Procedural Uncertainty, the Parliamentarian, and Questions of Order in the United States Senate

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Abstract:

Scholarship on the United States Senate has demonstrated the pivotal role the presiding officer can play when asked to interpret the chamber's rules and precedents. In this study, we broadly evaluate how questions of order are arbitrated in the United States Senate. We find that while short-term partisan interests play an important role in determining how presiding officers interpret rules and precedents, the emergence of the Senate parliamentarian in the 1920s served to reduce uncertainty regarding procedural matters in the chamber. This has led to fewer instances of partisan rulings on questions of order and raised the costs of executing a drastic change in Senate procedure via unorthodox procedures.

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Elected to fill a vacant Senate seat in 1825, John Randolph (Jacksonian Republican-VA) had already developed a reputation for being a lengthy and caustic speaker. By 1826, Randolph had taken to occupying the floor on a daily basis, often for hours, with lengthy, dull speeches highlighted only by the occasional offensive language. These speeches served the dual purpose of slandering the personal attributes of political opponents and delaying their legislative proposals. After one of the most pointed of these diatribes, directed at then-President John Quincy Adams, many senators were demanding the Senate's presiding officer call Randolph to order. The presiding officer, Vice President John C. Calhoun (D-SC) was also a political opponent of Adams. He refused to take action against Randolph and allowed him to speak unabated. In a letter to the National Journal, Adams (or a sympathizer), writing under the pseudonym "Patrick Henry" attacked Calhoun for his inaction (Burdette 1940; Gamm and Smith 2000). Calhoun responded by stressing the dangers of the vice president playing an active role in the Senate:

> Mark the consequences! If the Vice-President should belong to the same party or interest which brought the President into power, or if he be dependent of him for his political standing or advancement, you will virtually place the control over the freedom of debate in the hands of the Executive (from Onslow's Second Letter to "Patrick Henry", 1826 quoted in Cheek, Jr. 2003).

Over one-hundred and seventy-five years later, Calhoun's warning would sound particularly prophetic during another contentious debate over the interpretation and enforcement of Senate rules. In 2003, the Republican Party, frustrated by the filibustering of President George W. Bush's judicial nominees, entertained an unorthodox procedural option for limiting debate in the chamber. The procedure, which came to be known as the "nuclear option," would work as follows: A senator favoring the confirmation of the judicial nominee would raise a point of order that the Senate must reach a vote on nominations in order to execute its constitutional "advise

and consent" power. The presiding officer (most likely Vice President Dick Cheney) would sustain the point of order, thus establishing a new precedent limiting debate on nominations. An opponent of the ruling could appeal Cheney's decision and that appeal would be debatable. However, supporters would be able to offer a non-debatable motion to lay the appeal on the table. This would allow the majority to proceed to an immediate vote on the nominee (Koger 2008).[1]

At the time, Democrats aggressively criticized the Republican proposal. Minority Leader Harry Reid (D-NV) called it a "… raw abuse of power fueled by a misreading of history *Congressional Record*, 109th Congress, December 8, 2006)."[2] Further, he argued Cheney's ruling would be contrary to the recommendation of the Senate parliamentarian, the non-partisan expert charged with advising the presiding officer on questions of chamber procedure (Preston 2005). Republicans countered by arguing that they held a majority of seats in the chamber and should be allowed to govern. A last minute compromise on the nominations ended the controversy, but not before another lengthy and serious debate was entertained regarding the proper role of obstruction in the Senate.

The preceding two episodes underscore two important points about policy-making in the United States Senate. First, they highlight the stability of the chamber's rules and procedures. Senators were free to speak unabated and obstruct the passage of key proposals in the early 19th century. Nearly two centuries later, chamber minorities still retained the ability to block bills and measures supported by Senate majorities. Second, the exchanges also demonstrate the potentially pivotal role played by questions of order. With favorable rulings from the presiding officer, majorities can successfully end debate and bypass obstruction through an assortment of unorthodox procedural maneuvers. Even when an unfavorable ruling occurs, under certain

circumstances majorities can still bypass obstruction and enact important, limiting precedents. Recent work by political science and legal scholars has argued that the majority's ability to overcome supermajority debate rules through favorable rulings on questions of order has been credible enough to have significantly constrained the way individual senators and parties exploited their procedural rights over time (Wawro and Schickler 2004, 2006; Gold and Gupta 2005). Despite this theoretical power, obstruction has grown exponentially in the modern Senate (Binder et al. 2007). Moreover, there is very little scholarly work examining how questions of order are ruled upon in the United States Senate.

In this study, we broadly evaluate how questions of order are arbitrated in the United States Senate. We argue that in the early chamber the political costs of employing favorable rulings from the presiding officer was much lower due to high levels of uncertainty regarding the proper interpretation of Senate precedents. The emergence of a seemingly minor institution, the Senate parliamentarian, served to reduce uncertainty regarding procedural matters in the chamber, leading a more knowledgeable chamber membership. This served to increase the stability of chamber procedures, leading to fewer instances of partisan rulings on questions of order. An empirical examination of all rulings by presiding officers that yielded a recorded roll call vote confirms this intuition. We conclude by arguing that this increase in procedural knowledge represents an overlooked, yet important, cost for modern Senate majorities seeking to bypass obstruction.

