day.<sup>43</sup>

The possibility of one legislative day spanning several calendar days can have an impact on the application of the two-speech rule, which counts time in legislative days. For example, if the Senate did not adjourn but, instead, recessed each day between January 5 and January 9 (such that all of these days remained the legislative day of January 5), any Senator who had made two speeches on January 5 on an amendment, could be prevented (on a point of order) from speaking again on the amendment during any of these subsequent days.

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amendment) would be unnecessary. Finally, the rules could instead be changed to make non-debatable any bill to which an amendment in the nature of a substitute has been agreed (thus not requiring an additional cloture process).

<sup>42</sup> Calendar days are used for some Senate calculations, such as counting the two days of Senate session that a cloture petition must lay over, for example.

<sup>43</sup> In 1980, for example, the legislative day in the Senate remained January 5, while the calendar day reached June 12 before a Senate adjournment.



The two-speech limitation, under Senate precedents, however, applies differently to executive business; it is a restriction only on a calendar day because a legislative day has been interpreted not to apply to executive business.<sup>44</sup> So, for example, if a Senator used her two speeches on a nominee during Monday's session of the Senate, she would be entitled to two additional speeches on Tuesday, regardless of whether the Senate adjourned or recessed at the end of Monday's session. To make the two-speech rule applicable to executive business could require a change in Senate standing rules, but it possibly also could be achieved by a ruling from the chair, particularly a ruling that is subsequently endorsed by a vote of the Senate.

It is not clear that this change would necessarily save the Senate time when debating a controversial nomination. If the majority leader did not have 60 votes to invoke cloture and move to a confirmation vote on a nomination, however, but decided it was worth spending potentially significant Senate floor time, the two-speech rule theoretically could provide a mechanism where a majority of the Senate could, eventually, be able to get to a final vote. The mechanics of the rule also could be difficult, such as deciding what constitutes a "speech"<sup>45</sup> and how managers of the nomination on the floor for both parties would be treated (as well as the leadership, who typically speak on multiple occasions on a question), and who would keep track of the number of speeches given by each Senator on each nomination.

## **Increase Procedural Burdens Borne by Opponents of Cloture**

Many Senators who support changing the operation of cloture are chiefly concerned with the level of costs associated with threatening (or of conducting) a filibuster. These Senators advocate requiring those who desire to prevent action by the Senate on a question to hold the floor and make their opposition known and even perhaps to speak to prevent final action by the Senate on the question.

A recent set of proposals discussed earlier seeks to allow supporters of a matter, under certain circumstances, to move cloture much more quickly than is typical under Rule XXII.<sup>46</sup> Specifically, once a cloture motion has been filed and the time for first degree amendments has passed, the proposal would allow the majority leader to move that the Senate vote on cloture if no Senator sought recognition to speak. One goal of the proposal, supporters argue, is to make those opposed to final action on a question hold the floor and speak, which might require at least some of those Senators to stay close to the floor to prevent the majority leader from using this mechanism to shorten the layover period for cloture. Under the current proposal, this idea also would apply to the possible 30 hours of post-cloture debate time, but only on nominations and motions to proceed (though there is no reason that the concept could not be applied to a broader variety of questions).

This proposal also envisions a parliamentary scenario that would allow the presiding officer to rule out dilatory motions and quorum calls in the period after a cloture motion is filed but before its disposition. The presiding officer is already permitted such power in a *post*-cloture environment, pursuant to existing provisions of Rule XXII. Interpretation of such a proposal may,

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<sup>44</sup> *Riddick's*, p. 714.

<sup>45</sup> See *Riddick's*, pp. 783-785 for a discussion of what has been judged to qualify as a speech under the rule.

<sup>46</sup> See S.Res. 9 (112<sup>th</sup> Congress) and S.Res. 465 (111<sup>th</sup> Congress).

if adopted, rely on the large body of precedents on dilatory actions developed for post-cloture procedure and apply them to the earlier period while the cloture petition is ripening.<sup>47</sup>

Along the same lines are proposals designed to make it harder for opponents of a measure or matter to use routine quorum calls to use up time at any point in the process; this would be accomplished by specifically linking certain quorum calls to a so-called “snap” vote. Under current rules and precedents, if a Senator notices the absence of a quorum, the presiding officer instructs the clerk to call the roll.<sup>48</sup> Typically, this is done to provide time for the next Senator who wishes to speak to reach the floor, and it routinely ends when the Senate agrees, by unanimous consent, to dispose of the call of the roll. This back and forth occurs routinely every day the Senate is in session.

