THE APPEAL OF ORDER:

THE SENATE'S COMPLIANCE WITH ITS LEGISLATIVE RULES

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Introduction

Twice in the 99th Congress, the Senate adopted new legislative rules but denied itself effective control over their enforcement. Both sets of rules changes affected implementation of the Congressional Budget Act of 1974. Although this act had imposed various requirements and prohibitions on the Senate's budget-related procedures and decisions, it also had reserved to the Senate the power to waive any of these rule-making provisions by simple majority vote.[1] In effect, the Budget Act had created rules for the Senate to obey only when and if a majority of its members chose not to set them aside.[2] In framing the Gramm-Rudman-Hollings act of 1985, however, the Senate sought to strengthen the 1974 statute and the new deficit reduction procedures attached to it by requiring a vote of three-fifths of all the Senators "duly chosen and sworn" (the same majority usually required to invoke cloture) to waive any of eight enforcement provisions.[3] Then in passing the reconciliation act of 1985, the Senate applied the same three-fifths vote requirement to motions to set aside certain Budget Act provisions concerning reconciliation *bills* and amendments, and new provisions (commonly known as the "Byrd rule") to prevent reconciliation bills from including extraneous matter without direct and significant budgetary impact.[4]

These three-fifths vote requirements were intended to promote Senate compliance with many of the Budget Act's key enforcement provisions, including the deficit reduction program, by preventing a simple majority of Senators from waiving them at will. But waiving one of these provisions by three-fifths vote was not the only way to circumvent it. Instead, a Senator could propose an amendment violating the "Byrd rule," for example, and wait for the Presiding Officer to sustain another Senator's point of order against it. Then the amendment's sponsor could appeal the ruling of the Chair. If a simple majority of Senators were to vote not to sustain the ruling, however proper it might be, they would be voting to permit consideration of the amendment, thereby setting aside the extraneous matter prohibition. Anticipating this possibility, the "Byrd rule" also states that "[a]n affirmative vote of three-fifths of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under this section...."[5] And although the three-fifths vote requirement did not apply to appeals in the Senate under the original 1985 Gramm-Rudman-Hollings act, this potentially gaping loophole was closed two years later.[6]

By enacting these provisions, the Senate recognized the historic right of any Senator to appeal almost any ruling of the Presiding Officer, as well as the implications and potential consequences of this right.[7] The opportunity to sustain or overturn rulings of the Chair--and to decide certain points of order in the first instance--always has preserved for the Senate its ultimate control over the rules of its proceedings. In this way, the Senate has protected itself against the constitutionally designated President of the Senate, who may preside whenever he chooses even though he is not even one of its members. But by requiring a three-fifths vote to overrule the Chair, the Senate also acknowledged its evident concern that Senators otherwise might be too prone to support appeals against properly made rulings as a convenient way to escape the constraints of rules preventing them from doing what they wanted to do. To insulate themselves against any such tendency, the Senate took the unprecedented step of assigning authority to its Presiding Officer which Senators could not easily recapture at any moment by simple majority vote.[8]

These developments lend credence to tempting exaggerations that the Senate's rules are irrelevant and that it does whatever it wants in whatever ways it chooses, making the Senate an undisciplined and unpredictable place. No one would question that unanimous consent agreements are absolutely essential to the conduct of Senate business, and that the Senate would be a far different, more cumbersome, and less efficient institution if Senators always insisted on following their rules. Most often, therefore, the Senate's non-compliance with its rules is non-controversial, or at least it is negotiated in advance to the satisfaction of all interested Senators. But as Senators negotiate unanimous consent agreements, they bear in mind that any one of them can object and insist that any of the standing rules be applied.[9] In such cases, the Senate usually cannot vote directly to waive the rule in question by simple majority vote, as the House frequently does when it adopts special rules proposed by its Rules Committee. The provisions of the Budget Act for waiver motions in the Senate were, and remain, exceptional. Senators who oppose enforcement of any other rule have three alternatives: they can seek unanimous consent to set it aside, they can move to suspend the rule by two-thirds vote, or they can propose in effect that the Senate waive the rule by majority vote as it decides a question of order.

What happens when Senators disagree about whether to comply with one of their rules? How often does the Senate actually circumvent its rules by votes on points of order, appeals, or suspension motions? Does the Senate agree to set aside some kinds of rules more frequently than others? And has the Senate become more or less likely during the past several decades to avoid compliance with its rules when they cannot be waived by unanimous consent? Before addressing these questions, this study first presents a taxonomy of legislative rules to offer one perspective from which to view the record of questions of order on the Senate floor since 1965.

A Taxonomy of Legislative Rules

Just as a theory is a scheme for organizing ideas, a taxonomy is a scheme for organizing things. And just as a theory is judged by its elegance and utility, the value of a taxonomy depends on how well it fits our understanding of what we already think we know, and how much it points us to new connections and perspectives. A useful taxonomy proposes distinct and internally coherent categories that tap significant dimensions of a set of things. It is even more attractive if it also offers new vantage points by identifying shared characteristics of evidently diverse elements of the set. The taxonomy of legislative rules presented here distinguishes among five general classes of rules and among several groups of rules within each class. Following the definition of each group are several examples of congressional rules that fall within it.[10] Taken together, these categories account for most of Congress' legislative rules, and without undue pushing and squeezing.

I. Organization rules address differentiations and relations among individual members and groups of members within the legislature.

A. Designation rules provide for leadership and other official positions and for a division of labor within the legislature by identifying members, groups, and others with distinctive positions or responsibilities.

The Senate shall choose a President pro tempore.

There is in the House a Permanent Select Committee on Intelligence.

The membership of the Committee of the Whole consists of all members of the House.

The House and Senate may create a conference committee to resolve legislative differences between them.

B. Mandate rules set out the authorities, powers, and responsibilities of the designated individuals and groups.

The House Committee on Energy and Commerce has jurisdiction over national energy policy generally.

The Senate's Majority and Minority Leaders may agree jointly that a committee shall be authorized to meet during a session of the Senate.

General appropriations measures are to be considered in Committee of the Whole.

Conference committees are to reach agreements that fall within the scope of the differences between the House and Senate positions.

C. Connective rules define the relationships among the designated individuals and groups, and with each member and the legislature as a whole.

A Senator may have any bill placed directly on the Calendar of Business, instead of it being referred to the standing committee of jurisdiction.

Standing committees and the Committee of the Whole only may recommend amendments on which the House itself then votes.

Instructions to conferees are not binding.

The Speaker may refer a bill, in whole or in part, to two or more standing committees.

II. Consideration rules govern what matters the legislature considers, when, and in what order.

A. Schedule rules affect when the legislature meets and for how long, and how the legislature decides to consider bills and other matters.

Neither house may adjourn for more than three days without the consent of the other.

When a Senator objects to the immediate consideration of a Senate resolution when it is submitted, it lies over for one legislative day.

The Speaker may declare the House resolved into Committee of the Whole to consider a bill after the House agrees to a special rule authorizing him to do so.

The first two hours after the Senate convenes following an adjournment constitute the Morning Hour, during which Senators transact morning business.

B. Priority rules establish the precedence of, and relationships among, measures, amendments, motions, and other matters that members and committees may want to propose on the floor.

Senators may propose amendments to the portion of a bill that is proposed to be stricken.

A motion that the Committee of the Whole rise and report a general appropriations bill back to the House takes precedence over limitation amendments.

Consideration of a conference report by the Senate suspends but does not displace the unfinished business.

After the House has reached the stage of disagreement, a motion to recede and concur has precedence over a motion to recede and concur with an amendment.

C. Proposal rules affect the propositions that a member can present for consideration, based on their substance or content.

Any member may make a point of order against a revenue measure or amendment that would cause total revenues to be less than the level specified in the budget resolution for that fiscal year.

An amendment offered on the House floor must be germane.

It is not in order in the Senate to offer to a reconciliation bill an amendment proposing extraneous matter.

An amendment to an appropriations bill is not in order in the House if it proposes to change existing law or in the Senate if it proposes new or general legislation.

III. Participation rules control the rights and opportunities for individual members and groups of members to take part in legislative activity.

A. Recognition rules identify the members who enjoy a right to, or preference in, recognition for certain purposes or under certain circumstances.

The Senate's Presiding Officer recognizes the Majority Leader when he seeks recognition at the same time as another Senator.

A member who voted on the prevailing side may move to reconsider the vote.

A Representative must be opposed to a bill, at least in its present form, to qualify to offer a motion to recommit it.

The Chair recognizes the majority floor manager of a conference report to offer a motion to dispose of any accompanying amendment in disagreement.

B. Limitation rules restrict the ways in which individual members can participate in the legislature's collective deliberations.

An amendment is not in order in the Senate if it proposes to change a bill in two or more places.

Representatives debate amendments in Committee of the Whole under the five-minute rule.

No Senator may offer more than two amendments under cloture until all Senators have had an opportunity to do so.

Members shall not refer disparagingly to other members or the other body.

C. Quantity rules determine the number of members required to take certain actions.

A simple majority of members constitutes a quorum for the conduct of business.

