SENATOR AND SENATE: INFLUENCE ON THE LEGISLATIVE AGENDA

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THE AGENDA PROBLEM

One of the key characteristics of any legislative body is the means by which its agenda is determined. Proposals that do not reach the agenda cannot be enacted into law; control of the agenda, therefore, provides negative control over policy.[1] In parliamentary systems, for example, the agenda generally is determined by the prime minister and the cabinet. Backbenchers and opposition parties may be able to raise issues for debate, but usually not for decision. The legislative agenda normally is the province of the majority, acting through the government. While the government may not always succeed in having its own proposals enacted, it can be reasonably confident that no major proposals will be brought to the point of decision without its concurrence.

In the American system, of course, the executive branch may influence, but cannot control, the agenda of Congress. The President's legislative initiatives rarely are ignored, but they are not guaranteed even consideration (much less approval) on the House and Senate floor. The congressional agenda also is affected by developments external to government such as international crises, changes in economic conditions, media investigations, and constituent demands. But these are influences to which the Congress chooses to react. A congressional response of one kind or another may be necessary politically, but it is not

required constitutionally. Under the Constitution, each chamber has the authority to fix its own rules of proceedings; with few exceptions, this authority includes the authority to decide for itself what issues it will consider, in what form, and when.[2]

To a considerable extent, the annual legislative agenda of Congress is determined by the decisions of prior Congresses. For example, Congress traditionally has appropriated funds for most government activities one year at a time, even though the only constitutional constraint is a two-year limit on appropriations to raise and support armies. The consequence is an annual agenda of at least thirteen general appropriations bills (plus assorted continuing resolutions and supplemental appropriations) on which the House and Senate are supposed to complete action each year. As part of the Congressional Budget Act of 1974, Congress also required that it act annually on at least two concurrent budget resolutions, one before and one after its consideration of the regular appropriations bills. Moreover, the two chambers have imposed on themselves a two-stage funding process for most federal programs, which anticipates that Congress will enact an authorization for a program before considering its annual appropriation. Before World War II, authorizations usually were permanent. In recent years, however, Congress has taken to enacting one-year or limited-year authorizations that, in theory at least, must be renewed annually or periodically simply to continue current government activities.[3]

Collectively, these authorization, appropriation, and budget measures consume a major share of congressional time and attention each year, both in committee and on the floor. Yet it remains within the power of Congress to alter, abolish, or ignore this component of its annual agenda. By simple majority vote, the House and Senate could repeal the applicable provisions of their rules and the Budget Act that call for authorizations and budget resolutions.

Funds sometimes are appropriated without prior authorization, and appropriations may be enacted in an omnibus continuing resolution if the individual appropriations bills are not completed. With regard to these kinds of measures, as well as the thousands of new proposals that are introduced every two years, Congress retains control over its own agenda. Therefore, the House and Senate each must have one or more means for determining which measures shall reach the floor and in what order.

The most obvious and important means is the standing committee system of each chamber. The committees perform an essential screening and filtering function without which Congress would be overwhelmed. During the 96th Congress, for example, House committees reported favorably on 878 or 9.6 percent of the 9,103 bills and joint resolutions that were introduced; of the 3,480 bills and joint resolutions introduced in the Senate, 862 or 24.8 percent were reported favorably (many with amendments). Of course, many of these measures are introduced without any expectation of favorable action. Still, committee decisions reduce the potential agenda from many thousands of measures to a fraction of that number which the Congress' own policy specialists believe merit debate and passage. A bill that is reported from committee is placed on one of the calendars of the House or Senate, which, generally speaking, are catalogues of measures that are available for floor consideration. Most often, then, the process of agenda-setting becomes one of selecting measures to be taken from the appropriate calendar and brought to the floor.

The House manages this selection process in several ways. House rules grant privileged status to certain kinds of measures--e.g., appropriations and budget measures--that are considered essential to congressional operations and the fulfillment of its constitutional responsibilities. Privileged bills and resolutions may be called up for floor consideration whenever another measure

is not already pending. Most other major bills reach the floor only after the House first agrees to a special rule, in the form of a resolution reported by the Rules Committee, that makes the bill privileged for consideration in addition to setting ground-rules for debating and amending it. Still other measures are brought up when the Speaker, at his discretion, recognizes a Member to make a privileged motion to suspend the rules and pass a particular measure by a two-thirds vote. Whatever the means employed to bring a measure from a calendar to the floor of the House, the specific timing of floor action is arranged with the Speaker and other majority party leaders.

These are some of the means by which bills and resolutions may reach the floor, but control over the House floor agenda almost always rests with the majority. A measure's privilege permits it to be called up but does not compel the House to consider it; under some circumstances, the House can decide by majority vote not to consider a privileged measure, although it is unlikely to do so. A special rule for considering a non-privileged bill can be rejected, in which case the bill itself is unlikely to be considered unless the Rules Committee proposes a more satisfactory set of procedural arrangements. And if a suspension motion is opposed by one-third plus one of the Members voting, the measure at issue is returned to its calendar for possible action later during the Congress by other means. In short, a united and determined voting majority generally can prevent measures from being considered on the House floor and certainly can prevent them from being passed.

Conversely, that same majority has equivalent power to compel action on measures of its choice. If a bill the majority favors is not reported from committee or is not granted a special rule, there are discharge procedures available to bring it to the floor anyway by majority vote. These procedures rarely are invoked since decisions about the floor schedule usually are not

controversial. But if a controversy does arise, the rules of the House are designed to permit a voting majority to make that decision, if it is determined to do so. In general, it is beyond the capacity of any single Representative, or any minority of Representatives, to compel floor action on controversial measures without majority consent.[4] A Representative can attempt to persuade and mobilize support, but the agenda of the House essentially is for the majority to decide.