Questions of Order

Unlike the House of Representatives, the United States Senate does not adopt new rules at the start of each session. The chamber operates as a "continuing body" and its standing rules carry over from one Congress to the next. This feature of the chamber has several important

consequences. First, any resolution seeking to alter existing procedure must be considered under established chamber rules. Thus, any proposed significant alternation to the Senate's formal debate rules will likely be met with obstruction. Second, as the body rarely recodifies its standing rules, Senate procedure is largely governed by the body of precedents formed by rulings on previous procedural questions (Den Hartog and Monroe 2010).

Senate precedents are established by decisions on points (or questions) of order. Frequently, questions of order touch on the two most unique institutional features of the Senate: the right to unlimited debate or the right to offer non-germane amendments (Bach 1989). Decisions on these questions can constrain obstructive senators as well as significantly alter the substantive content of legislation. Accordingly, when a precedent is established, it can have both important long-term procedural and short-term policy consequences.

Questions of order are ruled upon by the Senate's presiding officer. Article I of the Constitution decrees that the vice president will serve as the president of the Senate, and in his absence the Senate will choose a president *pro tempore*.[3] Unlike the House Speaker, the Senate has never granted the presiding officer a wide range of power (Gamm and Smith 2000).[4] Most of the chamber's limited collective decision-making authority has been allocated to committees and parties. Of the powers the presiding officer does possess, ruling on questions of order is the most substantial.

When a question of order is presented to the chair, he or she can choose to uphold it, reject it, or submit it to the floor for consideration by the full chamber. Questions of order that the chair rules upon are subject to an appeal from the full Senate. Rulings by the presiding officer carry with them a great deal of legitimacy, and while they can be overturned by a simple majority, successful appeals are rare in the Senate (Riddick and Frumin 1992). If a question is

not submitted or appealed, the presiding officer's ruling stands. In addition to providing legitimacy, there are important procedural advantages for senators who have their point of order upheld, as opposed to submitted or rejected.

Appeals of rulings and submitted points of order are generally debatable. However, in both instances the underlying measure can be subject to a non-debatable motion to table that requires only a simple majority to pass. This is the impetus behind the nuclear option.[5] If an appeal is successfully tabled, the ruling of the presiding officer is upheld. If a submitted point of order is tabled, than that point is rejected. Thus, if a member was seeking to quickly end a filibuster, or simply take an obstructive member off the floor, that member would need the chair to uphold the point of order to end the debate. Moreover, senators attempting to rectify perceived rules infractions would also be advantaged by having their point of order upheld. The next section demonstrates this by briefly evaluating several historical episodes.

Applying Chamber Rules

The episodes detailed in the introduction are just two of many instances where majorities sought to utilize a supportive presiding officer to alter or bypass unfavorable chamber rules. These cases have important short-term policy implications even when they lack the longer-term procedural ramifications of the nuclear option. For example, Calhoun's refusal to call Randolph to order occurred during debate over the United States participation in the Panama Congress. The Panama Congress was an opportunity for the United States to negotiate lower tariffs on American products entering Central and South American countries, and it was a central component of the Adams administration's agenda. By failing to call Randolph to order, Calhoun's actions not only led to an open fissure between him and the President, but also allowed the Randolph obstruction to kill the United States involvement in the Congress.[6]

Wawro and Schickler (2004, 2006) have argued that arbitrary chair rulings have played an important role in the Senate's development. The authors provide several examples of incidents where they claim senators relied on favorable rulings on questions of order to constrain excessive debate. An example of such an episode occurred during consideration of the Lecompton Bill in 1858. The Lecompton Constitution was written during a meeting of pro-slavery Kansas state legislators in 1857. Free-soil Kansans boycotted the meeting and the resulting document was highly supportive of slavery in the new state. Senate Democrats and President James Buchanan (D-PA) strongly supported the recognition of the constitution. Minority party Republicans, who controlled just 20 of the chamber's 66 seats, opposed the measure and sought to delay or block its passage.

During an all-night session on March 13th, the minority made 20 motions to adjourn the chamber. After another motion to adjourn was made by Senator William Pitt Fessenden (R-ME), presiding officer John Slidell (D-LA) ruled it out of order because senators were being summoned to make a quorum. Senator Hannibal Hamlin (R-ME), one of the longest serving members in the Senate, argued that, "the practice has been the other way always (*Congressional Globe*, 35th Congress, March 15, 1858)." Fessenden appealed Slidell's ruling but it was quickly tabled on a nearly straight party-line vote. The ruling was important not just because it blocked the minority's ability to offer obstructive adjournment motions during quorum calls, but also because it served to remind the minority of the power the majority had over the rules of debate. Later in the evening, Senator Robert Toombs (D-GA) took the floor and threatened the filibustering minority with a rules change, arguing that "nothing could be done until the business of the House [the Senate] is put in the power of the majority by the previous question motion

(*Congressional Globe*, 35th Congress, March 15, 1858, 121)." Wawro and Schickler argue that this threat to change the rules facilitated the eventual passage of the Lecompton Bill.[7]

Perhaps the most famed episode involving the attempted usage of chair rulings to overcome obstruction occurred during consideration of the Federal Elections Bill of 1890.[8] The bill is arguably the most celebrated episode of obstruction in the history of the United States Senate. The central provision of the bill was to make federal circuit courts, rather than state governors, the final arbiter of congressional election procedures (Welch 1965). This was seen as necessary to ensure the voting rights of Southern blacks. Those rights had been under constant assault by Southern officials and residents since the end of Reconstruction. As former Democratic Senator and Governor of South Carolina, "Pitchfork" Ben Tillman put it: "We took the Government away. We stuffed ballot boxes. We shot them. We are not ashamed of it" (quoted in Hoar 1903, 150). Not surprisingly, senators representing Southern states vowed to kill the measure in the Senate.