A minimum of 60 votes are required for the Senate to invoke cloture on anything other than a change in the standing rules.

A recorded teller vote in Committee of the Whole takes place upon demand by 25 members.

It requires unanimous consent for the Senate to set a time certain for voting on final passage of a bill.

D. Information rules mandate the information that members should have, their resources for obtaining it, and their opportunities to benefit from it.

The House committee report on a public bill shall include an inflationary impact statement.

The Senate committee report on a measure shall be available for at least two calendar days before the measure is considered.

Except under cloture, each amendment is to be read before the Senate begins to debate it.

A conference report is to be accompanied by a joint explanatory statement.

IV. Conclusion rules enable the legislature to reach decisions by establishing methods for it to bring an end to some action or process.

A. Closure rules impose, or permit imposition of, restrictions on collective debate.

By invoking cloture on a matter, the Senate imposes a thirty-hour cap on the time available for considering it further.

A majority of Representatives may vote to order the previous question on a matter being considered in the House, thereby precluding further debate on it.

A motion to table is not debatable.

In the House, there are no more than forty minutes of debate on a motion to suspend the rules.

B. Disposition rules govern how the legislature makes collective decisions.

When the Senate tables an amendment, it disposes of it adversely.

House and Senate committees may set certain rules permitting or prohibiting proxy voting.

If a Representative objects to a voice vote on the ground that a quorum is not present and the Chair sustains a point of order to that effect, a rollcall vote then takes place.

The vote by which the House agrees to the conference report on a budget resolution is deemed to be the vote by which it also passes a joint resolution raising the debt ceiling by the appropriate amount.

C. Completion rules specify when a decision has been reached and cannot be revisited.

An amendment may not propose only to re-amend matter that already has been amended.

After the House or Senate has agreed to an amendment, that amendment no longer may be amended.

Once the House or Senate has reconsidered a vote, another motion to reconsider the same vote is not in order.

The third reading of a bill in either house precludes additional amendments to its text.

V. Preservation rules are the means by which the legislature preserves its system of order as well as its flexibility, by choosing to require or not to require compliance with its other rules.

A. Enforcement rules permit members to insist that the legislature and its members comply with applicable rules.

The Presiding Officer submits questions of the germaneness of amendments to appropriations bills for decision by the Senate.

The House may vote to reject a provision of a conference report that would not have been germane to the bill in the form the House originally passed it.

Under cloture, the Senate's Presiding Officer may rule that the appeal from a ruling of the Chair is dilatory and, therefore, not in order.

A Representative may make a point of order against an amendment only before debate begins on it.

B. Waiver rules set out the means by which the legislature can decide not to be bound by one or more of its rules.

The vote by which a Senate committee orders a bill reported cures any violations of its rules that may have occurred during earlier stages of committee action.

By adopting a special rule, the House may waive rules governing the content and layover of committee reports.

A three-fifths vote of the Senate is required to waive certain deficit reduction provisions of the Budget Act.

No motion to suspend a rule is in order in the Senate except upon one day's notice in writing.

The Senate at Two Extremes

On February 28, 1800, Thomas Jefferson wrote to his old friend and mentor, George Wythe, for help in completing his A Manual of Parliamentary Practice. According to the Vice President, he decided to write the manual not only to satisfy his intellectual curiosity, but also to meet his responsibility to rule as well as reign as President of the Senate. "The Senate have established a few rules for their government, and have subjected the decisions on these and on all other points of order without debate, and without appeal, to the judgment of their President...."[11] Jefferson's Manual was a necessary supplement to the Senate's small body of standing rules; "[i]t is much more material that there should be a rule to go by, than what that rule is; that there may be a uniformity of proceeding in business, not subject to the caprice of the Speaker, or captiousness of the members."[12]

In his 1938 history of the Senate, by contrast, George Haynes quoted with apparent approval a disparaging assessment of the place of formal rules in the life and business of the Senate:[13]

> When the Senate took action upon the draft of "rules for conducting the business of the Senate," April 16, 1789, it now seems ironic that the Journal should record, not that the Senate voted to adopt the rules as reported, but that the Senate "resolved, that the following rules...be observed."
>
> A century later, the President pro tempore declared: "Rules are never observed in this body; they are only made to be broken. We are a law unto ourselves," and Anthony, who had presided over the Senate in several Congresses, and upon whose motion the Standing Committee on Rules was first constituted, said, "The rules of the Senate have been its own sense of propriety and dignity."

Here are two distinctly different images of the Senate: one in which its Presiding Officer carries the burden of preserving "a uniformity of proceeding in business" by deciding all questions of order without debate or appeal; and another in which rules can be broken at will so long as the Senate preserves its own "sense of propriety and dignity." Although neither of these images is a fair portrayal of the contemporary Senate, each of them does mirror an extreme aspect of reality in the Senate.

Under a series of precedents that the Senate began to establish during the prolonged and difficult 1977 filibuster against a natural gas deregulation bill--a filibuster later described by Senator Robert Byrd, who ultimately broke it, as "the most vicious postcloture filibuster that ever occurred in the history of the Senate"[14]--the Senate's decision to invoke cloture now vests in its Presiding Officer powers approaching those Jefferson described. Under cloture, the Chair decides all points of order without debate, and is supposed to take the initiative to rule motions and amendments out of order without waiting for Senators to make points of order from the floor. Among the rules that the Chair is to enforce under cloture is the prohibition against dilatory motions. To this end, Senators presiding under cloture have held that amendments and other motions were dilatory, even though such rulings inescapably require judgments about Senators' motives. And under the same authority, Presiding Officers also have rejected quorum calls as dilatory and even appeals from other rulings of the Chair. So in extreme circumstances, the Chair can refuse to allow his or her decisions to be challenged by appeals, thereby taking effective custody of the Senate's rules and their enforcement, in order to limit the potency of post-cloture filibusters.

Another consequence of invoking cloture is to require that all amendments not already adopted must be germane. In this respect, a vote for cloture constitutes a treaty of sorts among Senators. Senators relinquish their

ability to conduct a filibuster against the bill or amendment on which cloture is invoked; in return, they receive the assurance that their colleagues will not offer any non-germane amendments that no longer can be filibustered. If not for this germaneness requirement, and the requirement that even germane amendments must be submitted in writing before the cloture vote, Senators would have good reason never to vote for cloture, nor would they be willing to invoke it if they doubted that the requirements would hold. With the viability of the cloture procedure at stake, therefore, Senators are most reluctant to reverse rulings of the Chair under cloture that amendments are not germane. When the Senate came perilously close in 1984 to overturning two such rulings in order to consider non-germane amendments on gun control and school busing, the two party leaders, Baker and Byrd, joined together to convince the Senate to pull back from the brink of establishing precedents with damaging long-term consequences.[15]

Amendments to appropriations bills also must be germane, but the Senate's reaction to this requirement comes much closer to resembling the characterization of the Senate that Haynes quoted and evidently endorsed.[16] In addition to imposing this germaneness requirement, Rule XVI also prohibits amendments to appropriations bills from proposing "legislation" that would, for example, change the underlying law the appropriation would be used to implement. But the two prohibitions are not enforced in the same way. Whereas the Presiding Officer rules on most points of order, including assertions that amendments constitute legislation on appropriations bills, Rule XVI states that the Senate is to decide all points of order challenging the germaneness of amendments to those bills. The Senate also has firmly established the precedent that if the House passes an appropriations measure containing a legislative provision, Senators are not precluded from amending it. So they may offer legislative amendments to an appropriations bill if their amendments are germane to provisions already included in the bill as the House passed it.

This combination of rules and precedents creates an opportunity that Senators are not reluctant to exploit. If a Senator makes a point of order against an amendment on the grounds that it constitutes legislation, the Senator who offered the amendment can forestall a ruling by the Presiding Officer by raising the question, or the "defense," of germaneness. This defense asserts that even though the amendment may be legislative in character, it is in order anyway because it is germane to legislation already in the bill. The Senate then votes on the germaneness of the amendment. If a majority holds that the amendment is germane, the point of order against it falls and the amendment is considered. If the Senate decides that the amendment is not germane, it is not in order for that reason, and the original point of order becomes superfluous. Decisions about germaneness that the Senate makes in this context do not involve institutional interests and risks comparable to those at stake when the same issue arises under cloture. So Senators are far more willing to vote that a non-germane amendment to an appropriations bill

is germane because their support for the amendment outweighs their concern for enforcing the rule.

Compare Senators' reactions to similar questions of order when raised in these two different contexts. After the Senate had invoked cloture in September 1975, for example, Russell Long reacted strongly when a colleague announced his intention to appeal the Chair's ruling against his school busing amendment even while acknowledging that the ruling was correct:[17]

> Mr. President, if we are going to set that kind of precedent, Senators would be voting for government by mob rule here in the United States. They would be voting for total disorder. They are voting to completely strike down every concept under which men try to govern themselves.

James Allen was more precise:[18]

> That is the reason why it is so dangerous--as we have found out time and time again on the floor of the Senate--to invoke cloture. Senators are then subject to the harsh rules or the exact provisions of rule XXII if they are in the minority. But if a Senator is one of 51 who are willing to run roughshod over the rules, then he can amend the rules any way he wishes.

