# The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design.

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**Abstract**

The constitutional designation of the vice president as the president of the United States Senate is a unique feature of the chamber. It places control over the Senate's rules and precedents under an individual who is not elected by the chamber and receives no direct benefits from the maintenance of its institutions. We argue that this feature of the Senate has played an important, recurring role in its development. The vice president has frequently acted in a manner that conflicted with the wishes chamber majorities. Consequently, the Senate has developed rules and precedents that insulate the chamber from its presiding officer. These actions have made the Senate a less efficient chamber, but have largely freed it from the potential influence of the executive branch. We examine these arguments using a mix of historical and contemporary case studies, as well as empirical data on contentious rulings on questions of order.

## Introduction

While the United States Constitution has many distinguishing features, its establishment of a separation of powers framework is perhaps the most well known. The framework divides authority amongst the three branches of the federal government in order to prevent any one branch from wielding too much power. While the Constitution outlines a series of overlapping powers that the branches use to check each other, the formal institutions of each branch are largely left distinct. As such, each branch of government is largely free to exercise its powers separately from one another.

One notable exception to the separation of powers framework is the constitutional placement of the vice president as the president of the Senate. This provision places the administration of the Senate's rules and procedures in the hands of an individual who is not elected by the chamber and receives no direct benefit from the maintenance of Senate institutions. In contrast, the Constitution specifies that the House of Representatives be presided over by a Speaker who is a member of the House and is directly elected by the members of that chamber.

Observers of American politics have expressed concern about the vice president's presence in the Senate throughout congressional history. These critics have argued that he will serve as an agent of the executive branch, and provide the president with a means of altering policy outcomes in that chamber. Further, as the vice president is not electorally accountable to the chamber, Senate majorities have no direct check on how he performs his duties as president of the Senate. Thus, chamber majorities may be unwilling to delegate strong formal authority to its presiding officer. Having a relatively weak chamber leader has had serious implications for the legislative process in the Senate. Having limited means by which a presiding officer can enforce order and stop dilatory actions, the transaction costs associated with passing legislation have been relatively high for Senate majorities (Gamm and Smith 2000). By contrast, the majority party in the House has delegated a great deal of formal authority to the Speaker, which has allowed that chamber to develop strong centralized agendas and has

made the task of passing legislation much more efficient.

Previous work by Gamm and Smith (2000) has suggested that early Senate development was influenced by the vice president's role as the chamber's presiding officer. They argue that the Senate's decision to allocate committee appointment power to the presiding officer was reversed after perceived abuses by the vice president and conclude that "the failure of the vice president as a Senate leader was nearly preordained by the inability of senators to hold him accountable (Gamm and Smith 2000, 106)."

In this paper, we further examine the consequences of the constitutional placement of the vice president as the president of the Senate. We argue that this feature of the Senate has played an important, recurring role in its development. The vice president has frequently acted in a manner that conflicted with the wishes of the majority party. Because of this, the Senate has developed rules and precedents that insulate the chamber from its presiding officer. These actions have made the Senate a less efficient chamber, but have largely freed it from the potential influence of the executive branch.

In what follows, we examine these claims in greater detail. We take a two-pronged approach to examining the role of the vice president in the development of Senate institutions. First, using both historical and contemporary case studies, we find that the vice president has demonstrated a willingness to depart from existing chamber precedents and drastically reform the way business is conducted in the Senate. Because of the vice president's lack of electoral accountability to chamber majorities, these new precedents may run counter to the wishes of a majority of senators. Second, employing a dataset of contentious rulings on questions of order, we find that vice presidents are significantly more likely to rule against the majority party than other senators serving in the chair. We conclude that the patterns of behavior exhibited by the vice president in the Senate have significantly depressed the likelihood senators would opt to centralize chamber power and led to a less efficient chamber. The next section evaluates the origins of the vice president's placement in the Senate and our theory in greater detail.

## The Vice President in the Senate

The United States Constitution decrees that "the Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided."[1] While it also specifies that the chamber elect a president *pro tempore*, it notes that he will only serve in the vice president's absence. The clause was adopted ten days before the Constitutional Convention ended, with eight states in favor, two opposed and one abstaining (Farrand 1966; Gamm and Smith 2000; Milkis and Nelson 2008). By contrast, the clause specifying the election of the Speaker of the House was adopted unanimously, with no debate. While the debate over the Senate's presiding officer was brief, it revealed some important reservations.

In support of the provision, Roger Sherman argued that the vice president's presence in the chamber was necessary to prevent a tie vote. Further, if he did not serve in the Senate the vice president would be "without employment (Farrand 1966, 537)." Elbridge Gerry argued against the clause's adoption, suggesting that "we might as well put the President himself at the head of the legislature. The close intimacy that must subsist between the president and vice president makes it absolutely improper (Farrand 1966, 536)."[2] Gerry's point was supported by George Mason of Virginia, who argued that "the office of vice-president [was] an encroachment on the rights of the Senate; and that it mixed too much the legislative [and] executive, which as well as the judiciary departments, ought to be kept as separate as possible (Milkis and Nelson 2008, 57)." Delegates Edmund Randolph and Hugh Williamson also spoke in opposition to the clause.

The debate over the propriety of placing the vice president at the head of the Senate spilled over into the broader debate over ratification. Writing in opposition to ratification, the anti-federalist "Cato" referred to the vice president as "unnecessary" and "dangerous."[3] He argued that "this officer, for want of other employment, is made president of the Senate, thereby blending the executive and legislative powers, besides always giving to some one state, from which he is to come, an unjust preeminence (Storing 1981, 115)." These crit-

icisms were dismissed by Alexander Hamilton, who reiterated Sherman's arguments about the necessity of breaking tie votes and pointed to a similar arrangement in the New York legislature as precedence for the decision (see Hamilton, "Federalist 68," in Wright 1961.)

**The Role of the Presiding Officer**

Presiding officers play a potentially pivotal role in legislative bodies. Throughout the history of the United States, Congress has seen a continuous increase in its responsibilities. It has also experienced a growth in both the House and Senate's membership. These two changes have resulted in a greater number of bills being introduced, more members seeking floor time for debate, and a wider range of viewpoints and issue areas being presented and considered. This has caused an increase in the time spent considering the larger number of trivial measures and protracted debate needed for the increased numbers of controversial ones. Eventually, these increased demands on the time of Congress have real policy consequences, as sessions expire before additional important legislation can be considered and passed (Oppenheimer 1985).

To overcome these problems, many legislatures will delegate authority to a central chamber leader (Cooper and Brady 1989; Cox 2000; Rohde 1991). This leader will then employ these new powers to expedite debate and increase the number of measures passed. This delegation of authority occurred at various points in the House of Representatives. Throughout the 19th century, obstruction – or filibustering – was a problem that plagued that chamber (Koger 2004). Accordingly, members allocated the Speaker of the House a great number of formal powers. This authority has included the ability to choose whether or not to entertain certain motions, the right to recognize various members on the floor, the right to refer bills to committees and the ability to appoint committee members. These powers effectively put an end to obstruction in the House and streamlined chamber business (Binder 1997; Schickler 2001).

Scholars of the House of Representatives are quick to note that the centralization of

chamber rules in that body was not done exclusively by formal rules changes. Many of the most significant changes were implemented via the establishment of new chamber precedents by the Speaker of the House in 1890 (Binder 1997; Lawrence 2004). Furthermore, scholars have noted that this procedure, in which the presiding officer utilized his ability to recognize members and rule on questions of order, is also feasible in the United States Senate (Binder 1997; Gold and Gupta 2005; Koger 2004, 2008; Tiefer 1989; Wawro and Schickler 2004, 2006). As obstruction in that chamber increased throughout the 20th century, observers of the Senate began to question why authority was not centralized in the same manner it was in the House.

One explanation is that allocating additional powers to the vice president was particularly risky, as he is not electorally accountable to the full chamber (Gamm and Smith 2000). Additionally, as the debate during the Constitutional Convention suggests, the vice president's placement as president of the Senate grants him authority to oversee debate in the chamber. Senators needed to be concerned that any authority granted to the president *pro tempore* could be executed by a vice president hostile to their interests. The only definitive means of solving this problem involves removing the vice president designation as chamber president via a constitutional amendment.

By virtue of his constitutional placement as president of the Senate, the vice president does possess some authority within the chamber. The most consequential of these powers are the right to enforce chamber order (generally by ruling on questions and points raised by senators) and the right to recognize members seeking the floor (Byrd 1988; Tiefer 1989). If the vice president's institutional affiliation does represent a serious constraint to Senate majorities, we should expect to see two things: First, he should be more likely to utilize these powers in a manner that facilitates his own policy goals and second, these goals should be more likely to conflict with Senate majorities than the goals of presiding officers elected by the chamber.

In what follows, we examine the following five historical case studies: John C. Calhoun

and Committee Selection; Levi Morton and the Federal Elections Bill; John Nance Garner and the Right of Recognition; Alben Barkley, Richard Nixon and the Continuing Body Challenge; and Dick Cheney and the Nuclear Option. These cases were selected for several reasons. First, they are all cited in some capacity by scholars of institutional development in the Senate. These scholars typically presented abbreviated versions of these cases while focusing almost exclusively on the success or failure of minority obstruction. We expand on these abbreviated accounts in an effort to gain more leverage on the role played by the presiding officer in overseeing the debates. Second, in all five episodes, the vice president was in a position to significantly alter chamber precedents in a manner consistent with his own ideological interests. By focusing on episodes where the vice president played a prominently role, we are better able to explain future changes in the relationship between the senate and presiding officer.