If the quorum call is not lifted by the time the clerk reads the last name, however, the quorum becomes a “live” one. This means that to allow the Senate to stay in session, a majority of Senators must register their presence (technically through a vote on a subsequent motion); alternatively, the Senate may adjourn. Some proposals to change the cloture rule would use this procedure to shorten the length of time spent on the layover period for a cloture motion. If any quorum call were to “go live,” an automatic (presumably early) vote on invoking cloture would be triggered. Similarly, the same technique could be used to obtain a vote on the question if cloture were invoked and another quorum call was allowed to go live. Such a proposal also could be modified to say that the automatic vote would occur only after a specified number of quorum calls or after the Senate had expended a certain amount of time in quorum calls.

A related recent proposal also sought to address these rules and practices that allow opponents of a measure or matter to delay or prevent a vote with relative ease.<sup>49</sup> It proposed to create an “extended debate” session, which the Senate could enter after a (less than three-fifths) majority voted to invoke cloture. During this session, Senators could prevent a vote on the main question only by talking, but not by forcing the majority to attend to keep a quorum or to vote. The proposal provided disincentives for the use of quorum calls and also would have allowed the majority leader to postpone votes that could occur during the extended debate session, thereby forcing opponents to commit time to floor debate without necessarily requiring supporters of the measure to bear the burden of remaining in attendance responding to quorum calls.

Other proposals do not focus either on changes that would require opponents of cloture to speak on the floor or on new prohibitions on opponents’ use of certain motions or quorum calls. Instead, these ideas seek to increase the procedural burden borne by opponents of cloture by changing the voting threshold for cloture such that its invocation would directly depend, in part, on the number of Senators voting *against* it. Specifically, one recent proposal would have provided that cloture would be invoked by a simple majority as long as less than 41% of the Senate (chosen and sworn)

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<sup>47</sup> As an alternative to prohibiting dilatory quorum calls post-cloture, past suggestions have proposed that any time consumed by a quorum call after cloture count against the time for debate guaranteed to the Senator who noted the absence of a quorum.

<sup>48</sup> Under certain conditions, quorum calls may be ruled dilatory by the chair in the post-cloture environment. See *Riddick’s*, pp. 314-318.

<sup>49</sup> See S.Res. 21 (112<sup>th</sup> Congress), which embodies what some refer to as a “talking filibuster” proposal. (In addition, although S.Res. 10 (112<sup>th</sup>), as introduced, did not include these elements, it was amended to include provisions from S.Res. 21, prior to the Senate vote on it.) Note that S.Res. 24 (112<sup>th</sup> Congress) mirrored the procedural changes proposed in S.Res. 21 (112<sup>th</sup>), as introduced, but was framed as a standing order, not as a proposed change to the Senate standing rules.

voted against cloture, while another proposed that simple majority could invoke cloture unless two-fifths of the Senate (typically 40) or more voted against cloture.<sup>50</sup> Under the current rule requiring three-fifths of Senators to invoke cloture, 41 Senators (if 100 Senators vote) can oppose and thereby prevent the invocation of cloture, even by *not voting* at all. Under the change proposals, 41 opponents of cloture, in one case (or 40, in the other) would need to vote to prevent its invocation; if a sufficient number of opponents do not vote, cloture is invoked as long as more Senators vote for cloture than against it.

## **Other Related Issues**

Other proposals to change the operation of cloture do not involve new or altered Senate rules on cloture, but rather, focus on more vigorous enforcement of existing rules. In addition, the use of “holds”—although not explicitly addressed by the cloture rule—is an associated practice that has been the subject of proposals to alter the operation of the cloture process. One final idea unaddressed by the previous discussion involves proposals to delay or sunset the operation of any rules changes adopted.