In the Senate, by contrast, majority control over the agenda is much more tenuous. To bring a bill from the Senate's legislative calendar to the floor, any Senator may move that the Senate proceed to the consideration of the bill. However, this motion is debatable under most circumstances. As a result, the very question of considering a measure on the Senate floor may be subject to a filibuster, even before the Senate begins debate on the bill or resolution itself. In this respect, as in so many others, the right to debate at length gives individual Senators and minorities within the Senate enormous leverage over the agenda.

Recent Senate Majority Leaders have attempted to conserve the available floor time, and have been reluctant to bring measures up for consideration without some reasonable assurance that the Senate will reach a vote on final passage. The overwhelming majority of measures, therefore, reach the floor of the contemporary Senate by unanimous consent. A Senator who refuses to give his or her consent implicitly threatens a filibuster against the motion to consider the bill at issue, and then, presumably, against the bill as well. This threat frequently is sufficient to convince the leadership to postpone action on the bill in favor of other measures that also deserve consideration and that do not face the same obstacle to enactment. It is not even necessary for a Senator to make his or her objection on the floor. By placing a "hold"

on a measure, a Senator registers an unofficial objection to any unanimous consent request for the measure's consideration. The floor leaders of both parties have tended to honor "holds" for reasonable periods of time. And if the Majority Leader eventually decides that the measure must be considered anyway, the Senator who placed the "hold" retains the right to object to taking up the bill by unanimous consent as well as the right to filibuster against a motion to consider it.

Debate, therefore, is a powerful weapon that Senators can use, or merely threaten to use, to exert negative influence over the floor agenda. It falls to the Majority Leader, working in concert with the Minority Leader, to cope with this potential problem as he proposes arrangements for the Senate's daily schedule and its longer-term legislative agenda. As a matter of well-established practice, only the Majority Leader or his designee makes motions to adjourn or recess, even though any Senator may make such a motion under Senate rules. Similarly, Senators delegate to the majority party leadership their right to request or move for the consideration of particular measures. Most of the time, the floor agenda does not become a matter of great controversy--due to both the skill and perseverence of the party leaders and the self-restraint of other Senators. But the Majority Leader can only propose the agenda; he may not impose it.

In these respects, the influence of individual Senators on the agenda is primarily negative. Through the use of "holds," objections to unanimous consent requests, and the right to debate motions to consider, a Senator can delay or even prevent floor action on bills that most Senators may wish to debate, amend, and pass.

There also are respects in which individual Senators can exert a positive

influence on the floor agenda. It is true that Senate committees generally control the normal channels by which measures reach the floor through committee decisions to report or not to report. The Majority Leader (in consultation with other Senators, to be sure) then selects from among these bills as he proposes the daily and weekly floor schedule. There are devices, however, that Senators may use to press for floor consideration of measures or issues that would be unlikely to reach the floor through the usual processes of committee action and scheduling by the leadership.

A Senator who is sufficiently determined may be able to compel Senate attention to a matter on which the committee of jurisdiction, the majority party leadership, and a majority of his or her colleagues are not prepared to act. These devices do not guarantee approval of the proposal in question, but they can be used to assure it a place on the agenda. Senate action during the Carter presidency on the issue of appropriate procedures for treaty termination illustrate some of the opportunities available to individual Senators under Senate rules and how they may be used for this purpose.

A JOINT RESOLUTION, A SENATE RESOLUTION, AND AN AMENDMENT

On December 15, 1978, President Carter announced that the United States and the People's Republic of China would recognize each other formally on January 1, 1979; the 1954 mutual defense treaty between the United States and the Republic of China on Taiwan would be terminated at the end of 1979. As Senators discussed the wisdom of these actions, they also debated the propriety of the President's decision to invoke the termination provisions of the treaty with Taiwan without formal congressional concurrence.

Little more than a year before President Carter's announcements, the Congress had completed action on Public Law 95-384, the International Security

Assistance Act of 1978, which included the following provision:

> Sec. 26. (a) The Congress finds that --
>
> (1) the continued security and stability of East Asia is a matter of major strategic interest to the United States;
> (2) the United States and the Republic of China have for a period of twenty-four years been linked together by the Mutual Defense Treaty of 1954;
> (3) the Republic of China has during that twenty-four-year period faithfully and continually carried out its duties and obligations under that treaty; and
> (4) it is the responsibility of the Senate to give its advice and consent to treaties entered into by the United States.
>
> (b) It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.

Although this "sense of the Congress" provision had no legal force, it was a clear statement of congressional preference. Thus, Carter's unilateral action ignored Congress' expressed desire for prior consultation and raised a constitutional question that had never been resolved conclusively: does a president have the authority to terminate a treaty without the advice and consent of the Senate or majority votes in both the House and the Senate?

When the 96th Congress convened in January 1979, Senator Harry F. Byrd, Jr., of Virginia initiated a campaign to bring the general issue of treaty termination procedures before the Senate for debate and decision.[5]

A Joint Resolution. The 96th Congress met for the first time on January 15, 1979, and the Senate immediately began action on a series of routine, organizational matters that customarily are its first order of business on such an occasion. Before these proceedings could be completed, however, the Senator from Virginia presented the Senate with its first legislative business. Although the majority and minority leadership had agreed upon an order of business for the beginning of the first meeting of the Senate, Senator Byrd stood and sought

recognition and was recognized by the Vice President in accordance with paragraph 1 of Rule XIX:[6]

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him....

Despite this rule, it has been the accepted practice of the Senate for many years that the Majority Leader or his designee is to be recognized if that Senator and any other Senator both are seeking recognition at the same time. This customary right to preferential recognition is essential to the orderly flow of business on the Senate floor because it gives the majority leadership the opportunity to exercise its equally customary privilege to make the unanimous consent requests and motions by which the daily schedule is arranged and business is expedited. Without such practices, any Senator could be recognized to propose action on any measure without regard to the legislative business that is pending or anticipated. In this case, however, Senator Byrd evidently addressed the Presiding Officer at a moment when no other Senator was speaking and none of the floor leaders was seeking recognition. Under these circumstances, Senator Byrd had a right to be recognized.