Early cases demonstrate that the vice president was not a reliable agent for chamber majorities. In more recent cases, senators were unwilling to give the vice president the opportunity to use his authority to alter chamber procedure. We then employ a dataset of contentious rulings on questions of order and confirm that the institutional affiliation of the presiding officer has a significant effect on the likelihood a ruling will favor the majority party. The next section evaluates the 1826 conflict between Vice President John C. Calhoun and the Senate.

## John C. Calhoun and the Committee Selection

The presidential election of 1824 was one of the most contentious and controversial elections in American history. The race featured four candidates: General Andrew Jackson of Tennessee; Secretary of State John Quincy Adams of Massachusetts; Secretary of the Treasury William H. Crawford of Georgia and Speaker of the House Henry Clay of Kentucky. When the election results came in, Jackson had won the popular vote. Adams finished a close second, and Crawford edged out Clay for third place by just under 1,000 votes (Remini

1991). However, since no candidate received a majority of the Electoral College votes, the election was thrown into the House of Representatives. By virtue of finishing fourth, Clay was eliminated from consideration. The Speaker endorsed John Quincy Adams, leading to his election despite his second-place popular vote finish.[4]

Adams' first annual message to Congress served to further alienate those upset by the election outcome, which they had dubbed the "corrupt bargain." The message called for the federal government to take an active role in establishing "internal improvements," which included roads, a national university and the improvement of the patent system (Hecht 1972; Remini 2002). It also called for a more active role in foreign policy, highlighted by the United States attending a congress of Latin American ministers in Panama, commonly referred to as the Panama Congress.

On December 26, 1825, President Adams sent the nominations of two men, John Sargent of Pennsylvania and Richard Anderson of Kentucky, to the Senate for confirmation to serve as ministers to the Panama Congress. The United States' support of the Panama Congress was one of the centerpieces of the Adams administration's agenda. Adam's justifications for the mission included the desire to eliminate high duties on American goods coming into the Latin American countries, the opportunity to bolster the nation's reputation by helping secure a peace settlement between Latin American and Spain, and a general showing of good will to the United States neighbors (Sanders 1954). The reasons for opposition to the mission were fairly diverse: resentment of the varying levels of support Latin America had shown the United States; a fear that slavery would be challenged at the conference; a concern that attendance would violate the American policy of neutrality; and bitterness towards Adams' narrow victory during the election of 1824. At the time Adams submitted the nominations, few doubted that they would eventually be confirmed. However, it soon became apparent that they would encounter aggressive opposition on the Senate floor (Hecht 1972; Malanson 2006; Remini 1959; 1991).

The opposition was led by Senator Martin Van Buren (Jacksonian Democrat - NY)

and Vice President John C. Calhoun of South Carolina (Remini 1959). Van Buren and Calhoun organized a caucus of opponents to the nominations and agreed on a strategy to use delay to, as Clay described it, "defeat" or "cripple the measure" (Remini 1991, 292). Additionally, Calhoun utilized his position as presiding officer at key points during the debate to thwart both the administration and a majority of the Senate. First, the vice president took advantage of an earlier Senate decision to infuse its presiding officer with the ability to appoint senators to committees (Gamm and Smith 2000).[5] Calhoun used this power to appoint four Southern opponents of Adams to the five-member Foreign Relations Committee. Not surprisingly, when the committee reported out the nominations, it was accompanied by a lengthy critique of the Panama Mission (Malanson 2006).

Second, Calhoun used his position as vice president to enforce chamber debate rules only when it suited Adams' opponents. Senators like John Randolph (Jacksonian Republican - VA) used the debate to publicly assail and slander the president. Adams and his supporters in the Senate took offense to Calhoun's refusal to call Randolph to order during a six hour speech, despite what they perceived as his irrelevance, violent accusations and that, during the tirade, the vice president allowed Randolph to "drink himself drunk with bottled porter" (Remini 2002, 84). Calhoun defended his decision by arguing that the vice president had no power to call a senator to order, and that if given that ability "[it would] virtually place the control over the freedom of debate in the hands of the Executive (from Onslow's Second Letter to 'Patrick Henry', 1826 in Cheek 2003)."

The vice president's assertion that he lacked this power did not square with many contemporary commentators. Writing a few years later, Joseph Story (1833, 516-517) argued that "[the power to call members to order] had been silently supposed to belong to the vice president, as an incident of office."[6] Calhoun's claim also did not stop him from declaring an Adams sympathizer out of order during debate a few months later (Hatfield 1997).

The nominations were not confirmed until March 14, 1826 by a vote of 27 to 17. Ultimately, the delay proved to be fatal for the United States involvement in the mission as

neither minister was able to arrive in time. The delay forced both Sergeant and Anderson to travel during the height of the summer disease season. Sergeant arrived right as the Panama Congress was concluding and Anderson died of disease en route (Malanson 2006).[7]

Perhaps of even greater importance though, was that the episode highlighted the consequential role the vice president can play in the Senate – though not in the way many feared. Vice President Calhoun was clearly not influenced by any "close intimacy" with the president, as Gerry suggested he would be. At the time, presidents and vice presidents campaigned separately for their positions. Thus, the vice president did not necessarily share the president's policy interests.[8] However, the episode did demonstrate how the vice president could use his position to tilt policy outcomes in his direction. This led the Senate to a lengthy discussion of the vice president's formal powers within the chamber (Byrd 1988).[9]

Throughout that debate, senators repeatedly expressed concern over vesting power in their presiding officer. These members specifically argued that the constitutional placement of the vice president as president of the Senate meant that the chamber is led by a member who they did not elect, and thus, may represent a differing party or ideology. This was the essence of Senator Thomas Hart Benton's (Jacksonian Republican - MO) opposition to any expansion of the presiding officers' powers. He argued that "[the Senate] does not elect him, and [they] cannot displace him, except by an impeachment, which must be instituted in the other house (*Register of Debates*, 27th Congress, February 11, 1841, 282)." Samuel Smith (Jacksonian Republican - MD) compared the situation to the House of Representatives, noting that "if [the Speaker of the House's] decisions are unsatisfactory, they can refuse to re-elect him – but we, sir, have no such power. Our presiding officer is not elected by us – he is sent here by the people of the United States, and totally independent of us (*Register of Debates*, 27th Congress, February 11, 1841, 282)." Finally, Senator Samuel Bell (Adams Republican - NH) argued that the Constitution created the office of the vice president, and in doing so, supplied him with the power to oversee debate in that chamber. He concluded that the while chamber could enlarge, modify and limit power because it is "expressly vested

in that body by the Constitution," they "cannot [completely] divest the vice president of it (*Register of Debates*, 27th Congress, February 12, 1841, 306)."

The chamber ultimately opted to strip the presiding officer of the ability to select committees.[10] The chamber also considered removing the formal power of being able to enforce chamber order. However, Bell's point regarding the vice president's constitutional authority was well taken, and senators also pointed out the necessity of having someone enforce order in the chamber.[11] The Senate decided that the presiding officer could call members to order and rule on questions raised by senators, though those decisions were subject to an appeal of the chamber. This authority eventually became the most important procedural element in the presiding officer's arsenal. By providing Senate majorities with favorable rulings on questions of order, vice presidents could side-step obstructive minorities and bring measures to a final passage vote (Binder 1997; Gold and Gupta 2005; Koger 2004, 2008; Tiefer 1989; Wawro and Schickler 2004; 2006). However, even when the vice president shared the same partisan affiliation as the majority party, he was not electorally accountable to them. As such, it did not guarantee he would act as a faithful party agent. The next episode highlights this in greater detail.

## Levi Morton and the Federal Elections Bill

The presidential election of 1888 was a highly competitive affair that pitted former Indiana Senator Benjamin Harrison (R-IN) against incumbent President Grover Cleveland of New York. Harrison ran a campaign that emphasized the Republican Party's support for protectionist tariffs while downplaying another dominant issue for the party, that of African-American voting rights (Sievers 1959; Calhoun 2005). Harrison and his supporters were dogged by allegations of vote-buying, while Cleveland's partisans were accused of voter intimidation in the South. The end result saw Harrison winning the Electoral College 233 to 168, even though Cleveland won the popular vote by less than one percent.

The Republicans were also victorious in the 1888 congressional elections. During the

51st Congress (1889-1891) they held the House of Representatives by a margin of 179 seats to 152. In the Senate they controlled 51 out of 88 seats in the chamber. This would mark the first time since 1875 that the Republican Party controlled the presidency and both houses of Congress. In his annual message to Congress, President Harrison outlined a list of recommendations for congressional legislation (Calhoun 2005). The list hit on the three major issues of that period: the tariff, silver legislation, and finally, voting rights legislation for African-Americans (Schickler 2001).[12]

The legislative vehicle that provided for African-American voting rights was the Federal Elections Bill. It sought to move the power to establish election procedures from state governors to federal circuit courts (Welch 1965). Southern state governors had long used their power to establish election procedures in a manner that disenfranchised African-Americans. Democrats viewed the bill as an attempt to "federalize" elections, taking power from the states by giving it to a Republican-dominated judiciary. Due to their desire to pass a restrictive tariff and silver legislation beforehand, the Federal Elections Bill was postponed until the wanning months of the session (Upchurch 2004).

Senator George Frisbee Hoar (R-MA) successfully moved that the Senate consider the bill on December 2, 1891.[13] Democrats, under the leadership of Senator Arthur Pue Gorman (D-MD), immediately began to filibuster the measure (Lambert 1953; Upchurch 2004). After three weeks of delay, the filibuster began to weaken the Republican coalition. Specifically, Western Republicans, who wanted to pass additional silver legislation – a high priority for their constituents – started to switch positions and come out against the bill.[14]

The defections goaded Republicans into taking a more aggressive approach. Specifically, Wawro and Schickler (2006) argue that Republican senators sought to utilize partisan behavior by the presiding officer, Vice President Levi Morton (R-NY) to circumvent the Democratic obstruction.[15] The authors claim that Morton obliged the majority through the partisan usage of his ability to recognize members on the floor and his arbitrary rulings on questions of order.