Northeastern Republicans, the Federal Elections Bill's primary supporters, sought to utilize favorable rulings from Vice President Levi Morton (R-NY) to overcome the obstruction. This was a logical strategy as House Republicans had overcome obstructive minorities in that chamber through comparable procedures earlier in the session. The procedure involved a series of rulings by then-Speaker of the House Thomas Brackett Reed (R-ME) designed to overcome disappearing quorums and give majorities more direct control over the legislative process (Binder 1997; Lawrence 2004).[9] These precedents, known as Reed's Rules, ushered in an era of strong party control in the House (Binder 1997; Lawrence 2004).

Morton had limited experience on matters of parliamentary procedure and his rulings came under a great deal of scrutiny from both sides of the debate. He rendered five notable rulings on questions of order during consideration of the Federal Elections Bill. While none of those rulings were strong enough to outright kill the obstruction, four of them served to limit the minority's capacity to obstruct the measure in important ways.[10]

Senate Republicans had hoped to persuade the vice president to vacate the chair in favor of a more partisan member. He refused to do so and after several months of delay the Federal Elections Bill was displaced. The Senate would not seriously consider another federal voting rights bill for seventy-five years (Binder and Smith 1997). Wawro and Schickler (2006, 69-71) go on to argue that majorities utilized points of order to establish important obstruction-limiting precedents during consideration of a bill to authorize the acquisition of Cuba in 1858, a bill to readmit the state of Texas in 1870, the 1908 Aldrich-Vreeland Currency Bill and numerous other pieces of legislation. The implication from such cases is fairly straight forward: simple majorities can end or constrain debate by utilizing favorable rulings from the presiding officer. Further, the authors argue that the usage of these unorthodox procedures play an important role in explaining for the low number of manifest filibusters in the 19th and early 20th centuries.

While the Senate has retained the same unorthodox procedural mechanisms to overcome minority obstruction in the modern era, such methods have rarely been successfully employed.[11] Indeed, most reported episodes where the majority party used a favorable chair ruling to constrain debate are confined to the 19th century. This is consistent with empirical work on the use of questions of order. In his study of all 213 questions of order that led to roll call votes occurring between 1965 and 1986, Bach (1989) reports that the Senate rarely bypassed existing rules and precedents. If majorities successfully limited obstruction in the 19th and early 20th

centuries by relying on favorable presiding officers, it seems unusual that they would abandon the process in modern congresses. One possible explanation for why such unorthodox procedures have not been regularly employed in the modern Senate is that while the mechanism has been consistently available to majorities, the costs of employing that mechanism has changed over time. In the next section, we outline how early Senate majorities may have been able to exploit informational uncertainties regarding the proper application of chamber precedents.

Informational Asymmetries and the Senate Parliamentarian

The Senate parliamentarian, like his counterpart in the House, is charged with providing information on Senate procedure to the presiding officer. In the House, King (1997) argues that the parliamentarian operates as an "institutional guardian," and his neutrality is paramount in resolving parliamentary disputes. The Senate parliamentarian's role has been described in a similar way by newspapers and political observers (Hinton 1950; Drury 1955; Riddick 1978). Prior to the creation of the parliamentarian's office, presiding officers and senators lacked reliable information on chamber rules and procedures. As former parliamentarian Floyd Riddick noted, procedural support for the presiding officer "had not been crystallized quite to the extent it began to be after the parliamentarian's office was created (Riddick 1978, 63)." The first acting parliamentarian, Charles Watkins, was appointed in 1923. In his *Notes as Vice President*, Vice President Dawes details how he decided to defer to Watkins on questions of order. He claimed that he never had a ruling overturned and that this was due "chiefly" to Watkins' advice (Dawes 1935). Caro (2002) suggests that Dawes decision to defer to Watkins led other senators to begin routinely asking the parliamentarian for advice on procedural matters.

During the pre-parliamentarian era, knowledge of existing Senate precedents was held only by a select few members. This informational asymmetry likely played to the advantage of political parties. While members on both sides of the aisle could turn to their procedural experts on important questions of order, many of the existing precedents were complicated and ambiguous. Thus, without a neutral interpreter, there was a great deal of uncertainty as to who was correct. Criticism from media outlets or observers of the Senate was likely mitigated, at least in part, by this uncertainty.

The decision to defer to a formal parliamentarian's office in the 1920s seems somewhat odd given that questions of order can bear directly on senators' ability to offer non-germane amendments and have access to unlimited debate. As such, it would seem likely that presiding officers and majorities would want to exercise routine control over them. There are, however, some important possible explanations for why majorities would want to utilize a neutral arbiter on matters of parliamentary procedure. First, as Gamm and Smith (2000) suggest, arbitrary rulings may have been strongly related to the lack of access to parliamentary expertise. The presence of a formal officer charged with providing expertise on procedural questions would certainly alleviate this problem. Thus, there would be no need to turn to fellow partisans for cues on how to rule.

