Parliamentary Rule: The Origins, Development, and Role of the Senate Parliamentarian in the Legislative Process

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“I talked earlier about all the people who are helpful to us. Some people I didn’t mention who are so vital to us, Mr. President, are the Parliamentarians. The Senate rules are extremely complex. I know them pretty well, but I am amateur compared to our Parliamentarians who interpret the precedents and Rules of the Senate and advise the Presiding Officer anytime we are in session. Their work is vital to the well-oiled Senate we have.”

-Majority Leader Harry Reid
February 7, 2009

Introduction

The literature on Congress includes a theoretically diverse collection of approaches to understanding the legislative process. The most prominent approaches focus on the political behavior of representatives and senators and the strategic calculations they make to achieve their goals in the institution. According to these behavioral and rational choice approaches, member action shapes Congress as an institution and determines the legislative process within it. More recently, a historical-institutional approach has proliferated in the literature which focuses on how Congress itself shapes the goal-driven behavior of its members and the legislative process. Yet regardless of the approach employed, the literature on congressional decision-making shares a common interest in the nature of conflict within Congress and the manner in which it is resolved.

Conflict resolution is above all a question of order. Specifically: What kind of legislative organization serves to order the deliberations of Congress through which agreements are reached? According to Krehbiel (1992), “legislative organization refers to the allocation of resources and assignment of parliamentary rights to individual legislators or groups of

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1 Majority Leader Harry Reid’s comments on the Senate Floor cited in the Congressional Record-Senate (February 7, 2009), S1989.
legislators.”

Put simply, procedural rules in the House and Senate regulate member participation in the legislative process. Shepsle’s (1979) concept of “structure-induced equilibrium” highlights the importance of procedural rules in producing stable policy outcomes.

Majority Leader Reid’s comments on the Senate Parliamentarian draw attention to the changing nature of procedural rules in the contemporary Senate. Reflecting this development, Senate decision-making has become increasingly regulated as procedural rules determine the legislative process to a greater extent today than they have historically. The literature on congressional decision-making acknowledges the centrality of Senate rules to the legislative process. According to Krehbiel (1992), “legislative scholars…have been in long-standing agreement that rules are important determinants of legislative choice.” However, there is disagreement on what drives procedural choice in Congress and the impact of such rules on the legislative process.

According to Evans (1999), “very little research has been done about the development of the Parliamentarian’s role in either chamber, particularly the Senate.” As a result, this paper will attempt to determine the extent to which procedural rules influence member behavior by examining the role of the Parliamentarian in Senate decision-making. The Parliamentarian represents a particularly useful analytical unit through which to analyze this question, as the position is located at the nexus of Senate rules and the behavior of individual members.

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6 Ibid., 616.
To this end, this paper will first explore the different theoretical approaches to legislative organization found in the literature and will generate two hypotheses from them in order to provide specific assumptions for the Parliamentarian’s role in the legislative process. The paper will then briefly define the several components that together comprise the “Senate rules,” including the institution’s informal precedents. The establishment of Senate precedents will be examined in more detail as it is from their interpretation that the Parliamentarian primarily derives his influence. The relationship between the Parliamentarian and individual senators will then be examined in order to better understand the extent to which the office influences the legislative process. Finally, two case studies will be analyzed in more detail to examine the ways in which this relationship affirms the two hypotheses generated in this paper. Specifically, the case studies provided by the creation of a new precedent during the health care reform debate and the innovative utilization of motions to suspend the rules in the 111th Congress were selected because they fulfill many of the conditions predicted by both hypotheses.

Theoretical Approach: Path Dependent or Majoritarian?

Theories of congressional organization can be divided into three general approaches: distributive (Mayhew 1974); informational (Krehbiel 1992); and partisan (Rhode 1991, Cox & McCubbins 1993 and 2005, Sinclair 1995). These theoretical approaches have advanced our understanding of the relationship between congressional procedure and decision-making as well as the implications of this relationship for member participation in the legislative process. Yet the question remains, what determines procedural rules in the Senate? In an effort to answer this question, this paper will focus on two general theories that can be derived from the literature on congressional organization: path dependency and majoritarianism.
The first theory posits that institutional rules are path dependent. Put simply, the Senate’s inherited rules of procedure affect the legislative process by constraining the majority party in the pursuit of its goals and enhancing the ability of the minority party to obstruct the majority. According to Binder (1997), “earlier procedural decisions are inherited by subsequent majorities – and act as constraints when those majorities try to choose their own set of rules.” In this way, procedural rules are “sticky.” Binder argues that the Senate’s inherited rules interact with competition between the majority and minority parties to structure the legislative process in the institution. Senate decision-making is thus dependent on both the partisan need and capacity for change and past procedural decisions that serve to constrain individual member behavior.

The principal manner in which rules restrain Senate majorities from one Congress to the next is that they require a supermajority vote to be changed. As a result of these costs, Senate rules have remained relatively stable over time, especially when compared to those in the House of Representatives. Procedural innovations are typically incorporated into the existing rules instead of replacing them entirely. As such, the development of Senate rules reflects a “path-dependent layering process.” Viewed from this perspective, the institution’s rules are “historical composites” that continue to impact the legislative process in unintended ways long

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after they are created.\textsuperscript{12} According to Binder and Smith (1997), “the character of the Senate today represents the sum choices senators have made about institutional arrangements since the very first Senate met in 1789.”\textsuperscript{13}

An alternative theory asserts that Senate rules reflect majoritarian decisions. Krehbiel (1992) raises the consideration that “objects of legislative choice in both procedural and policy domains must be chosen by a majority of the legislature.”\textsuperscript{14} As a result, “majoritarianism” remotely determines procedural rules. Wawro and Schickler (2006) apply Krehbiel’s concept of “remote majoritarianism” to the pre-cloture Senate. Specifically, they argue that the “mutability” of Senate rules enables a committed majority to curtail minority rights in response to excessive obstruction. Put simply, the provisions of Senate rules, such as the super-majoritarian requirement to change them, are ultimately majoritarian in nature.\textsuperscript{15} Senate majorities may overcome the super-majoritarian barriers erected by the institution’s inherited rules simply by establishing a new precedent by a simple-majority vote.\textsuperscript{16} It should be noted, however, that this approach does not entirely dismiss the relevance of the Senate’s inherited rules. Rather, Wawro and Schickler argue that the “stickiness” of these rules do not prevent, in and of themselves, a committed majority from exerting more control over the legislative process.\textsuperscript{17}

Determining the particular structure of procedural choice in the Senate is a theoretical question from which several predictions about legislative behavior can be derived. As discussed, 

\textsuperscript{12} Schickler, \textit{Disjointed Pluralism}, 267.


\textsuperscript{14} Krehbiel, \textit{Information and Legislative Organization}, 16.


\textsuperscript{16} Ibid., 263.

\textsuperscript{17} Ibid.
theories of legislative organization can be divided into two principal schools of thought regarding this question: path dependency and majoritarianism. The Senate Parliamentarian represents an ideal analytical unit with which to empirically test the predictions of each. An empirically motivated hypothesis can be generated for each approach in order to provide specific assumptions for the Parliamentarian’s role in the legislative process. With these hypotheses, the relationship between the Parliamentarian and individual members can then be observed in an effort to determine the relevance of these theories to decision-making in the contemporary Senate.

First, the Path Dependent Hypothesis can be derived from its corresponding theory of legislative organization in order to explain the Parliamentarian’s influence in Senate decision-making.