Long again took the floor 4 years later under similar circumstances:[19]

> Mr. President, the cloture rule will not work, it will not work, Mr. President, unless Senators are willing to vote their conscience on the germaneness issue and uphold the Parliamentarian.

Even making allowances for hyperbole (and the positions of Long and Allen on school busing), these expressions of concern for regular order are in sharp contrast with 3 Senators' characterizations of the de facto standard applied to the defense of germaneness: "It depends on whose ox is getting gored;" "Germaneness is what the Senate says it is;" and "The Senate has no rule of germaneness, except what the Senate decides on a case-by-case basis."[20] And listen to Mark Hatfield, then Chairman of the Appropriations Committee, as he addressed with evident exasperation the first of 5 questions of order the Senate would decide on June 5-6, 1986, all of them to determine whether amendments to an urgent supplemental appropriations bill constituted non-germane legislation. Referring to a comparable 1981 vote holding an abortion amendment germane, Hatfield said that the Senate had "opened Pandora's box:"[21]

> Since that date in 1981, we have legislated on appropriation bills at will. We have reauthorized foreign assistance of this country. We have enacted a $20 billion Energy Security Act for Synfuels on an appropriation measure. We adopted a crime bill on an appropriation vehicle. And that

> is just to give you but three of dozens upon dozens of instances in which this body has seen fit to violate its own rule XVI.
>
> ...I do not think there ought to be any pity demonstrated out here today that somehow we are violating a rule that is a sanctified rule of this Senate. Let me tell you it is a hoarish rule. That is what it is. It is not sanctified because we have perverted it. We have used it. And we have exploited it only on the basis of our personal interests.

We might well expect that a balanced image of the Senate lies somewhere between such extremes. But where?

Points of Order and Appeals

We can examine the Senate's compliance with its legislative rules in a more systematic way by considering the 213 instances between 1965 and 1986, during the 89th through 99th Congresses, in which a question of order was sufficiently contested to provoke one or more rollcall votes on the Senate floor.[22] By contrast, there were only 10 rollcalls throughout the same period on motions to suspend one of the Senate's legislative procedures, and 9 of the motions proposed to make appropriations amendments in order. While suspension motions have evolved into a well-developed procedure on which the House of Representatives now relies to act on one-third or more of the measures it passes,[23] the two-thirds majority such motions require evidently is such an imposing obstacle that Senators rarely have attempted to overcome it.[24]

There are essentially three ways in which the Senate itself can determine the outcome of a question of order by rollcall vote. First, any Senator may appeal the Presiding Officer's ruling on almost any point of order (or almost any ruling the Chair makes under cloture that is not triggered by a point of order). The Senate then can vote directly on the appeal, either sustaining or overturning the decision of the Chair, or it may agree instead to a motion to table the appeal. Second, Rule XX authorizes the Presiding Officer to refrain from ruling on any question of order and instead to submit it directly to the Senate for its decision by majority vote.[25] In either case, the Senate again has two options: either voting directly on the point of order or agreeing to table it. And third, Senate rules and precedents require the Presiding Officer to submit certain points of order directly to the Senate for it to decide. In addition to questions of germaneness under Rule XVI, the Senate itself acts on points of order that proposals or proposed actions are unconstitutional. By examining the 213 questions of order that led to rollcall votes in one of these ways, as well as the decisions the Senate made on them, we can better gauge the extent to which the Senate has agreed in recent decades to be bound by its own rules.[26]

Frequency

How often does the Senate decide questions of order? Certainly far more often than the House. When Lewis Deschler retired in 1974 as House Parliamentarian, he noted in his letter of resignation that:[27]

> [F]rom the beginning of the 70th Congress, in 1927, there have been only eight appeals from decisions of the Speaker, and in seven of these eight cases the decision of the Speaker was sustained by the House of Representatives. On the one occasion when the Speaker was overruled (on February 21, 1931), the House was actually following the wishes of Speaker Longworth, for he in effect appealed to the House to overrule him in order to correct what he regarded as an erroneous precedent.

The difference between the houses in this respect is the difference between their presiding officers. As the elected leader of the majority party, the Speaker expects and receives the support of his fellow partisans when he (or another member he designates to preside) makes a ruling that is appealed. Consider, for example, Speaker O'Neill's reaction when 44 Democrats voted in 1980 to overturn a ruling that John Ashbrook's amendment was not in order because it constituted legislation on an appropriations bill. In a letter to each of the dissenting Democrats, O'Neill wrote:[28]

> It is elementary to our procedural control of the House that the chair be supported by members of our party. That is basic to a parliamentary body. In other countries if such a vote were lost, the government would fall.

While the right to appeal remains inviolate, Representatives realize that in practice appeals stand virtually no chance of success and are almost equally certain to irritate the Speaker. Thus, members exercise this right only in the extreme heat of battle or when the minority encounters an irresistible opportunity to embarrass the majority party.[29]

Senators consider themselves under no such constraints. Only very rarely is there any basis for interpreting the Senate's vote on a question of order as a vote of confidence in the Majority Leader, much less the majority party as a whole.[30] Nor do the outcomes of rollcall votes on appeals reflect on the Senators who made the rulings while serving as the Presiding Officer. Because the responsibility for presiding over the Senate is distributed among majority party Senators, and especially among the junior members, they are not expected to base the rulings they make on their own knowledge of Senate proceedings. In almost every instance, Senators have good reason to presume that rulings of the Chair, whoever occupies it, reflect the judgment and advice of the Senate Parliamentarian. And no matter how much confidence the Senate has in its Parliamentarian's expertise and fairness, it is a far different matter for Senators to challenge his or her opinion, as expressed by the

Presiding Officer, than for Representatives to appeal from a ruling of their Speaker.

Nonetheless, points of order and appeals that result in rollcall votes are far from a routine, daily occurrence in the life of the Senate. On average, the 213 questions of order that led to rollcall votes between 1965 and 1986 occurred at the rate of 1 for every 113.3 hours the Senate was in session or 1 for every 17.2 days of session. In terms of legislative workload, the Senate disposed of a question of order by rollcall for every 78.9 measures it passed during the 89th-99th Congresses. And during 7 of the 11 Congresses, there was a question of order requiring a rollcall vote for every 5.9 amendments the Senate adopted by rollcall vote. The 213 incidents gave rise to a total of 238 rollcall votes, a total which constituted 2.4 percent of all the rollcall votes that Senators cast during the 22 year period.[31] (See Table 1.) This record stands in sharp contrast to the situation in the House, where rollcalls on appeals are noteworthy events. But it hardly can sustain a characterization of the Senate as an institution in which "[r]ules are never observed," if by that we mean a place where Senators regularly violate legislative rules (or attempt to do so) over the objections of any of their colleagues. Although the Senate does rely every day on unanimous consent agreements that set aside some of its standing rules, such agreements are quite a different thing from disagreements over whether the rules are being or should be "broken."

Subject

The import of these totals only begins to emerge when we identify the subjects that the questions of order involved. As we already have noted, some questions are more likely to occur than others, and they are more likely to be contested in some situations than in others.

Most striking is the fact documented in Table 2 that virtually three-quarters (159 or 74.6 percent) of the 213 questions involved determinations as to whether particular amendments were in order for floor consideration. Most common were decisions concerning the germaneness of amendments to appropriations measures, budget resolutions, or reconciliation measures; 31.9 percent of all 213 points of order and appeals determined whether amendments satisfied the germaneness requirements of Rule XVI or the Budget Act. An additional 15.5 percent of the questions of order turned on the germaneness of amendments proposed when the Senate was operating under cloture or under unanimous consent agreements requiring germaneness. And slightly more than 13 percent of the 213 incidents involved decisions as to whether appropriations amendments violated other provisions of Rule XVI prohibiting most legislative amendments and some amendments proposing unauthorized appropriations. Finally, almost all of the remaining challenges to amendments were based on cloture and Budget Act requirements other than germaneness (7.0 percent and 3.3 percent respectively) and requirements of the Constitution (2.8 percent). Put differently, of the 159 questions of order

concerning amendments, 101 (or 63.5 percent) involved determinations of germaneness and 35 (or 22.0 percent) arose under cloture.

The impact of the Senate's rules on the ability of its members to seek approval of their preferred policies by offering them as amendments dominated the procedural conflicts that have led to rollcall votes on the floor. The lack of a generally applicable germaneness requirement may encourage an unqualified presumption that all Senators have an opportunity--indeed, a right--to offer whatever amendments they wish to whatever measures they choose. So the restrictions on amendments that the Senate's procedures do impose, especially to budget-related measures and under cloture, become more controversial than its other rules. No other subject accounted for more than a handful of questions of order during any Congress. The remaining 54 questions (one-fourth of the total) that did not concern amendments addressed such matters as debate procedures, the motions, measures, and conference reports that are in order under various circumstances, voting and quorum procedures, and the procedures involved in invoking cloture. But none of these matters provoked more than 7.5 percent of all the 213 incidents, and none of them arose as often as once a year on average during the entire 22 year period.

