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François Vergniolle de Chantal

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Is Senatorial Leadership even possible? The Deadlock of the American Upper Chamber.

François Vergniolle de Chantal

« *You have to think of the Senate as if it were 100 different nations and each one had the atomic bomb and at any moment any one of you could blow up the place. So that no matter how long you've been here or how short you've been here, you always know you have the capacity to go to the leader and threaten to blow up the entire institution. And, naturally, he'll deal with you* » *(anonymous senator, quoted in S. Binder, 1997a, p.151).*

Checks and balances, the founding principle of American institutions, are not only found in the constant inter-branch dialog. The same applies within each branch, and especially in Congress. The bicameral division was initially meant by the Founding Fathers as an internal check within the lawmaking process. The upper chamber, the great anchor of the republic according to James Madison, was supposed to be a council to the Executive. As such, it was one of the institutional barriers meant to control the vortex of demagoguery and instability that the lower chamber was always in danger of becoming.

Nowadays, the internal legislative check of the founding generation is still the order of the day even though the political dynamic is not the one envisioned in the late 18th century. The two chambers making up Congress often do check and balance each other, especially when each party controls one chamber. The reasons accounting for this mutual control are numerous and varied. From constituency size to different electoral constraints including diverging partisan balance, many political factors contribute to the complex relations between the two chambers. One is especially important though: the majoritarian decision-making process in the House of Representatives compared to the omnipresence of minority procedures in the Senate. Under specific conditions, the Speaker of the House may impose a partisan discipline on his troops while shutting out the minority from any meaningful action. In the Senate however, a single senator can derail the whole legislative process thanks to a whole range of minority procedures such as the filibuster, the most (in)famous of them all.

Highly unusual until the 1960s, the filibuster, or rather the threat of its use (known as a "hold"), is now the norm (Wawro, 2011).

The leadership of the Senate is thus a risky, unrewarding and uncertain task. The Majority Leader is often unable to garner the necessary support to have a bill adopted or even considered on the floor. Despite the high expectations in him – no woman has ever held this position so far – the Majority Leader is formally weak. Unlike the Speaker of the House, he has no constitutional status and his powers are merely the results of twentieth century practice. Being a *primus inter pares*, he can only bargain with his colleagues, which paves the way for highly uncertain outcomes. Senate leadership has thus been compared by former Majority Leaders to "herding cats", "pushing wet noodles" or "keeping frogs in a wheelbarrow", a series of telling expressions that illustrate the constant frustrations inherent to the job.

The point of this chapter is to temper this usual assessment by highlighting that the omnipresence of minority procedures is also in line with majority interests. Even though Senate Leaders are caught up in a web of confusing procedures, conflicting past precedents and various partisan imperatives, they may at times rely on this uncertain environment to promote their specific goals. They typically do it through informal bargaining. They can also, however, act as game-changers, especially when their Caucus is divided (Strahan, 2007). If significant procedural changes are indeed few and far between, this does not imply that senatorial Leadership is impotent. In November of 2013, the Senate profoundly altered the use of filibusters on presidential nominations and this was as big a decision as the creation of cloture votes in 1917, while the century in-between was characterized by minor adjustments even though the larger political landscape experienced tremendous changes (social reforms of the 1930s and 1960s, civil rights, conservative backlash etc..). The relative lack of successful senatorial reforms is indicative of the fact that the procedural specificities of the upper chamber are not only the result of minorities somehow hijacking the regular process; rather, they are also tolerated by the majority, in so far as minority procedures are a convenient tool for the majority. Indeed, divisions within the majority party, the prospect of soon becoming the minority, or the relations to the Presidency are considerations that temper the theoretical commitment of the majority party to a majoritarian decision-making process.

The Historical Development of Leadership in the U.S. Senate.

In his famous 1960 book on presidential powers, Richard Neustadt explained that Presidents could only act one way with Congress, through persuasion (Neustadt, 1960). The same could be said about senatorial leadership. Historically, the Senate remained essentially unorganized [1] until Woodrow Wilson's presidency. Elected to the presidency after decades of near-complete Republican domination on the Executive branch, Wilson considered he had gained a mandate to govern and consequently built on Theodore Roosevelt's achievements to turn the presidency into an institution designed to promote social changes. One of the main illustrations of that change was his relations to Congress. Not only did he initiate the tradition of addressing Congress for the State of the Union, but he also pressured Democratic majorities – in the 63rd Congress elected in 1912, Democrats had a slim majority in the Senate and dominated the House – into organizing themselves to facilitate the passage of the presidential agenda. The "greatest deliberative body in the world", the U.S. Senate, was the most impacted since the House already was largely organized in a majoritarian way.