**PATH DEPENDENT HYPOTHESIS**

*Senate rules are path dependent and the Parliamentarian’s influence in the legislative process is significant.*

This hypothesis suggests that the Parliamentarian is an influential actor because of the path dependent nature of Senate decision-making. The Parliamentarian will rule independently of both the majority and minority parties due to the authority provided by the Senate’s inherited rules. The Parliamentarian’s rulings will be impartial in nature and will not favor one side over the other. As a result, the Path Dependent Hypothesis predicts that the Parliamentarian’s rulings will rarely be overturned. Finally, the behavior of the Parliamentarian predicted by the Path Dependent Hypothesis will not be dramatically affected by issue salience or agenda control.
Second, the Majoritarian Hypothesis can also be derived from its corresponding theory of legislative organization in order to explain the Parliamentarian’s influence in Senate decision-making.

**MAJORITARIAN HYPOTHESIS**

*Senate rules reflect remote majoritarian decisions and the Parliamentarian’s influence in the legislative process is minimal.*

This hypothesis suggests that because Senate rules reflect majoritarian decisions, the Parliamentarian will not be an influential actor in the legislative process. The Parliamentarian will be deferential to the majority party as a result of the fact that the mutability of Senate rules allow a majority to easily overturn rulings that favor the minority. Given this deference, the Parliamentarian will rarely rule in favor of the minority party. However, the minority party will be expected to contest the Parliamentarian’s rulings given the blatant partisan bias of the position. These appeals will be unsuccessful more often than not. Finally, the behavior of the Parliamentarian predicted by the Majoritarian Hypothesis will be expected to intensify during the consideration of controversial legislation and parliamentary maneuvers that significantly impact the majority’s ability to control the agenda.

**Senate Rules: A Brief Overview**

An examination of the parliamentary procedures that govern Senate decision-making is important because, as C. Lawrence Evans and Walter J. Oleszek have written, “procedure shapes policy.”\(^{18}\) It is with this in mind that this paper first provides a brief overview of the various

components of the Senate’s rules. Specifically, Senate rules are derived from four primary sources: the Constitution; the Standing Rules of the Senate; statutory rules passed by Congress; and informal precedents. It is the combination of each of these sources that forms the procedural framework within which the legislative process unfolds in the Senate. Fully understanding Senate decision-making is thus dependent on appreciating the complex interplay between these several components.

The Senate determines its own rules pursuant to the Constitution. According to Article I, Section 5, “each House [of Congress] may determine the rules of its proceedings.” This clause has been interpreted to authorize the House and Senate to independently establish their parliamentary procedures. It is this constitutionally-bestowed rule-making authority that allows the Senate to determine its own standing and statutory rules and create informal precedents to govern its daily proceedings.

The Senate has established formal rules pursuant to Article I, Section 5. There are currently 44 standing rules that cover everything from non-controversial issues like the oath of office (Rule III) and the committee referral process (Rule XVII) to controversial issues such as the process to end debate (Rule XXII). These rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. For the most part, the

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19 Long-standing traditions of the Senate, such as the preferential treatment given to the Majority Leader to make motions, as well as party conference rules can also impact Senate decision-making.

20 Technically, the Standing Rules of the Senate can be amended with 51 votes, or a simple majority of the institution. However, Rule XXII of the Senate’s Standing Rules creates a higher threshold for ending debate on measures to amend the institution’s rules. Specifically, debate can only be ended “by three-fifths of the senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting.” in the Senate Manual: Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate. (110th Congress, 2nd Session) Senate Document 110-1, 21.

21 The Constitution divided the Senate’s membership into three classes with staggered tenures. Such a system ensured that a majority of the Senate would not stand for election at any one time, thus ensuring that the institution would “continue” from one Congress to the next. This reasoning is reflected in Rule V of the Standing
Senate’s standing rules are very general and do not address circumstances that may arise in specific parliamentary situations. The Senate’s 44 standing rules total only 70 pages in length.

Senate rules may also be established pursuant to statutory rules created by public laws passed by Congress and signed by the president. For example, Congress has periodically passed legislation giving the president special authority to negotiate trade agreements with other nations. Pursuant to this authority, these agreements, once finalized, receive expedited consideration in Congress. Debate in the House and Senate is often limited and amendments are prohibited.

Perhaps most significant for the current political debate, the Congressional Budget Act of 1974 created many of the procedures that govern the consideration of budget-related legislation in Congress today. The impact of this rule-making statute can be observed in the periodic consideration of budget resolutions, annual appropriations bills, and reconciliation directives in the House and Senate.22

Finally, the Senate operates on a daily basis largely according to rules established pursuant to a collection of informal precedents. According to the late Senator Robert C. Byrd (D-West Virginia), “precedents reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations.”23 Former Senate Parliamentarian Floyd M. Riddick offered the following clarification of the relationship between the Senate’s precedents and its standing rules:

The precedents of the Senate are just as significant as the Rules of the Senate. The rules are very vague in some regards, and the practices of the Senate


pursuant to those rules are developed and established, and as they are established, they become the rules of the Senate until the Senate should reverse this procedure.\textsuperscript{24}

Put simply, precedents reflect the practices of the Senate pursuant to the Constitution, its standing rules, and any relevant rule-making statutes. These practices serve to “fill in the gaps” contained in these procedural authorities when they fail to address specific parliamentary situations.

\textbf{Anatomy of a Precedent}

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the Senate’s Presiding Officer, or “Chair,” on points of order against violations of the Senate’s rules. These rules are not self-enforcing and violations that do not elicit points of order do not necessarily create new precedents. One of the most consequential developments in the evolution of Senate decision-making resulted from the creation of a new precedent by this method.

In 1937, the Senate Majority Leader was granted priority of recognition as a result of a ruling made by Vice President Jack Garner while presiding over the Senate. As a result, the Senate’s precedents now state:

\begin{quote}
The Presiding Officer is required to recognize the senator who in his discretion first sought recognition. However, in the event that several senators seek recognition simultaneously, priority of recognition shall be accorded the Majority Leader and Minority Leader, the majority manager and the minority manager, in that order.\textsuperscript{25}
\end{quote}

This precedent serves as the foundation on which centralized party leadership is based in the contemporary Senate. Since any member can technically make a motion to consider legislation

\textsuperscript{24} Floyd M. Riddick, “Oral History Project,” interview by Donald A. Ritchie, (November 21, 1978), \textit{United States Senate Historical Office}, interview no. 9, 426.

under the Senate’s rules, being the first to do so enables the Majority Leader to set the schedule and control the agenda to a limited degree. According to Smith (2007), the establishment of a precedent giving the Majority Leader priority of recognition "initiated the modern regime [in Senate party leadership] in which the Majority Leader assumed responsibility for the Senate’s agenda."26

One of the best known examples of establishing a precedent pursuant to a ruling of the Presiding Officer involves a highly anticipated parliamentary situation that did not occur. Specifically, both Democratic and Republican majorities in the Senate recently contemplated utilizing what is known as the Constitution, or Nuclear, Option, to change the institution’s standing rules. In this particular approach, a senator would make a point of order that any further debate on an issue is dilatory and move that a final vote should be taken on the underlying question. Despite the fact that such a motion violates the Standing Rules of the Senate, specifically Rule XXII, the Presiding Officer would sustain the point of order and a simple majority of the Senate would then vote to table any appeal of the Chair’s ruling. Such action would effectively establish a new precedent that debate on a particular issue can be brought to a close by a simple-majority vote. Significantly, this precedent would have bound all future Senates until it was superseded by the creation of yet another new precedent.27

