

# CRS Report for Congress

## Some Devices for Post-Cloture Delay in the Senate

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### SUMMARY

Cloture is the only device under the Senate's standing rules by which its members can end the debate on a measure, amendment, or other debatable matter. Rule XXII limits to 30 hours the total time available for further consideration of any question on which an extraordinary majority of Senators invokes cloture. Senators have various opportunities for delay by which they can attempt to consume this 30-hour period--for example, through demanding the reading of amendments, requesting roll call votes, appealing rulings of the Chair, insisting on quorum calls, and offering amendments and motions. However, recent rulings governing procedure under cloture have limited the use of these devices in the Senate today.

## SOME DEVICES FOR POST-CLOTURE DELAY IN THE SENATE<sup>1</sup>

### INTRODUCTION

The dearth of rules limiting debate on the Senate floor enables one or more Senators to delay proceedings as a means of influencing both the Senate's legislative agenda and its decisions. Senators may debate bills, amendments, and other matters at length; and they preserve this right through objections to conducting business by unanimous consent instead of by adherence to Senate rules. Under these rules, there is no procedural device by which a simple majority of Senators can end debate and bring the Senate to a direct vote on a matter.<sup>2</sup> Instead, if debate does not end by unanimous consent, the Senate can invoke cloture under Rule XXII, a device that requires support by more than a simple majority and does not compel an immediate vote on the matter being considered.

The Senate has amended the cloture rule to make cloture somewhat easier to invoke and to limit post-cloture filibusters. In its present form, Rule XXII requires a vote of three-fifths of all Senators to invoke cloture on any matter other than a proposed change in Senate rules (on which a cloture motion must be

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<sup>1</sup> This report first appeared as a CRS Special Report on October 23, 1984 and has been revised for this issuance.

<sup>2</sup> A successful motion to table does end debate, but only at the cost of disposing adversely of the matter tabled.

supported by two-thirds of the Senators present and voting). If cloture is invoked, each Senator may speak for no more than one hour thereafter (except that other Senators may yield as much as two additional hours to each of four Senators--the Majority Leaders and the majority and minority floor managers). The time for considering a matter under cloture may not exceed a total of 30 hours (except that each Senator is guaranteed the right to speak for 10 minutes, even if the 30 hour ceiling has been reached). All amendments offered under cloture must be germane and non-dilatory, and Senators must submit them in writing before the vote on the cloture motion. After cloture is invoked, amendments are not read when offered if they have been available in printed form for twenty-four hours or more. No Senator may offer more than two amendments under cloture until every other Senator has had the opportunity to offer two amendments.

The 30 hour ceiling on post-cloture consideration, as well as several provisions that were added to Rule XXII in 1979, limited the potential length (but did not eliminate the possibility) of post-cloture filibusters. Such filibusters remain possible because the time required to conduct votes and quorum calls (and to read amendments, when necessary) is not assessed against the hour of debate allowed each Senator. Consequently, it was (and is) possible for a Senator to consume hours of the Senate's time while only using minutes of his or her hour. The 1979 amendments were intended to assure that consideration of a matter did not extend beyond a total of 100 hours after cloture was invoked. Although the time required for votes and quorum calls still is not charged against any Senator's hour, it is charged against the total, which was reduced in 1986 from 100 hours to 30 hours.

The prospects for filibusters by amendment under cloture also are limited by the more stringent rules and precedents that apply under cloture and by the tendency of the Senate to enforce rules and requirements more strictly under cloture than under other circumstances. For example, it is not unusual for Senators to offer amendments that amend measures in more than one place, even though such amendments generally are not in order. Senators rarely object to this practice under normal circumstances, but there is precedent for such an amendment being ruled out of order under cloture.<sup>3</sup> From time to time, Senators also offer amendments that inadvertently do not refer to the appropriate pages and lines of the text to be amended, and other Senators normally do not object. Under cloture, the Presiding Officer has taken the initiative to rule such amendments out of order as being improperly drafted (p. 233).<sup>4</sup> More importantly, recent precedents authorize the Presiding Officer to rule an amendment out of order as dilatory or nongermane without a point of order being made and even before the amendment is read.