Under presidential pressure, the Democratic majority created in 1913 a new position, that of Senate Majority Leader, meant to unify the Democratic majority (Hatcher, 2010). The newly created Leadership – under the aegis of John Kern (a Democrat from Indiana) – tried to organize floor deliberation, thus formalizing the process of Unanimous Consent Agreement (UCA) that had been sporadically implemented in the previous decades [2]. Three years later, after "a few willful men" prevented a bill to arm merchant ships from being adopted, the Senate adopted the "cloture", a provision to end filibusters (Rule XXII(2)) that was used to limit debate on the Treaty of Versailles. Its use remained largely unusual though in the 1920s and 1930s (Mayhew, 2003). The Senate Majority Leader, despite his lack of formal powers, could effectively manage the floor and have substantial legislation adopted when needed. The New Deal witnessed another important change. The Senate Majority Leader gained what is to this day his only official power, the "right of first recognition": the Senate Majority Leader will always be the first to be recognized by the chair, which allows him to set the floor agenda by making motions, including the motion to proceed to the consideration of a measure, before any other senator can do so. A skillful Leader can thus shape the ensuing debate while minimizing disruption.

By mid-century, the main leadership components of today's Senate were thus in place. The rules made the Leadership a consensus-building tool. The main role of the Majority

Leader was to craft a UCA to debate a bill after committee action [3]. This meant to get the approval of all senators – or at least a sufficient number to invoke cloture – on how to debate a bill on the floor (number and type of amendments for instance); then, the Majority Leader used his right of first recognition to formally open the debate. In case of obstruction – generally confined to Civil Rights issues until the 1960s – the Majority Leader could ask for a cloture vote to end debate and get a final vote on the text. The Democratic Majority Leaders of the 1950s and 1960s (Lyndon Johnson, Texas, and Mike Mansfield, Montana) operated in a procedural vacuum that made it possible for them to develop their own personal style of leadership. If Johnson became famous for his ability to force his colleagues into action (Cairo, 2002) [4], Mansfield adopted a more subtle tactic that relied on constant listening and accommodation. In both instances, the personal qualities of the Leaders mattered much more than their formal power. The normal mode of operation was informal. According to the rules, the Majority Leader only has one power, the right of first recognition. By international standard, this is incredibly weak, which raises the question of why has the U.S. Senate stuck to such a lack of leadership rules? How was it even possible to organize the lawmaking process?

Part of the answer lies in the classic assessment made by Donald Matthews in his 1960 account of the Senate, *U.S. Senators and their World*. According to him, members of the upper house operated according to informal norms that regulated their behaviors, including seniority (the longer you serve in the institution the higher up you are in the hierarchy) and self-restraint in the use of minority obstruction. But this focus on norms has to be complemented by two other factors. First, the early procedural decisions in the Senate: Binder (1997a) largely documented the abolition of a previous question motion in 1806, its cumulative consequences and the ensuing procedural divergence with the House. The lack of a previous question motion – a common tool of all legislative chambers in the world to stop debate and proceed to a vote – proved crucial. Indeed, this initial choice by a Senate barely over thirty members paved the way for the current lack of discipline in the upper chamber. Second, the specificities of the U.S. party system are also to be taken into account. Until the 1960s, American parties were divided to such an extent that their delegations in Congress were largely empty shells. Republicans had a substantial wing of moderates and even some progressives, whereas Democrats had a southern branch made up of explicitly racist and highly conservative members who used filibusters for race issues only. This meant that party discipline was basically inexistent, especially on Civil Rights measures. A majority was

almost always bipartisan, as witnessed during the New Deal and the Great Society. Taken together, procedural path-dependency, partisan and ideological mismatch, the light touch of effective Majority Leaders and informal norms of behaviors, were mutually supportive and combined to create the "most exclusive club" described by William White in his 1957 journalistic account of the Senate, likened to a *Citadel*. To some, including White, the Senate was thus the prime example of a consensual, tradition-bound and stable institution; to others, the Senate was a stuffy venue, wholly disconnected from national trends and hijacked by Southern segregationists.