Once recognized, Byrd introduced and requested immediate consideration of a joint resolution, S. J. Res. 3, which stated:[7]

> That it is the sense of the Congress that approval by the Senate of the United States is required to terminate any Mutual Defense Treaty between the United States and another nation.

After this resolution was read for the first time, the Majority Leader, Senator Robert C. Byrd of West Virginia, objected to its further consideration at that time, and the Vice President announced that it would be held at the desk until it could be read a second time. The Majority Leader also expressed regret

that the Senator from Virginia had offered his resolution before the Senate had completed its initial organizational business, which then continued.

The Senator from Virginia might simply have introduced his resolution, without requesting its immediate consideration, and it would have been referred routinely to the Committee on Foreign Relations. In turn, the Committee could have held hearings and then reported the resolution, with or without amendments, back to the Senate for floor consideration. However, he apparently believed that the Committee was unlikely to take any affirmative action on the resolution, probably because its approval could affect, or reflect on, President Carter's termination of the Taiwan treaty. Rule XIV permits any Senator to introduce a bill or joint resolution and have it placed directly on the Senate's legislative calendar without having been referred to and reported from the committee of jurisdiction. Therefore, he introduced and asked for the immediate consideration of his resolution on January 15th; but he did so not with the expectation that the Senate actually would debate and act on it at that time, but as the first step toward bypassing the Foreign Relations Committee altogether.

Each bill and joint resolution must be read three times before it is passed, according to Rule XIV, and each reading must occur on a different legislative day, except by unanimous consent. A new legislative day begins when the Senate meets following an adjournment; when the Senate meets after a recess, it continues in the same legislative day. Thus, a legislative day may extend over more than one calendar day, depending on whether the Senate chooses to recess or adjourn. Because the Senate normally recesses at the end of each day's proceedings, it is not unusual for legislative days to continue for several days or weeks or sometimes even for months.

The Rule also states that no bill or joint resolution may be referred to a committee before its second reading has taken place, and that it may not be

considered by the Senate on the day of its second reading without unanimous consent. Finally, Rule XIV indicates that a bill or joint resolution need not be referred to one or more of the Senate's standing committees. After its second reading, any Senator may object to "further proceeding thereon." In that case, it is neither referred to committee nor considered immediately by the Senate. Instead, it is placed directly on the calendar without having received any formal committee consideration.

Most bills and joint resolutions are introduced, considered as having been read twice, and referred to committee, without any discussion on the Senate floor. The Senate, like the House, places great importance on its committee system for initiating, screening, and perfecting measures. Under unusual circumstances, however, and especially if the sponsor of a measure anticipates that it would be received unsympathetically in committee, Rule XIV offers a means for avoiding the stage of committee consideration.[8]

To take advantage of this opportunity, a Senator may introduce a bill or joint resolution and ask for its immediate consideration by unanimous consent. If there is no objection, the Senate considers the measure at that time, notwithstanding the provisions of Rule XIV. If there is objection to its consideration after the first reading, it is held at the desk until the next legislative day when it is read for the second time. If the sponsor of the measure (or any other Senator) then objects to further proceeding after the second reading, the measure is placed directly on the Senate's calendar of legislative business. House bills and joint resolutions received by the Senate may be handled in the same way.

Senators do not invoke these procedures frequently or casually. Whenever a Senator is tempted to do so, he or she must weigh the danger of encouraging a

practice that ultimately could undermine the committee system and the authority of his or her own committees. The day after the first step was taken in 1980 to place H.R. 5200, the Fair Housing Act Amendments, directly on the calendar, one Senator argued that:[9]

> The strongest objection to the use of rule XIV, particularly its frequent use, is that it will disrupt the committee system. The numerous bills considered by the Senate need careful and thorough committee review. The last thing the Senate needs, and the last thing this country needs, is to bring ever increasing numbers of legislation to the Senate floor without thorough committee review. With many problems facing the Nation, the Senate must divide legislation up into committees in order to consider and draft individual bills carefully. Placing a bill on the Senate Calendar through the use of rule XIV bypasses this vital committee step of the legislative process.

Most Senators would probably agree with this contention. Nonetheless, Rule XIV has been invoked from time to time when a Senator's interest in the progress of a certain measure has outweighed his or her commitment to normal legislative procedures. For example, in 1978, a joint resolution proposing a constitutional amendment for congressional representation of the District of Columbia was placed directly on the calendar, as was another joint resolution extending the ratification deadline for the Equal Rights Amendment. During the following year, Rule XIV also was used to avoid committee referral of a joint resolution proposing another constitutional amendment--for the direct popular election of the President and Vice President.

It was this process that the Senator from Virginia set in motion on January 15th. He expected that some Senator would object to the immediate consideration of his joint resolution, and, consequently, that it would be held at the desk until the next legislative day. After second reading, he or a like-minded colleague then would object to further proceeding on the measure. In this way, S. J. Res. 3 would be placed on the calendar without being referred

to the Foreign Relations Committee--a committee which, the Senator evidently thought, was unlikely to report the measure favorably, at least in the form in which he believed it should be passed by the Senate.

The legislative day of January 15, 1979, continued until February 22nd, as the Senate recessed from day to day while it debated a change in its rule governing cloture and filibusters. Once this matter was resolved, the Senate adjourned for one second during its session of February 22nd, solely to create a new legislative day. After the adjournment, S. J. Res. 3 was presented for its second reading. Harry Byrd then made the necessary objection, which automatically sent the joint resolution to the calendar.