A closer examination of the bill's consideration demonstrates that the vice president issued five notable rulings. While four of these rulings favored the majority party, none were strong enough to overcome the minority obstruction. And the vice president's first substantial decision went against the wishes of his party. During morning business on December 23rd, John Tyler Morgan (D-AL) introduced a resolution dealing with the elections bill. The following day he moved to consider it. Senator John Sherman (R-OH) objected, claiming the bill had been placed on the calendar and that Morgan was acting out of order. Morton upheld this relatively minor point by Sherman. Morgan appealed the decision and then proceeded to debate that appeal. Sherman again called the Alabama Democrat to order, claiming that debate was not in order on an appeal. Morton rejected his fellow Republican's point of order this time, ruling that Morgan was correct – and that debate was in order.

The first two favorable rulings occurred on January 16th. On that day, Morgan proposed an amendment limiting the scope of the bill. During debate over the Morgan amendment, Senator Isham Harris (D-TN) proposed altering it with a second-order amendment. At this point Hoar moved to table the Morgan amendment. The motion to table is non-debatable and can be approved by a simple-majority. Gorman immediately objected and raised a point of order that Hoar could not table the Morgan amendment while Harris's secondary amendment was before the Senate. Morton rejected Gorman's point, ruling that the tabling motion was in order and that it carried the secondary amendment with it. This ruling eliminated any extraneous debate on the Harris amendment as well. The Maryland Democrat appealed from the vice president's decision and started to debate it. He was called to order by Senator George Edmunds (R-VT) – who pointed out that debate on an appeal was not in order if the original motion was non-debatable. Morton upheld Edmunds' point that the motion to table was non-debatable. This ruling was clearly consistent with previous precedents and Gorman's appeal was rejected 31 to 15.

The Democratic obstruction continued and Morton again became involved in a controversial procedural dispute. On January 20th, Senator James George (D-MS) began speaking

against the bill. He had spoken for several hours before he yielded the floor to Morgan for several minutes so he could rest. Hoar objected to this, arguing that a senator could only yield the floor to another senator by unanimous consent. He explained that "otherwise a senator might hold the floor for a session, and it has been settled again and again" (*Congressional Record*, 51st Congress, January 20, 1891, 1567). Morton upheld Hoar's point of order and the Democrats failed to appeal the decision.

Immediately afterwards, Senator Nelson Aldrich (R-RI) moved that the Senate consider a formal rules change proposal. The proposal would have directly altered the rules governing unlimited debate. Vice President Morton announced that the question was on considering the Aldrich resolution. Meanwhile, John Tyler Morgan had sought recognition from the chair to speak. Morton used his right to recognize senators by opting not to acknowledge Morgan. He then announced that the ayes had won on the motion to consider the Aldrich resolution and the chamber quickly adjourned.

This partisan victory was short-lived, however. The following day, Gorman called the chamber's attention to the fact that Morton failed to announce the outcome of the vote on the Aldrich resolution. Specifically, the vice president failed to announce that the motion had carried. The Vice President willingly acknowledged this point, reversing the decision on the motion to consider, and debate on its propriety continued.

After further discussion, Aldrich once again moved to consider his rules change resolution. This sparked yet another point order, this time from Harris, who claimed that Aldrich's motion was not in order. The Tennessee Democrat insisted that the pending motion to correct the journal could not be superseded. Harris attempted to explain his argument, but Aldrich and Senator William Blair (R-NH) cut him off and argued that debate was no longer in order. Morton ignored his fellow Republicans and agreed to hear out Harris and his Democratic colleagues. Debate continued for over two hours before the vice president finally ruled that Aldrich's resolution was in order. He was sustained by a vote of 35 to 30. The minority continued to obstruct consideration of the Aldrich resolution, and four days

later enough Western Democrats joined Democrats to displace the Federal Elections Bill by a vote of 35 to 34. It was not considered again.

Morton's behavior while presiding over the consideration of the Federal Elections Bill differs in some important ways from Calhoun's actions during consideration of the Panama Congress. While the vice president was partisan at times, in other ways his actions were far more neutral (Binder et al. 2007). Indeed, Morton's first ruling – that debate was in order on an appeal – went against his own party. His decision to acknowledge a technical error on his behalf and reverse an earlier partisan ruling also likely frustrated leaders within his party.

Vice President Morton's actions are especially interesting when compared to those taken by Speaker Thomas Reed (R-ME) during the same 51st Congress. As the leader of the House Republicans and as the presiding officer of the House, Reed issued a series of rulings to create his now famous "Reed's Rules". These rulings prohibited the use of dilatory motions by the minority party, ended the use of disappearing quorums, and generally limited the ability of the minority party to obstruct the agenda priorities of the majority party (Binder 1997). These rulings strengthened majority party control of the House and made the legislative process in the House far more efficient.

Democrats in the Senate were quite concerned that Morton would issue rulings that would establish majority party control in the Senate as Reed had in the House. Indeed, some commentators *expected* the vice president to establish a new precedent that debate was not in order.[16] Republican senators recognized the potential power of the presiding officer to push through their parties agenda, but questioned Morton's dedication to this cause. Morton's previous rulings during the debate on the Election Bill were not consistently favorable to the Republican Party. This highlights a key difference between the Speaker of the House and the vice president: the Speaker was accountable to the House majority. The vice president is not, and while he is free to act in accordance with his own policy preferences, he is also free to preside in a neutral manner if he so chooses. This may be one of the reasons Wawro and

Schickler (2006, 77) note that Senate Republicans "encouraged [Morton] to go on vacation to Florida [at the start of the conflict], which would have left the chair open for someone who was more clearly sympathetic to the supporters of the Elections Bill." It is likely that the minority party's ability to use of dilatory actions – now considered a key institutional feature of the Senate – would have been extinguished during the debate over the Election Bill, if not for the constitutional provision placing the vice president as the presiding officer of the Senate.

## John Nance Garner and the Right of Recognition

The preceding two episodes primarily dealt with vice presidents enforcing chamber order. However, throughout the 19th century and early 20th century, the importance of the right of recognition also began to crystallize in the Senate.[17] This essentially provides the presiding officer with the ability to control the nature and order of debate. While the Senate's formal rules have long stated that the presiding officer must recognize the first senator who addresses him, the situation was often more confusing. The presiding officer would be assailed by numerous senators seeking recognition and he would have to make an often controversial judgment call on who addressed him first. As Morton elected to do, presiding officers could also opt to ignore members seeking recognition.

An extreme example of this occurred in 1863, during consideration of a bill to indemnify President Abraham Lincoln from legal action stemming from his decision to suspend the writ of habeas corpus. The bill was met with aggressive resistance.[18] The conference report was brought to the Senate floor on March 2nd and opponents immediately began obstructing its passage. This was significant because during this period, congressional sessions featured a mandatory adjournment date on March 3rd.

Opponents controlled the floor and offered repeated motions to adjourn. The obstruction was brought to a close by arbitrary usage of the right of recognition by the presiding officer (Burdette 1965). Vice President Hannibal Hamlin (R-ME) was out of the chamber. He was

replaced by a junior senator, Samuel Pomeroy (R-KS).[19] After an unsuccessful motion to adjourn – offered by Senator Lazarus Whitehead Powell (D-KY) – Pomeroy stated that "the question is on concurring in the report of the committee of conference. Those in favor of concurring in the report will say 'aye'; those opposed 'no.' The ayes have it. It is a vote. The report is concurred in" (*Congressional Globe*, 37th Congress, March 3, 1863, 1477). Pomeroy spoke in such a low voice that much of the Senate was unable to hear him. When Trumbull moved the chamber consider a new bill, Powell insisted that the Senate continue with the indemnity bill – unaware that the chamber had just passed it. This sparked a heated debate over the manner in which the bill was passed. Eventually, a motion to adjourn was successfully agreed upon on the debate carried over. Pomeroy ignored his motion that the vote was out of order, ignored an appeal from James Bayard (D-DE) and finally, ignored a motion from William Richardson (D-IL) to reconsider the vote.

This arbitrary exercise of the recognition power was largely unchanged until the 75th Congress in 1937. The 75th Congress occurred during the height of President Franklin D. Roosevelt and the New Deal coalition's power. Roosevelt and running mate John Nance "Cactus Jack" Garner (D-TX) captured over 60% of the popular vote and carried 46 of the 48 states. Congressional Democrats also faired extremely well and the party added to its sizeable seat advantages in both chambers. At the start of the Congress, Democrats held 76 of the 96 seats in the Senate and 334 of the 435 House seats.

Vice President Garner had served in the House of Representatives for 28 years before he was elected Speaker of the House in 1931. His election as vice president marked just the second time in American history that a former House Speaker would hold that post.[20] Garner did not view the new position as a promotion and his quotes on the vice presidency are some of the most enduring. The Texan was famously quoted as saying that the "vice presidency isn't worth a pitcher of warm spit (quoted in Milkis and Nelson 2008, 451)."[21] He also described it as "a no man's land somewhere between the legislative and the executive branch (Timmons 1948, 176)" and remarked that he "would rather remain in the House

(Timmons 1948, 174)." Despite his lack of regard for the office of the vice president, Garner had developed a reputation as a superb parliamentarian during his tenure in the House and he brought those skills with him as the presiding officer of the Senate.