Going into the 1970s and 1980s, the Senate experienced profound mutations that were summarized by Barbara Sinclair in her 1989 book, *The Transformation of the U.S. Senate*. She called that "new Senate" a "hyperpartisan and individualistic" chamber where values and practices inherited from the 1950s and 1960s were turned upside down. The norms of self-restraint and institutional pride gave way to a politicized and partisan chamber where the "permanent campaign" (Blumenthal, 1982) was the obsession shared by all senators. They have become more extreme in their views and they never hesitate in using minority procedures to further their own particularistic objectives without any consideration for their leadership or larger policy objectives. The confluence between individualistic behavior and partisan polarization has proven to be extremely toxic. In 2006, Norman Ornstein and Thomas E. Mann called it "the curse of the Senate" in *The Broken Branch*, a book criticizing the supine Congress of the Bush years. The senatorial politics of the 2000s and 2010s seem to be an echo chamber that amplifies the worst characteristics of American politics, namely individualism and extremism.

A Leadership Crisis?

Compared to the House, the contemporary Senate seems to be a legislative state of nature. Polarization has also impacted the lower chamber but its consequences have been quite different. Since the 104th Congress and Newt Gingrich's Speakership, centralization and strict majority-rule are the guiding principles of lawmaking in the House of Representatives. John Boehner is maybe the weakest of all Speakers since 1994 but his formal powers bear no comparison with the lone right of first recognition of Harry Reid in the Senate. The "conditional party government" thesis articulated by D. Rohde in 1991 for the House of Representatives doesn't fit the Senate. The key proposition of Rohde is that polarized parties

produce a lawmaking process that is centralized in majority party leaders. Indeed, polarization implies that most members of the party will trust strong central leaders to act on their behalf. Party Leaders are thus mainly followers of their troops. Franklin Roosevelt famously wrote in 1931 that "*Leadership can be successful only through the greatest amount of party harmony"*, an insight shared by most theories of legislative decision-making, including Rohde's. But in the Senate, the ability of a minority to block changes in the rules and the inherent weakness of the chair (no constitutional status, no stability) have limited the powers of the majority party leadership. As a result, polarization of parties has not translated into rules that enhance the procedural advantages of the majority party and its leader.

This shows how wide a gap there is between party discipline and a shift to extremes. To that extent, the word "polarization" is a misnomer that hides a major difference. In the House, both ideological extremism and party discipline have been mutually supportive at least until the rise of the Tea Party and the Leadership of John Boehner (see Alix Meyer's chapter in this volume). But the Senate illustrates the divergence between the two ever since the early 1990s. In a legislative body that empowers legislators with resources, both the Minority and Majority party leadership have few means to restrain fellow partisans. Even within a quite homogeneous party, there will be legislators whose personal views, home constituencies, and political ambitions will motivate them to pursue uncommon strategies that party leaders would not otherwise pursue. The party leadership will often find that floor strategies are driven by the day-to-day tactics of more extreme legislators. The Tea Party senators have often tried to promote their own views without any consideration for their leadership, for instance during the numerous fiscal debates that have taken place since 2010. On the Majority side, the same has applied, since Harry Reidhad many difficulties keeping his party united during the healthcare debate. The rolling debate on immigration reform has also repeatedly shown that Senate Democrats do not speak in one voice. More generally, Senate Leaders cannot retain their position without the support of their colleagues, and they have few resources they can use to motivate compliant behavior. As a procedural matter, the Majority Leader always needs unanimous consent to conduct the normal business of the Senate and cannot afford to seriously alienate any of his colleagues. His institutional role is thus limited to bargaining and the preservation of good relations within his Caucus.

Leaders in the "new Senate" have seemed to be passive bystanders in a chamber spinning out of control. Their common objective has been to try to accommodate their fellow senators as much as they could without radically altering the rules giving them so much