## **Altering the Practice of Extended Debate under Existing Rules**

There are a number of Senate rules and precedents which, if enforced or used differently by the Senate, could provide means to limit debate in some circumstances.

The two-speech limit in Rule XIX, explained earlier, for example, could be routinely enforced during debate on legislation. If the majority leader recessed the Senate each night, instead of adjourning it, then each Senator would be limited to two speeches on the pending business before the Senate (not including executive business). There are significant hurdles to this idea, not the least of which is the enormous record-keeping task this could present for Senate floor staff as well as questions over what constitutes a “speech.” In addition, each Senator gets two speeches for each question at hand, so it might lead to more complex parliamentary situations where a Senator makes repeated, different motions to obtain an additional two speeches on the underlying issue.<sup>51</sup>

Another tool available is the precedent that allows the presiding officer, if no Senator seeks recognition, to put the pending question to the Senate without any further consideration.<sup>52</sup> Although this tool is currently used by presiding officers in some circumstances,<sup>53</sup> its use could be increased.<sup>54</sup> A determined opposition, of course, could counter this strategy by positioning a Senator on the floor who would be able to gain recognition to prevent the question from being put, if need be.

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<sup>50</sup> See S.Res. 440 (111<sup>th</sup> Congress) and S.Res. 13 (112<sup>th</sup> Congress), respectively.

<sup>51</sup> In current practice, Senators very infrequently raise a point of order to enforce this rule, presumably in the interests of collegiality, comity, and flexibility. There are contradictory precedents on the application of the two-speech rule to the period after cloture is invoked (*Riddick's*, pp. 305, 782.)

<sup>52</sup> *Riddick's*, p. 716.

<sup>53</sup> See for example, “Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010,” debate in the Senate, *Congressional Record*, daily edition, vol. 153, August 3, 2009, p. S 8651.

<sup>54</sup> The Levin-McCain proposal referenced earlier seeks an informal understanding among Senators that the presiding officer should more frequently put the pending question to a vote as long as the majority leader or bill manager has given Senators advance notice.

A combination of the enhanced enforcement of the two-speech rule and the putting of the question by the chair could also be used to try and foreclose extended debate, particularly if the majority leader decided to hold extended Senate sessions, reaching into the night or perhaps overnight. This approach may require the opposition to defend its position and take to the floor from time to time to preclude a vote, but the costs of staying in session are still largely borne by the majority party, because the majority would need to be present (relatively near to the floor) to ensure a quorum is available to do business and to vote on the question, when put to the Senate.<sup>55</sup>

Finally, there have been proposals to require that debate and amendments be germane to the pending business before the Senate. Currently, there is no general germaneness requirement for amendments (except in the post-cloture period); debate must be germane to the measure or matter before the Senate only for the first three hours of debate each calendar day. The ability of a Senator to speak extemporaneously about anything for as long as she wants, regardless of what is pending, is a central feature of the Senate and changes to it would seem to face long odds.<sup>56</sup>

### **Altering the Effect of “Holds”**

The Senate has usually understood holds to be notifications by Senators to their floor leaders, sometimes on a confidential basis, of an intent to object to the consideration of an item of business. Their effectiveness depends on Senate rules that place no limits on debate of most questions (absent unanimous consent or cloture). As a result, fashioning a mechanism that limits the use of holds is difficult, because even if a hold is not made public, it may represent a potential threat to filibuster an action, and for that reason may effectively deter attempts to call up or consider an item of business.

Senate standing rules do not currently address the practice of holds, and regulating them does not necessarily require amendment of Rule XXII. To the extent that a hold often indicates a threat to subject a measure or matter to extended debate, however, proposals to reduce the effects of extended debate (by addressing, for example, mechanisms by which a simple or supermajority may expedite consideration) often include proposals addressing holds.<sup>57</sup>