Just as many of the questions of order concerning amendments arose under cloture, half of the remaining points of order and appeals also related to filibusters and cloture, involving either interpretations of Rule XXII or proposals to amend it. Under cloture, for example, can a Senator file notice of his intent to move to suspend the rules? Under cloture, does acceptance or rejection of a unanimous consent request constitute business for purposes of suggesting the absence of a quorum? Under cloture, is it dilatory to move to reconsider the 70 to 28 vote by which the Senate has tabled a motion? And a recurring question that generated considerable heat and light: at the start of a new Congress, can a simple majority of Senators force an end to a filibuster against a proposal to amend the cloture rule? In all, 32.4 percent of the questions of order decided by rollcall votes related to cloture in one way or another, even though the Senate is involved with cloture procedures a far smaller fraction of the time it is in session.

There are several reasons for this association between questions of order and cloture. Obviously, the Senate only invokes cloture, or attempts to do so, when Senators believe they have a great deal at stake. Even today, Senators do not undertake filibusters lightly nor does the Senate often invoke cloture when reasonable prospects remain for a negotiated settlement. When supporters of a bill or some other matter do resort to cloture, they confirm that "the legislative struggle" has escalated to a new level of conflict. In addition to marking a shift from one set of procedures to another, the cloture vote usually signifies a less precisely defined but equally important shift from procedural "softball" to "hardball." Senators now begin to demand enforcement of rules that normally are ignored--for example, that a Senator loses the floor when he makes a motion or yields for something other than a question. The

result is more frequent points of order. And because the rulings on these points of order can affect the filibuster's potency, Senators are less inclined to accept adverse rulings so appeals become more likely as well. Moreover, the Senate does not invoke cloture very often, so it is natural for Senators to have doubts and disagreements about what is permitted under cloture and what is not. And these uncertainties are magnified by the precedents of the last decade or so that restrict post-cloture filibusters by expanding the powers and responsibilities of the Presiding Officer, especially to take the initiative to rule that such things as amendments, motions, and quorum calls are not in order because they are dilatory.[32]

If we examine the questions of order resulting in rollcall votes from the more abstract perspective of the taxonomy presented earlier, we find a similar concentration of procedural conflict. As Table 3 indicates, 77 percent of the 213 incidents involved "consideration" rules governing what matters the Senate takes up on the floor and when it does so. None of the other four general classes of rules accounted for much more than 10 percent of the cases. In view of the extent to which minority powers define the essential character of the Senate, it is noteworthy that, during 22 years of recent Senate activity, only 16 questions of order decided by rollcall (7.5 percent of the total) involved "conclusion" rules, including rules controlling collective debate and decision-making. Only 6 questions related to "organization" rules, including "mandate" rules governing committee jurisdictions. And of the 164 questions relating to "consideration" rules, 146 of them (or more than two-thirds of the 213 cases) concerned "proposal" rules more specifically--rules under which the content of propositions governs whether or when members can present them for consideration, including rules requiring that amendments be germane and prohibiting them from adding legislation or unauthorized funds to appropriations bills.[33]

Disposition

We must be cautious in drawing inferences from the numbers and subjects of questions of order that resulted in rollcall votes. Any Senator has the right to make a point of order or challenge a ruling of the Chair, no matter of right, no matter whether his or her position has merit or enjoys widespread support in the Senate. And if the Senator requests a rollcall vote on the question, his or her colleagues typically support the request. If we wish to explore how Senators collectively have dealt with procedural questions, therefore, we must examine how the Senate decided them. As noted earlier, questions of order are presented to the Senate for decision by majority vote either when the Presiding Officer submits a point of order without first ruling on it--by choice or pursuant to rule or precedent--or when a Senator appeals a ruling the Presiding Officer has made--usually, but not always, in response to a point of order. These possibilities are reflected in the arrangement of Table 4.

Of the 213 questions of order the Senate decided during the 22 year period we are examining, the Presiding Officer submitted 77 (or 36.1 percent) without first ruling on them. On 42 occasions, the Senate voted to accept or reject the defense of germaneness. After a Senator made a point of order that an amendment offered to an appropriations bill constituted legislation, and before the Chair ruled on the point of order, another Senator intervened to raise this defense--asserting, usually implicitly, that the amendment was in order even if it was legislation because it was germane to some legislative provision already in the bill. The Senate then voted, and determined in almost 3 of every 5 cases (59.5 percent) that the amendment was in fact germane and, therefore, in order. The defense of germaneness has been effective, but it has not guaranteed protection for appropriations amendments against points of order.[34]

The Senate sustained a larger share of the remaining points of order that the Presiding Officer submitted directly to it. Of these 35 questions, 21 also involved the germaneness of amendments, and 6 were based on constitutional grounds.[35] The Senate upheld more than two-thirds (68.6 percent) of all these points of order, and slightly more (71.4 percent) of those based on germaneness requirements. In sum, then, the Senate voted directly on 77 procedural challenges to proposals or proposed actions; by overruling points of order (in 11 instances) or by accepting the defense of germaneness when it was raised (in 25 instances), the Senate allowed the challenged business to proceed in almost half (46.7 percent) of the cases.

More often the Senate decides questions of order on appeal, only after the Presiding Officer has ruled on them. The Senate acted on 127 appeals by rollcall vote from the 89th through the 99th Congress, and upheld the rulings of the Chair 82.7 percent of the time. Not surprisingly, 86 of the appeals challenged rulings that decided whether amendments were in order; the Senate rejected 81.4 percent of these challenges. The remaining appeals dealt with a diverse variety of procedural issues, some of them arising during highly-charged filibusters, so the Senate's decisions on them cannot bear the weight of much analysis.[36] Only 3 times, for example, did the Senate decide on appeal if conference reports were not in order because the conferees had exceeded the "scope of the differences" between the House and Senate versions of the same measure. Twice the Senate sustained the rulings of the Chair, but we can infer nothing from these 3 incidents about the influence that Senate conferees derive from the breadth of their authority. What we can conclude, however, is that while the Senate may reverse almost any procedural decision of its Presiding Officer, it has not done so very often. When given the opportunity to judge the judgment of the Chair, the Senate has rejected these judgments less than 20 percent of the time.

It would be an oversimplification to conclude that the Senate has sustained rulings of the Chair in the overwhelming majority of cases in order to preserve procedural regularity on the floor. There are other possible explanations. Many appeals arose, for example, when the Presiding Officer ruled

against procedural tactics of filibustering Senators; by voting to sustain the Chair in such cases, Senators also contributed to ending, or at least shortening, the filibusters. By the same token, there are extra-procedural virtues to voting that amendments are not in order because they are non-germane or even unconstitutional when the Presiding Officer submits such points of order directly to the Senate for decision. By sustaining them, Senators dispose of the amendments without having to vote on their merits, and they also expedite final passage of the bills they are considering. The entanglement of procedural regularity with political advantage and institutional convenience can be difficult if not impossible to unravel.

If we ultimately are interested in assessing the extent to which the Senate has decided questions of order by rollcall vote in ways consistent with its established procedures, a conclusive answer unfortunately is beyond our reach. That answer would require us to make an independent and authoritative judgment on the merits of each question, and no one outside the Senate is qualified to do so. However, we can approximate an answer if we accept two assumptions. First, we assume that rulings of the Chair are correct--that they are derived as accurately and fairly as possible from the Senate's rules and precedents. If so, rollcall votes to uphold rulings of the Chair are decisions to comply with Senate procedures. Second, when the germaneness of an amendment is in question, we assume that the amendment in fact is not germane--under Rule XVI, Rule XXII, the Budget Act, or unanimous consent agreements. Without doubt, this is a much more questionable assumption, but it does reflect the author's unsystematic observations and Senators' tendency to discuss germaneness in terms of relatedness, not in terms of the much more well-defined (though not always constraining) criteria of Senate precedents.[37] If we accept this second assumption as well, then we conclude that the Senate votes to enforce its procedures when it upholds points of order on germaneness and when it rejects the defense of germaneness.

When we apply these assumptions to 190 of the 213 questions of order, we find from Table 5 that 72.1 percent of the time the Senate voted to enforce its procedures.[38] Conversely, on no more than 53 occasions from 1965 through 1986 (less than 5 times on average during each Congress) did the Senate decide by rollcall vote, deliberately or not, to set aside one or more of its procedures, either by overturning a ruling of the Chair or by accepting the defense of germaneness (which we assume was raised only to protect an appropriations amendment that was subject to a point of order).[39] Even if our two assumptions are mistaken in some cases, they are unlikely to be erroneous so often as to jeopardize this fundamental conclusion: that the Senate has not routinely or even typically used its authority to decide contested questions of order as a way to circumvent procedures that it found inconvenient or that would have prevented it from reaching the policy results a majority of its members sought.

<u>Change</u>

The remaining question on which this analysis can shed some light is how the Senate may have changed between the mid-1960s and the mid-1980s. Even by the beginning of this period, the Senate had been transformed from the institution that William White believed was dominated by an "Inner Club" epitomized by "the Senate type:"[40]

> The Senate type makes the Institution his home in an almost literal sense, and certainly in a deeply emotional sense. His head swims with its history, its lore and the accounts of past personnel and deeds and purposes. To him, precedent has an almost mystical meaning and where the common run of members will reflect twice at least before creating a precedent, the Senate type will reflect so long and so often that nine times out of ten he will have nothing to do with such a project at all.