legislative freedom. The fact is that the only significant change in Senate's history remains to this day the creation of cloture in 1917. The war context and the recent passage of the 17th Amendment instituting the direct election of senators were certainly decisive factors whose impact cannot be replicated nowadays. Since the early 1990s, the striking fact about minority procedures in the Senate is the lack of reform. The upper chamber formally adopted a rule change for the last time in 1986 when Rule XXII was amended to limit post-cloture debate to 30 hours. Between 1986 and the Fall of 2013, minority procedures remained unchanged. Besides, the Leadership came to tolerate new practices that were not even mentioned in the rules, such as "holds", which are individual notifications of intent that a senator plans to filibuster a bill or a nomination. Instead of addressing the crucial issue of minority procedures, Leaders have constantly tried to avoid the subject [5]. They have rather developed forms of "unorthodox lawmaking" (Barbara Sinclair, 1995). Indeed, more polarized parties have accelerated procedural innovation. Thus, according to Steven Smith (2014), a pattern of obstruction and restriction similar to a "parliamentary arms race" has pervaded the Senate, just like in the House during the 1980s. The deep partisan divide of the past two decades has intensified and broadened minority obstruction and majority reaction. With less resistance from within the party, each party has an incentive to score political points against the opposition. A cohesive minority party especially is able to block action; it has become the norm in the modern Senate. Thus, for today's generation of senators, the ability of a minority party, if it is fairly cohesive, to obstruct a majority party is the normal state of affairs. Senators began to assume that the other party would fully exploit its procedural options and prepared to do the same. The majority cannot assume that there will be a final vote on a bill or nomination; the minority cannot assume that opportunities to offer amendments will be preserved. This is what Steven Smith recently called the "Senate Syndrome" (2014). Since the late 1980s, Majority Leaders have responded to minority obstruction with innovations in parliamentary tactics and new precedents but never frontally addressed the issue of minority procedures.

Procedural Makeshift in a Polarized Senate.

The "dysfunction" of the contemporary Senate is illustrated by the omnipresence of the filibuster threat. This is the main characteristic of today's Senate: the threat of a filibuster and not an actual – "talking" – filibuster, the way Frank Capra famously showed in his 1939

movie, *Mr. Smith Goes to Washington*. Indeed, Leaders have condoned the rise of the so-called "holds" since the 1970s. They are requests to the floor leader [6] that a measure not be considered on the floor until some condition is met. From the start, floor leaders kept confidential the identity of the senator placing a hold. At times, floor leaders may have used the secrecy to their advantage by privately addressing the concern of the senator or even using the hold as an excuse to delay floor action on a matter. But on the whole, holds became a serious problem for lawmaking in the Senate. During the 1970s and 1980s, repeated announcements by majority leaders that holds were not a right and could be ignored did not make much of a difference [7]. Leaders still wanted advance notice of problems, and senators appreciated the opportunity to exercise something approaching a personal veto (Smith, 1989). That is how holds gained their effectiveness as implicit threats to filibuster. The threats became more credible and the floor leaders' need for predictability increased as the number of actual filibusters increased. The holds thus became a defining feature of the Senate because Leaders started to take into account the mere notification of an individual senator's opposition to a given measure or nomination as a veto. This form of "silent filibuster" is nowadays omnipresent, even though its secret nature has been recently reformed. In 2007 and 2011, the Senate officially addressed the issue. In 2007, an ethics reform bill was adopted that incorporated changes to holds. The new rule did not ban holds but rather was intended to make public the identity of senators placing holds under certain circumstances. But the process was convoluted and full of ambiguity. A new agreement was thus implemented in 2011, after Obama officially called for an end to holds on executive nominations in his 2010 State of the Union Address and a most embarrassing episode that occurred the same year when Richard Shelby (a Republican from Alabama) objected to Senate action on nearly seventy executive branch appointments because of his interest in acquiring an Air Force tanker project and an antiterrorism center for his state. As part of the 2011 agreement, the Senate's party leaders agreed to tighten the rule governing holds. Again, holds were not banned**,** but a disclosure requirement was imposed after two days. The debate on holds is a prime example of Leader's ambiguous relations to minority procedures (Smith, 2014). Even though holds are obstacles to a proper unfolding of the lawmaking process, Leaders have reneged on any attempt to seriously temper holds.

No surprise then in the fact that the number of cloture votes has been steadily on the rise ever since holds started and no matter which party was in power. There was a first steep increase in cloture motions in the early 1970s, another in the 1990s, and yet another at the end

of the first decade of the 21st century, after Republicans lost control of the chamber in 2006. In the 96th Congress (1979-80), the "last great Senate" according to one observer (Shapiro, 2012), 18 cloture votes were taken; 45 such votes were taken during the 103rd Congress (1993-1994), but 108 in the 110th Congress [8]. In the 113th Congress, cloture motions have skyrocketed: from January 3, 2013 through August 4, 2014, 190 cloture motions have been filed. But this is only the tip of the iceberg. The expansion of minority rights over the past twenty years has been so pronounced that the minority party Leadership now refers to the upper chamber as the "60-vote Senate" – the necessary threshold to successfully invoke cloture and proceed to a vote.