In recent Congresses, the Senate has twice agreed to establish some procedures governing the use of holds, though in neither case did it amend its standing rules. In the 110<sup>th</sup> Congress, Congress created, in statute (Section 512 of P.L. 110-81), that an objection on the floor by any Senator, on another Senator’s behalf, to a unanimous consent request to proceed to an item of business, would under certain circumstances to trigger the identification (in a designated section of the appropriate Senate calendar and in the *Congressional Record*) of the Senator on whose behalf objection was made.<sup>58</sup> In the 111<sup>th</sup> Congress, there were proposals formally submitted and informally discussed

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<sup>55</sup> Besides the immediate costs of maintaining a quorum, an additional cost to a majority wanting to end debate is that the time spent in floor consideration on one measure may delay Senate action on other matters. If a sufficient supermajority (e.g., three-fifths of Senators) wants to end consideration of a question, use of the cloture process often will take less floor time than requiring opponents to hold the floor (even under enhanced enforcement of rules limiting the number of speeches for each Senator).

<sup>56</sup> For additional information on previous debate change proposals, see archived CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by Christopher M. Davis and Betsy Palmer.

<sup>57</sup> Conversely, those wanting to better regulate holds or alter their effects likely would need to focus attention on changes to Rule XXII and/or other rules that govern the mechanisms by which the Senate proceeds to consider a question.

<sup>58</sup> See CRS Report RL34255, *Senate Policy on “Holds”: Action in the 110<sup>th</sup> Congress*, by Walter J. Oleszek, for (continued...)

to enhance the regulation (and/or limit the effect) of holds, especially those placed confidentially (so-called secret holds). Some of the proposals were modeled on the hold directive found in P.L. 110-81 and sought to address some perceived limitations of these existing statutory provisions, but none were agreed to in the 111<sup>th</sup> Congress.<sup>59</sup> Such proposals were also introduced in the 112<sup>th</sup> Congress or included as an element of other proposals to change the operation of cloture.<sup>60</sup> One such proposal—S.Res. 28—was adopted as a new standing order in January 2011, establishing a new process by which an objection to proceeding to a measure or matter on behalf of another Senator triggers a requirement for notice to be placed in the *Record* and in the designated section of the appropriate Senate calendar).

In sum, to the extent that a hold on a measure by even one Senator may mean that a successful cloture process is necessary to proceed to the bill (and in some cases, also, to end debate on it and amendments to it), any efforts to limit the impact of holds should be assessed within the context of proposals to change the operation of cloture in the Senate.

## Opportunities for Amending

In recent Congresses, attention has been paid to the extent to which amending opportunities have been available during consideration of a measure. Some Senators have focused their concerns on the frequency with which the majority leader “fills the amendment tree”—that is, offers a series of amendatory motions such that opportunities for other Senators to make additional amendments pending are (at least temporarily) limited.<sup>61</sup> Others have expressed concern that individual Senators have become more willing to object to unanimous consent requests that would allow more amendments to become simultaneously pending, or to otherwise constrain the ability of bill managers to negotiate packages of “cleared” amendments.<sup>62</sup> These concerns can be both directly and indirectly linked to the operation of cloture. For instance, Senators concerned that amending opportunities will be limited may be inclined to oppose proceeding to the bill at all without

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(...continued)

details. Also see CRS Report RL31685, *Proposals to Reform “Holds” in the Senate*, by Walter J. Oleszek, for more explanation of the current debate over holds.

<sup>59</sup> For example, S.Res. 502 (111<sup>th</sup> Congress) proposed additions to Rule VII that closely mirror some existing provisions of P.L. 110-81, chiefly by requiring Senators to submit their notices of intent (and explanations thereof) after objection is lodged on their behalf, but in a shorter time-frame than is provided for by P.L. 110-81. An altered version of this proposal—which includes an additional provision identifying as the “holder” any Senator who objects on behalf of an anonymous colleague to a floor unanimous consent request—was offered to other measures considered on the floor in the 111<sup>th</sup> Congress. See, for example, S.Amdt. 4183 to H.R. 4899 (111<sup>th</sup>) and S.Amdt. 4019 to S. 3217 (111<sup>th</sup>). Another proposal in the 111<sup>th</sup> sought to establish a new Senate standing rule on holds that would have required disclosure in the *Congressional Record* by any Senator who either has given his or her party leader a notice of intent to object to proceed to a matter or has indicated publicly such intent on the Senate floor; the proposal also sought to reduce the extent to which certain holds effectively preclude floor consideration of a measure or matter; see S.Res. 440 (111<sup>th</sup>).

