Parliamentary Rule: The US Senate Parliamentarian and Institutional Constraints on Legislator Behaviour

JAMES I. WALLNER

This article analyses the extent to which institutional rules constrain member behaviour in the United States Senate by examining the evolution of its parliamentarian. Interestingly, the US Senate parliamentarian has received surprisingly little scholarly attention given the important role she performs in the legislative process. The subsequent analysis thus provides a new understanding of the parliamentarian's role in the legislative process and the interplay between institutional rules and member behaviour in the Senate. To this end, the following analysis is situated within the context of the two primary theoretical approaches to understanding how institutional rules constrain member behaviour: path dependency and majoritarianism. These contrasting approaches provide expectations about the extent to which members will defer to the parliamentarian's interpretation of Senate rules rather than exercising their own discretionary control over those rules. Examining the evolving relationship between the parliamentarian and individual members affirms the centrality of institutional rules as a constraint on member behaviour over the past several decades. Yet such an examination also yields two surprising, and potentially contradictory, observations. First, individual senators in both parties have increasingly deferred to the parliamentarian to interpret the Senate's rules. This is surprising given that the Senate has simultaneously become more individualistic, partisan, and ideological over the same period. Second, the majority party has recently disregarded the norm of parliamentary constraint reflected in past practice and demonstrated a willingness to ignore Senate rules when doing so was necessary to achieve legislative success. This could signify a potential shift in how majorities view the constraints imposed by Senate rules if current trends of legislative dysfunction continue.

Keywords: *Congress; Senate; legislative process; member behaviour; rules; US Senate parliamentarian.*

Introduction

> I talked earlier about all the people who are helpful to us. Some people I didn't mention who are so vital to us, Mr. President, are the parliamentarians. The Senate rules are extremely complex. I know them pretty well, but I am amateur compared to our parliamentarians who interpret the precedents and rules of the Senate and advise the presiding officer anytime we are in session. Their work is vital to the well-oiled Senate we have. (Majority Leader Harry Reid, 7 February 2009[1])

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Majority Leader Reid's comments about the Senate parliamentarian illustrate the complexity of procedural rules in the institution. This suggests that senators may defer to the parliamentarian's interpretation of those rules on a regular basis. Supporting such a supposition is the fact that the legislative process in the contemporary Senate has become increasingly constrained by parliamentary procedure. The literature on Congress acknowledges the centrality of rules to the legislative process. According to Krehbiel (1991, p. 15), 'legislative scholars ... have been in long-standing agreement that rules are important determinants of legislative choice'. However, there is considerable disagreement over what governs procedural choice in Congress and the extent to which members defer to endogenous institutions to interpret those rules (Evans, 1999).

As the parliamentarian is charged with interpreting the Senate's rules, it follows then that the position is an important one. Yet according to Evans (1999, p. 616), 'Very little research has been done about the development of the parliamentarian's role in either chamber, particularly the Senate'. This is unfortunate, given that the perspective provided by an analysis of the evolution of the Senate's parliamentarian and its ongoing relationship with individual senators underscores the fact that current scholarship focusing simply on the behaviour of individual members or political parties is limited. Such a focus is not sufficient alone to account for how the Senate works. Instead, a more nuanced approach is needed that incorporates institutional influences on member behaviour. In an effort to fill this void, this article examines the extent to which procedural rules constrain member behaviour, either individually or collectively, by examining the development and contemporary role of the Senate parliamentarian.

To this end, this article sets out the primary theoretical approaches to understanding the relationship between institutional rules and member behaviour found in the literature and generates two hypotheses from them in order to provide specific expectations about the extent to which members defer to the parliamentarian's interpretation of Senate rules. It then briefly defines the several components that together compose the Senate rules. The multiple ways Senate precedents can be created are then examined in more detail because it is through the creation of new precedents that the extent of member deference to the parliamentarian can best be observed. Deference, particularly to a third party as understood here, is interpreted as a constraint on member behaviour. The evolving relationship between the parliamentarian and individual senators is then examined in order to understand better the extent to which members defer to the parliamentarian's interpretation of precedent rather than exercising their own discretionary control over the Senate's rules. This examination is necessarily qualitative and historical in nature. The limited amount of observable behaviour (that is, votes to overturn rulings of the presiding officer) precludes efforts to form generalised models with which to measure statistically significant behaviour.

Finally, three case studies are analysed in greater detail in order to shed some light on how senators and the parliamentarian work together in practice. These case studies were selected because they each provide examples of instances in which highly motivated members of the majority and minority parties did not appeal the parliamentarian's interpretation of Senate rules despite the controversy associated with the underlying legislation. These cases also fulfil many of the underlying conditions predicted by both hypotheses, and thus provide an opportunity to assess better the utility of the path dependent and majoritarian theories in describing how the Senate actually works. Specifically, the creation of a new precedent during the 111th Congress provides an example of an instance in which the parliamentarian disregarded past practice, and by doing so helped the majority party pass a highly salient bill. Second, the parliamentarian's decision to grant budget resolutions privileged status during the second session of the 112th Congress significantly undermined the majority party's ability to control the Senate's floor agenda, and thus directly benefited the minority party. Similarly, the innovative utilisation of motions to suspend the rules during the 111th and 112th Congresses undermined the majority's ability to block unwanted amendments from receiving votes on the Senate floor. However, in this last case, the majority party demonstrated a willingness to disregard the parliamentarian and voted to overturn past procedural practice. Whether or not this willingness represents the emergence of a new behavioural pattern on the part of Senate majorities, and thus contradicts the previous two cases, is explored in the concluding section.

Theoretical Expectations: Path Dependent or Majoritarian?

Various theoretical approaches have advanced the understanding of the relationship between congressional procedure and decision-making as well as the implications of this relationship for member participation in the legislative process (Cox & McCubbins, 1993, 2005; Krehbiel, 1991; Mayhew, 1974; Rohde, 1991; Sinclair, 1995). These approaches all share an interest in the extent to which members are constrained by procedural rules determined by others. In an effort to explore this interest, this article focuses on two general theories that can be derived from this literature: path dependency and majoritarianism.

The first theory posits that institutional rules are path dependent (Aldrich, 1994). The Senate's inherited rules of procedure affect the legislative process by constraining the majority party in the pursuit of its goals and enhancing the ability of the minority to obstruct the majority. According to Binder (1997, p. 3), 'Earlier procedural decisions are inherited by subsequent majorities – and act as constraints when those majorities try to choose their own set of rules'. In this way, procedural rules are 'sticky' (Binder, 1997, p. 6; Shepsle, 1986). Binder argues that the Senate's inherited rules interact with competition between the majority and minority parties to structure the legislative process in the institution. Senate decision-making is thus dependent on both the partisan

need and capacity for change *and* past procedural decisions that serve to constrain individual member behaviour.

The principal manner in which the Senate's rules limit majorities from one Congress to the next is that they require a super-majority vote to end debate on the creation of a new standing rule. As a result of these costs, Senate rules have remained relatively stable over time, especially when compared with those in the House of Representatives. Procedural innovations are typically incorporated into the existing rules instead of replacing them entirely. As such, the development of Senate rules reflects a 'path-dependent layering process' (Schickler, 2001, p. 16). Viewed from this perspective, the institution's rules are 'historical composites' that continue to affect the legislative process in unintended ways long after they are created (2001, p. 267). According to Binder and Smith (1997, p. 23), 'the character of the Senate today represents the sum choices senators have made about institutional arrangements since the very first Senate met in 1789'.