Leaders have devised ways of circumventing minority obstruction. Cloture is one. It ends debate and allows for a final vote. But this is by no means the only one. The other major freedom of individual senators – next to the freedom of unlimited debate – is the freedom to amend a text on the floor. There is no "germaneness" requirement governing floor debate, so that a single senator can derail the general debate by offering an amendment that has no connection whatsoever to the bill under consideration. Majority Leaders have been able to limit this freedom. Some statutory limitations have been created, for instance in the budget process since the 1974 *Budget Act*. It made the consideration of budget measures largely immune to filibusters and imposed strict germaneness rules to amendments. But these were the result of a larger confrontation between Congress and the Presidency. In the context of the Watergate scandal, Congress members garnered the necessary institutional patriotism to counter the budgetary moves decided by Nixon. In order to preserve their constitutional budgetary prerogatives against presidential "impoundments" (unilateral presidential decisions not to spend the appropriations voted by Congress), Congress members created a new legislative framework that limited the individual powers of senators while protecting the legislative budget power. But the amendment process was limited in another way and this time it was an innovation by Majority Leaders. Trent Lott, a Republican senator from Mississippi and Majority Leader in the early 2000s, systematized the practice of "filling the amendment tree", an innovation that was taken up afterwards by both Republican Bill Frist and Democrat Harry Reid (Smith, 2014). The Majority Leader can fill the "amendment tree" [9] by virtue of his right of first recognition. By seeking recognition to offer a series of amendments, the Majority Leader can prevent other amendments from being offered, at least temporarily. At a minimum, filling the tree stalls the amendment process, thus providing the Leader with some control of the floor proceeding.

Building around minority obstruction to get results, Majority Leaders have been most cautious when formally dealing with minority rights. For instance, Harry Reid, the Democratic Majority Leader since 2006, resisted demands for a bold move at the start of the 212th Congress in 2011 and instead negotiated an agreement with Republican Minority Leader Mitch McConnell. This "gentlemen's agreement" was simply based on a common exercise in self-restraint. It was merely intended to smooth relations between the parties and avert a confrontation over formal changes in Senate rules [10]. Later, at the start of the 113th Congress, in January 2013, the Senate adopted modest procedural reforms: limiting the number of times that any one bill can be filibustered and limiting the time to debate a motion to take up a bill or to debate a minor nomination. The minority Republicans went along because they were given opportunities to offer amendments in return. Plus, these changes were supposed to be temporary, good only for the 113th Congress (2013-2014), unless renewed by the Senate.

The modesty of these changes offers a striking contrast to the intensity of polarization. The question then becomes why has Senate Leadership remained so passive when confronted to the rise of minority obstruction in a polarized context? A subsidiary to this first question is why a sudden reform in the Fall of 2013 was implemented that none of the Senate watchers anticipated?

Senatorial Leadership & Procedural Reform.

The only significant procedural reform in Senate's history was the creation of cloture in 1917. However, the external chocks that made it possible are – fortunately – not on the horizon nowadays. Under more routine circumstances, the upper chamber seems to be impossible to reform and forever tied in procedural knots. There are broadly two reasons accounting for this dead-end, procedural first and political second.

Senatorial rules can be formally amended in two ways, both of which are not unanimously agreed on by all senators (Smith, 2014) [11]. The first one is the simplest: a majority vote to change the rules; but this raises a difficulty: the motion to proceed on a rules change is debatable, which means that it can be filibustered. In the current context, this implies that a rule change requires a 2/3 majority of voting senators, the super-majority required by Rule XXII [12]. The other option is more complicated and has been a rolling debate in senatorial circles since the late 1950s. It requires a ruling by the presiding officer of the