Whether or not this characterization was fair in 1956, by 1969 Nelson Polsby had bidden "Goodbye to the Inner Club."[41] By that time, the membership and center of gravity in the Senate had changed significantly, perhaps beginning with the group of young and energetic--and liberal--Senators first elected in 1958.[42] The trend toward greater activism and individualism in the Senate that so many observers have noted, with an accompanying decline of apprenticeship and deference to committee and party leaders, would continue through the 1980s, and without regard to party or ideology.[43] If the elections of 1958 and 1964 brought to the Senate a new breed of liberal Democrats, their conservative Republican counterparts arrived during the Reagan era. And of course, we witnessed during 1981-1986 the first break in Democratic control of the Senate since 1954. Were such changes in the Senate reflected in how it has decided questions of order on the floor?

One development is unmistakable from Table 1; the 94th Congress (in 1975-1976) witnessed a qualitative and persistent change in the number of contested questions of order on which the Senate passed final judgment. During the 89th-93rd Congresses, Senators acted by rollcall vote on an average of only 5 points of order and appeals per Congress. There were only 2 such events in the 90th Congress, as many as 8 in the 92nd, and a total of 25 for all 5 Congresses together.[44] During the 94th Congress alone, by contrast, there were 32 such questions of order, and only once did the total fall below this level during the next five Congresses. From one plateau, the number of these questions quintupled during 1975-1976 and then remained at a new plateau. As Table 1 also indicates, this jump is not well-reflected in other trend lines of Senate activity, including the total numbers of rollcall votes and measures passed, nor does it reflect changes in the levels of what Barbara Sinclair has characterized as contested floor activity.[45] There does not seem to be any single explanation for this development, though it appears associated with two issues on which we already have focused. The 94th Congress began with an extended contest to amend Rule XXII, which alone resulted in rollcalls on 8 questions of order. And as Table 2 shows, cloture remained controversial

for several years thereafter. The Senate cast rollcall votes on between 12 and 20 cloture-related procedural questions during each of the 94th-97th Congresses. Then during the 98th and 99th Congresses, a decrease in the number of questions of order involving cloture was offset by the increasing number that concerned the germaneness of amendments under Rule XVI and the Budget Act.

The procedural (though certainly not the political) controversy over cloture--amending Rule XXII as well as applying it--escalated and then peaked during the 94th and 95th Congresses. During those 4 years, 1975 to 1978, there was a sharp increase in the number of questions of order generating rollcalls that were cloture-related, and these questions constituted more than half of the total. They become substantially less frequent during the next two Congresses and then all but disappeared during the 1983-1986 period.[46] On the other hand, the percentage of questions concerning amendments rose steadily from slightly less than half in the 94th Congress to include all such questions that arose during the 98th Congress, before subsiding somewhat in 1985 and 1986.[47] Whether amendments were in order was the single subject that accounted for almost 90 percent of the questions of order disputed on the Senate floor during 1981-1986.

In terms of our taxonomy of rules, Table 3 indicates that the percentage of questions involving "consideration" rules increased fairly steadily from 59.3 percent in the 94th Congress to the 70 percent range during the following 6 years and then to 90 percent or more during the 98th and 99th Congresses. Not surprisingly, this development is almost wholly the result of increases in the frequency of questions that turned on "proposal" rules, which include rules imposing germaneness and other substantive requirements on amendments. As a percentage of the total, these questions increased steadily from 43.8 to 95.6 percent between the 94th and 98th Congresses before declining slightly during 1985 and 1986. Disagreements over the ways in which and the extent to which procedures should limit the policies that Senators could advance, especially in the form of amendments, became increasingly prevalent in both absolute and relative terms during the 12 years after the number of questions of order jumped so markedly from their 89th-93rd Congress level. No such trends are discernible in the percentages of questions falling into each of the other 4 general classes of rules, except that most of these frequencies declined in the 98th-99th Congresses as questions involving "consideration" rules became so dominant. There were no questions of order at all in each of the remaining 4 classes during at least one of the post-93rd Congresses, and their maximum levels ranged from only 6.2 percent of the 213 questions for "organization" and "preservation" rules to 20.0 percent for "participation" rules.

From 1975 to 1982, the percentage of rollcalls on questions of order that decided appeals also increased from 56.0 in the 94th Congress to almost 80 percent in the 96th and 97th. Then as Table 4 documents, this frequency dropped to less than 40 percent in 1983-1986, for at least two reasons reflected in Table 2. First, there was a decline in the number of contested ques-

tions of order arising under cloture and decided or even initiated by the Presiding Officer. Second and conversely, there were increases in the number of points of order against amendments for violating the germaneness requirements of Rule XVI, and these are questions on which only the Senate can rule. Thus, the changing frequency of appeals was not the result of deliberate choices that Senators made, because whether their Presiding Officer initially rules on a question of order is controlled by well-established rules and precedents that are rarely if ever violated.

What Senators do control is the final outcome of the questions of order on which they vote, either on submission or on appeal. There were too few instances per Congress of points of order being submitted or the defense of germaneness being raised to search for consequential changes over time in the decisions the Senate made in such cases.[48] However, if we examine the somewhat larger numbers of Senate decisions on appeals, we can say that with the exception of the 98th Congress, the Senate has been quite consistent in sustaining rulings of the Chair that Senators challenged from the floor. In none of the other 5 Congresses that met between 1975 and 1986 were decisions of the Chair reversed as much as one-fourth of the time they were appealed. Generally speaking, Senators could anticipate in recent years that attempts to overturn the Chair on appeal were likely to fail. Moreover, they could predict with only slightly less confidence that Senate votes on questions of order were likely to produce procedural outcomes in conformity with established procedures. From Table 5 we find that the frequency of enforcement decisions (reflecting the two assumptions discussed above) varied from not much less than two-thirds to not much more than three-fourths, and this notwithstanding the frequent success of the defense of germaneness.

A Pattern of Compliance

In sum, questions of order resulting in rollcall votes did not occur frequently at any time during the 1965-1986 period, when measured against the Senate's legislative activity. Their number did increase sharply during the 94th Congress and then remained at virtually the same level during 6 of the next 8 years. But this change is more impressive in relative terms than in absolute terms. The number of questions of order decided by rollcall vote per measure passed varied between .001 and .006 during the 89th-93rd Congresses, and then between .017 and .026 during the six following Congresses.

Throughout the entire 22 year period, the ability of Senators to offer amendments was the single subject that dominated contested questions of order, accounting for almost all of them during the two most recent Congresses. During the 94th-97th Congresses, questions relating to amending and enforcing the cloture rule also arose relatively often, but not during the 98th-99th Congresses even though Senators continued to practice the fine art of filibustering. Reflecting the prevalence of questions involving amendments, "consideration" rules--primarily "proposal" rules and, to a far lesser extent,

"schedule" rules--were the subject of more than three-fourths of all contested questions of order. When asked to decide these questions, the Senate upheld points of order in more than two-thirds of the cases, and sustained rulings of the Chair more than 80 percent of the time. Finally, even though the defense of germaneness was successful more often than not, the Senate appears to have decided most questions of order in ways that conformed with its established procedures. Thus, the data presented here do not portray a Senate that is inclined to reject rulings of the Chair or assertions from the floor that its procedures are being violated.

The right to debate at length and to offer non-germane amendments are the most important prerogatives Senators enjoy. So it comes as no surprise that questions of order involving them provoke rollcall votes more often than any others. Senators are particularly sensitive about protecting these rights, as they interpret them, from both their colleagues and their Presiding Officer. Sp when the two rights intersected, as when the Senate almost decided in 1984 to overrule the Chair in order to consider two controversial non-germane amendments under cloture, Senators ultimately could be persuaded that the Senate's institutional needs had to take priority over their policy preferences.[49] In acting on most other questions of order, though, there is much less at stake. Why then have there not been even more challenges, and successful challenges, to procedural requirements and prohibitions, especially during a period of individualism and largely accommodative leadership in the Senate?[50]

One explanation may be that, in an institution in which unpredictability is inescapable, Senators value procedural regularity more than conventional impressions of the Senate might lead us to expect. We may not differentiate sufficiently well between the Senate's ability (and need) to set aside some of its rules by unanimous consent and its unwillingness to set aside others by majority vote on contested questions of order. And we may fail to distinguish among the Senate's different kinds of procedural rules which, as Tables 2 and 3 document, vary greatly in the frequency with which they provoke contested procedural questions. Specifically, we may be too inclined to generalize, however unintentionally, from the Senate's votes on appropriations amendments and its controversies under cloture--which have given rise to most rollcalls on questions of order--to its proceedings under other and usually more routine circumstances.