Although more than a month had elapsed between the first and second stages of the process, the Senator had succeeded in avoiding referral of his measure to the Foreign Relations Committee. He had no assurance, however, that S. J. Res. 3 would ever be brought from the calendar to the floor. Like other measures, a bill or joint resolution placed directly on the calendar usually can reach the floor only by unanimous consent or by a debatable motion to consider it. As a general rule, either approach requires the concurrence of the Majority Leader and the chairman of the committee of jurisdiction, and Byrd had assurance of neither. It was quite possible, therefore, that S. J. Res. 3, once placed on the calendar, might languish there indefinitely and never reach the agenda of matters receiving formal Senate action.

A Senate Resolution. Probably with this prospective difficulty in mind, Senator Byrd of Virginia initiated a second approach to the same issue. On January 18th, while S. J. Res. 3 was at the desk awaiting second reading, he introduced and asked for the immediate consideration of a Senate resolution, S. Res. 15, as follows:[10]

> Resolved, That it is the sense of the Senate that approval of the United States Senate is required to terminate any Mutual Defense Treaty between the United States and another nation.

The text of this resolution differed from the text of S. J. Res. 3 in that it expressed the sense of the Senate instead of the Congress as a whole.

After the legislative clerk read S. Res. 15 for the first time, the Majority Leader objected to its immediate consideration, and the Presiding Officer announced that the resolution would "go over, under the rule." The "rule" to which the Presiding Officer referred is another provision of Rule XIV. The provisions of this Rule under which S. J. Res. 3 was placed on the calendar do not apply to simple Senate resolutions such as S. Res. 15. The Senate has developed a different procedure which takes effect when a non-privileged Senate resolution is submitted and any Senator objects to a request for its immediate consideration. The resolution "goes over," under paragraph 6 of Rule XIV, and is placed before the Senate for consideration before the close of morning business during the Morning Hour on the next legislative day.

Under Rule VIII, the Morning Hour occupies the first two hours of a meeting of the Senate following an adjournment. During the first hour of the Morning Hour, morning business is privileged. Morning business consists of a variety of routine proceedings which are specified in paragraph 1 of Rule VII and which include the presentation of petitions and memorials, the receipt of committee reports, the introduction of bills and joint resolutions, and the submission of Senate and concurrent resolutions. Morning business may continue during the second hour of the Morning Hour, if necessary, but it is no longer privileged. At the conclusion of morning business during the first hour or at any time during the second hour, a non-debatable motion to consider any measure on the calendar is in order. At the end of the Morning Hour, a measure considered in

this way is displaced by the unfinished business and is returned to the calendar. If there is no unfinished business, consideration of the measure may continue beyond the Morning Hour, but the Senate also may agree to a motion to take up another measure instead.

Under Rule XIV, a non-privileged Senate resolution coming "over, under the rule," is considered during this sequence of events. After the submission of resolutions, which is the last order of business specified in Rule VII, but before morning business is closed, the Presiding Officer lays before the Senate the first resolution coming over, under the rule. The resolution may be considered until the end of the Morning Hour. However, during the second hour of the Morning Hour, the resolution may be displaced by a motion to take up another measure on the calendar. If the Senate acts on the first resolution, it then considers the next resolution coming over, under the rule. If such a resolution is still pending before the Senate at the end of the Morning Hour, it is returned to the calendar, whether or not there is unfinished business, unless the Senate agrees to a debatable motion to continue with its consideration.

It is largely in order to avoid the Morning Hour that the Senate usually recesses instead of adjourning. By recessing, the Senate enjoys more flexibility in its proceedings; other times are arranged, by unanimous consent, during each day's session to transact the routine morning business that otherwise would occur during the Morning Hour. Consequently, a resolution that goes over, under the rule, may rest on the calendar for some time before the next legislative day arrives. When it does, however, the resolution should come up for debate even though it may not be brought to a final vote. By placing S. J. Res. 3 on the calendar, Senator Byrd succeeded only in avoiding the Foreign Relations Committee. By requesting immediate consideration of S. Res. 15, he

opened a second possible avenue for action on the same issue, and with a far greater likelihood that it actually would be debated by the full Senate.

As it developed, the Senator was denied consideration of S. Res. 15 because he failed to make a timely objection to a unanimous consent request to waive Senate rules. After the one-second adjournment in the middle of the day on February 22nd, the Majority Leader asked and secured unanimous consent "that there be a 1-minute period for the transaction of routine morning business with no resolutions coming over under the rule."[11] The effect of this request was to waive the applicable provisions of Rules VII, VIII, and XIV, and to leave time only for the second reading of S. J. Res. 3 and another joint resolution that had been held at the desk. By the time Senator Byrd inquired if it was not also the appropriate time to consider his resolution, the Senate had agreed to the unanimous consent request and morning business had been closed. As a result, S. Res. 15 had to remain on the calendar for the duration of the new legislative day, which might continue indefinitely. These developments may have strengthened Senator Byrd's supposition that he was unlikely to receive active support from the Majority Leader in bringing either of his measures from the calendar to the floor. Although the Senator from Virginia had succeeded in moving his measures from the potential agenda of measures introduced to the available agenda of measures on the calendar, neither was likely to reach the actual floor agenda unless he could alter the parliamentary situation to his advantage.

An Amendment. Byrd's opportunity arrived on March 5th, when the Senate began consideration of S. 245, its version of the Taiwan Enabling Act--a bill to rearrange U.S. relations with Taiwan in light of the President's decisions of the previous December. The bill was considered by unanimous consent, but it was too controversial for there to be a unanimous consent agreement to limit debate

and to require that all amendments be germane. Consequently, when debate began in earnest on March 7th, Senator Byrd was able to offer the text of S. Res. 15 as a non-germane floor amendment.