Senate. It is based on the opinion of vice-president Nixon in 1957 in response to a parliamentary inquiry from Hubert Humphrey (a Democrat from Minnesota) about the rules under which the Senate was proceeding. According to Nixon's opinion [13], a simple majority is plainly entitled to change the rules of the Senate at the start of each new Congress. In the mid-2000s, when the debate on confirmations was stuck, the Republican Majority Leader, Bill Frist, devised a "constitutional option" – quickly dubbed "nuclear option" in the media because of its wide-ranging implications on Senate governance – that would end obstruction on nominations. The scenario, as explained in a Law Review article written by a former Senate Republican leadership aide (Gold, Gupta, 2004) would work like this: in times of a unified government, a senator from the majority party would make a point of order that the Constitution implies an obligation on the Senate to vote on nominations, which means that a simple majority may invoke cloture on a nomination. The presiding officer, probably the vice-president for that occasion, would rule in favor of the point of order. The minority party would appeal the ruling, but a member of the majority party – presumably the Majority Leader himself – would be recognized by the chair to offer a motion to "table" (meaning to "discard") the appeal. Because it takes just a simple-majority vote to adopt the nondebatable motion to table, the appeal would be tabled and the presiding officer's ruling on the point of order would stand. Thus, simple-majority cloture for nominations would be instituted by a ruling of the chair backed by a simple majority of senators [14].

The other set of reasons are political and electoral, starting with the fact that individual senators want to retain their prerogatives. It sounds like a real challenge to convince a supermajority of senators to weaken their powers within the institution. Just as obvious is the fact that senators anticipate an electoral swing and their resulting minority status. Since the 1980 election, the upper chamber has changed majorities more often than the House – in 1980, in 1986, in 1994, briefly between 2000 and 2001, again in 2006 – and the electoral vulnerability of senators compared to Representatives is a long-recognized fact of political science (Abramowitz & Segal, 1992; Krasno, 1994; Gronke, 2000). Nearly all senators nowadays have experienced a change in party control and are sensitized to its consequences (committee chairmanships & hearings, agenda control). This has consequences for the policy and electoral calculations of the parties. The prospect of a change in party control encourages the minority to withhold support for legislation in the hopes of having a stronger hand after the next election. It also may encourage the majority to push a larger agenda for fear of losing seats at the next election. Either way, obstructionism is encouraged (Smith, 2014). Additional

electoral calculations and anticipations can easily be added to the mix. The Majority Leader can tolerate minority obstruction so as to avoid a disruption of his party's legislative agenda because of the divisions within the party. This may be especially the case with Democrats, whose moderate wing – currently known as "Blue Dogs" – remains influential. Plus, even if there are ways for a majority to force a change in the rules, there are also costs that the minority can impose if the majority does so. In the context of most legislating, a fight over the rules is certainly too costly for the majority, as illustrated by the fight against nominations between 2003 and 2005. Moreover, a party that controls the presidency may find supermajority cloture to be an advantage or disadvantage depending on whether it wants to pass or block legislation. The filibuster can be used to block legislation that the president opposes. Since 2010, the ideological frenzy of the House Republicans – under pressure from Tea Party members – has systematically gone nowhere because the Senate would not budge. Clinton also benefited from this moderating effect of the upper chamber when Republican Majority Leader Bob Dole contributed to the moderation of ideological impulses coming from the lower chamber during the 104th Congress. As for the minority party, it quickly recognizes that it may not be held accountable for outcomes in a Senate "controlled" by the other party and, considering the low approval ratings of Congress [15], it can hope that frustration with Washington will cost electoral support for majority party senators. This is the calculation made by Republicans since 2010.

Both the complexity of rules and electoral anticipations from senators themselves thus seemed to make impossible any substantial readjustment of minority procedures. Until the Fall of 2013 that is. With the benefit of hindsight, it is possible to decipher the alignment of factors that made reform possible. First, the electoral configuration: the surprising outcome of the 2012 Senate elections, which increased the Democrats' majority from 53 to 55 seats, and the reelection of Democratic President Barack Obama encouraged the majority party to act on its agenda in the 113th Congress despite Republican obstruction. The Democrats also expect to lose seats in the 2014 elections and to suffer a loss of presidential influence in Obama's last two years in office during the next Congress. Second, the deterioration of the relations between Mitch McConnell and Harry Reid. By the fall of 2011, the "gentlemen's agreement" of the previous January had disintegrated. Reid and the Democrats complained of a Republican obstruction as early as the Spring of 2011; but after the collapse of the president's job bill in the Fall, Reid publicly declared that the agreement had broken down. In January of 2013, Reid and McConnell came up with two minor procedural changes that streamlined the