However, the relative paucity of contested questions of order may say even more about the ample opportunities that Senators enjoyed throughout the period under study to express themselves, propose their preferred policies for floor votes, and influence the Senate's schedule and decisions. Senate procedures have not been a serious obstacle to individualism. Its rules normally are not confining and when they do pinch, it is not for very long. "Mandate" rules assigning committee jurisdictions are unquestionably important, but Senators rarely contest bill referrals on the floor because they know that these decisions will not foreclose them from offering their proposals as floor amendments, whether germane or not. And "limitation" and "closure"

rules that restrict individual debate rarely become controversial because they almost always allow Senators sufficient ways and means to be heard. Rarely if ever do Senators contend that existing procedures do not give them enough latitude for what Sinclair describes as a style of "unrestrained activism."[51] Furthermore, when Senators do initiate points of order or appeals (or waiver motions under the Budget Act) to achieve some personal objective, they need the support of at least a majority of their colleagues, who may very well conclude that their individual interests are best served by insisting that the Senate comply with the rule at issue. More generally, if current procedures suffice for Senators' purposes, they would benefit little from a willingness to set aside a wider range of these procedures through rollcalls on questions of order, thereby making what happens on the Senate floor even less predictable than it already is.

A cold calculation of tactical advantage might lead us to expect that Senators would use questions of order, and especially votes to overturn rulings on appeal, more often for a more lasting purpose: not merely to set some Senate procedure aside temporarily but to alter it permanently. Lacking the means to change its rules by simple majority vote without the danger of a filibuster, the Senate could resort to votes on appeals as a way of achieving much the same result by establishing new precedents. Efforts to amend the cloture rule in 1967, 1969, 1971, and again in 1974, for instance, led to rollcalls on questions of order by which Senators favoring change sought to establish that, at the beginning of a new Congress, the Senate could decide to take up a cloture reform resolution by simple majority vote or invoke cloture on it in the same way.[52] And during the 1977 natural gas filibuster, Majority Leader Byrd initiated questions of order to create the first precedents requiring the Presiding Officer to take the initiative under cloture to rule amendments, motions, and other matters out of order without awaiting points of order from the floor.[53]

Then in 1979, Byrd made a point of order designed to limit the availability of the defense of germaneness to protect amendments to appropriations measures. Apparently frustrated with Senators' willingness to accept the defense as a way of voting to consider amendments they supported, Byrd made a point of order in November 1979 that the question of germaneness could not be raised in defense of an amendment when there was no House language in the bill to which the amendment could possibly be germane. In sustaining the point of order, a decision the Senate upheld on appeal, 44 to 40, the Presiding Officer observed that "it is a question of first impression and it [the ruling] would have the effect of adding to the existing precedents a threshold question, that being whether or not there is House language for the amendment to be germane to...."[54]

Later during the 96th Congress, Senator Byrd again used a question of order to establish an important new precedent. In March 1980, he successfully appealed the ruling against his contention that he could offer a nondebatable motion that the Senate go into executive session to consider a

particular nomination on the Executive Calendar. Under the Senate's previous practices, a non-debatable motion was in order to go into Executive Session, but a debatable motion then was required to take up anything other than the first nomination or treaty on the Executive Calendar. The second of these motions could be filibustered, a possibility that Byrd's appeal was designed to eliminate. He argued that "the Senate should be able to reach a nomination on the Executive Calendar without having to first go through the treaties or deal with a filibuster on the motion to proceed to the first nomination on the Calendar." Senator McClure opposed Byrd's appeal, contending that "when we are going to depart from the established usage under the rules, it seems to me we ought to talk about amendments of the rules, rather than by majority vote on an appeal of the ruling of the Chair establishing new rules." Byrd responded that "my motion does not contravene any rule; my motion does not contravene any precedent. It merely establishes a precedent."[55] Sometimes only a fine line can be drawn between a decision on a question of order that effectively nullifies or changes an existing procedure and one that establishes a precedent where none had existed.[56]

This approach to modifying procedure would be especially attractive when the Senate is operating under cloture because the Chair decides all questions of order and appeals are not debatable. But Senate leaders rarely have sought to change the "rules of the game" through questions of order, whether under cloture or not. These three incidents were exceptional, probably because, as McClure argued in 1980, "it is a very dangerous course of conduct upon we have embarked in changing the rules of the Senate from time to time as may be convenient to meet the exigencies of a particular situation."[57] Although contemporary Senators may not attribute to precedent "an almost mystical meaning," as White claimed his "Senate type" did, they all must appreciate that a Senate in which a simple majority could effectively change the rules at will would be a fundamentally different place than it has ever been.

Yet the opportunity to vote on points of order and appeals does give the Senate room for maneuver that its leaders have used from time to time when they became convinced that some procedural change was necessary. More often, the Senate has taken advantage of this flexibility when the meaning and merits of its procedures were not in question, but when their application in a particular situation was about to interfere too severely with doing something important to most of its members. In December 1985, for example, Senators voted 27 to 68 against sustaining a ruling of the Chair that a conference report was not in order because the conferees had exceeded their authority. The subject of the report was an essential measure to increase the public debt ceiling. The provision at issue was the compromise that Senate and House conferees had reached on what already was known as the Gramm-Rudman-Hollings act which, ironically, required three-fifths votes to set aside some of the new requirements and prohibitions it imposed--the development with which this analysis began.

NOTES

* The author is Senior Specialist in the Legislative Process at the Congressional Research Service (CRS) of the Library of Congress. Nothing in this paper is to be construed to represent a position of CRS. The author wishes to express his gratitude to Eric Austin and Nancy Horn of the Inter-university Consortium for Political and Social Research and to Gregory Harness and Ann Womeldorf of the Senate Library for their generous assistance.

[1] Section 904(b) of the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344). The Senate also could adopt resolutions by majority vote to waive certain provisions of the Act.

[2] Throughout this analysis, the term "rules" encompasses the Senate's standing rules and orders, its precedents, and rule-making provisions of laws such as the Budget Act.

[3] Section 271 of the Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177). Two of the three-fifths vote requirements are permanent changes in the Budget Act; the others are to be in effect only for the duration of the Gramm-Rudman-Hollings deficit reduction program. A seventh temporary three-fifths waiver requirement was added by Section 211 of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (P.L. 100-119). See U.S. Congress, Senate, Committee on the Budget. Congressional Budget and Impoundment Control Act of 1974, as Amended. 100th Congress, 1st Session; Committee Print; S. Prt. 100-73; January 1988; pp. 38-39, 58-59. For the House, the Gramm-Rudman-Hollings act as amended requires a vote of three-fifths of the members present and voting to waive either of two deficit reduction enforcement provisions (see Sections 301(i) and 304(b) of the Budget Act as amended).

[4] These requirements remain in force until the end of Fiscal Year 1992. Section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272), as amended by Section 7006 of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509) and Section 205 of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (P.L. 100-119). See Congressional Budget and Impoundment Control Act of 1974, as Amended, pp. 49-51. On this issue, also see Edward M. Davis and Sandy Streeter, Extraneous Matter in Reconciliation Measures: An Overview of the Practice. Report by the Congressional Research Service; July 25, 1986; and U.S. Congress, House of Representatives, Committee on Rules. The Budget Reconciliation Process: The Inclusion of Unrelated Matters. Hearings before the Subcommittee on the Legislative Process. 99th Congress, 2nd Session; July 30-31, 1986.

[5] Section 20001 of P.L. 99-272, the 1985 reconciliation act.

[6] Section 210(c) of P.L. 100-119, the Gramm-Rudman-Hollings reaffirmation act of 1987.

[7] A few of the Presiding Officer's decisions are not subject to appeal, such as recognition decisions under paragraph 1(a) of Rule XIX which directs the Presiding Officer to recognize "the Senator who shall first address him."

[8] Senators have included three-fifths vote requirements as part of other proposed rules changes concerning the germaneness of amendments under cloture and to appropriations measures. See U.S. Congress, Senate, Committee on Rules and Administration. Report on Senate Operations, 1988. Committee Print; S. Prt. 100-129; 100th Congress, 2d Session; September 20, 1988.

[9] On this subject, see Robert Keith, "The Use of Unanimous Consent in the Senate," in U.S. Congress, Senate, Commission on the Operation of the Senate. Committees and Senate Procedures. Committee Print; 94th Congress, 2d Session; 1977; pp. 140-168; and Steven S. Smith, Call to Order: Floor Politics in the House and Senate. Washington: The Brookings Institution, forthcoming; especially chapter 4.

[10] For illustrative purposes here, some of these rules are stated in over-simplified form.

[11] Albert Ellery Bergh (Managing Editor), The Writings of Thomas Jefferson. Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1903; v. II, pp. 335-336. (Emphasis in the original.)

[12] Ibid, p. 337.

[13] George H. Haynes, The Senate of the United States. Boston: Houghton Mifflin Company, 1938, v. 1, p. 377.

[14] 128 Congressional Record 12218.

[15] This episode is discussed in Stanley Bach, "The Nature of Congressional Rules," a paper presented at the 1987 Annual Meeting of the American Political Science Association.

[16] According to Galloway, the President pro tempore Haynes quoted was Ingalls of Kansas, speaking in 1876. George B. Galloway, The Legislative Process in Congress. New York: Thomas Y. Crowell Company, 1953; p. 542.