The second primary method by which a precedent can be created is pursuant to a vote of the full Senate on an appeal of the Presiding Officer’s ruling on a point of order. Specifically,

26 Steven S. Smith, Party Influence in Congress (New York: Cambridge University Press, 2007), 68.

27 For a detailed description of this method of establishing new precedents, see: Martin B. Gold and Dimple Gupta, “The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster,” in the Harvard Journal of Law & Public Policy, vol. 28, issue 1 (Fall 2004): 205-272. (It is telling that the act of the Presiding Officer ignoring the advice of the Parliamentarian and creating a precedent in direct violation of the Senate’s rules is referred to as the “nuclear option.”)
Any ruling by the Chair not appealed or which is sustained by a vote of the Senate, or any verdict by the Senate on a point of order, becomes a precedent of the Senate which the Senate follows just as it would its rules, unless and until the Senate in its wisdom should reverse or modify that decision.28

For example, the disposition of an amendment in the 104th Congress offered by Senator Kay Bailey Hutchison (R-Texas) to the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995 (Public Law 104-6) established a precedent that superseded both the ruling of the Chair and Rule XVI of the Standing Rules of the Senate. Specifically, the Hutchison amendment sought to change federal law regarding endangered species. Senator Reid raised a point of order that the amendment violated Rule XVI, which the Presiding Officer subsequently sustained.29 Senator Hutchison then appealed this ruling to the full Senate, which overturned the Presiding Officer by a vote of 57 to 42. The Hutchison amendment was subsequently adopted by voice vote. This action created a new precedent that “legislating” on an appropriations bill is allowed under the Senate’s rules, despite the fact that the decision of the Chair was correct and the Hutchison amendment was in direct violation of the Senate’s standing rules. At the time, members voted largely on the substance of the underlying amendment and not in consideration to whether or not the measure violated Rule XVI. That the members did not fully appreciate the unintended consequences of establishing a new rule in this manner is evidenced by the vote to reverse this precedent in the 106th Congress.30

28 Frumin, Riddick’s Senate Procedure, 987.

29 Rule XVI states: “On a point of order made by any senator, no amendment offered by any other senator which proposes general legislation shall be received to any general appropriation bill.” Rule XVI, “Appropriations and Amendments to General Appropriations Bills,” Senate Manual, 14.

30 Majority Leader Trent Lott (R-Mississippi) introduced a resolution (S. Res. 160) to reverse this precedent in the 106th Congress. The Senate passed S. Res. 160 on July 22, 1999 by a vote of 53 to 45. According to Senator Lott, the Hutchison precedent created in the 104th Congress had two negative consequences. First, authorizing legislation was increasingly offered as amendments to appropriations measures on the Senate floor with little debate.
Finally, responses by the Presiding Officer to parliamentary inquiries may also create new precedents. While such responses are generally treated as non-binding on the Senate, they do gain precedential value over time to the extent that parliamentary inquiries provide future Congresses with insight into past parliamentary practice. However, it is important to note that such precedents are not considered as binding on the Senate as those established pursuant to a definitive action such as a ruling of the Presiding Officer or a vote of the full Senate.

A Question of Interpretation

The first collection of Senate precedents, entitled, *A Compilation of Questions of Order and Decisions Thereon*, was prepared in 1881 by the Chief Clerk of the Senate, William J. McDonald. The compilation was organized alphabetically by topic and briefly covered the procedures governing issues such as offering amendments, floor debate, and voting. It was a short 25 pages in length. Another compilation followed in 1893 entitled, *Precedents Related to the Privileges of the Senate*. This 350-page volume was compiled by the Clerk of the Senate Committee on Privileges and Elections, George P. Ferber. Ferber’s compilation was augmented in 1894 by Henry H. Smith, Clerk of the Committee to Investigate Attempts at Bribery, etc. This expanded collection of precedents totaled 975 pages in length and was filed under the equally lengthy title of *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States, relating to their powers and privileges respecting their members and officers, and to investigations, contempts, libels, contumacious witnesses, expulsions, writs of habeas corpus, etc., with decisions of the U.S. Supreme Court and other courts related thereto*.

and perfunctory consideration. Second, must-pass appropriations measures were increasingly being delayed as controversial provisions were added to them. The Lott resolution was designed to remedy these problems.

Precedents resulting from parliamentary inquiries are designated by the word “See” in *Riddick’s Senate Procedure*.
This compilation was prepared in response to accusations of corruption against the Senate’s membership in the late 1870s and early 1880s. Among its provisions, Smith’s *Digest of Decisions and Precedents* included a sweeping survey of the judicial decisions up to that point related to the powers and privileges of Congress.

The first collection of precedents that resembled the volume utilized in the contemporary Senate was published in 1908 by Chief Senate Clerk, Henry H. Gilfrey. Gilfrey’s compilation, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate* was updated in 1914, 1915, and 1919. These volumes averaged around 700 pages in length. Like McDonald’s earlier compilation, Gilfrey’s *Precedents* was organized alphabetically and served as a useful reference work for members and employees of the Senate at the beginning of the twentieth century.

The most recent compilation of Senate precedents was prepared by Senate Parliamentarian Charles L. Watkins and Assistant Parliamentarian Dr. Floyd M. Riddick in 1954. The collection, *Senate Procedure: Precedents and Practice* was updated in 1964, 1974, and 1981. The most recent edition, *Riddick’s Senate Procedure*, was published in 1992 and is over 1600 pages in length. This lengthy tome contains over a million precedents which govern the legislative process in the Senate today. Precedents established in the years since 1992 have not yet been published. They are maintained by the Senate Parliamentarian.

*The Senate & Its Parliamentarian*

At this point it is helpful to return to the two hypotheses generated earlier to develop predictions for the behavior of the Parliamentarian in the legislative process. The Path Dependent Hypothesis predicts that the Parliamentarian will be an influential actor in the legislative process as a result of the authority he derives from the Senate’s inherited rules of procedure. The
Parliamentarian’s rulings will not exhibit a bias in favor of the majority or minority party. In contrast, the Majoritarian Hypothesis predicts that the Parliamentarian will not be an influential actor in the legislative process as a result of the majoritarian nature of Senate rules. The Parliamentarian’s rulings will thus demonstrate a clear bias in favor of the majority party.

While the Office of the Senate Parliamentarian has not always been in existence, it would be incorrect to infer that members presiding over the Senate prior to the creation of the Parliamentarian did not have the institutional knowledge of applicable precedents necessary to accurately rule on points of order. By the beginning of the twentieth century, the Senate’s clerk advised the Presiding Officer on parliamentary questions using compilations such as Gilfrey’s *Precedents* to assist them in this effort. Nevertheless, senators during this period were not always dependent on the clerk for procedural advice when ruling on points of order. According to Riddick, for much of the Senate’s history, “senators felt that they had knowledge of the job and they didn’t need a Parliamentarian whispering in their ear when they were presiding as to how the Senate should be run.”

William S. White made a similar observation of the Senate’s members in the mid-1950s. Specifically, White described the prototypical “Senate-type” of the period as a “past master of the precedents, the practices, and even the moods of the Senate and as a parliamentarian formidable in any debate or maneuver.” Such procedural self-sufficiency was perpetuated by a unique institutional culture that promoted a high degree of institutional patriotism.