Those parliamentary skills were often utilized during his tenure in the Senate – mostly in his application of recognition.[22] He applied his right of recognition specifically in an effort to speed up the Senate and facilitate the massive Democratic agenda.[23] Timmons (1948, 185) described the strategy accordingly: "His speed plan was: After a bill had been read and before a senator had time to clear his throat, adjust his papers and call for recognition, Garner in rapidly tumbling worlds would say: The question is: Shall the bill be engrossed, read the third time and passed. There being no objection the bill is pass."

Garner finally clarified the order of recognition in 1937, when he broke from the established practice by asserting that the chair would recognize the majority and minority leaders first (Binder et al. 2007).[24] When confronted as to why he recognized Senator Alben Barkley (D-KY) when other senators were requesting the floor, Garner stated that "the chair recognized the senator from Kentucky because he is the leader of the Democrats in the Senate (*Congressional Record*, 74th Congress, August 13, 1937, 8839)." Later in the debate he announced that he "would recognize the senator from Vermont [Mr. Austin], acting Republican leader, in the same way (*Congressional Record*, 74th Congress, August 13, 1937, 8839)." The precedent now formally specifies that if multiple senators request recognition at the same time "priority of recognition shall be accorded to the Majority and Minority Leader, the majority manager and the minority manager, in that order (Riddick and Frumin 1992, quoted in Gold 2004, 40)." Garner's decision was not challenged by the chamber.

Two conclusions can be drawn from Garner's ruling. First, the execution of his recognition duties was in line with the concerns expressed by Gerry, Mason and Cato. The vice president used his position to expedite debate in the chamber to his benefit and that of the executive branch. The effectiveness of this action was likely enhanced by his parliamentary background in the House and the presence of large partisan majorities to insulate him from

backlash. Despite this attempt to use parliamentary procedures to bolster the Roosevelt agenda, scholars have argued that Garner largely abandoned his parliamentary duties in the Senate after his falling out with the administration (Timmons 1948; Hatfield 1997).[25]

Second, while his ruling was a short-term execution of power by the vice president, in the long run it served to shift authority from the presiding officer and towards the party leaders. Byrd (1988) argues that the right of first recognition has since become the most important power enjoyed by the majority leader. Scholars and other majority leaders have echoed this point. Gold (2004, 40) points to a biography of former majority leader Mike Mansfield (D-MT) which argued that the right allowed the leader to "outflank any other senator in offering motions or amendments, and to the most important voice, rarely overruled, in shaping the nature and timing of Senate business." It guarantees that the majority leader will be the first member allowed to propose a motion to proceed, to report a unanimous consent agreement or offer an amendment (Gamm and Smith 2002; Beth et al. 2009). These powers are critical in order for the majority leader to manage the Senate's floor time effectively.

While the presiding officer still possessed a great deal of theoretical power, the vice president's lack of electoral accountability and the newly established powers of the majority leader led the chamber to shy away from utilizing the presiding officer in a manner that circumvented obstruction. The next two cases highlight instances where the vice president demonstrated a willingness to alter chamber precedents in a significant manner, but was blocked *ex ante* by the chamber.

## Alben Barkley, Richard Nixon and the Continuing Body Challenge

A question of order may be raised in the United States Senate at virtually any time.[26] The question is to be decided without debate by the presiding officer. As the Federal Elections Bill episode demonstrates, question of order can – at least theoretically – be used in combination with a tabling motion by simple majorities seeking to overcome the chamber's filibuster rules. During the mid-20th century, this strategy greatly appealed to supporters of civil

rights legislation who were frustrated by their inability to overcome filibusters by Southern Democrats. This strategy, however, necessitates a favorable ruling by the presiding officer. At several points, vice presidents demonstrated a willingness to break from long-standing Senate procedure and provide such a ruling.

The filibuster had become a much scorned institution for supporters of civil rights by the late 1940s. They had seen Southern Democratic filibusters derail anti-lynching bills in 1922, 1935 and 1938, an anti-poll tax bill in 1946, and a fair employment bill in 1946 (Binder and Smith 1997). The situation was made substantially worse in 1948, when presiding officer Arthur Vandenberg (R-MI) ruled that the chamber's cloture rule did not apply to motions to proceed (Mann 1996; Gold and Gupta 2005).[27] In this instance, the ruling was issued by the president *pro tempore*, Vandenberg, because the vice presidency was vacant due to Truman's elevation to the presidency. Had a Democratic replacement been found, the ruling would likely not have been made.[28] Civil rights proponents sought to reverse this precedent by a resolution, but the resolution was filibustered. In 1949, they turned to Vice President Alben Barkley (D-KY).

Prior to his election as vice president, Barkley served in the Senate for 22 years. During that period, Barkley had developed some sympathy towards supporters of civil rights legislation. Accordingly, when presented with the opportunity on March 10, 1949, he ignored the advice of the chamber parliamentarian and overturned the Vandenberg ruling (Gold and Gupta 2005).[29] The *de facto* leader of the Southern Democratic coalition – Senator Richard Russell (D-GA) – immediately appealed. Supporters of the resolution sought to cut off debate by successfully tabling the Russell appeal. This failed by a vote of 45 to 50. The failure to garner a majority on the motion to table doomed the civil rights proponents' strategy and they were forced to agree to compromise. The compromise resolution allowed cloture motions to be filed on motions to proceed, but raised the threshold and specified that cloture did not apply to changes in the chambers' rules (Binder and Smith 1997).[30]

While liberals failed to garner a majority on the tabling motion in 1949, it did not

dissuade them from using the tactic again. In 1953, Senators Clinton Anderson (D-NM) and Herbert Lehman (D-NY) introduced a change in the Senate's rules predicated on the belief that the chamber was not a "continuing body." The continuing body theory argued that since senators had staggered terms, two-thirds of the membership continued to the next Senate (Mann 1996; Binder et al. 2007). Thus, the rules of the body continued as well. Anderson and Lehman sought a favorable ruling by outgoing Vice President Barkley that – because the chamber was not a continuing body – their rules change resolution was subject to simple majority support at the beginning of the new Congress. Barkley did not get a chance to render another ruling; however, as the resolution was tabled by a vote of 71 to 22 before the question of order was raised (Gold and Gupta 2005).

Alben Barkley and President Harry Truman were replaced in 1953 by Republican President Dwight D. Eisenhower and Vice President Richard M. Nixon. Prior to being named Eisenhower's running mate, Nixon represented California in the Senate from 1949 to 1952. Nixon knew that his position as vice president made him the forerunner for the Republican nomination when Eisenhower retired. He also knew that African-American voters were going to be an important demographic during the next election (Mann 1996). Thus, when Anderson brought up his continuing body challenge again in 1957, Nixon was supportive.

Anderson submitted a motion to alter the chambers' rules on January 3, 1957 – the first day of the session. Immediately after the resolution was proposed, Anderson's Senate allies, Hubert Humphrey (D-MN) and Paul Douglas (D-IL) sought recognition from the vice president so they could raise a point of order that the chamber was not a continuing body (Caro 2002). However, Majority Leader Lyndon Johnson (D-TX) also demanded recognition, and under Garner's 1937 ruling, the right of first recognition belonged to the majority leader. Nixon recognized Johnson, who immediately made a motion to table the Anderson motion.

Johnson allowed debate to continue on the Anderson resolution under a unanimous consent agreement. Further, he allowed Anderson and his supporters to raise a parliamentary inquiry regarding the Senate's status as a continuing body. The debate was fairly brief, and

many of the arguments were reiterated from the 1953 challenge. In support of his motion, Anderson stated that the "we are again facing the question of whether or not the Senate of the United States, round by round, shall determine its own rules or whether it shall be bound by rules adopted a century ago (*Congressional Record*, 95th Congress, January 4, 1957, 141)." His speech went on, emphasizing the harm the filibuster has caused to civil rights, as well as constitutional arguments in support of change. Anderson concluded after a discussion of the positive utility the House derived from Speaker Reed's ruling in 1890.

Humphrey raised a parliamentary inquiry following the Anderson speech, asking "under what rule is the Senate presently proceeding (*Congressional Record*, 95th Congress, January 4, 1957, 178)?" The vice president's ruling was highly supportive of the Anderson motion. Nixon argued first that "although there is a great volume of written comment and opinion to the effect that the Senate is a continuing body with continuing rules, as well as some opinion to the contrary, the presiding officer of the Senate has never ruled directly on this question (*Congressional Record*, 95th Congress, January 4, 1957, 178)." He then acknowledged the disjoint between the constitutional provision specifying one-third of Senate be elected each Congress and the provision stating that each House may determine its' own rules. Nixon concluded by ruling that "the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress (*Congressional Record*, 95th Congress, January 4, 1957, 178)." While politically savvy, the ruling had no binding effect on the chamber's rules due to the priority held by Johnson's tabling motion. Shortly thereafter, the tabling motion passed 55 - 38 (Gold and Gupta 2005).[31]

Much like John C. Calhoun in the 19th century, it is clear that both Barkley and Nixon were willing to use their authority to further their own policy goals. For both Barkley and Nixon, doing so would have meant abandoning established Senate precedents. However, unlike past episodes, chamber majorities blocked the vice presidents from engaging in this

behavior. This was likely due to several factors. First, even if a majority of the chamber supported civil rights legislation, many members were hesitant to sacrifice their individual power to obstruct legislation in order to achieve it. Second, there were undoubtedly political factors at play (e.g. Johnson did not want to cede the African-American vote to Nixon).

Both of these factors were likely exacerbated by the institutional affiliation of the vice president. While members were hesitant to sacrifice their personal powers, they were surely more hesitant to centralize those powers to a member not electorally accountable to them. Further, the constitutional placement of the vice president as president of the Senate ensured that there would be times where the chamber president was not of the same party as the chamber majority. Thus, political factors were unavoidable at certain points in the Senate's history. The next episode highlights the most recent attempt by the vice president to assert a more dominant role in the Senate.