These developments have not prevented Senators from filibustering effectively. Although they may not be able to delay a final Senate vote indefinitely, Senators still may be able to delay the vote sufficiently. As the time and workload pressures on the Senate increase--for example, as deadlines such as a planned adjournment or the end of a fiscal year approach--the opportunities for delay still can be sufficient to achieve Senators' legislative objectives.

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<sup>3</sup> This precedent is cited on page 232 of Senate Procedure, Senate Document 97-2. Later page references in this report are citations to the same document.

<sup>4</sup> If, however, a matter on which cloture has been invoked is then reprinted for any reason, Rule XXII allows amendments to be reprinted also to conform with the new pagination and lineation. Otherwise, an amendment offered under cloture may be modified only by unanimous consent.

Depending on the circumstances, delay (or even the threat of delay) can encourage the Majority Leader not to seek floor consideration of a measure, or to set aside a measure under consideration in favor of another on which the Senate can complete action more expeditiously. The same devices also can encourage the floor managers of a measure to seek some accommodation, especially by offering substantive changes in the measure to satisfy the Senators who are delaying its passage.

#### DEVICES FOR DELAY UNDER CLOTURE

Following is a brief discussion and assessment of some of the opportunities and possible devices for delay that remain available under cloture.

#### Reading Amendments

Rule XXII requires that amendments are in order under cloture only if submitted in writing by 1:00 p.m. on the day following the filing of the cloture motion (for first degree amendments) or by one hour before the beginning of the vote on the cloture motion (for second degree amendments). Moreover, the rule states that "[a]fter cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty-four hours." The combined effect of these provisions is virtually to eliminate the need to read any first degree amendments, and to require the reading of second degree amendments only during the first hours of post-cloture consideration. During these first

hours, a Senator may demand reading of a lengthy second degree amendment, but only if it is germane and not dilatory.

### Roll Call Votes

The right of a sufficient number of Senators (a minimum of 11) to demand roll call votes is grounded in Article I, Section 5 of the Constitution. Moreover, Senators often can demand more than one roll call vote in connection with the same motion or amendment; for example, the vote on an amendment (or on a motion to table it) may be followed by a second roll call vote on tabling the motion to reconsider the vote on the amendment (or the motion to table).<sup>5</sup>

On the other hand, Senators may demand that the Presiding Officer enforce a more demanding standard for ordering the yeas and nays. By precedent, if there has been a roll call within three hours of the request for the yeas and nays, the number necessary to support the request is one-fifth of the number who participated in the earlier vote. Although Senators normally accommodate their colleagues who seek roll call votes, enforcing this precedent would make roll calls more difficult to obtain and would limit the use of roll calls as an effective delaying tactic under cloture.

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<sup>5</sup> Before cloture, additional roll calls can be secured by demanding that amendments be divided. Any Senator may demand, as a matter of right, that an amendment be divided into its component parts if it proposes to insert new matter in the bill and if each of its parts could stand as an independent proposition. And if the yeas and nays are ordered on an amendment and the amendment then is divided, the yeas and nays automatically are considered as having been ordered on each division. Therefore, if a division is demanded after the yeas and nays have been ordered on an amendment consisting of ten parts, as many as twenty roll call votes could occur in connection with that amendment alone--roll call votes on each division and roll call votes on motions to table the motion to reconsider the vote on each division. Under cloture, however, amendments are not divisible.