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Charles L. Watkins was named the first Senate Parliamentarian on July 1, 1935. In the 7 decades since its creation, the Parliamentarian has become central to ensuring the “orderly flow” of the legislative process. Specifically, the Parliamentarian serves to

…advise the presiding officer of the Senate on all parliamentary aspects of the Senate’s activities. This advice is based upon the Senate rules, the precedents and practices thereunder, and the Constitution, where applicable. He also advises all senators and committee staffs on these same matters, being particularly responsive to the joint leadership, since it has the responsibility for the orderly flow of the Senate’s business. He’s also called upon by other branches of the government, the press, and the public, to answer questions and give advice regarding the procedural aspects of Senate activity. To perform these duties and functions, the parliamentarian of necessity prepares and maintains in written form the precedents and practices of the Senate.

According to Riddick, the primary responsibility of the Parliamentarian is to advise the Presiding Officer “on every procedure that he must rule on or everything he should say even.” When the Presiding Officer is required to respond to a parliamentary inquiry or make a ruling on a point of order, it is the Parliamentarian who “whispers” the appropriate procedure to the Chair. This relationship is underscored by the customary practice of rotating the members temporarily serving as the Presiding Officer. A visitor observing the Senate from the galleries today will readily observe

35 The duties of the Office of Senate Parliamentarian were initially combined with those of the Journal Clerk. In 1937, these two offices were separated and Watkins continued as Parliamentarian. Today, the Journal Clerk records the daily minutes of the Senate and prepares the Senate Journal for publication. The Journal Clerk also maintains a history of bills and resolutions for inclusion in the Journal.

36 Riddick, interview no. 3, 95-96.

37 Riddick, interview no. 9, 447.

38 Riddick, interview no. 3, 88.

39 Riddick, interview no. 9, 447.

40 According to the Standing Rules of the Senate, “the President pro tempore may designate (in writing or in person) an Acting President pro tempore to preside until an adjournment, and this senator likewise is authorized to name another senator to perform the duties of the Chair. In practice, this subsequent delegation of the Chair’s authority occurs informally from one senator to the next, as the Presiding Officer gives way to another on a regular basis throughout the day. Thus in the course of a day’s proceedings, several senators are called to the Chair to preside over the Senate in the absence of the regular Presiding Officers.” Frumin, Riddick’s Senate Procedure, 1025.
the Parliamentarian and Presiding Officer interacting in precisely the same manner as described by Riddick over 30 years ago. Then, as now, the Parliamentarian “tries to keep the Chair posted on each step of the procedure before it arrives, if he can stay ahead; or if it’s too complex and he can’t be ahead, sometime he has to whisper one sentence at a time to be sure that the Chair states what the procedure is.”

Junior members of the majority party are called upon most often to preside. As a result, “few senators have the knowledge or experience presiding to manage Senate procedure by themselves, so they often will rely heavily on the advice of the Parliamentarian.” Without the Parliamentarian, these members would be incapable of supplying the detailed knowledge of the Senate’s rules necessary to correctly rule on any points of order that are raised. Speaking on the occasion of the retirement of Parliamentarian Murray Zweben in 1980, Senator Bill Bradley (D-New Jersey) recollected that “as a freshmen senator who has filled a substantial number of hours in the last two years presiding over this body, Murray has offered special help and guidance.” Senator Patrick Leahy (D-Vermont), speaking on the same occasion, remarked that his service presiding over the Senate as a freshmen would have been “impossible without the expertise, dedication, brilliance, and knowledge of our Parliamentarian Murray Zweben.”

Dependence on the Parliamentarian is not limited to the Presiding Officer. Individual senators and their staff often rely on the Parliamentarian’s advice in crafting their legislative

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41 Riddick, interview no. 9, 448.
44 Ibid., 3.
proposals and planning parliamentary maneuvers on the floor. Staff will typically visit the Parliamentarian’s office on the first floor of the Capitol to have their particular proposal or maneuver “blessed” in advance of any floor action. Referring to such visits, former Parliamentarian Robert B. Dove recollected that “you could have anywhere between one and 15 to 20 people show up at the office, and they usually have materials with them for you to review.”45 This interaction benefits both the staff and the Parliamentarian. The Parliamentarian is given advance notice of potential procedural questions with which they may be presented on the Senate floor. Such notice allows the Parliamentarian to prepare for any relevant points of order that may arise by researching their procedural history. Individual senators and their staff receive expert advice on how to execute their efforts in compliance with Senate rules. It is the practice of the Parliamentarian to treat such conversations as confidential. Riddick refrained from inadvertently revealing information given in confidence by only responding to specific questions he was asked directly.46

The increased dependence on the Parliamentarian by members, whether presiding or not, suggest an erosion of procedural knowledge in the Senate. In the years since the institution agreed to broadcast its proceedings on CSPAN, its members spend less time on the floor observing the legislative process. Senators’ schedules today are packed with committee hearings, constituent meetings, and fundraisers for the limited time in which they are in D.C. More than in the past, members return to their states at the first possible chance to spend time with families that remain behind or engage in the permanent campaign.47 As a consequence, senators have less

45 Emily Pierce, “Frumin Caught in Middle of Tax Battle,” Roll Call (March 5, 2003).

46 The Parliamentarian will typically consult with the majority staff of the Budget Committee when providing advice on questions related to the congressional budget process.

47 Schickler, Disjointed Pluralism, 208; Barbara Sinclair, The Transformation of the U.S. Senate (Baltimore: Johns Hopkins University Press, 1989), 105-111. Also see: Stephen Frantzich and John Sullivan, The
time to develop the procedural knowledge necessary to independently participate in the legislative process. Riddick argues that given these developments “it was just natural that they had to begin to depend on somebody to do the procedural aspects for them, leaving to themselves the substantive matters to be put into legislation”\textsuperscript{48} In this context, the Parliamentarian represents the only non-partisan figure on whom members can depend for procedural advice and guidance.\textsuperscript{49}

The development of ideologically homogenous parties at the end of the twentieth century also led to a gradual reduction in the procedural knowledge of individual senators. Party leaders exploited Senate rules to pass a more polarized legislative agenda as rank and file members grew more likely to leave procedural issues to their leadership. Reflecting this trend is the “improved team play on procedural matters” in the Senate and the subsequent increase in party-line voting.\textsuperscript{50}

It is important to note, however, that the ability of the Parliamentarian to influence the legislative process is indirect in nature as a result of his strictly advisory role. According to Senate precedents, “the Chair rules on points of order, not the Parliamentarian; the Parliamentarian merely advises the Chair.”\textsuperscript{51} The Presiding Officer may certainly rule on questions of parliamentary procedure independently of the Parliamentarian. However, such

\textsuperscript{48} Riddick, interview no. 3, 65.

\textsuperscript{49} The non-partisan experts at the Congressional Research Service also represent an invaluable resource for senators and their staff.

\textsuperscript{50} Frances E. Lee, Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate (Chicago: University of Chicago Press, 2009), 133, 142.

\textsuperscript{51} Frumin, Riddick’s Senate Procedure, 989.
independence is considered “extraordinary” in the contemporary Senate.\textsuperscript{52} Furthermore, the Senate only rarely disagrees with the advice of the Parliamentarian, as expressed through the ruling of the Chair. It can thus be inferred from such deference that the Parliamentarian will periodically frustrate individual members with his interpretation of Senate rules. Speaking on the occasion of the retirement of Charles Watkins, Minority Leader Everett Dirksen (R-Illinois) playfully suggested that the former Parliamentarian could easily write a memoir of his time in the Senate entitled, “Great Statesmen That I Have Overruled” or “Statesmen Whose Anger Was Short-lived Over My Unpleasant Rulings.”\textsuperscript{53} While admittedly made in jest, the Minority Leader’s comments underscore the ability of the Parliamentarian to block the legislative and procedural designs of senators. Current Parliamentarian Alan S. Frumin once remarked: “I know I’ve done my job when everyone thinks I’m somehow favoring the other side.”\textsuperscript{54} Such sentiment supports the Path Dependent Hypothesis which suggests that the Parliamentarian will rule independently of both the majority and minority parties.