An alternative theory asserts that Senate rules reflect majoritarian decisions. Krehbiel (1991) raises the consideration that 'objects of legislative choice in both procedural and policy domains must be chosen by a majority of the legislature' (p. 16). As a result, 'majoritarianism' remotely determines procedural rules. Wawro and Schickler (2006) apply Krehbiel's concept of 'remote majoritarianism' to the pre-cloture Senate. Specifically, they argue that the 'mutability' of Senate rules enables a committed majority to curtail minority rights in response to excessive obstruction. The provisions of Senate rules, such as the super-majoritarian requirement to change them, are ultimately majoritarian in nature (Wawro & Schickler, 2006, p. 33). Senate majorities may overcome the super-majoritarian barriers erected by the institution's inherited rules simply by establishing a new rule by simple-majority vote. While minorities may filibuster such efforts, their appeals can be tabled on a simple-majority vote without debate. It should be noted, however, that this approach does not entirely dismiss the relevance of the Senate's inherited rules. Rather, Wawro and Schickler argue that the stickiness of these rules does not prevent, in and of themselves, a committed majority from exerting more control over the legislative process.

What do these competing theories reveal about the degree to which institutional rules constrain member behaviour? Put another way, how does member deference to the parliamentarian's advice capture the path dependent or majoritarian dynamics that this article seeks to adjudicate? The short answer is that the parliamentarian's interpretation of the Senate rules acts as a constraint on member behaviour to the extent to which members base their legislative manoeuvres partly, or in whole, on that advice in the first place. Once viewed from this perspective, it becomes clear that the path dependent and majoritarian approaches, as understood here and explained in more detail below, are not simply alternative explanations for observationally equivalent outcomes precisely because the *process* itself is important. If procedural rules are path dependent, member behaviour will be constrained by the interpretation and application of those rules. By contrast, if a numerical majority determines procedural rules,

then member behaviour will be constrained only by the preferences of that majority. As explained in more detail below, these views offer contrasting predictions for the relationship between the parliamentarian and individual senators.

Determining the particular nature of procedural choice in the Senate is a theoretical question from which several contrasting expectations about member behaviour can be derived. As discussed, current theoretical approaches can be divided into two principal schools of thought regarding this question: path dependency and majoritarianism. The parliamentarian represents an ideal analytical unit with which to test empirically the predictions of each because the position is located at the nexus of Senate rules and the behaviour of individual members. An empirically motivated hypothesis can be generated from each approach in order to provide specific expectations regarding the parliamentarian's role in the legislative process and the extent to which members defer to the parliamentarian to interpret the Senate's rules. With these hypotheses, the evolving relationship between the parliamentarian and individual members can then be observed in an effort to determine both the accuracy and relevance of these theories in describing decision-making in the contemporary Senate, and, by extension, the degree to which inherited rules of procedure constrain the behaviour of senators.

First, the *Path Dependent Hypothesis* can be derived from its corresponding theory in order to make sense of the parliamentarian's role in Senate decision-making.

> *Path Dependent Hypothesis: Senate rules are path dependent and members are likely to defer to the parliamentarian's interpretation of those rules.*

This hypothesis suggests that members are more likely to defer to the parliamentarian because of the path dependent nature of Senate decision-making. It predicts that the parliamentarian will interpret rules independently of both the majority and minority parties owing to this deference and the authority provided by the Senate's inherited rules. This independence is reflected in the rulings of the presiding officer, which will be impartial in nature and will not favour one side over the other. As a result, the *Path Dependent Hypothesis* predicts that the parliamentarian's interpretation will rarely be overturned, and that such actions will occur on a bipartisan basis in the limited instances in which they are overturned. Finally, the *Path Dependent Hypothesis* predicts that the parliamentarian's interpretations of Senate rules will not be dramatically affected by issue salience or agenda control.

Second, the *Majoritarian Hypothesis* can be derived from its corresponding theory in order to make sense of the parliamentarian's role in Senate decision-making.

> *Majoritarian Hypothesis*: *Senate rules reflect remote majoritarian decisions and members are unlikely to defer to the parliamentarian's interpretation of those rules.*

This hypothesis suggests that because Senate rules reflect majoritarian decisions, members are less likely to defer to the parliamentarian. Rather, it predicts that the parliamentarian will be deferential to the majority party as a result of the fact that the mutability of Senate rules allows a majority easily to overturn interpretations of Senate rules that favour the minority. Given this deference, the parliamentarian will rarely interpret the rules in ways that favour the minority party. However, the minority party will contest the rulings of the presiding officer given the blatant partisan bias of the parliamentarian's interpretations and the absence of other procedural means to protest the majority's actions. These appeals will be unsuccessful more often than not. Finally, the *Majoritarian Hypothesis* predicts that the parliamentarian will be particularly likely to defer to the majority party for her interpretation of Senate rules during the consideration of controversial legislation and parliamentary manoeuvres that significantly affect the majority's ability to control the agenda.

Senate Rules: A Question of Interpretation

The extent to which members defer to the parliamentarian to interpret Senate rules can be measured by analysing the development of the office and its relationship with the presiding officer, party leaders, and individual members. This relationship is necessarily situated within the context of the evolving nature of the Senate's rules. It is expected that the relationship between the Senate and its parliamentarian will exhibit deferential characteristics if the institution's rules are overly complex and individual members regularly turn to the parliamentarian for their interpretation and application. Given the centrality of Senate rules to the following examination, a brief overview of what exactly constitutes those rules is in order.

Senate rules are derived from four primary sources: the Constitution; the standing rules of the Senate; statutory rules passed by Congress; and informal precedents. It is the combination of each that forms the procedural framework within which the legislative process unfolds in the Senate on a daily basis.

The Senate determines its own rules pursuant to the Constitution. According to Article I, Section 5, 'each House [*of Congress*] may determine the rules of its proceedings'. The Senate has established formal rules pursuant to this clause. There are currently 44 standing rules that cover everything from non-controversial issues such as the oath of office (rule 3) and the committee referral process (rule 27) to controversial issues such as the process to end debate (rule 22). These rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. For the most part, the Senate's standing rules are very general and do not address circumstances that may arise in specific parliamentary situations. The Senate's 44 standing rules total only 70 pages in length.[2]

Senate rules may also be established pursuant to statutory rules created by public laws passed by Congress and signed by the president. Perhaps most

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

Finally, the Senate operates on a daily basis largely according to rules established pursuant to a collection of informal precedents. According to the late Senator Robert C. Byrd (Democrat [D]-West Virginia), 'Precedents reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations' (Byrd, 1991, p. 52). Former Senate parliamentarian Floyd M. Riddick argued that precedents reflect the practices of the Senate pursuant to the Constitution, its standing rules, and any relevant rule-making statutes. These practices serve to 'fill in the gaps' contained in these procedural authorities when they fail to address specific parliamentary situations (Lawrence, 2013; Riddick, 1978).