Appeals from the Ruling of the Chair

The Senate traditionally has insisted on the right of members to challenge rulings of its presiding officers by appeals. In Senate Procedure, however, Floyd Riddick notes that, in 1977, the Chair ruled 33 amendments out of order without any of the rulings being appealed. "Each time an amendment was called up and ruled out of order, the majority leader was re-recognized by the Vice President under the custom and practices of the Senate to give the majority leader preferential recognition. This preferential recognition prevented the recognition of any other Senator to take an appeal from the ruling of the chair" (p. 233).

This instance notwithstanding, it is not certain to what extent the Senate would affirm the 1977 precedent that gives precedence to recognition of the Majority Leader over the right of another Senator to appeal a ruling of the Chair. Otherwise, every ruling of the Presiding Officer, whether made at his own initiative or in response to a point of order, is subject to appeal which, with sufficient support, may be decided by roll call vote. The Senate decides appeals without debate under cloture.

This is a potentially significant loophole in the cloture rule, in that truly determined Senators could appeal every ruling of the Chair--e.g., that amendments are nongermane or dilatory--and request the yeas and nays on each appeal. In addition, a Senator could make a point of order, even knowing that the Presiding Officer would overrule it, in order to appeal from the ruling of the Chair. However, such tactics would offend some Senators and possibly lead to limits on the right to appeal, at least under cloture.

### Quorum Calls

A Senator normally may suggest the absence of a quorum so long as business has been transacted since a quorum was last established; but under cloture, quorum calls have been held dilatory. Under Senate precedents, the transactions that constitute business for purposes of calling another quorum generally include the making or disposition of motions, including amendments, among other matters.<sup>6</sup> Thus, a Senator may suggest the absence of a quorum on numerous occasions during the course of a single day's proceedings. Each call continues unless it is dispensed with by unanimous consent or unless a quorum appears on the floor. If a majority of Senators do not respond to a quorum call, the Senate usually agrees, by roll call vote, to a motion to instruct the Sergeant at Arms to request the attendance of absent Senators, and this roll call establishes the presence of a quorum.

### Amendments

Each Senator may call up a number of amendments under cloture, so long as (1) time remains under the 30 hour ceiling, (2) the amendments were submitted in writing by the deadlines imposed by Rule XXII, and (3) the amendments are properly drafted, germane, and non-dilatory. Although the rule states that "[n]o Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise," this presumably would not prevent a Senator from calling up a succession of amendments if no other

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<sup>6</sup> See the listing on pp. 838-840 of Senate Procedure. The absence of a quorum may not be suggested immediately following a roll call vote which demonstrated the presence of a quorum unless business has intervened.

Senators seek recognition to offer amendments of their own. Debate on each amendment is charged against the time of Senators recognized to speak, but the time consumed by votes in connection with the amendment is charged only against the 30 hour ceiling. A Senator who has consumed his or her one hour for debate may call up an amendment, but may not debate it on his or her own time (p. 240).

Amendments that Senators usually can offer may not be in order under cloture. Under Senate precedents, for example, amendments that only express the sense of Congress or the sense of the Senate are dilatory per se under cloture. Senators also have been much less willing to vote that amendments are germane after cloture has been invoked than under other circumstances when amendments must be germane, such as during consideration of general appropriations measures.<sup>7</sup>

### Motions

In addition to amendments, Senators may offer other motions under cloture, as well as at other times, including motions to adjourn, recess, postpone, and refer; with sufficient support, roll call votes can be demanded on each such motion. However, motions have been ruled dilatory under cloture, and some procedural motions normally are the prerogative of the Majority Leader or his designee. Furthermore, motions to proceed to the consideration of other matters (in legislative or executive session) could be ruled out of order under cloture on the grounds that, under Rule XXII, a matter on which cloture is

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<sup>7</sup> Senators debated this issue in October 1984 during consideration of H.J. Res. 648, making continuing appropriations for Fiscal Year 1985.

invoked "shall be the unfinished business to the exclusion of all other business until disposed of." Rule XXII also permits one non-debatable motion to be made each day to extend the 30 hour ceiling on post-cloture consideration.