The absence of a general germaneness requirement allows Senators to bring propositions directly to the floor although the Senate is not considering legislation on a related subject. In this case, the Byrd amendment was related, although technically not germane, to the bill to which it was offered. But even if there had been no Taiwan Enabling Act, he could have offered precisely the same amendment to a variety of other bills addressed to totally unrelated issues. It may be very difficult to call up a bill from the calendar over the opposition of the Majority Leader or the committee of jurisdiction or both, but it is virtually impossible to prevent the text of that bill from reaching the floor in the form of a non-germane amendment. Without doubt, the right to offer non-germane amendments is the most potent leverage that individual Senators have to place matters on the floor agenda--not necessarily in terms of the measures on which the Senate votes, but in terms of the issues that Senators can compel it to confront.

During debate on Byrd's amendment, the Majority Leader, the chairman and ranking minority member of the Foreign Relations Committee, and several other Senators urged Byrd to withdraw his amendment on the grounds that such a significant constitutional question should not be decided without the benefit of committee hearings and recommendations. Some Senators may not have been certain what position to take; others may have made up their own minds, but feared that they might lose an immediate vote and hoped that a delay for committee consideration would strengthen their position. Whatever their reasons, these Senators did not wish to vote on Byrd's proposition (or a motion to table it)

as an amendment to the pending Taiwan bill. Their options, however, were severely limited. Mounting a filibuster against the amendment or withdrawing the bill from further consideration were both unacceptable alternatives, because either would have delayed enactment of important legislation. The only viable option was to convince the Senator from Virginia to withdraw his amendment.

This situation gave Senator Byrd the leverage necessary to extract guarantees that the Senate would debate and vote on one of the measures he had introduced. After negotiation on the floor, he agreed to withdraw the amendment. In turn, the Majority Leader propounded a unanimous consent request, to which the Senate agreed, that (1) both S. J. Res. 3 and S. Res. 15 would be referred to the Foreign Relations Committee, (2) the Committee would report one of the resolutions, perhaps with one or more amendments, by May 1st, (3) the resolution, as reported, would come before the Senate for consideration within 90 days, and (4) the parliamentary situation at that time would be arranged to permit a direct vote on the text proposed originally by Senator Byrd. Pursuant to this agreement, the Foreign Relations Committee reported S. Res. 15 on May 1st and the Senate began to consider it on June 6th.

The unanimous consent agreement of March 8th had assured the Senator from Virginia that there would be a direct vote on the text of his resolution. But the Committee had reported the resolution with an amendment in the nature of a substitute that proposed a somewhat different position on treaty termination. If the Senate agreed to the committee substitute, there would be no direct vote on the text of S. Res. 15 as introduced. To remedy this problem, Senator Byrd could offer the original text of his resolution as a substitute amendment for the committee substitute. Yet another problem remained, however. Although

the March 8th agreement had been interpreted to mean that the first vote would be on Byrd's position, there were at least five other amendments that could be offered and on which votes would occur before the vote on the amendment Byrd planned to offer. To honor the agreement, therefore, it was necessary for the Majority Leader to secure unanimous consent that none of these amendments--to the Byrd amendment, the committee substitute, or the resolution itself--would be in order until after the Senate voted on the Byrd amendment.

After these arrangements had been made and after considerable debate, the Senate voted on June 6th to agree to the Byrd amendment by a roll call vote of 59 to 35. The resolution, as amended, was never brought to a final vote for reasons relating to a court suit that had been filed by Senator Goldwater. Still, almost five months after the introduction of S. J. Res. 3, Senator Byrd finally achieved one of his primary goals: to put the Senate on record in support of his proposition that the Senate should play a part in the termination as well as the ratification of treaties.

CONSTRAINTS AND RESTRAINTS

Largely through the efforts of the Senator from Virginia, the Senate debated and voted on an issue that otherwise probably would not have reached the floor. By sending S. J. Res. 3 directly to the calendar, he avoided the possibility of committee inaction. By asking for immediate consideration of S. Res. 15, he sought an opportunity to make his case on the Senate floor. Finally, by offering the text of the latter resolution as a non-germane floor amendment, he was able to trade immediate action on the amendment itself for assurance of future consideration of one of his resolutions. Using his knowledge of Senate procedures, an individual Senator exercised demonstrable influence on the Senate agenda.

This was an unusual episode, to be sure. It is rare--it may even have been unprecedented--for a Senator to use all three of the devices employed by Senator Byrd in pursuit of a single legislative goal. Most of the time, also, the agenda is not in controversy. Senators generally agree that there are some measures on which they must act, for constitutional or procedural reasons, and others on which they should act, for policy or political reasons. The judgments of committees usually are respected, both in identifying the bills that should be considered and in creating the framework of policy to be enacted. The party leaders, and especially the Majority Leader, carry the responsibility for arranging the schedule to ensure a smooth and timely flow of legislation to and from the floor, and they usually do so to the satisfaction of their colleagues. Finally, Senators depend on their floor leaders to make reasonable efforts to help them achieve their own goals, while recognizing that only a fraction of the legislation introduced can ever be enacted.

By its very uniqueness, however, this episode does demonstrate two fundamental characteristics of the contemporary Senate and its operations: first, the institutional constraints on the majority party leadership; and second, the self-restraint customarily practiced by the remaining 99 Senators.

A familiar principle of organizational management is that authority should be commensurate with responsibility. In the contemporary Senate, however, the Majority Leader is given responsibility by his colleagues for arranging and managing the movement of legislative business on the floor, but he is not given the authority to impose and enforce the necessary decisions. Instead, he must rely on his ability to persuade and to gain the voluntary cooperation of others.[12] The Majority Leader occupies the pre-eminent institutional position in the Senate. From his perspective, however, it is a continuing challenge to minimize the

disparity between the prestige of his position and the limits of his power.