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the Senate's presiding officer, or Chair, on points of order against violations of the Senate's rules. These rules are not self-enforcing and violations that do not elicit points of order do not necessarily create new precedents. One of the best-known examples of establishing a precedent pursuant to a ruling of the presiding officer involves a highly anticipated parliamentary situation that did not occur. Specifically, both Democratic and Republican majorities in the Senate recently contemplated utilising what is known as the Constitution, or Nuclear, Option, to change the institution's standing rules. In this particular approach, a senator would make a point of order that any further debate on an issue is dilatory and move that a final vote should be taken on the underlying question. Despite the fact that such a motion violates the standing rules of the Senate, specifically rule 22, the presiding officer would sustain the point of order and a simple majority of the Senate would then vote to table any appeal of the Chair's ruling. Such action would effectively establish a new precedent that debate on a particular issue can be brought to a close by a simple-majority vote.

The second primary method by which a precedent can be created is pursuant to a vote of the full Senate on an appeal of the presiding officer's ruling on a point of order. For example, the disposition of an amendment in the 104th Congress offered by Senator Kay Bailey Hutchison (Republican [R]-Texas) to the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995 (Public Law 104–6) established a precedent that superseded both the ruling of the Chair and rule 16 of the standing rules of the Senate. Specifically, the Hutchison amendment sought to change federal law regarding endangered species. Senator Reid raised a point of order that the amendment violated rule 16, which the presiding officer subsequently sustained. Senator Hutchison then appealed this ruling to the full Senate, which overturned the presiding officer by a vote of 57 to 42. The

Hutchison amendment was subsequently adopted by voice vote. This action created a new precedent that *legislating* on an appropriations bill is allowed under the Senate's rules, despite the fact that the decision of the Chair was technically correct and the Hutchison amendment was in direct violation of rule 16. At the time, members voted largely on the substance of the underlying amendment and not based on whether or not the measure violated rule 16. That the members did not fully appreciate the unintended consequences of establishing a new rule in this manner is evidenced by the vote to reverse this precedent in the 106th Congress.[3]

Finally, responses by the presiding officer to parliamentary inquiries may also create new precedents.[4] Although such responses are generally treated as nonbinding on the Senate, they do gain precedential value over time to the extent that parliamentary inquiries provide future Senates with insight into past parliamentary practice. However, it is important to note that such precedents are not considered as binding on the Senate as those established in accordance with a definitive action such as a ruling of the presiding officer or a vote of the full Senate.

The constituent parts that compose the Senate's rules allow significant interpretation of their meaning and application in the legislative process. Exacerbating this uncertainty is the sheer number of precedents that have been created over the years. The first collection of Senate precedents, entitled *A Compilation of Questions of Order and Decisions Thereon*, was prepared in 1881 by the Chief Clerk of the Senate, William J. McDonald. The compilation was organised alphabetically by topic and briefly covered the procedures governing issues such as offering amendments, floor debate, and voting. It was a short 25 pages in length. Another compilation followed in 1893, entitled *Precedents Related to the Privileges of the Senate*. This 350-page volume was compiled by the Clerk of the Senate Committee on Privileges and Elections, George P. Ferber. Ferber's compilation was augmented in 1894 by Henry H. Smith, the clerk of the Committee to Investigate Attempts at Bribery, etc. This expanded collection of precedents totalled 975 pages in length and was titled *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States*.

The first collection of precedents that resembled the volume utilised in the contemporary Senate was published in 1908 by Chief Senate Clerk Henry H. Gilfry. Gilfry's compilation, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate* was updated in 1914, 1915, and 1919. These volumes averaged around 700 pages in length. Like McDonald's earlier compilation, Gilfry's *Precedents* was organised alphabetically and served as a useful reference work for senators.

Senate parliamentarian Charles L. Watkins and assistant parliamentarian Dr Floyd M. Riddick prepared the most recent compilation of Senate precedents in 1954. The collection, *Senate Procedure: Precedents and Practice* was updated in 1964, 1974, and 1981. Its most recent edition, *Riddick's Senate Procedure*, was updated in 1992 by Alan Frumin and is over 1600 pages in length.

This lengthy tome contains over a million precedents that govern the legislative process in the Senate today. Precedents established in the years since 1992 have not yet been published.

Findings: A Relationship Marked by Deference

While the Senate parliamentarian has not always existed, it would be incorrect to infer that members presiding over the Senate prior to the creation of the parliamentarian did not have the institutional knowledge of applicable precedents necessary to rule accurately on points of order. According to an 1894 *Washington Post* article, the Senate's journal clerk provided the 'reliable and expert coaching' that was necessary to enable many senators to 'readily and properly decide even the most ordinary points under the rules of the Senate' (Warden, 1894, p. 4). The clerk advised the presiding officer and individual members on parliamentary questions using compilations such as Gilfry's *Precedents* to assist them in this effort. Nevertheless, senators during this period were not always dependent on the clerk for procedural advice when ruling on points of order. According to Riddick (1978), 'Senators felt that they had knowledge of the job and they didn't need a parliamentarian whispering in their ear when they were presiding as to how the Senate should be run'. In the 1890s, journalists observing the Senate on a daily basis concluded 'It appears that there are nearly two dozen members who rate as good parliamentarians' (Warden, 1894, p. 4). White (1957) made a similar observation in the mid-1950s. Specifically, he described the prototypical 'Senate-type' of the period as a 'past master of the precedents, the practices, and even the moods of the Senate and as a parliamentarian formidable in any debate or maneuver' (White, 1957, p. 74). Such procedural self-sufficiency was perpetuated by a unique institutional culture that encouraged apprenticeship, deference to seniority, and institutional pride (Matthews, 1960).

Individual members, however, became increasingly likely to defer to others to interpret Senate rules after the creation of the parliamentarian. Charles L. Watkins was named the first official Senate parliamentarian on 1 July 1935. During the mid-1930s, the increase in New Deal legislation proposed by the Roosevelt administration 'expanded opportunities for procedural confusion and legislative mischief' (Baker, 2006, p. 143). Members also began to spend less time on the Senate floor during this period. A decline in the familiarity of the Senate's rules resulted that continued over the course of the twentieth century.

In the seven decades since its creation, the parliamentarian has become central to ensuring the orderly flow of legislation on the Senate floor. According to Riddick (1978), the primary responsibility of the parliamentarian is to advise the presiding officer 'on every procedure that he must rule on or everything he should say even'. In this capacity, the parliamentarian effectively presides over the chamber. When the presiding officer is required to respond to a parliamentary inquiry or make a ruling on a point of order, it is the parliamentarian who whispers the appropriate procedure to the Chair. A visitor observing the Senate from

the galleries today will readily observe the parliamentarian and presiding officer interacting in precisely the same manner as described by Riddick over 30 years ago. Then, as now, the parliamentarian 'tries to keep the Chair posted on each step of the procedure before it arrives, if he can stay ahead; or if it's too complex and he can't be ahead, sometimes he has to whisper one sentence at a time to be sure that the Chair states what the procedure is' (Riddick, 1978).