Speaking on the occasion of Watkins’ retirement, Senator Richard Russell (D-Georgia), himself a great student of the Senate’s rules, stated that while “one might think that Charlie Watkins was wrong on some point…one could not change his position unless one could find precedents that were spelled out in the record of the Senate and bring them to his attention.”\textsuperscript{55} With the growth in the number and complexity of Senate precedents, the likelihood of such a

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\textsuperscript{52} Gold, \textit{Senate Procedure and Practice}, 11.

\textsuperscript{53} Congress, Senate, \textit{Tributes to Charles L. Watkins, the first Parliamentarian of the Senate: upon the occasion of his retirement and designation as Parliamentarian Emeritus; delivered on the floor of the United States Senate}. 89\textsuperscript{th} Cong., 1\textsuperscript{st} sess., Senate Documents, vol. 1-1, nos. 2-40, (1965), 3.


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scenario occurring is increasingly rare. Reflecting on his tenure as Parliamentarian, Riddick observed

I was very seldom questioned. I might say, at this point, that I served over a period of twenty-five years at the desk, and only one ruling was overturned by a vote of the Senate. The Chair never failed to follow my advice except in one instance. I worked at that desk and advised them for over twenty-five years and only once was my advice to the Chair overruled.56

In the 30 years since the Republicans took over the majority in 1980, the Senate has voted to overturn the Parliamentarian only 16 times. On ten occasions, the question concerned authorizing amendments to general appropriations bills, which are prohibited under Rule XVI of the Standing Rules of the Senate. Two of these ten instances involved a “defense of germaneness” which is decided by a vote of the Senate and does not have precedential value. It is understood by the Senate that the advice of the Parliamentarian is not called into question in such a scenario and that a new precedent is not created. Six of the remaining decisions concerning Rule XVI clarified its definition of germaneness and did not create a new precedent that superseded the rule. Finally, in only two out of the ten instances was a new precedent created that superseded rule XVI. Notably, the Senate reversed the precedent established in both instances. In explaining his vote to overturn the Parliamentarian, thereby creating a new precedent that superseded Rule XVI, Senator Ted Stevens (R-Alaska) stated on the Senate floor that while he supported the underlying amendment in question, he was prepared to support a unanimous consent request offered by Senator Byrd that would reverse the newly established precedent. Stevens said that while he disagreed with the Parliamentarian’s ruling: “I do not argue with the Parliamentarians. They are the Parliamentarians, I am not.”57 If the cases concerning Rule XVI are thus excluded

56 Riddick, interview no. 3, 91-92.

57 Senator Ted Stevens’ comments on the Senate Floor cited in the Congressional Record-Senate (August 6, 1992), S11691.
for the reasons cited above, the Senate voted to overturn the Parliamentarian on only six occasions over the past 30 years. When measured against the 10,673 roll call votes taken during the same period, the total number of times in which the Parliamentarian was overturned by a vote of the Senate represents less than 0.0006%. This insignificant percentage of total votes supports the prediction of the Path Dependent Hypothesis that the Parliamentarian will only rarely be overturned.

These numbers, as well as Riddick’s reflections, point to the fact that the Parliamentarian’s influence increased as the volume of precedents grew, if for no other reason than individual senators were increasingly dependent on independent professional advice to clarify complex parliamentary procedures. By the middle of the twentieth century there were already hundreds of thousands of precedents governing the legislative process in the Senate. This number has grown to over a million today.\(^5\)\(^8\) As a point of comparison, Riddick spent a year reading over 30,000 pages of precedents on legal-sized stationary in preparation for writing *Senate Procedure* in the early 1950s. By the late 1970s, Riddick had come to believe that it was simply “impossible” for individual senators to truly master all of these precedents while simultaneously balancing the other competing demands of their office.\(^5\)\(^9\) As one senator put it, members could no longer match the Parliamentarian in terms of “knowledge of the Senate rules and procedures.”\(^6\)\(^0\)

Adding to the sheer volume of precedents is the fact that many of them are not well documented and easily accessible. Senators, especially the overscheduled members in the

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\(^5\)\(^8\) Riddick, interview no. 3, 73.

\(^5\)\(^9\) Riddick, interview no. 9, 71, 448.

contemporary Senate, do not have the resources necessary to master all of the applicable precedents on a given parliamentary question. It is precisely this lack of resources that allows the Parliamentarian to influence the legislative process by virtue of the advice he provides.

The highly specialized knowledge required of the Parliamentarian demands an apprenticeship in order to acquire the necessary experience. It is unlikely that an outsider unaccustomed to the Senate’s intricate rules and traditions will possess the knowledge necessary to accurately rule on the many different procedural questions with which he will be presented. All of the parliamentarians to date have served a period of apprenticeship as an Assistant Parliamentarian. Riddick served as Watkins’ assistant prior to becoming Parliamentarian in 1964. Similarly, all of Riddick’s successors served as Assistant Parliamentarians.61

Evans (1999) suggests that beginning in 1981, the practice of switching parliamentarians along with the partisan control of the Senate may indicate that majority parties now prefer loyalty to expertise in the Parliamentarian.62 However, this trend only persisted for two changes in the partisan control of the Senate: 1986 and 1994. Instead of marking the beginning of the politicization of the Senate Parliamentarian, these transitions represent the exception that proves the rule. In 2001, Majority Leader Trent Lott (R-Mississippi) named Alan Frumin Parliamentarian despite the fact that he had previously served when the Democrats were last in control and had been demoted to Assistant Parliamentarian when the Republicans regained the majority in 1994. Lott had little choice but to elevate Frumin after firing the current Parliamentarian, Robert Dove, as there was simply no one else available who could take Dove’s

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place at the time. Tellingly, the Republican majority chose not to fire Frumin in the aftermath of a 2003 budget dispute that was very similar to the one that led to Dove’s firing in 2001. According to one former Senate Republican Leadership aide, “You can’t fire somebody if you don’t have somebody to replace him with.” This example also provides support for the Path Dependent Hypothesis. According to the Majoritarian Hypothesis, Lott would have simply ordered the Presiding Officer to ignore Dove’s advice and rule in favor of the Republican majority. Such a ruling would have spared the Majority Leader from having to fire the Parliamentarian only to replace him with Frumin. That Lott chose to adopt the later course of action instead demonstrates that the Parliamentarian exercises influence in the interpretation of Senate rules and that overturning his advice does not come without costs for the majority party.

As these developments have demonstrated, the Parliamentarian has become increasingly influential in the legislative process at the beginning of the twenty-first century. Today, the Parliamentarian, more than any one member, acts as the final arbiter of Senate rules by virtue of the specialized advice he provides. For example, it was Frumin and not the Presiding Officer or the party leaders, who recently determined that the preamble to the Strategic Arms Reduction Treaty could be amended on the Senate floor in a controversial ruling during the lame duck session of the 111th Congress. Frumin’s determination potentially enabled Republicans, many of whom were hostile to the treaty, to delay ratification until the 112th Congress when they would have the numbers necessary to insist on substantial changes to the text of the treaty itself.