## Dick Cheney and the Nuclear Option

The latter half of the 20th century brought about some important changes in the office of the vice presidency. Presidents began to expand the executive branch duties of running mates. Starting with Garner, vice presidents acquired increased diplomatic duties, with more trips abroad. They also began meeting with the cabinet and publically stumping for presidential legislative priorities. In 1947, the vice president was made a member of the National Security Council (Goldstein 2008; Moe 2008). Further, the established practice of deferring to the Senate parliamentarian and the formalization of the recognition procedure made the duties of the Senate's presiding officer more routine (Madonna 2007). These two factors combined with a growing Senate workload to drastically decrease the proportion of time modern vice presidents spent presiding in the chamber.

By 2005, Nixon's advisory ruling was over half a century old and the ability of vice presidents to alter policy outcomes in the Senate was not fresh in the minds of most chamber observers. This quickly changed when Vice President Dick Cheney (R-WY) announced his

intention to rule on a question of order barring filibusters on judicial nominations. At the time, Republicans controlled 55 seats in the chamber. They had grown frustrated by Democratic filibusters over several of President George W. Bush's appellate court nominees.[32] Under the leadership of Majority Leader Bill Frist (R-TN), Republicans hoped to use a favorable ruling by Cheney on a question of order to circumvent the filibusters, much in the same way that civil rights proponents sought to use rulings from Vice Presidents Barkley and Nixon. The Republican proposal – which would eventually become known as the "nuclear option" – dominated coverage of congressional politics for the next two years (see e.g. Kane 2005; Preston 2005; VandeHei and Babington 2003.)[33]

The proposed nuclear option procedure differed in some significant ways from the strategy attempted by Clinton Anderson in the mid-20th century. Rather than raising a point of order that the Senate was not a continuing body, or that the Constitution declares that Congress may create its own rules, Republicans would challenge Democratic obstruction on the grounds that it prevented the Senate from executing its constitutionally proscribed duty to "advise and consent" to presidential nominations (Binder et al. 2007).[34] If the presiding officer upheld a point of order to this effect, an appeal would likely be taken. That appeal would be subject to a tabling motion that necessitated the support of a simple majority.

Dick Cheney had a long career in Republican Party politics prior to his ascension to the vice presidency. He served as chief of staff to President Gerald Ford, then for 10 years he represented Wyoming in the House of Representatives. Cheney resigned his House seat in 1989 to serve as Secretary of Defense under President George H.W. Bush. Unlike Richard Nixon, Cheney did not have any expressed presidential ambition. Instead, the vice president was likely motivated by an ideological commitment to the third Republican presidential administration he served in. Furthermore, scholars have suggested that Cheney played a major role in crafting that administration's agenda. Thus, it came as little surprise when the vice president announced that "if the Senate majority decides to move forward and if the issue is presented to me in my elected office as president of the Senate and presiding

officer, I will support bringing those nominations to the floor for an up-or-down vote (quoted in Kirkpatrick 2005)." The ruling would have been contrary to the Senate parliamentarian's reading of existing precedents and would like have drastically altered future policy outcomes in the chamber (Preston 2005; Madonna 2007).

Not surprisingly, Democrats were incensed by the proposal and argued that it represented an intrusion of the executive branch in Senate procedure. Senate Minority Leader Harry Reid (D-NV) accused the administration of being "drunk with power (Kane 2005)." Former Democratic Majority Leader Tom Daschle (D-SD) said the procedure would turn the Senate into "a rubber stamp for any administration, Republican or Democrat (Hulse 2003)." Senator Charles Schumer (D-NY) argued that the executive branch "stepped over the line by interfering with the Senate to reduce checks and balances (Kirkpatrick 2005)."

The Senate averted a showdown over the nuclear option when a coalition of seven Democrats and seven Republicans signed on to a compromise agreement. The seven Democrats agreed to support cloture motions on several of the obstructed nominations. In exchange, the Republicans agreed to withhold their support for the tabling motion on the appeal of Cheney's ruling (Binder et al. 2007). This left Frist without a simple majority to support the nuclear option procedure and the proposal was never attempted.

Cheney's support for the nuclear option was consistent with the Constitutional Convention criticisms of the presiding officer clause. The vice president was a fervent supporter of the administration's goals and demonstrated a willingness to further those goals by issuing a ruling breaking from established Senate precedents. His presence in presiding over the chamber during this debate would have provided his party with not only a favorable ruling (this could have been issued by any Republican presiding officer) but also a key vote on a tied tabling motion. However, as with the Continuing Body Challenge, senators *ex ante* blocked the vice presidents' ruling. This decision not to centralize chamber power – despite collective action problems – is consistent with historical concerns regarding the vice president's institutional affiliation. The next section evaluates those concerns empirically,

specifically asking whether the vice president could be expected to act as a reliable agent of the majority party, as the Speaker does in the House.

## Enforcing Chamber Order

The preceding episodes demonstrate the great deal of theoretical power wielded by the presiding officer of the Senate. In several instances (the Panama Congress, the Habeas Corpus Indemnification Bill, Garner's Ruling on Recognition) his actions had important policy implications. In others (the Federal Elections Bill, the Continuing Body Challenge, the Nuclear Option), rulings would likely have significantly altered the way the Senate conducted business. Specifically, control over the agenda would have been centralized in a manner that could be comparable to the House. Given the strong utility provided to the majority party by centralized agenda control, the decision to block presiding officers from utilizing favorable rulings on questions of order seems somewhat puzzling. This is especially true in the modern era, where obstruction occurs frequently. To illustrate this point, Figure 1 plots the approximate number of filibusters per Senate.[35]

[Figure 1 About Here]

The decision to not centralize agenda control in the chamber is likely the product of several factors. For example, scholars have pointed to problems stemming from additional inherited chamber rules, such as the lack of a previous question motion, and the constitutional provision staggering Senate elections (Binder 1997; Binder and Smith 1997; Binder et al. 2007). The cases presented in this paper suggest that the constitutional placement of the vice president as president of the Senate may be an additional constraining influence on Senate majorities. As Senator Samuel Smith noted during debate over Calhoun's actions, the House can refuse to re-elect a Speaker whose behavior they disagreed with, but the Senate does not have that luxury. In sum, members expressed concern whether the vice president would act as an agent of the majority. While the case studies suggest that he is

not reliable, another means of examining this is to evaluate his rulings on questions of order.

When a question of order is raised in the United States Senate, the presiding officer can choose to uphold it, reject it, or submit it to the floor for consideration by the full chamber (Tiefer 1989; Madonna 2007). If the presiding officer chooses to submit the question, the resulting Senate vote does not create a formally binding precedent. Rulings issued by the presiding officer are subjected to an appeal of the full Senate. However, these appeals can be bypassed by simple majorities without debate through a successful motion to table. As the case studies demonstrate, rulings on questions of order can have a significant impact on debate and on the policy substance of the underlying measure. The cases also suggest that the institutional affiliation of the vice president may cause him to rule in a manner that is less supportive of the majority party than senators chosen by a majority of the body.

To examine the effect institutional affiliation has on rulings issued by presiding officers, we created a dataset of all rulings issued by the presiding officer that resulted in roll call votes from the start of the 26th Senate to the end of the 106th. This dataset updated an earlier account provided by Bach (1989) which stemmed from 1965 to 1986.[36] By restricting the data to only rulings that resulted in roll call votes we are hoping to better isolate contentious or non-trivial rulings. This yielded 674 observations, or 8.28 rulings per Senate. Figure 2 displays the frequency of rulings on points of order, by Congress. Our dependent variable is coded 1, if the ruling favored the majority party and 0 if it went against them. This was determined by identifying the partisan affiliation of the member raising the question and recording whether the question was upheld, rejected or submitted. Rulings were coded as favorable to the majority party if a question was raised by a majority party member and was upheld or submitted – or if the question was raised by a minority party member and was rejected or submitted.

[Figure 2 About Here]

The primary hypothesis is that rulings issued by the vice president should be less supportive of the majority party than those issued by senators electorally accountable to the

chamber. In order to determine the partisan affiliation of the member raising the question of order, as well as the institutional affiliation of the presiding officer, we read through the *Annals of Congress*, *Register of Debates*, *Congressional Globe*, *Congressional Record* and *Senate Journal*. Rulings issued by the vice president were coded 1, all other rulings coded 0. In order to better account for the chair's decision-making, additional control variables were also specified.

While they do not carry with them the procedural consequences of an episode like the nuclear option, questions of order related to the germaneness of an amendment are fairly common in the United States Senate. We opt to include them in the full model because they frequently have important policy consequences.[37] The right to offer non-germane amendments is one of the Senate's most distinguishing features, but it is not absolute. There are several occasions when the chamber requires germaneness: when the Senate is operating under a unanimous consent agreement that specifically forbids non-germane amendments, for amendments to general appropriations measures, after cloture has been invoked or during the consideration of a budget resolution or reconciliation measure (Oleszek 2007; Tiefer 1989). In the modern era, the chair almost always submits these questions to the Senate to be decided without debate (Riddick and Frumin 1992). Once submitted, the chamber majority is free to dispose of the point of order in whatever way it sees fit. Given this, we anticipate that questions of order on amendments are likely to generate rulings favorable to the majority party. The amendment variable is a dummy signifying whether the question of order concerns the status of an amendment: 1 if so, 0 if not.

Regardless of their institutional affiliation, one might expect presiding officers to be more likely to defer to strong majority parties than weaker ones. Accordingly, we include a control variable for the strength of the majority party in a given Congress. To capture majority party strength, we employ Binder's 1997 measure. This takes the percentage of seats held by the majority party and multiplies it by the party's Rice cohesion score. The expectation is that the stronger the majority party, the more likely a ruling will go in their favor.