[17] 121 Congressional Record 30347.

[18] 121 Congressional Record 30348.

[19] 125 Congressional Record 36487.

[20] 127 Congressional Record 27418, November 13, 1981 (statement by Senator Helms); Congressional Record (daily edition), September 20, 1983, p. S12515 (statement by Senator Melcher); Congressional Record (daily edition), October 2, 1986, p. S14691 (statement by Senator Heinz).

[21] Congressional Record (daily edition), June 5, 1986, p. S6841. On October 1-2 of the same year, Hatfield made points of order on grounds of germaneness against amendments offered to a major continuing resolution. The Senate upheld the first 8 points of order on which there were rollcall votes. But when Paula Hawkins of Florida then offered a major school lunch and child nutrition amendment that clearly was non-germane, the Senate held otherwise by a vote of 78 to 17. It was policy and the politics of the upcoming election, but not procedure, that distinguished Hawkins' amendment from the ones preceding it. Congressional Record (daily edition), October 1-2, 1986, pp. S14411-S14721.

[22] These instances, as well as the rollcall votes on suspension motions, were identified by the Inter-university Consortium for Political and Social Research from its United States Congressional Roll Call Voting Records. Information on each point of order and its disposition has been compiled in Stanley Bach, Points of Order and Appeals in the Senate. Report for the Congressional Research Service; January 27, 1989.

[23] See Stanley Bach, "Patterns of Floor Consideration in the House of Representatives," a paper presented at the Center for American Political Studies of Harvard University; December 1988;

[24] Ironically, one reason for suspending the rules is to forestall a successful appeal from a ruling of the Chair that could have more detrimental consequences for the Senate. On May 27, 1982, the Senate invoked cloture on a supplemental appropriations bill and later voted for a suspension motion that permitted consideration of Richard Lugar's housing amendment. The debate suggests that some Senators may have voted for the suspension motion because they feared what might have happened if the motion had failed. Lugar could have offered his amendment, the Presiding Officer would have ruled it out of order, and then Lugar could have appealed that ruling. With this possibility in mind, Senators who opposed the amendment but anticipated that an appeal would prevail may well have preferred to vote for the suspension motion, which required a two-thirds vote, rather than unsuccessfully oppose the appeal, which would have required only a simple majority vote. 128 Congressional Record 12217-12219, 12253-12262.

[25] The Chair is most likely to do so if the point of order raises a question of particular importance on which the Senate's existing rules and precedents fail to offer sufficiently clear guidance.

[26] The unit of analysis here is the point of order and its disposition, not the rollcall vote. In a number of instances, the same point of order resulted in

two or more such votes: a vote on a motion to table a point of order or appeal, a vote on reconsidering the vote on that motion (or on tabling the motion to reconsider), then a vote on the point of order or appeal itself, and finally a vote on a motion to reconsider the vote by which the Senate decided the point of order or appeal (or on tabling the motion to reconsider). This analysis excludes points of order that did not result in any rollcall vote and those that led to a waiver motion or resolution pursuant to the Budget Act. The latter are not included because, as noted at the outset, the Act explicitly and deliberately created the means to set such points of order aside. For a more exhaustive discussion of other ways in which the Senate disposes of points of order, see Richard S. Beth, Senate Points of Order and Their Disposition: Trends in Recent Decades. Report by the Congressional Research Service; August 11, 1986.

[27] 120 Congressional Record 21590.

[28] O'Neill also observed that Democratic leaders had discussed the possibility of "disciplinary measures." 126 Congressional Record 23699. The Ashbrook amendment concerned the use of funds to implement Internal Revenue Service regulations affecting the tax-exempt status of private or religious schools. The appeal failed. 126 Congressional Record 21978-21980.

[29] On September 9, 1988, for example, Representative Rowland, a Republican from Connecticut, appealed the Speaker's ruling against consideration of his resolution that the House open each daily session with the Pledge of Allegiance. All but 7 Democrats voted to uphold the Chair, but the Speaker then announced that he would exercise his discretionary authority to request Members to lead recitations of the Pledge. Congressional Record (daily edition), p. H7331.

[30] As discussed in the concluding section, the Majority Leader sometimes has appealed rulings of the Chair in order to establish new precedents usually intended to expedite the conduct of Senate business. If many of his fellow party members were to oppose his position in such a case, it could well be taken as an indication of his weakness and their lack of confidence in his judgment and leadership.

[31] The data on days and hours in session and on the numbers of measures passed and rollcall votes are taken from Roger H. Davidson and Carol Hardy, Indicators of Senate Workload and Activity. Report 87-497 of the Congressional Research Service; June 8, 1987; Table 5-5, p. 72. The information on amendments the Senate adopted is presented by Barbara Sinclair in Table 9 of "The Transformation of the U.S. Senate--Institutional Consequences of Behavioral Change," a paper presented at the 1987 Annual Meeting of the Midwest Political Science Association. See also Sinclair's other excellent analyses of change in the Senate: "Senate Styles and Senate Decision Making, 1955-1980," The Journal of Politics, v. 48, 1986, pp. 877-908; and "Senate Norms, Senate Styles and Senate Influence," a paper

presented at the 1986 Annual Meeting of the American Political Science Association.

[32] Filibusters undoubtedly have affected the record of points of order and appeals in another way that is more difficult to document and quantify. Senators sometimes demand a rollcall vote on a question of order not because they are so concerned with the disposition of that question but because they wish to delay proceedings or because they are unhappy with something else the Senate is doing (or not doing). And these situations very often arise under cloture or in anticipation of a cloture vote. Unfortunately, though, there is no way to identify them without making assumptions about Senators' intentions--assumptions that sometimes are plausible but always are subjective. Suffice it to say that not all questions of order are raised because Senators are truly uncertain about the proper interpretation of their rules and precedents.

[33] Some questions of order affecting amendments did not involve "proposal" rules because they turned on matters of form, not content. For example, was an amendment out of order because it proposed to amend a bill in more than one place or because it sought to amend language that did not appear at the specified pages and lines? Most of the remaining "consideration" questions concerned "schedule" rules--especially the circumstances under which Senators could offer motions to recess or adjourn or could suggest the absence of a quorum. Such questions arose most often during, or in anticipation of, filibusters, so many of them probably were contested primarily or solely for purposes of delay. See the preceding note.

[34] The frequency with which the Senate has voted to accept the defense of germaneness raises a question about the meaning of "precedent." In general, a precedent is supposed to establish an interpretation of the rules that governs the Senate unless and until its members or the Presiding Officer holds to the contrary. But it is both unrealistic and unwarranted for each vote on the defense of germaneness to result in a recasting of the Senate's standards by which the germaneness of amendments to appropriations bills are to be judged thereafter. The Senate's votes on these questions do not yield consistent criteria of germaneness because they never were intended to do so. Most Senate votes on the defense of germaneness turn on whether or not Senators support the amendment at issue, not whether they think it meets a parliamentary test derived from precedent. Instead, it is probably fair to say that Senate votes on the defense of germaneness leave the existing standards of germaneness unchanged; each vote merely establishes an additional precedent for the fact that the Senate may decide not to be bound by them.

[35] Most of these germaneness questions also concerned appropriations amendments, but they did not take the form of the "defense" of germaneness raised with a point of order already pending that the amendment at issue was legislative in character. Of the 21 germaneness questions, 13 were raised against amendments to a continuing resolution during the 3 day period of October 1-3, 1986. See note 21.

[36] On September 29, 1977, for example, the Senate decided unanimously to sustain the ruling of the Chair that an amendment Russell Long had offered under cloture to the natural gas deregulation bill was not in order, but the Congressional Record does not indicate the basis for the Chair's ruling. 123 Congressional Record 31588-31589. (See also 128 Congressional Record 2344 for a similar incident in 1982.) Two years earlier, the Senate had voted 54-32 to table James Allen's appeal from the ruling of the Chair that a point of order he had made was not in order. This was one of three questions of order the Senate decided on the same day, all arising in connection with a motion that the Senate consider a resolution to amend its cloture rule. 121 Congressional Record 4108-4113. Just as hard cases do not necessarily make good law, such decisions do not offer reliable lessons about "parliamentary law" in the Senate.

[37] For example, the Gramm-Rudman-Hollings proposal was clearly related, in both a political and a fiscal sense, to the debt ceiling measure to which it was offered as an amendment. But the amendment certainly was not germane under Senate precedents. This is not to say, however, that Senators never seriously discuss whether amendments are germane; see, for instance, 120 Congressional Record 40362-40363 (December 17, 1974), and 126 Congressional Record 1202-1203 (January 30, 1980).

[38] No such assumptions can be made with reasonable confidence about the remaining 23 questions of order--points of order that the Senate voted to table or that the Chair submitted because they raised constitutional issues or for other reasons that did not involve germaneness.

[39] It bears repeating here that this analysis does not include motions and resolutions to waive provisions of the Budget Act, either by simple majority vote as originally required by the Act or by three-fifths vote as required for some purposes by the 1985 and 1987 amendments to it.

[40] William S. White, The Citadel. New York: Harper & Brothers, 1956, pp. 85.