This relationship is underscored by the customary practice of rotating the members serving temporarily as the presiding officer. Junior members of the majority party are called upon most often to preside. As a result, 'few senators have the knowledge or experience presiding to manage Senate procedure by themselves, so they often will rely heavily on the advice of the parliamentarian' (Gold, 2004, p. 11). Without the parliamentarian, these members would be incapable of supplying the detailed knowledge of the Senate's rules necessary to rule correctly on any points of order that are raised. Speaking on the occasion of the retirement of Parliamentarian Murray Zweben in 1980, Senator Bill Bradley (D-New Jersey) recollected, 'As a freshmen senator who has filled a substantial number of hours in the last two years presiding over this body, Murray has offered special help and guidance'.[5] Senator Patrick Leahy (D-Vermont), speaking on the same occasion, remarked that his service presiding over the Senate as a freshman would have been 'impossible without the expertise, dedication, brilliance, and knowledge of our parliamentarian Murray Zweben'.[6]

Dependence on the parliamentarian is not limited to the presiding officer. Individual senators and their staff often rely on the parliamentarian's advice in crafting legislative proposals and planning parliamentary manoeuvres on the floor. Staff will typically visit the parliamentarian's office on the first floor of the Capitol to have their particular proposal or manoeuvre blessed in advance of any floor action. Referring to such visits, former parliamentarian Robert B. Dove recollected, 'You could have anywhere between one and 15 to 20 people show up at the office, and they usually have materials with them for you to review' (Pierce, 2003, p. 1). This interaction benefits both the staff and the parliamentarian. The parliamentarian is given advance notice of potential procedural questions with which they may be presented on the Senate floor. Such notice allows the parliamentarian to prepare for any relevant points of order that may arise by researching their procedural history. In general, individual senators and their staff receive expert advice on how to execute their efforts in compliance with Senate rules. It is the practice of the parliamentarian to treat such conversations as confidential. For example, Riddick refrained from inadvertently revealing information given in confidence by only responding to specific questions he was asked directly (Riddick, 1978).

This dependence on the parliamentarian by members, whether presiding or not, suggests an erosion of procedural knowledge in the Senate. According to a long-time Republican leadership aide, members today lack a thorough knowledge of the Senate's rules and procedures. Instead, they rely on 'situational knowledge' supplied by staff in order to navigate the legislative process on a

case-by-case basis (Gold, 2003). In the years since the Senate agreed to broadcast its proceedings on C-SPAN (Cable-Satellite Public Affairs Network), its members have spent less time on the floor observing the legislative process. Senators' schedules today are packed with committee hearings, constituent meetings, and fundraisers for the limited time in which they are in Washington. More than in the past, members return to their states at the first possible chance to spend time with families that remain behind or engage in the permanent campaign. As a consequence of these developments, senators have less time to develop the procedural knowledge necessary to participate independently in the legislative process. Riddick (1978) argues 'It was just natural that they had to begin to depend on somebody to do the procedural aspects for them, leaving to themselves the substantive matters to be put into legislation'. In this context, the parliamentarian represents the only non-partisan figure on whom members can depend for procedural advice and guidance. Reflecting this dependence as early as 1955, Allen Drury (1955) observed that a good parliamentarian 'has to be the soul of impartiality, the embodiment of reliability and the epitome of absolute discretion' (p. 12). If a parliamentarian did not heed Drury's advice, it would be unlikely that members would respect his decisions. 'There would be no tolerance if you felt as though these people were politicizing the process' (Gold, 2003).

It is important to note, however, that the ability of the parliamentarian to influence the legislative process is indirect in nature as a result of her strictly advisory role. According to *Riddick's Senate Procedure*, 'The Chair rules on points of order, not the parliamentarian; the parliamentarian merely advises the Chair' (Frumin & Riddick, 1992, p. 989). The presiding officer may certainly rule on questions of parliamentary procedure independently of the parliamentarian. However, such independence is considered extraordinary in the Senate today, in part because the presiding officer is inexperienced and thus unfamiliar with the precedents (Lawrence, 2013). Furthermore, the Senate only rarely disagrees with the advice of the parliamentarian, as expressed through the ruling of the Chair. It can thus be inferred from such deference that the parliamentarian will periodically frustrate individual members with her interpretation of Senate rules. Speaking on the occasion of the retirement of Charles Watkins, Minority Leader Everett Dirksen (R-Illinois) reflected such frustration when he playfully suggested that the former parliamentarian could easily write a memoir of his time in the Senate entitled 'Great Statesmen That I Have Overruled' or 'Statesmen Whose Anger Was Short-lived Over My Unpleasant Rulings'.[7] Although admittedly made in jest, the minority leader's comments underscore the ability of the parliamentarian to block the legislative and procedural designs of senators. Past parliamentarian Alan S. Frumin once remarked: 'I know I've done my job when everyone thinks I'm somehow favoring the other side' ('Alan Frumin on making everyone equally dissatisfied,' 2001). Such sentiment supports the expectations of the *Path Dependent Hypothesis* that the parliamentarian will rule independently of both the majority and minority parities.

Also speaking on the occasion of Watkins' retirement, Senator Richard Russell (D-Georgia), himself a great student of the Senate's rules, stated that while 'one might think that Charlie Watkins was wrong on some point ... one could not change his position unless one could find precedents that were spelled out in the record of the Senate and bring them to his attention'.[8] With the growth in the number and complexity of Senate precedents, the likelihood of such a scenario occurring is increasingly rare. Reflecting on his tenure as parliamentarian, Riddick observed:

> I was very seldom questioned. I might say, at this point, that I served over a period of twenty-five years at the desk, and only one ruling was overturned by a vote of the Senate. The Chair never failed to follow my advice except in one instance. I worked at that desk and advised them for over twenty-five years and only once was my advice to the Chair overruled. (Riddick, 1978)

In the 30 years since the Republicans took over the majority in 1980, the ruling of the Chair on questions of parliamentary procedure has been appealed 48 times. Of these appeals, 31 were sustained (that is, the Senate agreed with the Chair's ruling, and by extension the advice provided by the parliamentarian). The full Senate overturned the decision of the Chair only 17 times (approximately 35 per cent). The ruling of the Chair was successfully overturned on 13 occasions in which a majority party member appealed the Chair's ruling (and, by extension, rejected the parliamentarian's interpretation of the rules). Minority appeals were successful on four occasions. If only instances in which a majority of both parties voted against each other are counted, the majority party success rate is 90 per cent and the minority party success rate is 50 per cent. The full Senate rejected majority appeals on 14 occasions. Minority appeals were rejected on 17 occasions. If only instances in which a majority of both parties voted against each other are counted, the majority party fail rate is 43 per cent and the minority party fail rate is 71 per cent.

On 10 occasions, the question concerned authorising amendments to general appropriations bills, which are prohibited under rule 16 of the standing rules of the Senate. Two of these 10 instances involved a *defense of germaneness*, which is decided by a vote of the Senate and does not have precedential value. It is understood by the Senate that the advice of the parliamentarian is not called into question in such a scenario and that a new precedent is not created. Six of the remaining decisions concerning rule 16 clarified its definition of germaneness and did not create a new precedent that superseded the rule. Finally, in only two out of the 10 instances was a new precedent created that superseded rule 16. Notably, the Senate reversed the precedent established in both instances. In explaining his vote to overturn the parliamentarian, thereby creating a new precedent that superseded rule 16, Senator Ted Stevens (R-Alaska) stated on the Senate floor that while he supported the underlying amendment in question, he was prepared to support a unanimous consent request offered by Senator Byrd that would reverse the newly established precedent. Stevens said that while he

disagreed with the parliamentarian's ruling, 'I do not argue with the parliamentarians. They are the parliamentarians, I am not'.[9] If the cases concerning rule 16 are thus excluded for the reasons cited above, the Senate voted to overturn the Chair (and, by extension, disagreed with the advice provided by the parliamentarian) on only seven occasions over the past 30 years. The absence of more successful challenges to the Chair's rulings (and, by extension, the parliamentarian's advice) conforms to the expectations of the *Path Dependent Hypothesis* that members are likely to defer to the parliamentarian's interpretation of Senate rules.