<sup>60</sup> S.Res. 10 (112<sup>th</sup>) included a proposal to prohibit a Senator from objecting on behalf of another unnamed Senator. The Levin-McCain proposal referenced earlier also seeks in formal agreement among all Senators that leaders and bill managers will not “honor” holds unless the objecting Senator voices objection on the floor (with reasonable notice) and will expect a Senator to object on the floor to any unanimous consent requests that he or she opposes (by the next day, with “appropriate notice”).

<sup>61</sup> For additional detail and explanation, see CRS Report RS22854, *Filling the Amendment Tree in the Senate*, by Christopher M. Davis.

<sup>62</sup> See for instance, remarks by Senator Dorgan, during consideration of S. 3217 (111<sup>th</sup>). *Congressional Record*, daily edition, May 18, 2010, pp. S3670-S3673.

assurances about such opportunities, thereby potentially increasing the need to use a cloture process on motions to proceed (a dynamic that is at the root of many proposals to limit debate on such motions). In addition, to the extent that negotiations over the offering of amendments often are reduced to the challenges the Senate faces in coming to a final vote on a pending question (including an amendment), proposals to make it easier to invoke cloture (or make it harder to sustain a filibuster) inherently implicate the leverage that Senators have in the floor amending process.

Since the current practices surrounding the right to extended debate have been linked to the argument that amending opportunities for Senators have been limited in recent years,<sup>63</sup> some proposals to change the operation of cloture have included provisions that address this aspect of Senate floor procedure.<sup>64</sup> Some recent proposals on changing the operation of cloture have addressed this issue by guaranteeing to each party the ability to offer a set number of amendments;<sup>65</sup> proponents of these provisions argue that such a guarantee could potentially alleviate the concerns of those Senators who now might block or seek to delay the Senate's consideration of a matter due to uncertainty over amending opportunities later. Another proposal instead would establish a non-debatable motion by which individual Senators could—with the agreement of a majority of voting Senators—be allowed to offer a germane amendment when it is otherwise not in order (due to an already-pending amendment).<sup>66</sup>

## **Effective Dates for Change Proposals**

Proposed changes to the operation of cloture often raise concerns that one party may be more advantaged by the changes than the other, especially because they typically involve some reduction of leverage to those opposing an end to debate (in most circumstances, a group dominated by the minority party). To address this concern, many supporters propose to make changes effective at some date in the future—perhaps in a future Congress when the identity of the majority party is as yet unknown. Others have suggested instead to provide that any changes are effective for only a short period, as a way to assess any unanticipated changes that may result without binding the Senate to the changes (because rules changes, as mentioned above, tend to become entrenched).<sup>67</sup> This latter approach often seems to opponents, however, to be a way of

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<sup>63</sup> On January 27, 2011, majority leader Harry Reid and minority leader Mitch McConnell conducted a colloquy on the Senate floor during which the majority leader pledged to use the procedural option of filling the amendment tree “infrequently” in the 112<sup>th</sup> Congress (2011-2012). In the same colloquy, the minority leader pledged to “... use our procedural options with discretion.” Both floor leaders further pledged to do all they could to see that Senators in their respective party caucuses respected the terms of the colloquy. According to Senators Reid and McConnell, this informal agreement was entered into, “in the interests of comity and [a] more open process in the Senate.” *Congressional Record*, daily edition, vol. 157, Jan. 27, 2011, p. S325.

<sup>64</sup> In past Congresses, Senators have introduced proposals focused only on the amending process, aimed specifically at prohibiting the majority leader from “filing the amendment tree.” (See, for example, S.Res. 12, 111<sup>th</sup> Congress.) Only proposals that include amending changes within the context of other proposed changes to the operation of cloture are referenced in this report.