Madonna (2007) has shown that deference to a formal parliamentarian has had an important effect on rulings on questions of order. The Senate parliamentarian is charged with providing information on chamber precedents and procedure to the chair. He shows that the decision to defer to a parliamentarian on questions of order in the 69th Senate cut down on information asymmetries, leading to less partisan rulings. As such, we control for rulings that occur after the 69th Senate.

Finally, for much of the 20th century, the Democratic Party was deeply divided between its Northern and Southern wings. Questions of order raised by Southern Democrats during this time period may not represent the interests of the majority party. We control for such rulings with a dummy variable coded 1 if the senator raising the question of order was a Democrat from a Southern state. As the dependent variable is dichotomous, we fit a logit model. Results are presented in Table 1. In an effort to verify the robustness of the key hypothesis, two alternative model specifications are also included – one omitting all questions that were submitted, and another omitting all questions on amendments.

[Table 1 Here]

**Results**

The results presented in Table 1 are supportive of our hypotheses. As the substantive findings are not altered by the restrictions in Model 2 and Model 3, we opt to discuss the results of the full model. First, the control variables performed as expected. The coefficient on the amendment dummy is significant and in the predicted direction in the full model. This is expected, as questions of order on amendments are almost always submitted to the full chamber where they are decided without debate. This likely serves as an advantage for majority party members seeking to get certain provisions included in a measure once on the floor.

Presiding officers also appear more likely to defer to stronger majority parties than weaker ones. The full model suggests that as the majority party gets stronger, the likelihood a

question of order is ruled on in a favorable manner increases. The coefficient is positive and significant in all three iterations of the model. Additionally, the parliamentarian dummy variable suggests that the majority party is less likely to receive a favorable ruling on a question of order in the modern era. Consistent with Madonna (2007), this finding suggests that the parliamentarian served to decrease information asymmetries within the Senate, resulting in more neutral arbitration by the presiding officer.

Case studies presented earlier in the paper demonstrate that the vice president has been willing to depart from long-standing chamber precedents. However, they also suggest that his rulings may not favor chamber majorities in the manner the House Speaker does. This is consistent with criticisms made during the Constitutional Convention. The vice president is not electorally accountable to Senate majorities, nor does he share any long term benefits from maintaining its institutions. Accordingly, the primary theoretical expectation was that the vice president would act as a less reliable agent to the majority party on questions of order. The results presented in Table 1 are supportive of this hypothesis. Table 2 presents predicted probabilities.

[Table 2 Here]

In the pre-parliamentarian era, holding the amendment and southern dummies to 0 and majority party strength to its mean, a senator was likely to rule in a manner favorable to the majority party 81.7 percent of the time. When the ruling occurred under a vice presidents' watch, that likelihood the majority received a favorable ruling dropped by approximately 11.3 percent. In the post-parliamentarian era, senators were likely to issue favorable rulings to majority party members 73.6 percent of the time. Again, the vice president's presence in the chair had a depressing effect on this percentage. As reported by Table 2, the predicted probability of the vice president issuing a favorable ruling to the majority party was only 59.8 percent.

## Discussion and Conclusion

The preceding empirical analysis demonstrates that the institutional affiliation of the presiding officer plays an important role in determining the likelihood he would support the chamber majority.[38] Specifically, it suggests that the vice president is a less reliable agent for the majority party than members who are electorally accountable to them. The three separate model specifications further speak to the robustness of this finding. Taken in conjunction with our case studies, we believe this represents strong suggestive evidence that the constitutional placement of the vice president as the president of the Senate represented an important constraint on the procedural choice of chamber majorities.

We do not mean to suggest that this represents the only explanation for why high levels of obstruction persist in the modern chamber. Scholars have noted other inherited chamber rules that have contributed to the decentralized modern Senate. The first of these was an 1806 decision to drop the seldom-used previous question motion from the Senate's rules (Binder and Smith 1997; Binder 1997). This decision stripped the chamber of any formal method of ending debate by a simple majority. The previous question motion became a tool of House majorities throughout the 19th and 20th century. Second, the constitutional staggering of terms for senators led to the chamber's continuing body status. As demonstrated by the episodes presented earlier, a key consequence of is that – unlike the House – the Senate does not adopt new rules at the start of each Congress (Binder 1997).

The evidence presented here suggests that the vice president's role in the chamber represents an additional "inherited institution" that has increased the costs of procedural reform in the Senate. Theoretical work done in political science and economics suggests that inherited institutions generally share three properties. We believe all three of these are consistent with the constitutional placement of the vice president as head of the Senate.

First, the long-term effects of the institution were indeterminate upon its adoption (North 1990; Pierson 2000; 2004). Supporters of the vice presidential clause at the Constitutional Convention generally argued for its inclusion on the basis that the vice president was nec-

essary to break tie votes. Concerns stemming for the vice president's lack of electoral accountability largely went unaddressed. In sum, the need to centralize power to a chamber leader in order to overcome high collective action costs was not foreseen by advocates of the institution.

Second, the adoption of the institution led individuals towards a particular path of decision-making. This is often referred to as "path dependence" (North 1990; Pierson 2000; 2004). The episodes presented here suggest that this was the case. Vice President John C. Calhoun's abuse of the committee appointment power caused Senate majorities to revoke that authority from the presiding officer.

Further, the lack of electoral accountability, the Federal Elections Bill example and the empirical evidence presented suggest that there is a weak attachment between the vice president and the Senate majority party. This, we believe, has made Senate majorities more likely to block vice presidential attempts to shape chamber procedures – as it did during the Continuing Body Challenges and Nuclear Option episode. The Garner example represents a case where the Senate majority allowed the vice president to issue a significant ruling. However, this ruling only further served to weaken the power of the presiding officer. This contrasts with the House, which has headed down a path of greater centralization.

Third and finally, the institution and subsequent path may exhibit substantial inefficiencies (David 1985; North 1990; Pierson 2000; 2004). This last point seems to touch directly to the debate over the desirability of filibuster reform in the Senate. In a recent New York Times article, Senate minority leader Mitch McConnell (R-KY) discussed his parties usage of the filibuster, stating that, "I think we can stipulate once again for the umpteenth time that matters that have any level of controversy about it in the Senate will require 60 votes" (quoted in Herszenhorn 2007). This quote supports the commonly made observation that in the modern Senate nearly all bills are subjected to some form of obstruction. The constitutional placement of the vice president as the head of the Senate has helped insulate chamber debate rules facilitating this obstruction. For example, had the Senate have operated with an

elected presiding officer – as the House does – during consideration of the Federal Elections Bill, it is likely procedural authority would have been centralized. This, in turn, would likely have improved the chambers' overall efficiency.[39]

The vice president's constitutional placement as president of the Senate has important implications for institutional design and reform in legislative bodies. First, it calls for a more nuanced view of procedural choice. While the Constitution does specify that "each House may determine the rules of its proceedings. . . ," the costs of determining those rules fluctuate with various institutional arrangements. The Constitution assigned control over the Senate's rules and procedure to an individual who was not elected by the chamber and did not receive tangible benefits from the maintenance of its institution. This institutional arrangement served to increase the political costs of reform. While these costs may not be prohibitive on their own, taken in conjunction with the dropping of the previous question motion, the constitutional staggering of Senate terms and the establishment of a chamber parliamentarian, they represent a substantial burden to would-be reformers.

This is not to suggest that reform in the Senate is impossible, or that chamber majorities will be unable to overcome obstruction on key bills. Indeed, majorities have overcome filibusters throughout history on certain bills, and likely will continue to do so in the future. However, the presence of that obstruction forces chamber majorities to allocate a great deal of time to certain measures, leading to the defeat of other pieces of their legislative agenda (Oppenheimer 1985). There may come a time where increased damage to a majorities' agenda necessitates that they willingly infuse their presiding officer with more authority. While such a decision is unlikely to be made under divided government, its feasibility can not be discounted.

# Notes

[1]See Article 1, Section 3, Clause 4 of the Constitution.

[2]Scholars – as well as some vice presidents – have been quick to note that it is unclear precisely which branch the vice president should be considered a part of (see e.g. Milkis and Nelson 2008; Nelson 1988; Reynolds 2008). While the mode of selection of the vice president is articulated in Article 2, Section 1, Clause 3 of the Constitution – the clause establishing the executive branch – it does not vest any executive power in the office. The only constitutional power explicitly granted to the vice president was to preside over the Senate.

[3]While the identity of Cato was never conclusively determined, many scholars argue that it was New York Governor George Clinton. Ironically, both Gerry and George Clinton would go on to serve as vice president. Clinton served during the administrations of Thomas Jefferson and James Madison until his death in 1812. Gerry then replaced Clinton as Madison's vice president until his death in 1814.

[4]Had Henry Clay have finished third, most historians and contemporary observers concede that he would have won the election in the House where, as the current Speaker, he held a great deal of respect and influence. This power held even after his defeat, and it was clear to all parties that Clay would have an enormous amount of influence in deciding the next president. His natural inclination would be to support Adams, who Clay disliked personally, but shared views with on government intervention (Remini 1991). After a meeting with Adams, Clay announced his support and the endorsement swung the election. The Kentucky congressional delegation, despite instructions from the state to vote for Jackson, switched its support to John Quincy Adams. Another state that votes for Clay, Ohio, also gave their support to Adams. After Clay's elevation to Secretary of State under Adams, Jackson and his supporters dubbed the exchange a "corrupt bargain." Despite this acquisition, there is substantial evidence suggesting sincere voting on behalf of members of the Electoral College (see e.g. Jenkins and Sala 1998, and Carson and Engstrom 2005).