The Majority Leader can decide how active he wishes to be as a policy initiator, a party spokesman, or a political broker, but he must be a legislative manager.[13] In view of the legislation that should be enacted and the time it consumes, responsibility for managing the agenda must be located somewhere. In the House, this responsibility is vested in the Speaker and his colleagues in the majority leadership, whose personal influence is buttressed by (1) a body of rules that limit debate and facilitate majority rule, (2) precedents that give the Speaker considerable control over recognition and, therefore, the order of business on the floor, and (3) a majority on the Rules Committee that usually is responsive to leadership interests. Although the Speaker's powers today are limited, especially in comparison with those of some earlier Speakers such as Reed and Cannon, he does have institutional resources that are not available to his closest counterpart in the Senate, the Majority Leader.

The Senate delegates to the Majority Leader the right to propose its legislative agenda and its daily schedule, and he usually can be recognized for this purpose when he wishes. Moreover, his proposals are accepted--more often than not, sooner or later. But the Majority Leader's success in this respect rests not on his power, but on his accommodation to his lack of power. He proposes what he believes he may be able to persuade the Senate to accept. If he calls up a measure to which there is intense opposition, he risks a filibuster, an inefficient use of floor time he wishes to shepherd, and a logjam of other measures to which he is also committed. His colleagues expect prior notification of his intentions and his deference to their objections. Any temptation he may feel to act without warning and consultation is certain to be quashed by the realization that his continued success as legislative manager depends on

their trust and confidence.

Moreover, as Senator Byrd of Virginia demonstrated, the Majority Leader cannot exercise conclusive control over the agenda even in the negative sense of preventing issues from coming to the floor.

A Majority Leader may oppose consideration of an issue for any number of reasons--for example, his own policy preferences, his concern for the record and unity of his party, or the need to act on other matters. In the case of S. Res. 15, Majority Leader Byrd may have been concerned that any vote in support of Harry Byrd's position (even on a vote to table his amendment to S. 245) could have been interpreted as a criticism of a president of his own party at a time when President Carter was engaged in a significant change in American foreign relations. The events and statements documented in the Congressional Record certainly do not indicate any enthusiasm on the Majority Leader's part for action on the resolution as introduced; in fact, the Majority Leader was among those voting against the Byrd amendment on June 6, 1979. Yet the resolution was considered and a vote did take place.

Thus, the Majority Leader operates under severe institutional constraints. His ability to lead under these circumstances depends on his sensitivity to the interests of his colleagues and the nature of the Senate, but it also depends on the willingness of his colleagues to be led.

The impact of the Majority Leader on the Senate's agenda and decisions depends in part on the size and cohesiveness of his majority, his relationship with the President and, to a lesser extent, the Minority Leader, and his own chosen style of leadership. With regard to the last of these factors, the contrast between Lyndon Johnson and Mike Mansfield offers the most striking comparison in the recent history of the Senate.[14] Yet the character of the

Senate itself may influence the styles adopted by Majority Leaders or, to put it somewhat differently, the types of Senators selected as Majority Leader.[15] And the Senate has been changing. The turnover in membership has been striking, and this turnover has been accompanied by changes in attitudes that have been at least as important to the Senate as an institution as the changes in Senate rules that have occurred as well.

It has been almost fifteen years since Polsby said "Goodbye to the Inner Club," and no contemporary Majority Leader would think of recommending that new Senators read Citadel as a primer on how to behave and succeed in the Senate.[16] For a variety of reasons that are beyond the scope of this analysis, the Senate has become a more individualistic body that is less receptive to assertive leadership and that almost certainly would rebel against the Johnson "Treatment."[17] Writing more than a decade ago about Mansfield's "soft-sell," Charles Jones commented that if Mansfield were to "decide tomorrow to do a turn-about and try to move the Senate he will find very little authority to back him up and even fewer sanctions to employ when powerful Senators watch in wry amusement."[18]

One Majority Leader's style and decisions can affect the options of his successors. In 1977, Ornstein, Peabody, and Rohde concluded that "Mansfield's relaxed style and his conscious attempts to bring junior members into Senate decision making have ... clearly contributed to the diffusion of power and the opening of procedures and opportunities that have characterized the Senate in the 1970s." In expanding their analysis four years later, the same authors observed of Mansfield's successor that, "[g]iven the enhanced independence of members and the breakdown of the apprenticeship norm, Byrd was well aware that he could not revert to a 1950s style of centralized command."[19]

This diffusion of power and the independence of Senators are tendencies

that are likely to prove difficult to reverse, barring a crisis of some magnitude. The formal powers and resources of the Majority Leader remain severely limited, and the institutional and interpersonal context in which they are exercised is notably less favorable to aggressive, rather than accommodating, leadership than in decades past--due in part, but only in part, to the styles of recent leaders with which Senators have become comfortable, which they find to be in their individual interests, and which are the only styles of leadership most of them have experienced.

In the Senate are the ingredients of anarchy--a group of strong-willed men and women, accountable primarily to others, who are governed by a body of formal rules that do not work. The Senate functions as well as it does by setting these rules aside in favor of unanimous consent agreements that require the implicit or explicit concurrence of every Senator. The Majority Leader may devote his best efforts to negotiating such agreements, but he may not impose them nor may the Senate as a whole impose them by majority vote. Any Senator may object. Consequently, the interests of every Senator concerned must be accommodated in one way or another if the rules are to be set aside. Otherwise, Senators have a right to debate that is limited only by the possibility of cloture. The rights of Senators also include the right to bypass the committee system, to bring resolutions to the floor for debate, and to offer nongermane amendments on whatever subjects they choose. The resulting potential for disruption, distraction, and delay are enormous.