Second, majorities may be willing to sacrifice the short-term partisan gains resulting from a favorable ruling for long term procedural stability. Arbitrary rulings that could be used to limit minority opposition offer today's policy decisions no security in the future when a new majority may be in place. This is something early Senate minorities were quick to point out when faced with a potentially important question of order. For example, Senator James Doolittle (R-WI) informed a Democratic opponent during an 1859 filibuster that although "[he may] to-day be

with the temporary majority, that the time is coming when the same rule that they prescribe now, may be prescribed to them, under circumstances when it may be not easy for them to bear it *Congressional Globe*, 35th Congress, February 25, 1859)." Similarly, during the Aldrich-Vreeland Currency Bill filibuster, Senator Robert La Follette (R-WI) reminded the majority that "every precedent you establish to-night will be brought home to you hereafter (*Congressional Record*, 60th Congress, May 29, 1908)."

Third, majorities may also seek to avoid conflict within their own party on questions of procedure. Scholarship on the House of Representatives has argued convincingly that when the majority party is large and ideologically cohesive they are more likely to centralize power (Binder 1997). Conversely, small and ideologically heterogeneous parties are likely to decentralize parliamentary rights. This logic should also apply in the Senate. Figure 1 plots the strength of the majority and minority parties in the Senate from the 35th to 108th congresses. Following Binder (1997), the variable is measured by multiplying a party's Rice cohesion score by their percent seat share. The figure demonstrates that the Republican majorities during Dawes' vice presidency were some of the weakest in history.

[Figure 1 Here]

In sum, there are several important reasons for why a presiding officer would be inclined to start deferring to a formal expert. Once this practice was initiated, deviating from it would be costly. Prior to the establishment of the office, presiding officers deliberately seeking to circumvent chamber rules could rely on an uninformed rank and file membership to mitigate the political effects of a partisan ruling. Simply put, most senators would be uncertain a ruling was inconsistent with existing chamber practice. Once the office was established, assistance on parliamentary questions was available to all senators. With such information, it would be easier

for rank and file members to identify and draw attention to partisan rulings issued by the presiding officer. Lawrence (2004) demonstrates that a decrease in informational asymmetries marked by the publication of Hinds' precedents in 1899 led to less arbitrary behavior by the Speaker in the House of Representatives.[12] Such an argument is also consistent with theoretical work done in political science and economics that suggests that once an institution has been selected, it can difficult to exit from (North 1990; Pierson 2000; 2004). In the case of the nuclear option, Minority Leader Reid and chamber Democrats were quick to argue that Cheney's ruling would be inconsistent with the parliamentarian's opinion (Preston 2005).

Given this, we should expect to see that the link between partisanship and rulings on questions of order be conditional on the presence of the parliamentarian. We evaluate this hypothesis using chair rulings on all questions of order that received recorded roll call votes in the Senate. The next section describes both data and methods.

Enforcing Chamber Order

To examine what influences chair decision-making on questions of order, we collect data on chair rulings on such questions. Bach's study, which collected data from 1965-1986, found 238 roll call votes derived from chair rulings (1989). This accounted for roughly 2.4% of all roll call votes in that era. This study expands Bach's dataset to all chair rulings that resulted in votes from the start of the 26th Senate (1839-1841) to the end of the 106th (1999-2001). These votes were identified by numerous different keyword searches of voteview (www.voteview.com), the *Congressional Globe*, *Congressional Record*, *Annals of Congress* and *Senate Journal* and back-checked using the indices of the *Congressional Record*.[13] This yielded 674 observations, or 8.28 rulings per Senate. To maximize the usefulness of these data, however, we distinguish the motivations for first, raising a question of order, and second, for appealing the chair's decision.

There are at least three reasons for raising a question of order. The first, and most obvious, is to rectify a perceived rules infraction that would lead to negative and important policy consequences. Rectifying infractions occurring on matters of little substance are unlikely to be worth the time and energy. Second, senators may offer a question of order to bypass the difficulties of garnering a supermajority to pass a bill or amendment. Third, they may do so to block or delay the passage of unfavorable legislation. Forcing a roll call vote on a question of order takes up time, and also provides minority coalitions an opportunity to demonstrate the lack of a quorum.[14]

As the motivation behind rising points of order for the purposes of demonstrating the lack of a quorum are substantially different from other questions, we attempt to mitigate their influence by dropping obvious examples and controlling for those factors that would increase the likelihood of delay. To do so, we exclude votes that result in a "no quorum" and those decided unanimously. For observations that met these qualifications, we went through the *Register of Debates*, *Congressional Globe*, *Congressional Record* and *Senate Journal* and recorded who the senator was that offered the question of order, who was serving as chair at the time and what the ruling was. We recorded 640 questions of order that resulted in roll call votes.

Fitting a Model of Chair Rulings

To examine what factors influence chair rulings in the Senate, we fit a multinomial logit model. The dependent variable is coded (1) if the chair upholds the point of order, (0) if the point of order is submitted to the Senate or (-1) if the point is rejected. Upheld points provide members with an increased source of legitimacy. Moreover, questions of order submitted to the Senate are generally subject to filibusters and as such, senators would prefer the chair uphold their point.