64 See: David M. Drucker, “Parliamentarian Says START Can Be Amended,” Roll Call (December 14, 2010). Democrats had a 59-41 majority in the 111th Congress. In the 112th, the Democratic majority was reduced to 53-47. Their smaller majority would complicate Democratic efforts to secure the 67 votes necessary to ratify the START treaty. In the end, the treaty was ratified despite the Parliamentarian’s ruling on December 22, 2010 by a vote of 71 to 26. Ten amendments were ultimately offered by Republicans.
Notably, the Democratic Majority did not attempt to contest the Parliamentarian’s ruling as predicted by the Majoritarian Hypothesis. No such threat occurred in this instance, despite the fact that the Parliamentarian’s ruling provided Republicans with a potentially useful tool with which to obstruct a top priority of the Democratic majority.

Referring to a dispute over the definition of an “earmark” in the fall of 2007, the Democratic staff director of the Senate Rules Committee acknowledged that the final determination would be made by the Parliamentarian. “It’s ultimately the Parliamentarian who is going to rule.”65 In similar fashion, Senator Byron Dorgan (D-North Dakota) remarked in 2003 that the “Parliamentarian’s rulings can be critical to the success or failure of a bill.”66

**Parliamentary Rule?**

This paper has argued that the Majoritarian and Path Dependent hypotheses provide useful constructs with which to illustrate the extent to which the Parliamentarian influences decision-making in the contemporary Senate. The Majoritarian Hypothesis assumes that the Parliamentarian is not an influential actor as a result of the essentially majoritarian nature of Senate decision-making. According to this hypothesis, the Parliamentarian typically accommodates the procedural considerations of the majority party as a result of the mutability of Senate rules. Such mutability allows the majority party to easily overturn the Parliamentarian’s rulings in the event they impede the ability to pass its agenda. Given this deference, the

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65 Alexander Bolton, “Senate Rules Referee is Put on the Hot Seat,” *The Hill* (September 21, 2007). Democratic Staff Director was Howard Gantman. The dispute was over whether earmarks could be added to authorization bills during conference committee deliberations. The Honest Leadership and Open Government Act of 2007 (Public Law 110-81) prohibited earmarks from being “air-dropped” into appropriations bills during conference committee deliberations.

Parliamentarian rarely rules in favor of the minority party. However, members of the minority party frequently appeal the rulings of the Parliamentarian in an effort to protest the heavy-handed tactics employed by the majority. The behavior predicted by the Majoritarian Hypothesis intensifies during the consideration of controversial legislation and parliamentary maneuvers that significantly impact the majority’s ability to control the agenda.

In contrast, the Path Dependent Hypothesis assumes that the Parliamentarian is an influential actor due to the path dependent nature of Senate decision-making. The Parliamentarian rules independently of both the majority and minority parties as a result of the authority provided by the Senate’s inherited rules. As such, the Parliamentarian’s rulings are impartial in nature and do not favor one side over the other. As a result, the Path Dependent Hypothesis predicts that the Parliamentarian will rarely be overturned. The behavior predicted by the Path Dependent Hypothesis is not dramatically affected by issue salience or agenda control.

The creation of new precedents during the health care reform debate and the innovative utilization of motions to suspend the rules in the 111th Congress are analyzed to determine whether the relationship between the Parliamentarian and individual senators affirms the Majoritarian Hypothesis or the Path Dependent Hypothesis. These cases were selected because they fulfill many of the conditions predicted by both hypotheses. The first case provides an example of the creation of a new precedent that disadvantaged the minority party during the consideration of legislation considered to be a priority of the majority. The debate over health care reform consumed several months of Senate floor time and the final legislation represented one of the most consequential legislative achievements of the Democratic majority in the 111th Congress. The second case illustrates a ruling by the Parliamentarian that benefited the minority party by undermining the agenda control of the majority. In addition, the precedent created in
this example has the potential to reverse rules changes supported by a supermajority in order to make it easier to combat minority obstruction. An examination of these cases concludes that the Path Dependent Hypothesis more accurately explains the influence of the Parliamentarian on decision-making in the contemporary Senate.

**Health Care Reform & the Sanders Amendment**

In the 111th Congress, the Parliamentarian made a controversial ruling during the consideration of the Patient Protection and Affordable Care Act of 2009 (PPACA; Public Law 111-148) that underscores the sheer complexity of Senate rules and the majority party’s dependence on the Parliamentarian to interpret them. In addition, this case also illustrates the deferential treatment given to the Parliamentarian by the minority party. While members of the minority expressed frustration with the Parliamentarian’s advice and even publicly criticized it, it is important to note that the minority party did not officially disagree with such advice by appealing the decision of the Presiding Officer. Finally, this example also demonstrates the indirect influence the Parliamentarian has over the legislative process by virtue of his knowledge of the Senate’s precedents. The evidence provided suggests that the Parliamentarian ruled independently of the majority party, despite the fact that the ruling ultimately made it more difficult for the minority to obstruct a legislative priority of the majority.

The ruling in question concerned an amendment offered by Senator Bernie Sanders (D-Vermont). The Sanders amendment would have established a national single-payer health care system and it was not considered to represent a threat to Democratic efforts to finally pass health care reform legislation. The Democratic bill manager, Senator Max Baucus (D-Montana), was aware that the Sanders amendment would be offered at some point on December 16, 2009, and it was expected that it would receive a vote by the end of the day. Yet in an effort to delay final
passage of the underlying legislation, Senator Tom Coburn (R-Oklahoma) objected to Senator Sanders’ unanimous consent request that the reading of the 767-page amendment be dispensed with. Senator Durbin later argued on the Senate floor that

…the leadership on the Senate Republican side insisted, through Senator Coburn of Oklahoma, that an 800-page amendment be read by the clerk. It is the right of a senator to ask for that. It is an archaic right because people don't sit here hanging on every word to understand an amendment. That never happens. It didn't happen yesterday. But the clerk started reading. Almost 2 hours into it, it was pretty clear that it would take 10 hours to finish this 800-page amendment, despite the best efforts of the clerk's office. Why did the Senate Republican leadership want to take 10 hours out of a day for something that was meaningless—the reading, word by word, line by line, page by page, of an 800-page amendment? To stop debate on health care reform.

After several hours during which the amendment was read, the Presiding Officer recognized Senator Sanders, pursuant to the advice of the Parliamentarian, for the purposes of withdrawing his amendment. The amendment’s withdrawal precluded continued minority objections to dispensing with its reading. However, withdrawal also negated the efforts of Senate liberals to receive a floor vote on one of their highest priorities.

The ensuing controversy surrounding this decision concerned whether or not Senator Sanders was eligible to be recognized during the reading of his amendment in order to withdraw it. The controversy stemmed from two considerations. First, Rule XV of the Standing Rules of the Senate clearly states that an amendment must be read when offered to legislation on the Senate floor. Notwithstanding the Chair’s recognition, the reading of an amendment “may not be dispensed with except by unanimous consent, and if the request is denied the amendment must be read and further interruptions are not in order; interruptions of the reading of an

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68 Senator Durbin’s comments on the Senate Floor cited in the *Congressional Record-Senate* (December 16, 2009), S313352-S313353.

69 Senate Rule XV “An amendment and any instruction accompanying a motion to recommit shall be reduced to writing and read…” *Senate Rule XV, Senate Manual*, 13.
amendment that has been proposed are not in order.” In practice, this requirement is routinely waived, but doing so requires unanimous consent. Senate precedent’s state that “when an amendment is offered the regular order is its reading, and unanimous consent is required to call off the reading.”