The Senate functions, therefore, both because of the efforts of its leaders and because of the self-restraint exercised by its members. The provisions of Rule XIV are not invoked frequently, and Senators do accept unanimous consent agreements that severely limit their rights to debate and to offer amendments

of their choosing. In general, Senators waive their rights far more often than they enforce them, even on matters of intense concern. In part, this restraint reflects the persuasive efforts of their floor leaders. In part also, it results from an appreciation that a Senator's reputation within the body can affect the prospect of achieving his or her own legislative goals. But it also represents a voluntary accommodation to the needs of the Senate as an institution--an understanding that persists in the individualistic Senate of today that comity and cooperation are as essential to the Senate as its books of rules and precedents.[20]

The case of S. Res. 15 illustrates some of the ways in which individual Senators can affect the Senate agenda by exercising their parliamentary rights. But it is not an example of the breakdown of comity and cooperation. The Senator from Virginia was under no obligation to withdraw his amendment to the Taiwan bill, even in the face of requests by the Majority Leader and the leaders of the Foreign Relations Committee and even though he had been thwarted in his attempt to bring up S. Res. 15 as a resolution coming over, under the rule. If he had chosen to do so, he might even have been able to prompt a floor debate on one of his resolutions earlier in the session by exercising his right to object to the consideration of other measures. Instead, he accepted a three-month delay between the time he proposed his amendment and the time S. Res. 15 was considered. In turn, when arranging for the resolution to come to the floor, the Majority Leader went to considerable lengths to ensure that Senator Byrd had the vote he sought even though the Majority Leader opposed Byrd's position.

Senator Byrd's non-germane amendment to the Taiwan bill was undoubtedly the action-forcing device. Without it, S. J. Res. 3 probably would have re-

mained on the Senate calendar until its death at the end of the Congress. And an experienced Majority Leader has several devices at his disposal to prevent debate and action on a resolution such as S. Res. 15. Even knowing this, the Senator from Virginia chose to present both resolutions and to pursue his procedural rights in promoting action on them. Perhaps more importantly, he waited to offer his non-germane amendment until the Taiwan bill came to the floor, almost three months after the Congress convened--instead of offering it to the first available legislative vehicle.

These decisions suggest some of the calculations that an astute Senator makes, and the delicate balance of rights and responsibilities that is the Senate. Senators may use the procedures available to them every day, but they do not. They take advantage of the rules (and the absence of rules) sparingly and selectively--especially when they seek to promote some action, not to prevent it. Procedures create opportunities but they do not determine outcomes; a Senator needs the voluntary support of his colleagues, no matter how clever his parliamentary strategy. And there is a fine line, which Senators generally recognize to exist even if it cannot be described precisely, between use and abuse of Senators' procedural freedom.

A Senator who crosses that line, in the eyes of his colleagues--for example, by filibustering too often or for too long--can undermine his standing within the body and risk provoking instinctive opposition that jeopardizes achievement of his legislative goals. On the other hand, when a Senator has forced an issue on the agenda, as a matter of right, his colleagues are more likely to react sympathetically and thoughtfully if he has developed a reputation for restraint and patience, if he has demonstrated that the issue is of intense concern to him, and if he has chosen an appropriate opportunity to act.

Sometimes a Senator is satisfied if he can force an issue to a vote, even if he loses; more often, he is not. Although S. Res. 15 never reached a final vote, it is still probably fair to say that Senator Byrd won: a majority of Senators did vote for the principle he espoused. Whether the outcome would have been different if he had not adopted his three-pronged strategy or if he had chosen a different and earlier opportunity to propose his non-germane amendment is an imponderable. But it may well be that his evident determination in pressing his issue, and his patience and timing in forcing the issue, may have prompted some of his colleagues to react more receptively than they might have otherwise.

More than any other individual or body, the Majority Leader is responsible for the Senate's agenda. Yet he is constrained by events, deadlines, and external pressures. And even within these constraints he is not autonomous. The agenda usually represents collective decisions which the Majority Leader can attempt to shape and direct, but it also reflects the influence and initiative of individual Senators over whom the Majority Leader has no formal control. The Senate cannot rely solely on enforcement of its rules to determine its agenda or to maintain and regulate other aspects of its operations. Instead, the agenda is shaped and re-shaped through a continual balancing of individual rights, collective preferences, political imperatives, institutional routines, and statutory requirements. In this process, the Majority Leader is pivotal, but all Senators are responsible.

NOTES

* The author is head of the Legislative Process Section and a Specialist in the Government Division of the Congressional Research Service. The views expressed here are those of the author and do not represent a position of the Congressional Research Service. The author wishes to express his appreciation to Richard Beth, Roger Davidson, Martin Gold, Ilona Nickels, Walter Oleszek, and Judy Schneider for their advice and assistance.

1 For purposes of this discussion, the legislative agenda is construed rather narrowly as the set of proposals and issues that reach the floor of the Senate for formal consideration and usually for decision. For other purposes, the agenda might be defined much more broadly to include, for example, matters that are the subjects of committee hearings or reports, or even subjects that provoke the sustained interest of Senators even though no formal action takes place. Under some circumstances, it is not necessary for a matter to reach the floor of the Senate to affect policy or program administration; admonitions to agency officials during the course of committee hearings or in the texts of committee reports may be sufficient. Under most circumstances, however, formal consideration on the Senate floor is a necessary stage in achieving significant, definitive, and permanent changes in federal law and policy.

2 The issue of the agenda and the potential for greater influence or control by the Senate leadership is discussed, without much explicit consideration of the impact of the Senate's procedures, by Jack Walker in "Setting the Agenda in the U.S. Senate." U.S. Congress. Senate. Commission on the Operation of the Senate. Policymaking Role of Leadership in the Senate. Committee print. 94th Congress, 2d Session. U.S. Government Printing Office; Washington, D.C.; 1976; pp. 96-120. See also: Herb Jasper, "Scheduling of Senate Business." U.S. Congress. Senate. Commission on the Operation of the Senate. Committees and Senate Procedures. Committee print. 94th Congress, 2d Session. U.S. Government Printing Office; Washington, D.C.; 1977; pp. 131-139; Walter J. Oleszek, Congressional Procedures and the Policy Process (Washington: Congressional Quarterly Press, 1978), pp. 133-150; and Robert L. Peabody, "Senate Party Leadership: From the 1950s to the 1980s," in Frank H. Mackaman (editor), Understanding Congressional Leadership (Washington: Congressional Quarterly Press, 1981), especially pp. 74-78, 84-88.