These numbers, as well as Riddick's reflections, point to the fact that members' deference to the parliamentarian increased as the volume of precedents grew, if for no other reason than overworked members were increasingly dependent on independent professional advice to clarify complex parliamentary procedures on the Senate floor. By the middle of the twentieth century there were already hundreds of thousands of precedents governing the legislative process. This number has grown to over a million today. As a point of comparison, Riddick spent a year reading over 30,000 pages of precedents on legal-sized stationary in preparation for writing *Senate Procedure* in the early 1950s. Adding to the sheer volume of precedents is the fact that, by their very nature, many of them are not well documented or easily accessible. Senators do not have the resources or time necessary to master all of the applicable precedents on a given parliamentary question. By the late 1970s, Riddick had come to believe that it was simply impossible for individual senators truly to master all of these precedents while simultaneously balancing the other competing demands of their office (Riddick, 1978). It is precisely this lack of resources and time that encourages members to defer to the parliamentarian and the advice she provides. As one senator put it, members could no longer match the parliamentarian in terms of 'knowledge of the Senate rules and procedures'.[10]

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

The recent practice of switching parliamentarians along with the partisan control of the Senate may indicate that majority parties now prefer loyalty to expertise in the parliamentarian, thereby providing support for the *Majoritarian Hypothesis* (Evans, 1999). Beginning this trend in 1981, the new Republican Majority Leader Howard Baker removed Murray Zweben as Senate parliamentarian and replaced him with Robert Dove. Zweben was removed because of fears in the Republican conference that he was overtly partisan and too deferential to the Democratic Leader Robert Byrd. According to Martin B. Gold, Baker's

counsel for floor operations at the time, 'People who had felt that he was too partisan over time certainly used the opportunity to try to get rid of him, and Baker was not going to fight to keep him there' (Gold, 2003). Baker's decision to offer the position to Gold supports the interpretation that the parliamentarian was politicised during this period. However, Gold's decision not to accept the offer and Baker's subsequent decision to name Zweben's assistant, Dove, as parliamentarian, provides evidence against such an interpretation. Gold declined the offer partly because he lacked the specialised knowledge required to do the job that can only come from experience. In addition, he did not want 'to be a partisan parliamentarian or be perceived to be one'. Gold felt that the parliamentarian's role should not become 'corrupted by overt partisanship'. Instead, Gold recommended Dove, as he was the 'single most knowledgeable person to take the position, because he came from years as the assistant parliamentarian, and before that the second assistant. He had the training, he had the temperament, he had the knowledge'. Gold also hoped that if Dove was promoted there would be 'at least some prospect that a later change in party control would not necessarily yield a change in the parliamentarian' (Gold, 2003).

Also supporting the claim that the parliamentarian has not been politicised is the fact that the trend of changing the occupant of the office with changes in party control of the Senate only persisted for two additional electoral cycles: 1986 and 1994. Instead of marking the beginning of the politicisation of the parliamentarian, these transitions represent exceptions that prove the rule. In 2001, Majority Leader Trent Lott (R-Mississippi) named Alan Frumin parliamentarian despite the fact that he had previously served when the Democrats were last in control and had been demoted to assistant parliamentarian when the Republicans regained the majority in 1994. Lott had little choice but to elevate Frumin after firing the current parliamentarian, Robert Dove, as there was simply no one else available who was willing to take Dove's place at the time. Lott offered Gold the parliamentarian position. However, Gold decided once again not to accept the offer for the same reasons that motivated him to turn down the offer in 1981. In his place, Gold recommended that Lott appoint Frumin.[11]

Tellingly, the Republican majority chose not to fire Frumin in the aftermath of a 2003 budget dispute that was very similar to the one that led to Dove's firing in 2001. According to one former Senate Republican leadership aide, 'You can't fire somebody if you don't have somebody to replace him with' (as cited in Taylor, 2003; Stolberg, 2003). This example also provides support for the *Path Dependent Hypothesis*. According to the *Majoritarian Hypothesis*, Lott would have simply ordered the presiding officer to ignore Dove's advice and rule in favour of the Republican majority. Such a ruling would have spared the majority leader from having to fire the parliamentarian only to replace him with Frumin. That Lott chose to adopt the later course of action instead demonstrates that the parliamentarian exercises influence in the interpretation of Senate rules and that overturning his advice is not cost-free for the majority party.

As these developments have demonstrated, members are more likely to defer to the parliamentarian today than they were to the Senate's clerk at the beginning of the twentieth century or the parliamentarian when the office was formally created in the 1930s. For example, it was Frumin, not the presiding officer or the party leaders, who concluded that the preamble to the Strategic Arms Reduction Treaty could be amended on the Senate floor in a controversial ruling during the lame duck session of the 111th Congress. Frumin's determination potentially enabled Republicans, many of whom were hostile to the treaty, to delay ratification until the 112th Congress when they would have the numbers necessary to insist on substantial changes to the text of the treaty itself (*Roll Call*, 14 December 2010). Notably, the Democratic majority did not attempt to contest the parliamentarian's ruling as expected by the *Majoritarian Hypothesis*. No such threat occurred in this instance, despite the fact that the parliamentarian's ruling provided Republicans with a potentially useful tool with which to obstruct a top priority of the Democratic majority.

Referring to a dispute over the definition of an earmark, a congressional directed spending project, in autumn 2007, the Democratic staff director of the Senate Rules Committee acknowledged that the parliamentarian would make the final determination. 'It's ultimately the parliamentarian who is going to rule' (as cited in Bolton, 2007, p. 1). In similar fashion, Senator Byron Dorgan (D-North Dakota) remarked in 2003 that the 'parliamentarian's rulings can be critical to the success or failure of a bill' (Stolberg, 2003). Such anecdotal evidence provides support for the *Path Dependent Hypothesis*.

Case Studies

The following three case studies are analysed in more detail in order to shed some light on how senators and the parliamentarian actually work together in practice and to determine whether this relationship better reflects the *Path Dependent Hypothesis* or the *Majoritarian Hypothesis*. These cases were selected because they fulfil many of the conditions predicted by both hypotheses. The first case provides an example of the creation of a new precedent that disadvantaged the minority party during the consideration of legislation considered to be a priority of the majority. The debate over health care reform consumed several months of Senate floor time and the final legislation represented one of the most consequential legislative achievements of the Democratic majority in the 111th Congress. Yet the minority did not appeal the ruling of the Chair in this instance, even though they had significant evidence supporting their claim that the parliamentarian's interpretation was contrary to Senate precedents.

Second, the parliamentarian's decision to grant budget resolutions privileged status during the second session of the 112th Congress undermined the majority's ability to control the agenda, and thus benefited the minority party. Interestingly, the majority party respected the parliamentarian's interpretation and subsequent decision and did not attempt to prevent individual budget resolutions sponsored

by minority party members from receiving straight up-or-down votes on the Senate floor, despite the highly salient nature of budgetary politics in 2012.