<sup>65</sup> See S.Res. 8 (112<sup>th</sup> Congress). The Levin-McCain proposal referenced earlier would address this issue by linking a four hour debate limit on certain motions to proceed to a modified amendment process. Specifically, the proposal seeks to allow four amendments (one for each party leader and each bill manager) on a measure brought up under this debate-limited motion to proceed.

<sup>66</sup> See S.Res. 10 (112<sup>th</sup> Congress).

<sup>67</sup> The Levin-McCain informal proposal discussed earlier states that it would include a “sunset” provision such that, if adopted, it would only apply to the 113<sup>th</sup> Congress.

assuring any benefits of the change accrue to the present majority party while preventing their accrual to a different party in the future.

## **Procedures for Changing Senate Rules and Practices**

Each proposal to change the operation of cloture discussed above does not necessarily require a change in Senate standing rules. For example, some rely only on changes in Senate practices, and some propose a series of steps on the Senate floor that could establish new precedents. Many proposals do, however, require a rules change.

A change to Senate standing rules could be accomplished via adoption of a simple resolution making specified rules changes, though standing rules changes can also be accomplished through provisions of a statutory measure (e.g., pursuant to an amendment to legislation adopted on the floor).<sup>68</sup> Once a simple resolution is on the *Calendar of Business* (typically after having been reported by committee), it could be brought before the Senate by unanimous consent or by a debatable motion to proceed.<sup>69</sup>

Once a rules change is under consideration on the Senate floor, it could be subject to extended debate; a cloture process may be necessary to end debate and allow for a final vote on adoption. As noted earlier, pursuant to changes made in 1975 to Rule XXII, cloture on a proposal to change the standing rules requires a two-thirds threshold of those present and voting. This provision makes it difficult to make changes in the standing rules of the Senate and contributes to the so-called entrenchment of Senate rules, as discussed earlier.

It is again worth noting that Senate procedure is governed not only by the standing rules and the precedents interpreting them, but also by the Constitution, standing orders,<sup>70</sup> the rule-making provisions of certain statutes that provide for procedures outside of the provisions of the standing rules (e.g., the Congressional Budget Act),<sup>71</sup> and practice. Changes to Senate procedures accomplished through these other mechanisms—for example, through adoption of a new standing order or enactment of statutory provisions that do not amend the standing rules—do not fall under the Rule XXII requirement that cloture on a rules change obtain a two-thirds affirmative vote. These options, however, would still be subject to the lower (but still supermajority) threshold of

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<sup>68</sup> Rule V requires one day's notice (in writing) of any attempt to modify or amend any Senate standing rule.

<sup>69</sup> A proposal for the Senate to consider a simple resolution immediately upon introduction can be objected to; in this case, the resolution lays over for one day (under Rule XIV) and would be laid before the Senate during morning hour on the next legislative day—a context that make proceeding to the resolution prohibitively complicated.

<sup>70</sup> Standing orders are non-statutory regulations on Senate procedure that are not embraced in the standing rules, but that nonetheless, can govern Senate business. Standing orders are simple resolutions (i.e., matters with an S.Res. designation) that—like Senate rules—continue to be in effect across Congresses. Two resolutions in the 112<sup>th</sup> Congress—S.Res. 28 (referenced earlier in relation to holds) and S.Res. 29 (which establishes a motion for waiving the reading of certain pre-printed amendments)—were recently adopted as standing orders. Other examples of standing orders in current effect are those that establish certain non-standing committees (e.g., Senate Select Committee on Intelligence), provide extra jurisdiction to a standing committee (e.g., the Senate Committee on Homeland Security and Governmental Affairs), provide detailed regulations on the travel expenses of Senators, and govern certain ceremonial aspects of Senate activity. The aforementioned Levin-McCain informal proposal is framed as a standing order, as well, rather than as a change to the Senate standing rules.

<sup>71</sup> For more detail and examples, see CRS Report RS20234, *Expedited or "Fast-Track" Legislative Procedures*, by Christopher M. Davis.

three-fifths to end debate. Changes accomplished via a new statutory provision, of course, would also require House—and potentially presidential—approval for enactment.

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## **Acknowledgments**

Betsy Palmer, former Analyst on Congress and the Legislative Process at CRS, also co-authored an earlier version of this report.