#### RECENT RULINGS GOVERNING PROCEDURE UNDER CLOTURE

The effective use of devices to extend post-cloture consideration (on matters such as energy legislation) provoked a series of rulings that have limited their potential use in the Senate today. Several of these precedents have been mentioned, but they are important enough to merit additional emphasis. For example, the Chair has taken the initiative to declare certain matters to be dilatory and, therefore, not in order under cloture. In 1977, Vice President Mondale sustained a point of order to the effect "that when the Senate is operating under cloture, the Chair is required to take the initiative under rule XXII to rule out of order all dilatory motions, including calls for a quorum, when it has been established by a quorum call that a quorum is present and the Chair's count reaffirms that a quorum is still present" (p. 248). At the initiative of the Chair, amendments have been ruled out of order as being nongermane (p. 234), improperly drafted (p. 233), or dilatory (p. 246). In addition to amendments and quorum calls, the Presiding Officer also has ruled various motions out of order as being dilatory, including motions to adjourn (p. 247), recess (p. 249), postpone indefinitely (p. 249), and reconsider (p. 249). Appeals from the ruling of the Chair have been held to be dilatory (pp. 247-248), as have requests for the yeas and nays (p. 251).

The discussion of cloture procedure in Senate Procedure suggests some inconsistency among past rulings on such questions and does not reveal an explicit standard by which a Senator can judge whether an action he or she contemplates taking would be ruled out of order as dilatory. Recent precedents seem consistent with the inference that the judgment as to whether or not an action is dilatory is a contextual one, and depends on such considerations as the length of the debate, the nature of the actions already taken, and the preferences of the majority of Senators. Nonetheless, these precedents generally point in the direction of a strict construction of the prohibition against dilatory motions and amendments under cloture. The future effectiveness of delaying devices under cloture will depend in part on the circumstances of the moment and how the Presiding Officer and the Senate choose to construe and apply this prohibition.

#### OTHER DEVICES FOR DELAY

Notwithstanding the restrictions imposed on post-cloture consideration by Rule XXII and the rulings discussed above, one or more Senators conceivably can consume most or all of the 30 hours available under cloture through a combination of speeches, quorum calls, and votes on amendments, motions, and other matters such as appeals--but only if the Presiding Officer and the Senate are not prepared to rule such actions out of order as dilatory.

Under these circumstances, Senators may conclude that the opportunities for post-cloture delay are insufficient for their purposes. If so, they may use their right to debate, as well as other available devices, to delay the time at which the Senate invokes cloture on the bill or other matter they

oppose. For example, Senators can place holds on a measure, object to the Senate considering it by unanimous consent, and then debate the motion to consider it (unless the measure is privileged or the motion is made during the Morning Hour). Thus, Senators can compel the Majority Leader to call up the bill by motion, if at all, and then place on the bill's supporters the burden of invoking cloture on the motion to proceed (to consideration of the bill), even before Senators begin to debate the bill itself.<sup>8</sup>

A less direct (and more extreme) approach would be for Senators to delay action on unrelated matters that arise on the Senate floor before the matter to which they object. For example, they may prolong debate on these other matters and object to unanimous consent requests for various purposes. By doing so, they can delay consideration of the bill that concerns them (perhaps until a point at which time pressures on the Senate schedule are greater) and reveal the intensity of their opposition (perhaps stimulating discussion of accommodations that would avoid extended debate). Such tactics, however, also would involve institutional and interpersonal costs that Senators would have to weigh.

Additional opportunities for delay often arise after Senate passage of a measure. If differences with the House have to be resolved, there can be extended consideration (perhaps requiring cloture) of questions such as disposing of House amendments, going to conference, and agreeing to a conference report.

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<sup>8</sup> And once a bill is before the Senate, the leadership may be persuaded to delay filing a cloture motion on it if its opponents encourage the hope that an accommodation might be reached that would make cloture unnecessary.