The third case illustrates a ruling by the parliamentarian that benefited the minority party by undermining the agenda control of the majority. Despite the fact that motions to suspend the rules post-cloture undermine the majority's control of the agenda, the majority did not seek to eliminate this new tactic with the creation of a new precedent until the 112th Congress. Moreover, the minority did not contest the majority's decision to establish such a precedent. Thus, this case, while seemingly confirming the *Majoritarian Hypothesis*, should be viewed as the exception that tentatively supports the rule. Not only did the majority party tolerate the ability of minority members to circumvent their agenda control ability with motions to suspend for over a year, but also, the minority party did not appeal or retaliate when the majority finally precluded their use. Thus, an examination of these cases concludes that the *Path Dependent Hypothesis* offers a more relevant explanation of the extent to which members defer to the parliamentarian to interpret the Senate's rules.

Health Care Reform and the Sanders Amendment

In the 111th Congress, the parliamentarian made a controversial ruling during the consideration of the Patient Protection and Affordable Care Act of 2009 (Public Law 111–148) that underscores the sheer complexity of Senate rules and the majority party's dependence on the parliamentarian to interpret them. In addition, this case also illustrates the deferential treatment given to the parliamentarian by the minority party. While members of the minority expressed frustration with the parliamentarian's advice and even criticised it publicly, it is important to note that the minority party did not act on its disagreement with that advice by appealing the decision of the presiding officer. Finally, this example also demonstrates the deference given to the parliamentarian to interpret Senate rules because of her knowledge of the Senate's precedents. The evidence provided suggests that the parliamentarian ruled independently of the majority party, despite the fact that the ruling ultimately made it more difficult for the minority to obstruct a legislative priority of the majority.

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

the Senate Republican leadership want to take 10 hours out of a day for something that was meaningless – the reading, word by word, line by line, page by page, of an 800-page amendment? To stop debate on health care reform'.[12]

After several hours of the clerks reading the amendment, yet before the reading was complete, the presiding officer recognised Senator Sanders, following the advice of the parliamentarian, for the purpose of withdrawing his amendment. The amendment's withdrawal precluded continued minority objections to dispensing with its reading.

The ensuing controversy surrounding this decision concerned whether or not Senator Sanders was eligible to be recognised during the reading of his amendment in order to withdraw it. The controversy stemmed from two considerations. First, Senate rule 15 states clearly that an amendment must be read when offered to legislation on the Senate floor. Notwithstanding the Chair's recognition, the reading of an amendment 'may not be dispensed with except by unanimous consent, and if the request is denied the amendment must be read and further interruptions are not in order; interruptions of the reading of an amendment that has been proposed are not in order' (Frumin & Riddick, 1992, pp. 43–44). In practice, this requirement is routinely waived, but doing so requires *unanimous consent*. Senate precedents state that 'when an amendment is offered the regular order is its reading, and unanimous consent is required to call off the reading' (1992, p. 44).

Second, rule 15 also states that any amendment may be withdrawn by its sponsor only at a time prior to any action on the amendment including 'a decision, amendment, or ordering of the yeas and nays'. According to the precedents of the Senate, 'An amendment may be withdrawn by the mover thereof in his own right until the Senate takes some action thereon, even as soon as it has been read, but the amendment must be before the Senate to be withdrawn' (Frumin & Riddick, 1992, p. 119). Given the seemingly clear-cut nature of Senate rules regarding this issue, Minority Leader Mitch McConnell (R-Kentucky) alleged 'The majority somehow convinced the parliamentarian to break with the longstanding precedent and practice of the Senate in the reading of the amendment'.[13] Senator Jim DeMint (R-South Carolina) believed that 'the parliamentarian was clearly biased' in making this ruling (quoted in *Roll Call*, 16 December 2009). It is remarkable that in these circumstances the clearly frustrated minority Republicans did not seek to overturn the parliamentarian.

In a letter submitted into the Congressional Record on 21 December 2009, Senator Benjamin Cardin (D-Maryland), who was presiding at the time the ruling was made, supplied the reasoning behind the Sanders ruling. The Cardin letter points to the influence of the parliamentarian in the legislative process in that Senator Cardin acknowledges the role of the parliamentarian in arriving at his determination that Sanders was eligible to withdraw his amendment: '... before Senator Sanders withdrew his amendment, I consulted with the senior assistant parliamentarian, who was on the floor while I was presiding. *He assured me* that a senator has the right to withdraw an amendment if no action

has been taken on it'.[14] Cardin goes on to state unequivocally, 'I sought and received the parliamentarian's advice on this matter and I followed it, which is how the Senate usually operates'.[15]

The parliamentarian advised that Sanders had the right to withdraw his amendment following precedents established in 1950 and 1992 because the amendment was not considered 'pending business' at the time of its reading. 'Prior to the time Senator Sanders withdrew his amendment, no action had been taken on it that would have prevented such a move without consent for a very simple reason: the amendment wasn't officially pending while it was being read into the record. So Senator Sanders had an unfettered right to withdraw it under such conditions.'[16] The 1950 precedent cited by the parliamentarian was the result of a parliamentary inquiry made by Senator Forrest C. Donnell (R-Missouri) as to whether or not a senator may withdraw an amendment during its reading. The presiding officer responded that an amendment could be withdrawn at such time. In the 1992 precedent cited, the presiding officer recognised Senator Brock Adams (D-Washington) for the purpose of withdrawing his amendment while it was being read.[17]

Yet unlike the precedents cited by the parliamentarian in the Cardin letter, the Sanders' amendment was offered pursuant to a unanimous consent agreement, which has been interpreted to constitute action that follows the Senate's precedents. According to a 1971 precedent, 'When the Senate is operating under a unanimous consent agreement or setting time for debate of a specific amendment that is *action* by the Senate on said amendment and subsequently it would take unanimous consent to withdraw the same'.[18] Unlike the parliamentary situation in the Sanders' scenario, the Adams amendment in the 1992 precedent cited by the parliamentarian was not offered pursuant to a unanimous consent agreement.

After examining the issue, Senator Coburn concluded that, had the Senate's precedents been properly followed, unanimous consent would have been needed to withdraw the Sanders' amendment by virtue of the manner in which it was offered. Coburn cited a 1979 precedent to support his argument that the Sanders' amendment was both pending and that unanimous consent was needed in order to withdraw it. The 1979 precedent concerned an amendment offered by Senator William V. Roth, Jr (R-Delaware). An objection was made to dispense with the reading of the amendment. In response to a parliamentary inquiry, the Chair advised, 'The amendment offered by the Senator from Delaware (Mr. Roth) is the pending order of business. A unanimous consent request that the reading of the amendment be dispensed with was objected to. Therefore, the amendment is in the process of being read and now will be read'.[19] According to Senator Coburn, this 1979 parliamentary inquiry should have superseded the 1950 precedent cited by the parliamentarian.