[5]Gamm and Smith (2000) argue that the centralization of this power was done with hopes that the presiding officer could help the chamber overcome the collective action costs imposed by the previous method of balloting.

[6]Story (1833, 516-517) went on to note that "[The power to call members to order] had never been doubted, much less denied, from the first organization of the Senate; and its existence had been assumed, as an inherent quality, constitutionally delegated, subject only to such rules, as the Senate should from time to time prescribe."

[7]Wilentz (2005) notes that only four other countries ended up sending delegates to the Panama Congress. He goes on to argue that the Congress "was reduced to drafting hastily some common defense treaties, none

of which would come into effect (Wilentz 2005, 262)."

[8]Article 2, Section 1, Clause 1 of the Constitution originally specified that the candidate finishing second in the Electoral College would be elected vice president. This led to a controversial "tie" in 1800 between Democratic Republicans Thomas Jefferson and Aaron Burr. In response to this, the 12th Amendment was adopted four years later (Milkis and Nelson 2008). It specifically declared that "[electors] shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President." It was not until later that it became common for electors to vote for the same party's presidential and vice presidential nominees.

[9]See *Register of Debates*, 20th Congress, February 11-15, 1828, 278-341 for this discussion. Another outcome of Calhoun's refusal to call Randolph to order was that the speech led to a duel between the senator and Secretary of State Henry Clay. During the speech, Randolph had compared Clay to "Judas" and denounced him as a "blackleg," or a swindler (Hecht 1972, 43). Clay promptly issued a challenge to the Virginian, which he accepted. While the two men missed on both shots, Clay's second round went through Randolph's coat (Benton 1897, Kirk 1951).

[10]Gamm and Smith (2000) note that they returned this power to vice president briefly in 1837. This was during the vice presidency of Richard M. Johnson. Johnson's vice presidency was unique, however, in that he was the only vice president elected directly by the Senate. Johnson lacked a majority of Electoral College votes, and the 12th Amendment specifies that "if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President." Thus, the chamber had no issue in temporarily centralizing power under him.

[11]Other senators echoed Bell's point. Senator Ezekiel Chambers (Adams Republican - MD) argued that "the Constitution had clearly indicated the powers of our presiding officer by making him such. *Ex vi termini*, he possessed the powers usual and proper to be exercised by a presiding officer, according to the usage and notions indulged by those who had given him this character (*Register of Debates*, 27th Congress, February 12, 1841, 320)." See speeches by Samuel Augustus Foot (Adams Republican - CT) and Josiah Stoddard Johnston (Adams Republican - LA) for the argument that it was necessary for some presiding officer to enforce order (*Register of Debates*, 27th Congress, February 13, 1841, 325-327; *Register of Debates*, 27th Congress, February 13, 1841, 328-338).

[12]Each issue had its own constituency within the Republican Party. Members representing northeastern banking and manufacturing interests wanted the tariff (Stephenson 1930; Sage 1956); Westerners greatly wanted to pass silver legislation (Elliot 1983; Ellis 1941); and finally, older members from the Reconstruction coalition wanted to see voting rights legislation (Hoar 1903).

[13]The motion to consider garnered complete support from the Republicans and easily passed 42 to 32.

[14]On December 19th, Senator William M. Stewart (R-NV), a key Western swing vote, came out against the bill, arguing that "this bill ought not to pass, because it never will be enforced; because it will consolidate the Southern whites; because it will bring further misery upon the Southern blacks, and because it will increase section animosities and kindle anew the discords of the past" (Elliot 1983, 127). A few weeks later, Senator Henry Teller (R-CO) expressed concern regarding how much time the bill was taking up, suggesting that "there has become a fixed notion that the election bill kept before the Senate by the friends of the bill for the purpose of staving off much-needed and much-demanded financial legislation (*Congressional Record*, 51st Congress, December 30, 1890, 881)."

[15]Morton did not have an institutional connection to the Senate, nor did he have any experience with parliamentary procedure. He had served in the House of Representatives for two years and as Minister to France for four, but never in the Senate (McElroy 1975).

[16]See *The Washington Post*, January 1, 1891, "A Caucus on Monday."

[17]Recognition was of particular significance in the House as well. Towards the end of the 20th century, Speakers exercised complete discretion over who would or would not be recognized. In 1910, moderate Republicans joined minority party Democrats in revolt against Speaker "Uncle" Joe Cannon (Binder 1997). The revolt decentralized some of the powers the Speaker acquired after the passage of Reeds' Rules. One of the rules adopted formally limited the Speaker's ability to arbitrarily recognize members (Tiefer 1989).

[18]The president suspended the writ in 1861 to deal with the presence of Confederate sympathizers in the border slave states of Maryland, Delaware, Kentucky and Missouri. The order – which was given during a congressional recess – essentially gave General Winfield Scott power to arrest and detain individuals at will (Sellery 1907; Weber 2006). Earlier during the debate, Vice President Hannibal Hamlin (R-ME) was forced to use his power to call members to order (Burdette 1965). A drunken Senator William Saulsbury (D-DE) had taken to the floor and delivered an offensive attack on the president that he concluded with the claim that he "never did see or converse with so weak and imbecile a man as Abraham Lincoln, President of the United States (*Congressional Globe*, 37th Congress, January 27, 1863, 549)." Hamlin ordered Isaac Bassett, the Sergeant-at-Arms, to detain Saulsbury. The Delaware senator pulled a revolver, leveled it at Basset and threatened to shoot him on the spot. Saulsbury was nearly expelled over the incident.

[19]Pomeroy was a first term senator with very little knowledge of chamber procedure. He would later be accused of bribing Kansas state legislators in exchange for his seat. This reportedly made him the basis for the character of Senator Dilworthy in Mark Twain's 1873 novel, *The Gilded Age* (Bogue 1981).

[20]Schuyler Colfax (R-IN) served as Speaker of the House during the 38th through 40th Congresses and as vice president during Ulysses S. Grant's first term.

[21]Scholars note that this quote was paraphrased. Garner's exact quote likely used a different four-letter

word in place of "spit" (Goldstein 2008; Milkis and Nelson 2008).

[22]As we will discuss later, by this point rulings on questions of order were largely deferred to the Senate parliamentarian, who become prominent in the 1920s (Madonna 2007). Garner had a particular affinity to parliamentarians and was quoted as telling Speaker Sam Rayburn to keep the House Parliamentarian Lewis Deschler, "by his side at all times (King 1997, 83-84)." Contemporary senators also noted the important role played by parliamentarians on questions of order during the period. Senator Elbert Duncan Thomas (D-UT) noted that when Garner would have him serve as president *pro tempore* "the parliamentarian took good care of us whenever a question of procedure arose (quoted in Timmons 1948, 189).

[23]The vice president also occasionally used recognition selectively. Timmons (1948) argues that one senator Garner often refused to recognize was Huey Long (D-LA). When approached by both Long and Robert La Follette (R-WI), Timmons (1948, 187) quotes Garner as telling Will Rogers that he sometimes thinks "the hearing in my right ear and the vision in my right eye isn't as good as it used to be. Long sits on my right and La Follette on my left. A man has to be fair in this job and bad vision or hearing can handicap him. I may not be able to hear or see Huey this morning."

[24]An additional ruling of consequence by Garner was related to the appointment of members to conference committees. The practice had been that the presiding officer appointed the conferees in accordance with the leaders' wishes. In 1935, Garner declared that "when he was authorized by the Senate to appoint conferees on a bill, it would thereafter be his policy to exercise some discretion in their selection (Riddick and Frumin 1992, 455)."

[25]Garner was more conservative than Roosevelt and broke sharply with the president during his court-packing plan in 1937 (Timmons 1948; Hatfield 1997; Byrd 1988). This was evident by the thumbs down he gave the plan when it was formally introduced in the Senate (Hatfield 1997). This disagreement spilled out into other policy areas, leading Roosevelt to drop Garner from the ticket in 1940. Garner then unsuccessfully challenged the president in the Democratic primary.

[26]Rule XX of the United States Senate specifies that "a question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate."

[27]This effectively eliminated cloture in the Senate as a small number of bill opponents could hold the floor indefinitely on the motion to proceed. Thus, the underlying bill would never make it to the Senate floor (Binder and Smith 1997).

[28]The ruling occurred during consideration of another anti-poll tax bill. Southern Democrats, under the leadership of Russell, were obstructing the motion to proceed to consideration of the bill. Majority Leader

Kenneth Wherry (R-NE) filed a cloture petition. Russell raised a point of order that cloture did not apply to motions to proceed. Vandenberg upheld the point, arguing that "the existing Senate rules regarding cloture do not provide conclusive cloture" and concluding that "the Senate has no effective cloture rule at all (*Congressional Record*, 94th Congress, August 2, 1948, 9603)." An appeal was taken by Senator Robert Taft (R-OH), but dropped after some debate. Truman spoke out in favor of reforming the way Rule XXII was applied shortly afterwards (Mann 1996).

[29]Majority Leader Scott Lucas (D-IL) filed for cloture on the motion to proceed to the resolution. Senator Richard Russell (D-GA) raised a point that this was out of order given Vandenberg's ruling. Barkley rejected Russell's point, arguing that he "could not believe that the Senate in debating this rule intended to freeze its own rules in perpetuity, so that it could never vote to change them so long as there was a determined group of senators opposed to any change, who were willing to prevent the Senate from even considering a change in the rules except by unanimous consent, and it would almost amount to that (*Congressional Record*, 95th Congress, March 10, 1949, 2175)."

[30]The threshold for cloture was raised from a two-thirds majority of senators present and voting to two-thirds of the Senate. The compromise passed on March 17th, by a vote of 66 to 29.

