

Statement of Joseph Cooper

Professor, Department of Political Science, Johns Hopkins University
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Chairman Lott, Senator Dodd, and members of the Committee, it is a great pleasure to appear before the Senate Rules Committee once again, though I hesitate to tell you how long ago it was I first appeared. That hearing several decades ago was chaired by a great and historic Senator Senator Carl Hayden of Arizona, who seemed very old to me at the time. He seems far less old to me now as I look back. I am also pleased to share testimony with Professors Binder, Evans, and Smith, three friends and colleagues in my discipline for whom I have long had great respect. We disagree on majority cloture and quite possibly on Aholds@. But I do congratulate the majority members and staff on their taste.

In thinking about my testimony I am struck by the anomaly of outsiders, albeit informed outsiders, testifying as expert witnesses on the informal practices or what Donald Matthews long ago called the Afolkways@ of the Senate. Certainly, Senators know and understand their own Afolkways@ better than outsiders and we thus must be your students, not you ours, in understanding these folkways. I conclude, then, that there is little, if anything, we can tell you that you do not already know about Aholds@. Still, arguably, there are virtues in Aoutside@ perspectives. We can perhaps aid in focusing your attention and in addressing broader questions of representative government.

Let me outline and assess four basic strategies to follow in seeking to remedy the problems caused by Aholds@. The first is a very radical one. It is to recognize that

A holds@ are an integral part of a unanimous consent framework for conducting business and highly dependent on it. The strategy to follow, then, is simply to impose a majority cloture system since the result will be to destroy the rationale and incentives for the use of A holds@. Bit will, in short, be to strangle them. I would oppose such a strategy because in my view the present unanimous consent framework for conducting business, A holds@ and all, is critical to the preservation of the Senate=s historic role as a check on the President and a bulwark for deliberation and accommodation in the political system. Lindsay Rogers, a great political scientist and student of the Senate made this argument in the 1920=s and it was the prevailing view and governing practice of the Senate in the 19th century. The case for this view is even stronger today, given the growth in presidential power, the rise in partisanship that has made the House an instrument of the President as party chief, and the intense policy division that now exists and makes more suspect than ever the notion that a bare 51% of the Senate has some general right to impose its will on the other 49%, no matter how intensely held minority views are. That to my mind is neither what Madison and the framers thought representative government was all about nor their view of how the Senate should conduct itself. Still, this hearing is on a particular recommendation with respect to A holds@ and thus I do not wish to develop my argument any further. If members of the Committee wish we can, of course, discuss this strategy in greater detail.

The second strategy is to make formal changes in the rules that will lessen the problems caused by A holds@ without challenging or altering the present unanimous consent framework for conducting business in any substantial way. That is an appealing strategy on its face. The proposal before the Committee is of this character and one that enjoys substantial support. In the interests of time I will focus my discussion on it alone. This proposal would force A holds@ to be open or revealed to the public. In the context of the use of holds by individual Senators simply to promote particularistic district interests or pet policy or personal peeves it seems an obviously desirable solution. Moreover, it also fits current tendencies to understand representative democracy in a plebiscitary fashion, something the Framers would find not only mistaken but dangerous. Representative

government, understood as Madison understood it, does not mean that any and all increases in openness contribute to representative democracy. Deliberation is essential as well and the two can clash. This is especially true in an age of mass media where increased openness does not necessarily mobilize public opinion but rather interest group pressure that poisons the capacity for deliberation and accommodation. Thus, without necessarily being against formally requiring Aholds@ to be public, let me point out some of the negative consequences that might be missed in the context of the frustrations they now involve for the party leaderships and Senators.

1. Would such a rule solve the problem of Asecret@ A holds@. Could not members merely advise the leadership that they wanted to be informed before a legislative matter or nomination was scheduled and in effect by so doing as a practical matter force the leadership to treat them as Aholds@. The results might well be to increase uncertainty and communication costs without doing much to eliminate the obstructive impacts of Aholds@. I venture to suggest the two party leaderships might well be worse off, not better off.

2. As noted, Aholds@ are an integral part of a unanimous consent system for conducting business and provide the leadership with information regarding where the problems are that need to be accommodated if the Senate is to proceed. Would requiring Aholds@ to be public aid or hurt the party leaders in identifying and strategizing about the key steps needed for accommodation. It can be argued that the actual result would be to reduce their flexibility and thus hamper their ability to perform as leaders. We may note that non-openness may aid their ability to strategize and accommodate and that they now possess the ability to make Aholds@ public and to threaten to or actually mobilize a cloture vote against any particular Ahold@. It may be objected that the time pressures and politics are such that they seldom do so. But that is far from entirely clear, especially with respect to the use of threats. For we know far more about the failures than the

successes. It is true as well that one of the costs of the present system is that members on occasion may not know the source of the Ahold@ on a matter they wish to get to the floor. However, prolonged Aholds@ have a way of not staying secret and revealing the source of the Ahold@ to other Senators might be better achieved by the establishment of such practice as an informal norm, not by formal rule.