Scholars have presented a wide array of qualitative evidence demonstrating that Senate majorities can gain substantial parliamentary advantages by utilizing favorable rulings by the presiding officer on questions of order. Such rulings can help majorities alter or bypass restrictive chamber rules and precedents. They can also serve as a warning to obstructive minorities that such rules can be changed. As such, the expectation is that sharing the same party label as the presiding officer would increase the likelihood for a member's point of order to be upheld as opposed to being either submitted or rejected. Members who do not share the presiding officer's party label should be more likely to have their questions rejected rather than submitted or upheld. This relationship is accounted for by creating a dummy variable indicating that the presiding officer is in the same party as the member raising the question of order.

The decision to defer to an acting parliamentarian in 1925 likely had a significant effect on the decision-making of the presiding officer. The emergence of the parliamentarian should have provided chairs with information on chamber procedure that they had been lacking. Further, more information would be available to rank and file senators. As a consequence, presiding officers would need to be more concerned about the accuracy of their rulings being challenged. Thus, the emergence of a formal Senate parliamentarian in 1925 should have a depressing effect on the likelihood of a partisan ruling. To capture this conditional effect, we include a dummy variable for senates occurring after 1925 and also interact that dummy with the same party variable.

The multinomial logit model also features several additional control variables. First, while controversial questions of order regarding filibusters attract far more attention, debates over the order of amendments are also frequently acrimonious, can establish important precedents, and are far more common. For example, in the 104th Congress, Senate Republicans

established a precedent that rules prohibiting legislation in appropriations bills was no longer binding.[15] If an amendment to an appropriations bill is challenged as containing legislation then the senator offering the measure is likely to raise a defense of germaneness. Senate Rule XVI, paragraph 4 specifies that the presiding officer should submit such questions to the full Senate where they are to be decided without debate (Riddick and Frumin 1992).[16] Given the presence of these chamber rules, the expectation is that questions of order on amendments are more likely to be submitted than rejected or upheld. However, as rulings on the propriety of amendments have different procedural consequences, we opt to report a second model that omits these observations. Doing so allows us to better assess the robustness of our findings.

Finally, Southern Democrats like James Allen (D-AL) and Richard Russell (D-GA) gained great notoriety for their ability to use parliamentary procedure to filibuster civil rights legislation supported by a majority of their party. Accordingly, we control for the presence of a Southern Democrat during a ruling of the chair. The dummy variable is a 1 if it occurs before the 97th Congress, both the chair and the senator raising the question of order are Democrats, and one of them hails from a Southern state. This simply reflects the view that southerners offering points of order are more likely to have their points rejected.

Results

The results are presented in Table 1. As Model 2 does not alter the substantive findings, only the results of Model 1 are discussed. Of the two control variables included in the model, only the amendment variable achieves the conventional level of statistical significance.[17] Presiding officers were significantly more likely to uphold questions of order on amendments than reject them, and generally more likely to submit them to the full Senate than reject or

uphold them. This speaks to the important role long-standing formal rules can play in determining behavior.

The primary theoretical expectation was that the introduction of the parliamentarian would reduce informational asymmetries within the chamber and have a depressing effect on the likelihood of a partisan ruling. The interactive variable capturing this hypothesis is negative and significant. However, understanding the substantive implications of such a finding necessitates evaluating predicted probabilities.[18] Accordingly, Table 2 and Table 3 display the predicted probabilities of upholding and rejecting a question of order given the presiding officer's partisan affiliation and the presence of the parliamentarian.

[Table 2 Here]

Table 2 presents the predicted probabilities that a question of order is upheld, rejected or submitted given the partisan relationship of the chair and senator raising the question in the pre-parliamentarian era. As expected, sharing the same party label as the presiding officer played a significant role in determining whether or not the question of order was upheld in the pre-parliamentarian era. Holding the Southern and amendment variables at 0, the presiding officer is 30.94% more likely to uphold a point of order offered by a member of his party prior to the emergence of the parliamentarian. Consistent with this, the presiding officer is 31.89% less likely to reject points of order raised by fellow partisans. This contrasts sharply with the findings presented in Table 3.

[Table 3 Here]

Table 3 evaluates the effect of partisanship on the likelihood a point of order is upheld, rejected or submitted by the presiding officer in the post-parliamentarian era. As expected, after the emergence of the parliamentarian, chairs show less evidence of partisan bias in their rulings

on questions of order. Points of order raised by fellow partisans are no longer significantly more likely to be upheld than those raised by members of the opposition. Additionally, points raised by fellow partisans are no less likely to be rejected or submitted than those raised by members of the opposition.

Discussion and Conclusion

The results demonstrate that a shift has occurred in the manner of which questions of order are ruled upon in the United States Senate. Such a shift is important, because such rulings govern the manner in which business is conducted in the chamber. They can directly restrict a members' right to unlimited debate, as well as his ability to offer non-germane amendments. Those rights have a profound effect on the chamber's policy output.