[31]While Nixon's ruling was not immediately binding, it did have some important consequences for Senate procedure. Two years later, Johnson proposed a compromise resolution which was motivated – in part – by Nixon's position on the issue and an influx in Democratic senators (Binder and Smith 1997). The resolution declared the Senate's rules would "continue from one Congress to the next (Gold and Gupta 2005, 231)." In exchange, the cloture threshold was lowered to two-thirds present and voting and applied to changes in the chamber's rules (Binder and Smith 1997).

[32]The filibusters were undertaken in response to the perceived ideological conservatism of the judges. The exact number obstructed varied throughout the course of the Bush presidency, but at the apex of the conflict it was over eight nominees. The most controversial nominations were that of Miguel Estrada and Janice Rogers Brown, nominated to the District of Columbia Court of Appeals, and Priscilla Owen, nominated to the Sixth Circuit.

[33]The nuclear option label stemmed from threats by Minority Leader Harry Reid (D-NV) "to bring the chamber to a standstill on all non-national security issues" if the procedure was enacted (Kane 2005). Republicans countered by arguing that Democratic filibusters of judicial nominees already constituted "nuclear" behavior (Hulse 2003).

[34]Article 2, Section 2, Clause 2 states that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public

Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."

[35]The primary source used in compiling this list is Bell and Overby's (2007) count, which updates an earlier list provided by the Congressional Research Service. Using their criterion, we added several filibusters from Binder and Smith (1997), Wawro and Schickler (2006), and Burdette (1940). First, the number of filibusters may or may not be directly related to problems stemming from a lack of control of the agenda. A successful filibuster may not kill just the underlying bill, but block other pieces of legislation that would have been considered later in the session. Raw counts cannot account for this. Second, threats of filibusters often successfully block bills from the floor. These are also unaccounted for. Third, determining whether a filibuster has occurred is fairly arbitrary. Some scholars will define a filibuster as an attempt to defeat a bill, others an attempt to delay a vote or simply extract concessions. Finally, determining when a filibuster has taken place requires a substantial amount of subjective judgment. While some scholars define a filibuster as an outright attempt to kill a bill, others will count attempts to delay the vote or extract concessions as filibustering. This problem is more serious in early Congresses. In recent years, sources like Congressional Quarterly give detailed summaries of legislation that make identifying filibusters easier. For the 19th and much of the 20th centuries, scholars like Burdette had to rely on less reliable sources.

[36]These votes were identified by numerous different keyword searches the *Congressional Globe*, *Congressional Record*, *Annals of Congress*, the *Register of Debates* and *Senate Journal* and back-checked using the indices of the *Congressional Record*. Additional robustness was provided by keyword searches of voteview (www.voteview.com, see Poole and Rosenthal 1997 for more.) From the 1st to the 24th Senate there were only 5 votes stemming for chair rulings – these were omitted from the dataset to alleviate some problems in determining party affiliation during these Congresses. To mitigate problems stemming from disappearing quorums, votes that were decided unanimously or did not yield a quorum were excluded from the analysis.

[37]See Bach 1991, 1997 for more on this. Additionally, as Model 2 demonstrates, omitting observations related to amendments does not alter the substantive findings of the model.

[38]This finding holds even when the partisan affiliation of the vice president is controlled for. There were a mere thirteen contentious rulings on questions of order when the vice president was a member of the minority party. In all thirteen cases, the question was raised by a member of the minority. When the model is fit using only instances where the presiding officer shared the same party affiliation as the majority party, the substantive results are unaffected.

[39]Indeed, much of the normative debate over procedural reform takes for granted that reform would improve chamber efficiency to some degree. Rather, the debate focuses on two somewhat related questions. First, how much more efficient would the chamber be? And second, is a more efficient Senate good for the government? Specifically, scholars have suggested that obstruction forces senators to compromise on

substance and that this acts as useful check on majorities (see e.g. Binder and Smith 1997; Binder et al. 2007; Wawro and Schickler 2004; 2006 for more on this).

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**Figure 1: Observed Filibusters per Senate**

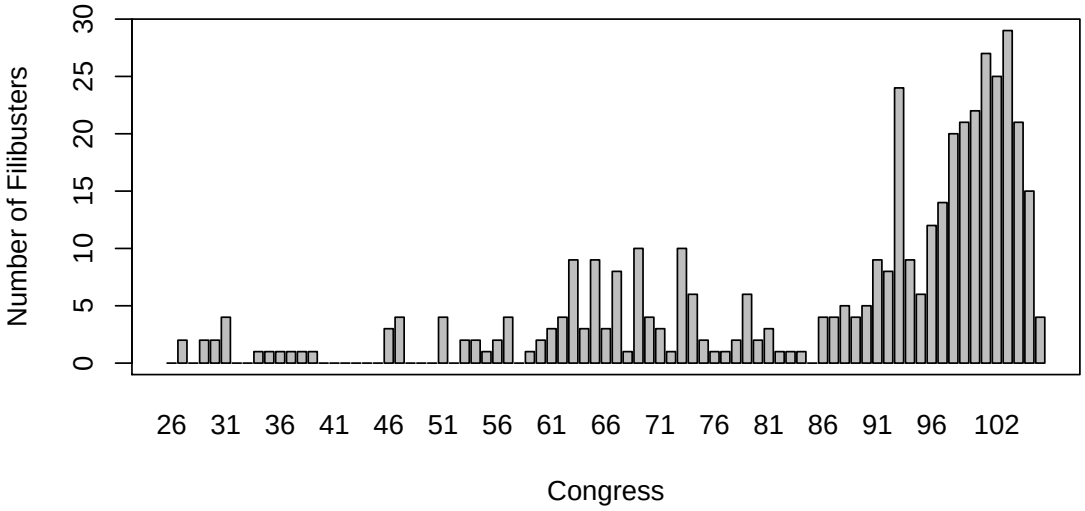

**Figure 2: Contentious Rulings of the Chair per Senate**

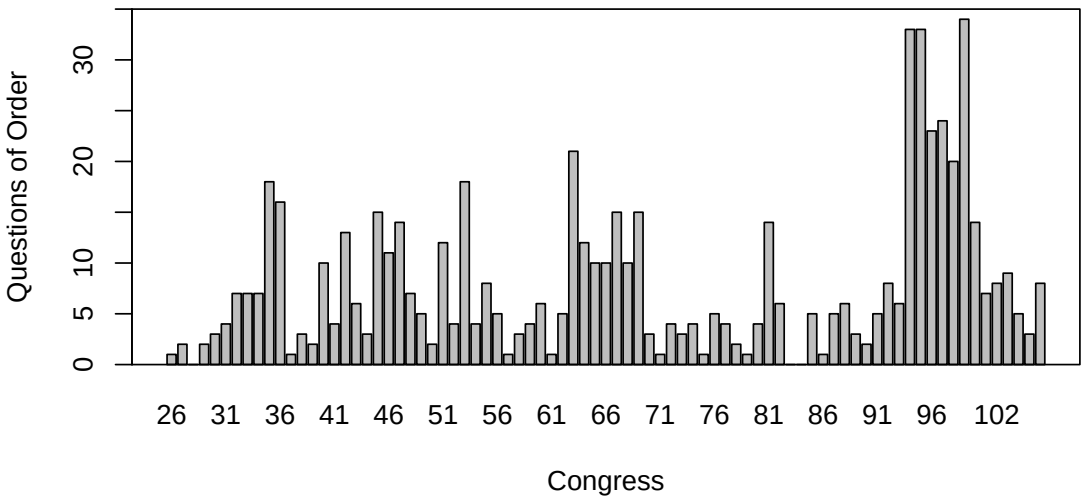

**Table 1: Logit Models of Chair Rulings Favorable to the Majority Party**

| **Covariate** | **Full Model** | **Model 2** | **Model 3** |
|---|---|---|---|
| Vice President | -0.630* | -0.793* | -0.640* |
| | (0.232) | (0.262) | (0.288) |
| Amendment | 0.919* | 0.393 | - |
| | (0.210) | (0.232) | - |
| Majority Party Strength | 0.038* | 0.033* | 0.038* |
| | (0.010) | (0.011) | (0.013) |
| Parliamentarian | -0.467* | -0.588* | -0.820* |
| | (0.216) | (0.240) | (0.284) |
| Southern | -0.301 | -0.398 | -0.199 |
| | (0.220) | (0.239) | (0.293) |
| Constant | 0.197 | 0.126 | 0.385 |
| | (0.381) | (0.419) | (0.484) |
| Observations | 674 | 403 | 274 |
| Prob $> \chi^2$ | 0.000 | 0.000 | 0.002 |
| Pseudo $R^2$ | 0.074 | 0.046 | 0.052 |

Note: $*$indicates significance at the p = .05 level. Coefficients with robust standard errors listed in parentheses. Model 1 is the full model; Model 2 is restricted to only observations where the chair issued a ruling; Model 3 is restricted to only observations where the question did not pertain to an amendment.

**Table 2: Predicted Probabilities of a Favorable Ruling for the Majority Party**

| | **Pre-Parliamentarian** |
|---|---|
| Senator | 0.817 |
| | [0.752, 0.881] |
| Vice President | 0.704 |
| | [0.609, 0.798] |
| Difference | -0.113 |
| | [-0.199, -0.028] |
| | **Post-Parliamentarian** |
| Senator | 0.736 |
| | [0.661, 0.812] |
| Vice President | 0.598 |
| | [0.485, 0.711] |
| Difference | -0.138 |
| | [-0.199, -0.028] |

Note: Predicted probabilities were estimated holding the amendment and southern dummies to 0 and majority party strength to its mean. Confidence intervals for the predicted probabilities were estimated using the SPost series of commands implemented in Stata by Long and Freese (2006).