3 See, for example, Louis Fisher, "The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices," Catholic University Law Review, v. 29, n. 1, Fall 1979, pp. 51-105; and Fisher, "Annual Authorizations: Durable Roadblocks to Biennial Budgeting," Public Budgeting and Finance, v. 3, n. 1, Spring 1983, pp. 23-40.

4 An exception to this generalization was created by the House in 1979 when Rule XXVII was amended to preclude Representatives in most cases from voting not to consider a motion to suspend the rules and pass a measure by voting not to order a second on the motion. This amendment to the rules was advocated as a means of reducing the opportunities for forcing roll call votes that were not seriously contested on procedural matters.

5 The discussion of congressional action in this section is based upon Stanley Bach, Floor Consideration of a Senate Resolution: The Case of S. Res. 15, January-June 1979, a report for the Congress by the Congressional Research Service, Library of Congress; Washington, D.C.; September 18, 1979.

6 This and other Senate rules cited are compiled in U.S. Congress. Senate. Standing Rules of the Senate. Senate Document No. 98-10. 98th Congress, 1st Session. U.S. Government Printing Office; Washington, D.C.; April 10, 1983.

7 125 Congressional Record 141, January 15, 1979.

8 Useful background on this procedure is presented in a statement by Senator Orrin Hatch of Utah on "Abuse of Rule XIV" in 126 Congressional Record S7435-S7438 (daily edition), June 19, 1980.

9 Ibid., p. S7436.

10 125 Congressional Record 475, January 18, 1979.

11 125 Congressional Record 3040, February 22, 1979.

12 In his 1961 article on Lyndon Johnson and the majority leadership in the Senate, Ralph Huitt mentions a number of rights, powers and resources that Johnson used effectively, but also quotes Johnson himself to the effect that the "only real power available to the leader is the power of persuasion. There is no patronage; no power to discipline; no authority to fire Senators like a President can fire his members of Cabinet." Ralph K. Huitt, "Democratic Party Leadership in the Senate," reprinted in Huitt and Robert L. Peabody, Congress: Two Decades of Analysis (New York: Harper & Row, 1969), p. 145. Writing in 1965, Huitt identified "a basic fact of life in the Senate: no one finally can make anyone else do anything." Having summarized the Majority Leader's powers, he concluded that "there is no reading of these formal powers which will support the notion that they amount to much." Huitt, "The Internal Distribution of Influence: The Senate," in ibid., pp. 182-183.

13 As Randall Ripley has put it, "[t]he procedural aspects of party leadership will always remain at its core...." Ripley, "Party Leaders, Policy Committees, and Policy Analysis in the United States Senate," in Commission on the Operation of the Senate, op. cit., p. 10.

14 See, for example, John G. Stewart, "Two Strategies of Leadership: Johnson and Mansfield," in Nelson W. Polsby (editor), Congressional Behavior (New York: Random House, Inc., 1971), pp. 61-92.

15 The two sides of this coin are aptly illustrated by Martin Tolchin in an article on Howard Baker as Majority Leader:

> As the Republican minority leader of the Senate in the 1960's, Everett Dirksen, Mr. Baker's father-in-law, had been famous for his oracular, highhanded approach to the job--threatening, for example, to withhold coveted committee assignments or hold back floor action on particular legislation as a means of forcing recalcitrant Senators

> to vote the party line. It was a familiar technique in an era when Senators spent a lifetime in the chamber, amassing political I.O.U.'s and nursing grudges. Today, 54 Senators are in their first term. They have little sense of institutional devotion and no disposition to be bullied.
>
> Howard Baker's approach to the job reflected the changing makeup of the Senate--he enlarged attendance at leadership meetings, for example, inviting freshmen and those with a special interest in the particular piece of legislation under discussion. His approach also reflected a very different personality: Mr. Baker is a patient builder of coalitions, generous with his time and slow to anger.

Martin Tolchin, "Howard Baker: Trying to Tame an Unruly Senate," in The New York Times Magazine, March 28, 1982, p. 74.

16 Nelson Polsby, "Goodbye to the Inner Club," reprinted in Polsby, op. cit., pp. 105-110. Polsby quotes Senator Joseph Clark's description of a luncheon in 1957 at which Johnson distributed to new Senators autographed copies of William S. White, Citadel: The Story of the U.S. Senate (New York: Harper & Brothers, 1957).

17 Rowland Evans and Robert Novak, Lyndon B. Johnson: The Exercise of Power (New York: The New American Library, 1966), pp. 88-118.

18 Charles O. Jones, "Somebody Must Be Trusted: An Essay on Leadership of the U.S. Congress," reprinted in Norman J. Ornstein (editor), Congress in Change (New York: Praeger Publishers, 1975), p. 271.

19 Norman J. Ornstein, Robert L. Peabody, and David W. Rohde, "The Changing Senate: From the 1950s to the 1970s" in Lawrence C. Dodd and Bruce I. Oppenheimer (editors), Congress Reconsidered (New York: Praeger Publishers, 1977), p. 12; Ornstein, Peabody, and Rohde, "The Contemporary Senate: Into the 1980s" in Dodd and Oppenheimer (editors), Congress Reconsidered, 2nd Edition (Washington: Congressional Quarterly Press, 1981), p. 22. These articles summarize some of the developments that have affected the context of leadership in the Senate. See also Irwin B. Arieff, "House, Senate Chiefs Attempt to Lead a Changed Congress," in Congressional Quarterly Weekly Report, September 13, 1980, pp. 2695-2700.

20 The notion of an individualistic Senate, as opposed to a centralized or decentralized Senate, is developed by Randall Ripley in Power in the Senate (New York: St. Martin's Press, 1969), pp. 3-19.