In the 19th and early 20th century congresses, Senate presiding officers were more likely to uphold questions of order raised by fellow partisans and reject those offered by opponents. This partisan advantage allowed majorities more direct control over chamber procedures and outcomes. However, the emergence of the Senate parliamentarian - a seemingly minor institution - has had a depressing impact on the likelihood chamber rules would be interpreted in a partisan manner. After the parliamentarian was established as viable resource for presiding officers in the 1920s, the chair was no longer significantly more likely to uphold or reject a point of order on the basis of partisanship. Predicted probabilities demonstrate that opposing party members were roughly six times more likely to have their points upheld in the modern era.

These findings highlight the important role information can play in determining procedural choice. The emergence of the Senate parliamentarian served to increase the amount of reliable information available to members on procedural matters. In doing so, it also decreased the informational asymmetry between the presiding officer and rank and file senators.

This made partisan rulings more costly to enact in the modern Senate. Consequently, modern presiding officers wield a great deal less personal discretion in interpreting questions of order.

The results presented here are consistent with the argument that the costs of overcoming obstruction were far lower in early Senates (Binder and Smith 1997; Wawro and Schickler 2006). In addition to the onerous physical costs of obstructing legislation on the floor, the potential for a simple majority to change the rules through an unorthodox procedure may have further limited minorities (Wawro and Schickler 2006). More specifically, these minorities would opt to forgo obstruction in an effort to preserve their parliamentary prerogatives - essentially living to filibuster another day. Wawro and Schickler (2006) suggest this is one of several factors that accounts for the low number of observed manifest filibusters in the chamber during this period. However, the authors do not discuss why the potential for such unorthodox procedural techniques has not reined in modern obstruction.

This study suggests that 19th century senators were likely cognizant of the majorities partisan advantage on questions of order. Members sharing the same party label as the presiding officer were nearly seven times more likely to have their points of order upheld in the pre-parliamentarian era. However, partisanship was no longer a significant factor in the presiding officers' decision-making after the introduction of the parliamentarian. Thus, the parliamentarian's emergence helped stabilize the enforcement of order in the chamber. This may have insulated minority senators from the threat of partisan rules changes and indirectly contributed to the increase in chamber obstruction.[19]

A potential caveat is that the majority party can dismiss the parliamentarian. Since the retirement of Floyd Riddick, there has been a marked increase in the number of firings in the office. Evans (1999, 616) describes that "since 1981 [to 1999], the Senate parliamentarian has

been replaced with each transition to a new majority party." While the majority has not hired a parliamentarian with clear partisan sympathies, it would be feasible for them to do so.[20] Moreover, such a decision could have important implications for unorthodox procedural choice in the chamber.

Notes

[1] The term nuclear option was coined in response to the Democratic Party's assertions that they would utilize every procedural tool they had to delay and disrupt the remaining Republican agenda.

[2] Later, in the same speech he claimed the nuclear option was "… the most important issue [he had] worked on in [his] public life," and called its rejection his "… proudest moment as minority leader *Congressional Record*, 109th Congress, December 8, 2006)." Notably, this did not prevent Reid from utilizing a slightly different process involving a question of order to alter Senate procedure during the 112th Congress (Binder 2011).

[3] While the Constitution does not provide a specific guideline for the election of the president *pro tempore*, in recent decades the position has been held by the most senior member of the majority party. When the president *pro tempore* is unavailable, the Senate chooses another senator, and today the body typically operates with a rotating chain of junior members.

[4] Gamm and Smith (2000) note that the Senate attempted to grant the vice president some formal authority, notably the power to partition committee assignments. Perceived abuses by Vice President Calhoun caused the Senate to revoke this authority shortly afterwards.

[5] The ability to utilize this procedure has not been constant throughout the chamber's history. The motion to table was made non-debatable sometime between 1828 and 1841. Even after Senate practice had dictated that it was non-debatable there was much ambiguity as to whether it was in order on an appeal. In 1841, the Senate overruled a decision by Senator Willie Mangum (W-NC), declaring that it was (*Congressional Globe*, 27th Congress, August 7, 1841). The first successful table of an appeal does not occur until 1854 (*Congressional Globe*, 33rd Congress, July 31, 1854).

[6] Calhoun's ruling occurred during a period where the Vice President and President were not necessarily of the same party. 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. Additionally, by refusing to call Randolph and others to order on multiple occasions, Calhoun prolonged debate on the Panama Mission. When Randolph and others finally gave way to Adams supporters and allowed a vote, the United States had missed the conference (Malanson 2006). The episode also brought about a nearly fatal duel between Randolph and Secretary of State Henry Clay (Whig-KY). Randolph and Clay fired two rounds at each other in the duel, with Clay's second round narrowly missing the senator and hitting his coat (Benton 1897; Kirk 1951).

[7] The Lecompton Bill would pass the Senate on March 23, 1858 by 33 to 25. With the exception of four Democrats (including Stephan A. Douglas), the measure passed on a straight party line. Two weeks later, the Senate bill would be defeated in the House of Representatives and replaced with a compromise measure.

[8] The Federal Elections Bill is also often referred to as either the "Force Bill" or the "Lodge Election Bill." The former was its designation by Democrats and other bill opponents. The House version of the bill contained a provision authorizing the president to employ the army and navy to enforce judicial decisions regarding voting. Democrats and other bill opponents seized

on this feature, hence the moniker "Force Bill" (Fry 1992). The nickname stuck even after the provision was stripped from the Senate bill. The latter name takes its name from the House sponsor, Representative Henry Cabot Lodge (R-MA).