Finally, Senator Coburn's experience illustrates the periodic frustration experienced by members as a result of their incomplete knowledge and limited access to the Senate's precedents. Coburn wrote in a letter to the parliamentarian:

> At the time of the ruling, I had no way of knowing about the 1992 Adams precedent since it occurred after the latest edition of Riddick's Senate Procedure was published. Furthermore, the 1950 precedent was inaccurately depicted in Riddick's, with the text of Riddick's contradicting the actual precedent cited. Had all the precedents been commonly available in a reliable and updated form, senators could have had a basis to challenge the Sanders ruling in real time. By the time the dust had settled after the ruling, as senators struggled to parse what had happened, such a challenge was long moot.[20]

As this case demonstrates, the complexity of the Senate's rules leads members of the majority to depend on the parliamentarian for procedural advice when presiding. In addition, the limited availability of precedents can impede individual members in the minority from exploiting their procedural prerogatives on the Senate floor by increasing their dependence on the parliamentarian to supply those precedents.

Privileged Consideration of Budget Resolutions

Consideration of the annual concurrent resolution on the budget is privileged under the 1974 Budget Act. This means that it cannot be filibustered on the Senate floor and that only a simple majority is needed both to proceed to its consideration and for final passage. Specifically, section 300 of the Budget Act establishes the timetable for the congressional budget process. According to this section, the Senate Budget Committee must report a budget resolution for each fiscal year no later than 1 April. Once reported, the resolution is placed on the Senate calendar and is eligible for consideration by a simple-majority vote. If the Budget Committee does not report a resolution by 1 April, any other budgets that have been introduced are placed directly on the Senate calendar and are eligible for expedited consideration by a simple majority after 15 April. In the absence of this automatic-discharge procedure, the Budget Committee, and by extension the majority party, would have exclusive veto power over annual budgets because they cannot be considered if not on the calendar.[21]

The auto-discharge process thus represented an attractive procedure for the minority party in the 112th Congress given the high salience of fiscal issues more generally and the increased willingness of the majority party to block minority proposals dealing with such issues from receiving votes on the Senate floor. Indeed, several minority members utilised this process in 2011 to secure up-or-down votes on their budget proposals.

Seeking to prevent this tactic from being utilised again in 2012, the majority successfully included language in the Budget Control Act (BCA) of 2011 (BCA; Public Law 112–25) that sought to vitiate automatic discharge of budget resolutions. Specifically, section 106(a)(2) of the BCA states:

> For the purpose of enforcing the Congressional Budget Act of 1974 after April 15, 2012, including section 300 of that Act, and enforcing budgetary

> points of order in prior concurrent resolutions on the budget, the allocations, aggregates, and levels set in subsection (b)(2) shall apply in the Senate in the same manner as for a concurrent resolution on the budget for fiscal year 2013 with appropriate budgetary levels for fiscal years 2012 and 2014 through 2022.

Yet as is often the case with Senate rules, the language was vague and considerable ambiguity remained. It was left to the parliamentarian to clear up these ambiguities and to decide whether or not the BCA precluded the auto-discharge process in 2012. The parliamentarian ultimately ruled that the BCA did not prevent budget resolutions from being placed directly on the calendar pursuant to the auto-discharge process if the Budget Committee did not report a resolution by 1 April. This ruling undermined the ability of the majority party to block unwanted votes on these issues. According to a contemporary news account, 'The Senate's chief referee has issued a key ruling against Majority Leader Harry Reid ... a move expected to bring unwanted election-year pressure on the Nevada Democrat to act on politically dicey budget bills' (Wong, 2012). This, and the ability to force Senate Democrats to go on the record on the president's fiscal year 2013 budget proposal, represented a significant victory for Senate Republicans given that 2012 was an election year and most members, particularly endangered incumbents in the majority party, would rather not take tough votes on fiscal issues.

This ruling affirms the path dependent nature of Senate rules and the deference given the parliamentarian by members in both the majority and minority parties. The parliamentarian acknowledged that the majority might have intended to turn off the auto-discharge process in the BCA. However, 'without language that is more precise on this matter, we are not inclined to remove these options for consideration from the Senate's budget process' (Wong, 2012). Notably, the majority party respected the ruling and did not seek to disregard the parliamentarian's interpretation of the rules, despite the controversial nature of the underlying issue.

Motion to Suspend the Rules Post-cloture

In the 111th Congress, an interpretation of Senate rules by the parliamentarian significantly undermined the majority leader's ability to control the agenda by preventing senators from offering amendments to legislation on the Senate floor. Specifically, the parliamentarian advised that motions to suspend the rules in order to offer a non-germane amendment, or motion to (re)commit after cloture has been invoked, are permitted pursuant to Senate rules. According to rule 5 of the standing rules of the Senate, 'No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof'.[22] Specifically, a 'Notice of Intent to Suspend the Rules' must be made in writing the day before such motion is

made. In the case of suspending the cloture rule to offer an amendment, the notice of intent would read as follows: 'Mr. President, I submit the following notice in writing: "In accordance with rule 5 of the standing rules of the Senate, I hereby give notice in writing that it is my intention to move to suspend paragraph 2 of rule 22 for the purpose of proposing and considering the following amendment"' (Frumin & Riddick, 1992, p. 1352). The text of the amendment is then included in the congressional record along with the notice of intent. The vote on the following day is first on the motion to suspend. The senator making the motion states the following: 'Mr. President, pursuant to the notice given by me on [*date*], I move to suspend paragraph 2 of rule 22' (Frumin & Riddick, 1992, p. 1553). Only in the event that the motion is successful will the amendment in question receive an up-or-down vote. Motions to suspend require a two-thirds vote of those present and voting for passage (typically 67 if all members are present and voting), as opposed to the three-fifths vote (60) required to invoke cloture, and the simple-majority requirement to pass a measure on an up-or-down vote.

Notably, the decision to suspend the rules rather than appealing the ruling of the Chair itself provides support for the *Path Dependent Hypothesis*. Senators concerned only with policy success or messaging would simply offer a third degree amendment in the event that they are blocked from offering amendments. While third degree amendments are not in order under Senate rules, appealing the decision of the Chair can be done with no advanced notice and requires only a simple majority (at most 51 votes) to succeed. By contrast, the required one-day's notice and higher threshold associated with motions to suspend present members with higher costs to pass their amendment. That members voluntarily submit to the super-majoritarian requirement of such motions instead of availing themselves of the simple-majority threshold associated with a third degree amendment reflects members' deference to the parliamentarian through their hesitance to change Senate rules by overturning rulings of the Chair and creating a new precedent. Put simply, while the two-thirds requirement to prevail on a motion to suspend erects a higher threshold for policy success, it also allows members to secure votes on their amendments over the objection of Senate majorities without upsetting the traditions and inherited rules of the institution.

In this case, the parliamentarian's ruling effectively neutralised restrictions on amendments and debatable motions as dictated by rules changes in 1975, 1979, and 1986. The original precedent created in this case affirmed the expectations of the *Path Dependent Hypothesis* that predict that the parliamentarian's rulings do not automatically favour the majority. This hypothesis correctly points out that the majority party will not always attempt to overturn the parliamentarian when it is disadvantaged by her rulings. As a result of this precedent, members of the minority party were able to utilise motions to suspend the rules to force a vote on any issue. In addition, this precedent potentially allowed a committed minority to engage in a post-cloture filibuster despite the opposition of a super-majority of the Senate.