Second, Rule XV also states that any amendment may be withdrawn by its sponsor only at a time prior to any action on the amendment including, “a decision, amendment, or ordering of the yeas and nays.” According to Senate Procedure, “an amendment may be withdrawn by the mover thereof in his own right until the Senate takes some action thereon, even as soon as it has been read, but the amendment must be before the Senate to be withdrawn.” Given the seemingly clear cut nature of Senate rules regarding this issue, Minority Leader Mitch McConnell (R-Kentucky) alleged that “the majority somehow convinced the Parliamentarian to break with the longstanding precedent and practice of the Senate in the reading of the amendment.” Senator Jim DeMint (R-South Carolina), believed that “the Parliamentarian was clearly biased” in making this ruling. It is remarkable that in these circumstances the clearly frustrated minority Republicans did not seek to overturn the Parliamentarian.

In a letter submitted into the Congressional Record on December 21, 2009, Senator Benjamin Cardin (D-Maryland), who was presiding at the time of the incident in question, supplied the reasoning behind the Sanders ruling. The Cardin letter points to the influence of the

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70 Frumin, *Riddick’s Senate Procedure*, 43-44.

71 Ibid., 44.


73 Frumin, *Riddick’s Senate Procedure*, 119. Italics added for emphasis.

74 Minority Mitch McConnell’s comments on the Senate Floor cited in the *Congressional Record-Senate* (December 16, 2009), S13309.

75 John Stanton, “Senate GOP Accuses Parliamentarian of Bias,” *Roll Call*, (December 16, 2009).
Parliamentarian in the legislative process in that Senator Cardin acknowledges the role of the Parliamentarian in arriving at his determination that Sanders was eligible to withdraw his amendment:

…the before Senator Sanders withdrew his amendment, I consulted with the Senior Assistant Parliamentarian, who was on the floor while I was presiding. He assured me that a senator has the right to withdraw an amendment if no action has been taken on it.76

Cardin goes on to state unequivocally: “I sought and received the Parliamentarian’s advice on this matter and I followed it, which is how the Senate usually operates.”77

The Parliamentarian advised that Sanders had the right to withdraw his amendment pursuant to precedents established in 1950 and 1992 because the amendment was not considered the “pending business” at the time of its reading.

Prior to the time Senator SANDERS withdrew his amendment, no action had been taken on it that would have prevented such a move without consent for a very simple reason: the amendment wasn’t officially pending while it was being read into the RECORD. So Senator SANDERS had an unfettered right to withdraw it under such conditions.78

The 1950 precedent cited by the Parliamentarian was the result of a parliamentary inquiry made by Senator Forrest C. Donnell (R-Missouri) as to whether or not a senator may withdraw an amendment during its reading. The Presiding Officer responded that an amendment could be withdrawn at such time. In the 1992 precedent cited, the Presiding Officer recognized Senator Brock Adams (D-Washington) for the purposes of withdrawing his amendment while it was being read.79

76 Senator Ben Cardin letter submitted for the record in the Congressional Record-Senate (December 21, 2009), S13646. Italics added for emphasis.

77 Ibid.

78 Ibid., S13647.

79 Ibid.
Yet unlike the precedents cited by the Parliamentarian in the Cardin letter, the Sanders amendment was offered pursuant to a unanimous consent agreement, which has been interpreted to constitute “action” pursuant to the Senate’s precedents. According to a 1971 precedent

> When the Senate is operating under a unanimous consent agreement or setting time for debate of a specific amendment that is *action* by the Senate on said amendment and subsequently it would take unanimous consent to withdraw the same.

Unlike the parliamentary situation in the Sanders scenario, the Adams amendment in the 1992 precedent cited by the Parliamentarian was not offered pursuant to a unanimous consent agreement.

After examining the issue, Coburn concluded that had the Senate’s precedents been properly followed, unanimous consent would have been needed to withdraw the Sanders amendment by virtue of the manner in which it was offered. Coburn cited a 1979 precedent to support his argument that the Sanders amendment was both pending and that unanimous consent was needed in order to withdraw it. The 1979 precedent concerned an amendment offered by Senator William V. Roth, Jr. (R-Delaware). An objection was made to dispensing with the reading of the amendment. In response to a parliamentary inquiry, the Chair advised

> …that the amendment offered by the Senator from Delaware (Mr. Roth) is the pending order of business. A unanimous consent request that the reading of the amendment be dispensed with was objected to. Therefore, the amendment is in the process of being read and now will be read.

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80 The unanimous consent agreement locking in the SANDERS amendment read as follows: Mr. REID. Mr. President, I ask unanimous consent that immediately after the opening of the Senate tomorrow…upon disposition of the above-referenced amendments and motion, the next two Senators to be recognized to offer a motion and amendment be Senator Hutchinson to offer a motion to commit regarding taxes and implementation and Senator Sanders to offer amendment No. 2837; that no amendments be in order to the Hutchison motion or the Sanders amendment; that upon their disposition, the majority leader be recognized. Majority Leader Harry Reid’s comment’s on the Senate Floor cited in the *Congressional Record-Senate* (December 14, 2009), S13177.

81 Senator Tom Coburn, letter submitted for the record, *Congressional Record-Senate* (January 20, 2010), S39. Italics added for emphasis.

82 Presiding Officer quoted in the *Congressional Record-Senate* (December 10, 1979), S18127.
According to Senator Coburn, this 1979 parliamentary inquiry should have superseded the 1950 precedent cited by the Parliamentarian.

Finally, Senator Coburn’s experience illustrates the periodic frustration experienced by members as a result of their incomplete knowledge and limited access to the Senate’s precedents. In a letter to Frumin, Coburn stated that

…at the time of the ruling, I had no way of knowing about the 1992 Adams precedent since it occurred after the latest edition of Riddick's Senate Procedure was published. Furthermore, the 1950 precedent was inaccurately depicted in Riddick’s, with the text of Riddick's contradicting the actual precedent cited. Had all the precedents been commonly available in a reliable and updated form, senators could have had a basis to challenge the Sanders ruling in real time. By the time the dust had settled after the ruling, as senators struggled to parse what had happened, such a challenge was long moot.\(^{83}\)

As this example demonstrates, the complexity of Senate rules often leads members of the majority to depend on the Parliamentarian for procedural advice when presiding. In addition, the limited availability of precedents can impede individual members in the minority from exploiting their procedural prerogatives on the Senate floor.

**Motion to Suspend the Rules Post-Cloture**

The Path Dependent Hypothesis informs us that individual senators, and the minority party collectively, possess considerable procedural rights with which to obstruct the majority party as a result of the Senate’s inherited rules. According to this analysis, minority party members obstruct the majority by abusing the Senate’s right to unlimited debate and the ability to freely offer germane and non-germane amendments on the Senate floor. In contrast, the Majoritarian Hypothesis predicts that the majority party is likely to avail itself of all of its procedural tools, including the establishment of new precedents, in order to maintain control over the legislative agenda. As a result, the Majority Leader will fill the amendment tree and file

\(^{83}\) Coburn, letter for the record, S40.
cloture on legislation in response to minority obstruction. The dramatic increase in the number of cloture motions filed and invoked over the last twenty-five years and the rapid rise in the practice of “filling the amendment tree” to block the consideration of unwanted amendments is consistent with the Majoritarian Hypothesis (See Figures 1 and 2 below).