[9] Throughout the 19th century, obstruction was a problem that plagued the lower chamber (Koger 2010).

[10] The first ruling actually went against the Republicans when Morton ruled that debate was in order on an appeal (Wawro and Schickler 2006). Morton's second ruling was that a motion to table a primary amendment was in order when considering a secondary amendment. This was helpful for the Republicans by allowing them to do away with multiple Democratic amendments with just one motion. His third ruling reconfirmed that debate was not in order on a motion to table. The vice president then ruled that a senator could not yield possession of the floor to another senator except by unanimous consent. This ruling also favored the Republicans by forcing the minority to hold the floor continuously. Wawro and Schickler (2006, 79) cite to a Herald article that concludes the ruling "removed from the Democrats one of the strongest supports upon which they were leaning." However, Morton receded slightly from this ruling the next day. Finally, he overruled a point of order by Senator Isham Harris (D-TN) that claimed a Republican rules change resolution was out of order and that a motion to correct the journal must be considered first. This ruling also served to cut down on extraneous debate.

[11] This is not to say they were *never* successful or not discussed. For example, in 1977, Senate Majority Leader Robert Byrd utilized a favorable ruling by Vice President Walter Mondale to overcome a post-cloture filibuster on a natural gas price deregulation bill (Gold 2008).

[12] Dawes' emergence in the Senate predates the publication of a comparable compilation of precedents in the Senate by thirty years. This occurred in 1954 with the publication of parliamentarian Floyd Riddick's *Senate Procedure*. Moreover, the appointment of a neutral, formal parliamentarian did not occur in the House until nearly 10 years after the publication of a comprehensive set of precedents (King 1997).

[13] From the 1st to the 25th Senates 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.

[14] An example of the disappearing quorum was provided during debate on Senator Nelson Aldrich's (R-RI) resolution to limit debate in the chamber. Opponents under the leadership of George Gray (D-DE) obstructed the Aldrich resolution. During the filibuster Gray made a point of order that compelling absent senators to attendance was out of order. The chair, Senator Henry Blair (R-NH) ruled against Gray, upon which the Delaware Senator appealed and Aldrich moved to table the appeal. The motion to table was upheld 29-7, but no quorum being present, the question recurred. It passed 4 more times with no quorum present before Aldrich finally was forced to move that the Senate adjourn (*Congressional Record*, 51st Congress, January 21, 1891).

[15] The serious ramifications of this decision led the party to overturn the precedent by statute in the 106th Senate (Rundquist 1999).

[16] While it was not always strictly enforced, this germaneness rule has been included in the Senate's formal standing rules since at least 1870 (*Senate Journal*, 41st Congress, July 11, 1870).

[17] Aggregating data over a wide time interval, as well as over several issue areas, increases the potential for correlated errors. This suggests the usage of robust standard errors may be

appropriate here. While there are no noticeable effects on the significance of the parameters, the robust standard errors are slightly larger.

[18] The multinomial logit model relies on the assumption that adding or deleting alternatives will not alter the relationship between the remaining alternatives. This often referred to as independence of irrelevant alternatives. Accordingly, a Small-Hsaio test was conducted to evaluate the appropriateness of the IIA assumption. The test failed to reject the assumption that IIA holds, indicating that the multinomial logit model may be appropriate. The predicted probabilities were generated utilizing the SPost package in Stata programmed by Long and Freese (2006).

[19] Changes in the physical and political costs of engaging in obstruction are the most likely factors contributing to this change in behavior. However, given the availability and application of favorable chair rulings in the 19th century, the potential impact of the parliamentarian cannot be ruled out. For a more detailed discussion of the factors contributing to the increase in chamber obstruction see Binder and Smith (1997), Wawro and Schickler (2004, 2006), Binder et al. (2007).

[20] In 1981, parliamentarian Murray Zweben resigned before the incoming Republican majority had a chance to fire him. The Republicans choice, Bob Dove, was then replaced by the new Democratic majority with Alan Frumin. In 1995, when the Republicans came back to the majority, they reinstated Dove. Finally, in 2001, Majority Leader Trent Lott (R-MS) fired Dove and replaced him once again with Frumin (Eisele 2001).

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Figure 1: Party Strength per Senate