Majority Leader Harry Reid, however, utilised what is known as the constitutional, or nuclear, option to change this precedent on 6 October 2011. Reid made a motion to suspend the rules and raised a point of order that such a motion is dilatory post-cloture. Despite the fact that such a motion violated the Senate's precedents as interpreted by the parliamentarian and confirmed by the Senate in previous actions, a majority of the Senate sustained the point of order on a party-line vote. Such action effectively established a new precedent that motions to suspend the rules post-cloture to offer non-germane amendments were not in order.

Notwithstanding Reid's actions, this case can more accurately be viewed as providing the exception that proves the rule. Despite the heated rhetoric on the part of Minority Leader McConnell, the minority party did not retaliate for the majority's use of the nuclear option to eliminate their ability to offer motions to suspend post-cloture. Moreover, the majority chose to reject the parliamentarian's interpretation in the specific instance of suspending the rules post-cloture for purposes of offering a non-germane amendment. It is important to note that motions to suspend the rules post-cloture for other reasons are still permissible under the Senate's rules as a result of the parliamentarian's original interpretation in the 111th Congress.

Conclusion

An examination of the relationship between senators and the parliamentarian demonstrates the extent to which members defer to, and are thus constrained by, the parliamentarian to interpret the institution's rules. In this sense, the development of the parliamentarian supports the informational model of congressional organisation (Krehbiel, 1991). Krehbiel's conclusion that final policies will not depart significantly from those supported by moderate legislators could possibly be adjusted to imply that the content and application of Senate rules will rarely depart significantly from the determination of the parliamentarian because of the deference she enjoys. By extension, the interpretation of parliamentary procedures governing the legislative process in the Senate is not likely to fluctuate significantly and will not reflect an inherent bias towards either the majority or the minority party.

It would then be incorrect, however, to infer that the development of the parliamentarian affirms all aspects of the informational model. Specifically, the parliamentarian's role in the legislative process does not support the view of 'legislatures as institutions of issue-by-issue majoritarian policy-making under uncertainty' (Krehbiel, 1991, p. 258). Although it is certainly true that the consistent application of Senate rules that guarantee the right of unlimited debate and the ability to offer amendments reduces uncertainty for *individual* members, such application may create problems for increasingly cohesive majority parties. Furthermore, there is nothing inherent in the transition to a more majoritarian legislative process, such as that exhibited in the House of

Representatives, that would not also serve to reduce uncertainty for the majority party in the Senate. For these reasons, it can be assumed that some costs accrue to efforts to change Senate rules via a simple-majority vote precisely because Senate majorities choose not to avail themselves of this option. It is in this sense that the Senate's rules serve as a constraint on individual members *and* majority parties. The power of this constraint, however, may be inversely related to the level of legislative dysfunction in the Senate over time.

With this in mind, the perspective provided by the parliamentarian's development and its ongoing relationship with the Senate demonstrate that approaches that focus solely on the behaviour of individual members or political parties are not alone sufficient to account for how the legislative process works in the Senate. Instead, a more nuanced approach is needed that accounts for how institutional forces influence member behaviour. Indeed, an examination of the evolution of the Senate parliamentarian demonstrates how rules of parliamentary procedure and other endogenous institutions may constrain the goal-driven behaviour of senators acting individually or collectively.

To this end, this article has provided qualitative evidence with which to test the path dependent and majoritarian approaches to understanding procedural choice and the impact of Senate rules on the legislative process. Hypotheses have been developed to incorporate the parliamentarian into these two approaches in order to test their theoretical validity. Each hypothesis generated a particular set of expectations for the interplay between the parliamentarian and the presiding officer, party leadership, and individual senators in the legislative process. These expectations were then examined in the context of the historical development of the office. Finally, three case studies were analysed in more detail in an effort to determine whether the relationship between the parliamentarian and individual senators supports the *Path Dependent* or *Majoritarian* hypothesis.

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

Specifically, the *Path Dependent Hypothesis* demonstrates the extent to which members are more likely to defer to the parliamentarian in the contemporary Senate by virtue of the specialised advice she provides to the presiding officer, party leadership, individual members, and their staff. Such deference is proportional to the complexity of the Senate's rules. Senators today simply lack the resources to develop the expertise necessary to participate successfully in the legislative process independently of the parliamentarian. In practice, the parliamentarian makes the ultimate interpretation of Senate rules. While a majority may override the parliamentarian's advice, the fact that it chooses to do so only very rarely, despite the fact that such advice may make it more difficult

for its members to achieve their goals, points to the constraints posed by the Senate's inherited rules of procedure.

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

Note on Author

James I. Wallner is the Executive Director of the Senate Steering Committee, United States Senate, and Adjunct Professor in the Department of Politics at the Catholic University of America, Washington, DC. He is the author of *The Death of Deliberation: Partisanship and Polarization in the United States Senate* (Lexington Books, 2013). Email: jameswallner@gmail.com

Notes

1. Congressional Record (Cong. Rec.) S1,989 (2009) (Statement of Sen. Reid).
2. The Senate's standing rules can be found on the website of the Senate Committee on Rules and Administration. The direct link to the rules is: http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome
3. Majority Leader Trent Lott (R-Mississippi) introduced a resolution (Senate Resolution 160) to reverse this precedent in the 106th Congress. The Senate passed Senate Resolution 160 on 22 July 1999 by a vote of 53 to 45.
4. The word 'see' in *Riddick's Senate Procedure* designates precedents resulting from parliamentary inquiries.
5. Congress, Senate, *Tributes to Murray Zweben, parliamentarian of the Senate: Commendations for outstanding service, loyalty, and unfailing dedication to the Senate of the United States, delivered on the floor of the United States Senate*, 96th Congress, 2nd sess., Senate Documents, vol. 14, nos 69–78 (1980), p. 2.
6. Senate Documents, vol. 14, nos 69–78 (1980), p. 3.
7. Congress, Senate, *Tributes to Charles L. Watkins, the first parliamentarian of the Senate: Upon the occasion of his retirement and designation as parliamentarian Emeritus; delivered on the floor of the United States Senate*, 89th Congress, 1st sess., Senate Documents, vol. 1-1, nos 2–40 (1965), p. 3.
8. Congress, *Tributes to Charles L. Watkins*, p. 4.
9. Cong. Rec. S11,691 (1992) (Statement of Sen. Stevens).
10. Congress, *Tributes to Charles L. Watkins*, p. 9.
11. Martin B. Gold, interview with the author, 23 August 2012.
12. Cong. Rec. S313,352–S313,353 (2009) (Statement of Sen. Durbin).
13. Cong. Rec. S13,309 (2009) (Statement of Sen. McConnell).
14. Cong. Rec. S13,646 (2009) (Letter submitted by Sen. Cardin).
15. Cong. Rec. S13,646 (2009) (Letter submitted by Sen. Cardin).

16. Cong. Rec. S13,646 (2009) (Letter submitted by Sen. Cardin). S13,647.
17. Cong. Rec. S13,646 (2009) (Letter submitted by Sen. Cardin). S13,647.
18. Cong. Rec. S39 (2010) (Letter submitted by Sen. Coburn). Italics added for emphasis.
19. Cong. Rec. S18,127 (1979) (Statement of the presiding officer).
20. Cong. Rec. S40 (2010) (Letter submitted by Sen. Coburn).
21. Concurrent resolutions cannot be placed on the calendar via the rule 14 process, which is used to bypass committee consideration and place most bills directly on the calendar.
22. Senate Rule V, *Senate Manual*, p. 5.

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