Figure 1

Cloture Motions Filed & Invoked: 97th-111th Congress

Data Compiled by the Congressional Research Service & Author

When combined with the practice of filling the amendment tree, the cloture process allows the Majority Leader to effectively block the ability of individual senators to participate in the legislative process pursuant to Senate rules. Robert Dove has observed that the practice of filling the amendment tree “has been used repeatedly in conjunction with cloture votes to, in effect, put the minority party in the position of either voting for cloture, in which case they have lost their right to amend, or voting against it.”86 As instances of filling the amendment tree and


motions to invoke cloture increase, the control of the Majority Leader over the agenda increases as well.

However, a ruling by the Parliamentarian in the 111th Congress significantly undermined the Majority Leader’s ability to combat minority obstruction by employing these tactics. Specifically, the Parliamentarian advised that motions to suspend the rules in order to offer an amendment, or motion to (re)commit after cloture has been invoked are permitted pursuant to Senate rules. According to Rule V of the Standing Rules of the Senate, “No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day’s notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof.” Specifically, a “Notice of Intent to Suspend the Rules” must be made in writing the day before such motion is made. In the case of suspending the cloture rule to offer an amendment, the notice of intent would read as follows:

Mr. President, I submit the following notice in writing: “In accordance with Rule V of the Standing Rules of the Senate, I hereby give notice in writing that it is my intention to move to suspend paragraph 2 of Rule XXII for the purpose of proposing and considering the following amendment.”

The text of the amendment is then included in the congressional record along with the notice of intent. The vote on the following day is first on the motion to suspend. The senator making the motion states the following: “Mr. President, pursuant to the notice given by me on [date], I move to suspend paragraph 2 of Rule XXII.” Only in the event that the motion is successful will the amendment in question receive an up or down vote. Motions to suspend require a two-thirds vote (i.e. 67) for passage, as opposed to the three-fifths vote (i.e. 60) required to invoke cloture, and the simple-majority requirement to pass a measure on an up or down vote.

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87 Senate Rule V, Senate Manual, 5.
88 Frumin, Riddick’s Senate Procedure, 1552.
89 Ibid., 1553.
Notably, the decision to suspend the rules rather than overturn the Parliamentarian itself provides support for the Path Dependent Hypothesis. Senators concerned only with policy success would simply offer a third degree amendment in the event that they are blocked from amending legislation by a “filled amendment tree.” While third degree amendments are not in order under Senate rules, appealing the decision of the chair only requires a simple-majority (i.e. 51 votes) to create a new precedent to allow such amendments. In contrast, the threshold associated with the motion to suspend presents members with a significantly higher hurdle to overcome in order to pass their amendment. That members voluntarily submit to the super-majoritarian requirement of such motions instead of availing themselves of the simple-majority threshold associated with a third degree amendment exemplifies the hesitance to change Senate rules by overturning the Parliamentarian and creating a new precedent. Put simply, while the two-thirds requirement to prevail on a motion to suspend erects a higher threshold for policy success, it also allows members to secure votes on their amendments without upsetting the traditions of the Senate.

In this case, the Parliamentarian’s ruling effectively neutralized restrictions on amendments and debatable motions as dictated by rules changes in 1975, 1979, and 1986. In 1975, the cloture rule was changed to reduce the necessary threshold to end debate from two-thirds to three-fifths of the entire Senate. However, Senator James Allen (D-Alabama) found a way around this liberalization with the post-cloture filibuster by which a final vote on legislation was delayed through the use of repeated motions. In response, Rule XXII was changed yet again in 1979 to require a final vote to take place no later than 100 hours after cloture was invoked. Any procedural motions offered counted against the 100 time limit. Yet 100 hours of post-cloture time still proved unworkable in light of the crowded Senate agenda, so the Senate again
modified Rule XXII in 1986 to reduce post-cloture time to 30 hours. Each of these rules changes passed with supermajority support.90

The precedent created in this case affirms the Path Dependent Hypothesis, which predicts that the Parliamentarian’s rulings do not automatically favor the majority. This hypothesis correctly points out that the majority party will not always attempt to overturn the Parliamentarian when it is disadvantaged by his rulings. As a result of this precedent, members of the minority party may now utilize motions to suspend the rules to force a vote on any issue. In addition, this precedent potentially allows a committed minority to engage in a post-cloture filibuster despite the opposition of a supermajority of the Senate.

Finally, this case affirms the central prediction of the Path Dependent Hypothesis that the creation of new precedents will often have unintended consequences. The precedent it created paradoxically strengthens the ability of the majority party to block the adoption of amendments that undermine its agenda. The Senate’s consideration of the FDA Food Safety Modernization Act (S. 510) at the end of the 111th Congress illustrates how the Majority Leader may use motions to suspend the rules to his advantage. As a result of the higher threshold to suspend the rules (i.e. a two-thirds vote), the Majority Leader now has a vested interest in blocking measures from receiving votes during regular order. Members blocked from offering their amendments on S. 510 resorted to filing motions to suspend the rules after cloture was invoked. Once filed, Majority Leader Reid negotiated a unanimous consent agreement that set up stacked votes on the motions and final passage. However, unlike unanimous consent agreements that typically set 60-vote thresholds for controversial issues, this unanimous consent agreement established a 67-vote threshold for passage pursuant to the threshold required to suspend the Senate’s rules. As a

90Sinclair, The Transformation of the U.S. Senate, 128-129.
result, the legislation negotiated by the majority was better protected from a limited number of minority amendments and ultimately passed.  

Conclusion

The preceding analysis of the Senate Parliamentarian provided evidence with which to test the predictive power of the Path Dependent and Majoritarian approaches to understanding procedural choice and the impact of Senate rules on the legislative process. Hypotheses were developed to incorporate the Parliamentarian into these two approaches in order to test their theoretical validity. Each hypothesis generated a particular set of predictions for how the Parliamentarian interacts with individual members in the legislative process. These predictions were then examined in the context of the historical development of the office. Finally, two case studies were analyzed in more detail in an effort to determine whether the relationship between the Parliamentarian and individual senators supports the Path Dependent or Majoritarian hypothesis.

While conceding that Senate rules reflect remote majoritarian choices on a fundamental level, such a theoretical approach tells us remarkably little about the impact they have on Senate decision-making in practice. Rather, an examination of the Parliamentarian has demonstrated the ways in which the concept of “path dependence” offers a richer explanation for how the legislative process unfolds on a daily basis.

Specifically, the Path Dependent Hypothesis demonstrates that the Parliamentarian influences decision-making in the contemporary Senate by virtue of the specialized advice he provides to the Presiding Officer, party leadership, individual members, and their staff. The

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Parliamentarian’s influence is proportional to the complexity of Senate rules. Senators today simply lack the resources to develop the expertise necessary to successfully participate in the legislative process independently of the Parliamentarian.

While the small data set admittedly limits the broader significance of these conclusions, the development of the Senate Parliamentarian certainly makes a compelling case for the utility of a path dependent approach for understanding legislative behavior more generally. Such a focus has the potential to contribute to the existing literature by broadening our understanding of the concept of path dependence and its implications for legislative organization. Specifically, an examination of the Parliamentarian draws our attention to the costs associated with changing inherited rules of procedure in legislative institutions. In addition, the evolution in the role played by the Parliamentarian in the legislative process highlights the degree to which these costs change overtime.
References


Riddick, Floyd M. “Oral History Project.” Interview by Donald A. Ritchie (July 12, 1978), *United States Historical Office.* Interview No. 3