[41] The Washington Monthly, August 1969, pp. 30-34.

[42] See, for example, Michael Foley, The New Senate. New Haven: Yale University Press, 1980.

[43] On change in Senate and House floor activity during this period, see Smith, Call to Order: Floor Politics in the House and Senate. For other assessments of recent continuity and change in the Senate, see note 31, and Norman J. Ornstein, Robert L. Peabody, and David W. Rohde, "The Senate Through the 1980s: Cycles of Change," in Lawrence C. Dodd and Bruce I. Oppenheimer (eds.), Congress Reconsidered (Third Edition). Washington: CQ Press, 1985; pp. 13-33.

[44] So few questions of order resulted in rollcall votes during each of these 5 Congresses that the data for 1965-1974 cannot sustain Congress-by-Congress comparisons. For this reason, data for these Congresses are combined for purposes of Tables 2-5.

[45] See Table 1 and the accompanying source note and note 31. This new level of procedural contention on the floor cannot be attributed to passage of the Budget Act in 1974. Only 10 of the 188 questions of order decided in 1975 and thereafter turned on provisions of the Budget Act; most Senate votes on setting aside procedures and requirements of the Act were on waiver motions and resolutions which this analysis does not include.

[46] There were increases during the 92nd-94th Congresses in the number of cloture votes and the number of times the Senate invoked cloture. See U.S. Congress, Senate, Committee on Rules and Administration. Senate Cloture Rule. Committee Print; S. Prt. 99-95; 99th Congress, 1st Session; pp. 77-85. See also Bruce I. Oppenheimer, "Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture," in Dodd and Oppenheimer, Congress Reconsidered (Third Edition), pp. 393-413.

[47] The total number of questions concerning amendments and those involving cloture cannot be added because a substantial number of them fall in both categories.

[48] Even so, note the sharp drop during the 97th-99th Congresses in the frequency with which the Senate accepted the defense of germaneness.

[49] See note 15 and the accompanying text.

[50] See, for example, Alan Ehrenhalt, "In the Senate of the '80s, Team Spirit Has Given Way to the Rule of Individuals," Congressional Quarterly Weekly Report, September 4, 1982, pp. 2175-2182; and Diane Granat, "Ruling Rambunctious Senate Proves to Be Thorny Problem for Republican Leader Baker," Congressional Quarterly Weekly Report, July 16, 1983, pp. 1427- 1432; both cited in Norman J. Ornstein, Robert L. Peabody, and David W. Rohde, "Party Leadership and the Institutional Context: The Senate from Baker to Dole," a paper presented at the 1986 Annual Meeting of the American Political Science Association.

[51] Sinclair, "Senate Styles and Senate Decision Making, 1955-1980."

[52] 113 Congressional Record 908-940; 115 Congressional Record 989-995; 117 Congressional Record 5485-5486; 121 Congressional Record 3835-3854, 4108-4115, 4115-4116, 4352-4354, 5242-5251.

[53] See, for example, U.S. Congress, Senate. Senate Procedure. Senate Document 97-2; 97th Congress, 1st Session; 1981; p. 246.

[54] 125 Congressional Record 31892-31894. See also 127 Congressional Record 21912-21913.

[55] 126 Congressional Record 4729-4732.

[56] See, for example, Congressional Record (daily edition), September 11, 1987, pp. S11989-S11993, S12068-S12074.

[57] 126 Congressional Record 4730.

Table 1
Frequency of Questions of Order Decided by Rollcall Votes in the Senate

	Congress										
	89th	90th	91st	92nd	93rd	94th	95th	96th	97th	98th	99th
Number of questions of order decided by rollcall vote	3	2	6	8	6	32	35	33	32	23	33
Number of rollcall votes relating to questions of order	3	3	6	8	6	41	38	39	33	26	35
Number of rollcall votes	491	595	667	955	1138	1311	1156	1055	966	673	740
Number of measures passed	1968	1731	1676	1371	1564	1552	1596	1483	1210	1316	1331
Number of matters eliciting at least 1 rollcall vote		164		222		273		240	183	124	146
Percent of bills passed eliciting at least 1 rollcall vote		8.3		16.4		21.0		18.0	14.4	10.6	
Number of amendments adopted by rollcall vote		113		187		182		179	161	127	136
Percent of amendments adopted by rollcall vote		30.8		35.3		28.5		35.1	29.3	31.8	31.0

Sources: The data on numbers of rollcall votes (in executive as well as legislative session) and measures passed are derived from Davidson and Hardy, Table 5-5, p. 72. These data do not agree with those presented by Sinclair in Table 2 of her 1987 paper. (See note 31.) Tables 2, 3, and 9, and the accompanying text, from that paper are the source for the bottom 4 rows of this table.

Table 2
Subjects of Questions of Order Decided by Senate Rollcall Votes

	Congress							
	89th-93rd	94th	95th	96th	97th	98th	99th	Total
Amendments in order:								
Germaneness under Rule XVI or Budget Act	5	7	7	7	9	12	21	68
Germaneness under cloture	2	1	4	6	5	2	0	20
Germaneness under unanimous consent agreements	5	4	0	3	0	0	1	13
Other Rule XVI provisions	4	1	1	4	7	6	5	28
Other Budget Act provisions	-	0	4	1	0	1	1	7
Other cloture provisions	0	2	6	2	5	0	0	15
Provisions of Constitution	2	0	1	0	0	1	2	6
Other	0	0	1	0	0	1	0	2
Debate procedures (cloture-related)	1	4 (3)	0	1	0	0	1	7 (3)
Measures in order (cloture-related)	1	0	0	0	1	0	0	2
Conference report in order (cloture-related)	1	0	0	0	2	0	1	4
Motions in order (cloture-related)	2 (1)	5 (5)	3 (2)	3 (1)	2 (1)	0	1	16 (10)
Voting and quorums (cloture-related)	0	2 (1)	4 (4)	3 (1)	1 (1)	0	0	10 (7)
Procedures to invoke cloture	2	2	0	3	0	0	0	7
Other (cloture-related)	0	4 (3)	4 (4)	0	0	0	0	8 (7)
Concerning amendments:								
Total number of questions	18	15	24	23	26	23	30	159
Percent of all questions	72.0	46.9	68.6	69.7	81.2	100.0	90.9	74.6
Involving cloture:								
Total number of questions	5	17	20	13	12	2	0	69
Percent of all questions	27.8	53.1	57.1	39.4	37.5	8.7	0.0	32.4
Total	25	32	35	33	32	23	33	213

Table 3
Rules Taxonomy Applied to Questions of Order Decided by Senate Rollcall Votes

	Congress							
	89th-93rd	94th	95th	96th	97th	98th	99th	Total
I. Organization								
A. Designation	0	0	0	0	0	0	0	0
B. Mandate	2	0	0	0	2	0	1	5
C. Connective	0	0	0	0	0	1	0	1
Subtotal	2	0	0	0	2	1	1	6
(Percent of Total)	(8.0)	(0)	(0)	(0)	(6.2)	(4.3)	(3.0)	(2.8)
II. Consideration								
A. Schedule	0	2	7	3	2	0	0	14
B. Priority	0	3	0	1	0	0	0	4
C. Proposal	19	14	18	21	22	22	30	146
Subtotal	19	19	25	25	24	22	30	164
(Percent of Total)	(76.0)	(59.3)	(71.4)	(75.8)	(75.0)	(95.6)	(90.9)	(77.0)
III. Participation								
A. Recognition	0	0	0	0	0	0	0	0
B. Limitation	0	3	6	2	5	0	1	17
C. Quantity	2	0	0	0	0	0	0	2
D. Information	0	2	1	0	0	0	0	3
Subtotal	2	5	7	2	5	0	1	22
(Percent of Total)	(8.0)	(15.6)	(20.0)	(6.1)	(15.6)	(0)	(3.0)	(10.3)
IV. Conclusion								
A. Closure	2	5	0	3	0	0	1	11
B. Disposition	0	1	0	1	0	0	0	2
C. Completion	0	0	1	1	1	0	0	3
Subtotal	2	6	1	5	1	0	1	16
(Percent of Total)	(8.0)	(18.7)	(2.9)	(15.1)	(3.1)	(0)	(3.0)	(7.5)
V. Preservation								
A. Enforcement	0	1	2	1	0	0	0	4
B. Waiver	0	1	0	0	0	0	0	1
Subtotal	0	2	2	1	0	0	0	5
(Percent of Total)	(0)	(6.2)	(5.7)	(3.0)	(0)	(0)	(0)	(2.3)
Total	25	32	35	33	32	23	33	213

Table 5
Enforcing Senate Procedures by Rollcall Votes to Decide Questions of Order

	Congress							
	89th-93rd	94th	95th	96th	97th	98th	99th	Total
Votes to enforce Senate procedures	12	17	23	23	24	13	24	137
Votes to set aside Senate procedures	6	9	8	9	7	7	7	53
Frequency of enforcement decisions	66.7	65.4	74.2	71.9	77.4	65.0	77.4	72.1
(Rollcall votes excluded from these calculations)	(6)	(6)	(4)	(1)	(1)	(3)	(2)	(23)