3. Equally, if not more important, could requiring Aholds@ to be public effectively remedy the time and political pressures that limit the ability of party leaders to control them without inducing greater harm in further energizing mass interest group politics?

A third strategy would also rely on rules change, but take action that seeks to alter the conduct of business of the basis of unanimous consent in a substantial way while still preserving its essentials. The goal would be to carve out special procedures to handle and suppress Aholds@ that are imposed by one or only a few members for highly particularistic or personal reasons without at the same time affecting the conduct of major business or interfering with existing processes of accommodation on minor legislative business or nominations. In a sense this strategy applies the rationale of the current Senate procedures for expediting minor business with a five minute debate limit for each Senator during the Morning Hour, subject to the objection of any single Senator (Rule VII).

It would, however, have to be tougher than this procedure to be effective. Thus, what comes to mind as a possibility is the creation of a suspension procedure for Aholds@, modeled after the suspension calendar in the House. In other words, the present suspension and morning business rules (V and VII) might be modified to permit the two party leaders at their discretion and by mutual agreement to bring legislative matters and nominations to the floor during a specified time period each week during which debate and amendment would also be limited. The critical point, however, would be to require a two-thirds vote to pass any item treated this way. This would insure that it could be used only to side-step Aholds@ that reflected minimal support in the Senate. Moreover, it would give

the majority leadership a useful weapon in achieving accommodative solutions. Let me, however, note two points in opposition to this proposal.

(1) Such a change goes against the grain of the traditions of the Senate that prize and protect the power not only of minorities but of the individual Senator. The Senate in its history has not distinguished between the two, but rather has tied the two together so as to use the power of the individual Senator as an instrument of protecting minority rights. This change would depart from that tradition in a sense make the Senate more like the House.

(2) As the history of the House demonstrates, the other side of limiting the power of the individual member is necessarily to increase the power of party leaders. It would be difficult to create a procedure of the type I have identified that was limited only to Aholds@. Certainly, it could not be done without formalizing Aholds@ by making them public and recorded in a congressional document so that the new rule could be limited in its scope. In either event, the power of party leaders would increase.

For both these reasons any proposed new rule of this character needs careful scrutiny, not acceptance simply out of the frustrations involved in current practice with respect to Aholds@.

A fourth and final strategy is to continue to try to handle the process informally, largely by joint leadership statements of proper practice and their intent to keep Aholds@ under control. There have been a number of these in recent years, but the reality is that, given the time and political pressures the leaderships are under, enforcement lags well behind statements of strong intent. The underlying problem is that informal control is highly dependent on a set of strong norms that mobilize and enforce community sentiment

in favor of approved practice. Yet, in a highly partisan age as well as one in which the scope of the federal government has tied states and local communities to federal programs to a far greater degree than in the 19th century, individual Senators feel impelled, if not obliged, to game the system for policy goals they care deeply about or to protect their states. Such gaming, however, always threatens to drive all behavior to its lowest common denominator and undermines the norms of forbearance and comity on which any informal system of control is dependent. It is thus unlikely in my opinion that this strategy can do much to reverse current practices, though it may well constrain the most egregious forms of behavior. Members do have to exercise some care both in the degree to which their A holds@ interfere with the rights and needs of other members and the Senate as a whole and the degree of embarrassment they can sustain if their Aholds@ become public as the most prolonged and galling ones often do. Still, it should be noted that this strategy is the polar opposite of the first one. It essentially rests on belief in the wisdom of the Senate traditions of comity and accommodationBin short, that Aholds@ overall play a positive role in a system for conducting business in which on balance the benefits still far outweigh the costs.

Let me conclude by summarizing the strategies I have outlined and my views. I would oppose the first strategy of imposing majority cloture in a comprehensive manner. I am inclined to be doubtful about the benefits of abolishing secret holds. I think a special procedure of the kind I described to strengthen the hands of the leadership is worth discussing. And, finally, in the absence of any clear predominance of opinion in the Senate in favor of a particular rules change, it should simply continue to try to work the system as is. In short, I conclude as I began. Since this is a matter which affects the daily lives of each and every Senator in a very immediate sense, all outside wisdom should be taken with an even larger grain of salt than usual.

Phone Nos. - 410-516-4879 (office); 410-467-6063 (home)
jcooper@jhu.edu