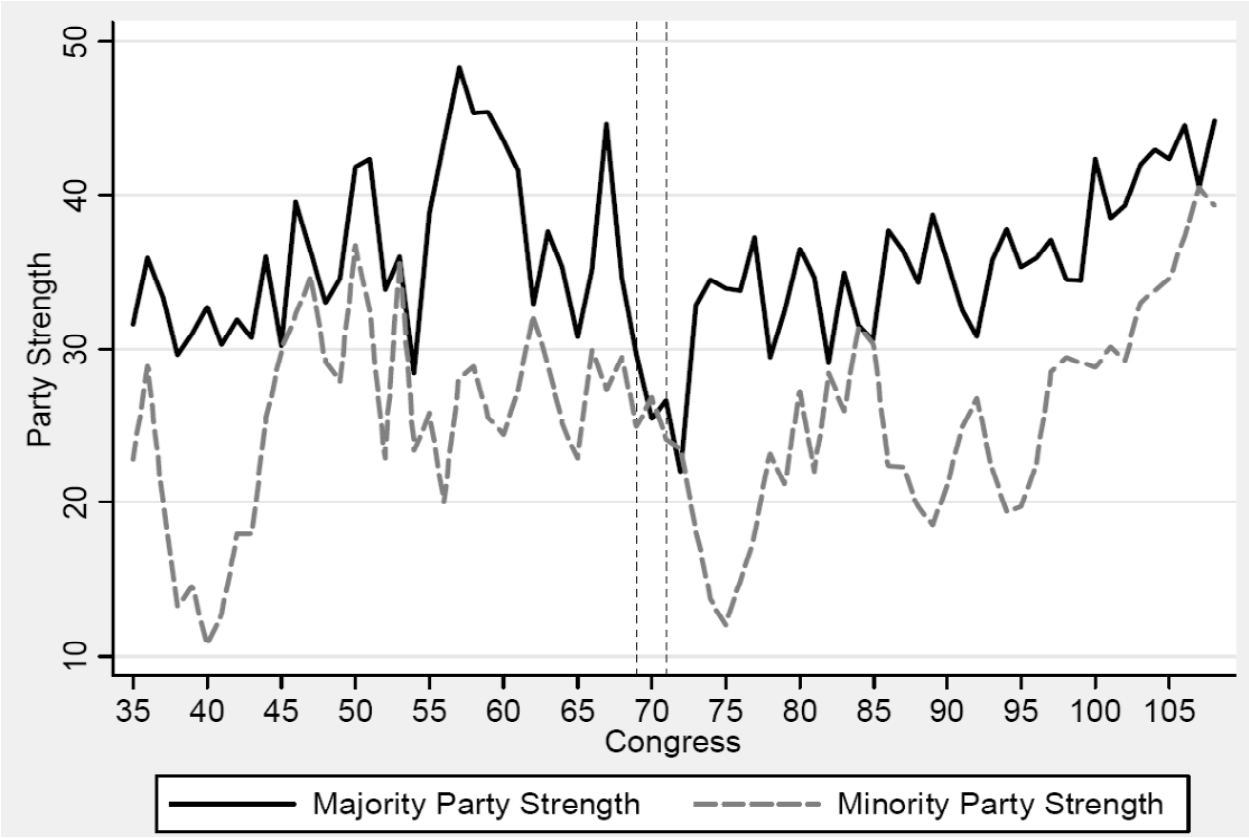

Table 1: Multinomial Logit Model of Questions of Order in the U.S. Senate

	Model 1			Model 2		
Covariates	Uphold: Reject	Uphold: Submit	Submit: Reject	Uphold: Reject	Uphold: Submit	Submit: Reject
Same Party	2.364* (0.436)	1.740* (0.392)	0.624* (0.313)	2.296* (0.506)	1.764* (0.613)	0.533 (0.492)
Parliamentarian	2.007* (0.466)	1.102* (0.423)	0.906* (0.342)	1.178* (0.587)	0.267 (0.658)	0.911 (0.483)
Same Party * Parliamentarian	-2.012* (0.543)	-1.281* (0.479)	-0.730 (0.449)	-2.119* (0.695)	-1.560* (0.796)	-0.559 (0.650)
Amendment	1.535* (0.238)	-0.714* (0.211)	2.250* (0.227)			
Southern	-0.034 (0.248)	0.135 (0.214)	-0.169 (0.244)	-0.319 (0.345)	-0.452 (0.387)	0.133 (0.333)
Constant	-2.450* (0.422)	-1.226* (0.402)	-1.224* (0.259	-1.843* (0.447)	-0.489 (0.517)	-1.354* (0.350)
Observations	640			262		
Probability > χ^2	0.000			0.000		
Psuedo R^2	0.125			0.062		

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 question did not pertain to an amendment.

Table 2: Predicted Probabilities for Chair Rulings in the Pre-Parliamentarian Era

	Uphold	Submit	Reject
Same Party	0.372 [0.276, 0.468]	0.223 [0.154, 0.291]	0.406 [0.305, 0.506]
Opposition Party	0.063 [0.016, 0.109]	0.213 [0.132, 0.295]	0.725 [0.626, 0.823]
Difference	0.309 [0.213, 0.404]	0.010 [-0.084, 0.103]	-0.319 [-0.447, -0.191]

Note: Predicted probabilities were estimated holding the amendment and southern dummies to 0. Confidence intervals for the predicted probabilities were estimated using the SPost (Long and Freese 2006).

Table 3: Predicted Probabilities for Chair Rulings in the Post-Parliamentarian Era

	Uphold	Submit	Reject
Same Party	0.356 [0.269, 0.442]	0.255 [0.179, 0.330]	0.390 [0.294, 0.485]
Opposition Party	0.271 [0.175, 0.367]	0.307 [0.206, 0.408]	0.422 [0.296, 0.548]
Difference	0.085 [-0.022, 0.192]	-0.052 [-0.156, 0.052]	-0.033 [-0.171, 0.106]

Note: Predicted probabilities were estimated holding the amendment and southern dummies to 0. Confidence intervals for the predicted probabilities were estimated using the SPost (Long and Freese 2006).