process for bringing up a bill in the 113th Congress and facilitated quick action on a motion to proceed. But these were limited in scope and in duration. Until then, Reid had opposed the reform-by-ruling approach advocated by Tom Udall (Democrat from New Mexico) and Jeff Merkley (Democrat from Oregon); he had given only the most token support for the general idea of reform (Smith, 2014). But on November 21st 2013, the Democratic Majority Leader Harry Reid made a point of order on presidential nominations. In other words, he raised an issue of parliamentary procedure by asking whether or not the rules had been broken. His point was that the Senate could close debate on the consideration of a presidential nomination, other than to the Supreme Court, by a simple majority vote. This point of order called upon the chair to make a ruling. Because Reid's point of order was inconsistent with Senate Rule XXII, the cloture rule that requires a three-fifths majority of all senators to close debate, the presiding officer ruled against Reid's point of order. Then, by a 48-52 vote, the Senate failed to sustain the ruling of the chair, thereby adopting the precedent that Reid requested.

This was a momentous change. The precedent of 2013 is one of the most important procedural developments in Senate history whose impact is yet to be assessed, especially the way Republicans will be reacting. Not only does the new threshold reshape the strategic calculations of presidents and senators involved in the nomination and confirmation process [16], but it also shows that minority procedures are not the insurmountable obstacle that analysts believed them to be. This is explained by the fact that contrary to the usual assumptions made by most theories of legislative leadership, Majority Leaders are not just the agents of their principals. They're not merely expressing the will of their Caucus or giving them what they want (in that case the preservation of their individual powers). The theory of "conditional agency framework" proposed by Randall Strahan (2007) better fits the recent development in senatorial politics. He emphasizes two elements that make it possible for Leadership to matter. First, building on Richard Fenno's framework (1973), the leader must have specific intensely held goals beyond staying in office, such as power in the institution and "good" public policy. Second, followers must be dissatisfied with the status quo but divided about how to change it. The 2013 decision is illustrative of this framework. Harry Reid, without being committed to procedural reform *per se*, is nonetheless aware of the constitutional duties of the Senate in the field of nominations, especially with a Democratic President. Nominations and confirmations are prime examples of checks and balances at work since all three powers are explicitly involved and the tensions within that crucial process have been running high since 2005. Here was a situation where the Senate as an institution was on the

brink of defaulting on one of its key constitutional obligations. Second, the Democrats were not united in their assessment of the crisis on nominations. Apart from some leading proponents of reforms – mostly junior and recently elected – the rest of the Democratic Caucus is tepid at best when it comes to reform of minority procedures – Harry Reid himself being a good illustration here – because of electoral and political considerations. Taken together, there was in 2013 a window of opportunity to act decisively on minority procedures and Harry Reid, unlike Bill Frist in 2005, decided to do so, thus proving once more the only existing law of politics, namely that it is event-driven and individually-shaped.

Unlike the House, where the Speaker is largely the agent of his principal, a majority of the majority party as Dennis Hastert used to say, the U.S. Senate illustrates how decisive the Leader can be, especially when uncertainty is on the rise. In the context of polarization and individualism, the Leadership has nonetheless succeeded in "leading from behind" over the past twenty years. The relative lack of substantial procedural reform until 2013 actually exemplifies the extent to which Leadership control can successfully take informal paths. Senate Leadership, just like the presidential influence theorized by Neustadt (1960), is both omnipresent and largely invisible. The recent reform of filibusters on nominations also shows that Leaders can be assertive under certain circumstances – individual leadership, intensely held goals, and division of the followership. A red line seems to be crossed when institutional stalemate is so intense as to prevent the upper chamber from fulfilling its core executive functions. The dysfunctional nature of the nomination process since 2003 has proven to be the catalyst for procedural change. A larger factor at work to understand the recent reform is also that no assembly and no elected official can have a purely negative record. The contemporary Senate has been a gigantic veto factory – including for major bills – and the two latest Congresses – the 112th and 113th – have been the most unproductive since the historic 80th "Do-Nothing" Congress of 1946-48. This may have been the necessary shock for a long-expected streamlining of senatorial procedures by a determined Majority Leader, thus bringing the upper chamber closer to a properly working assembly.

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François Vergniolle de Chantal is Professor of American Government & Politics at Paris Diderot University (Paris, France). He is the co-director of the French journal *Politique*

Américaine published by L'Harmattan. His next forthcoming book is about legislative control in the U.S.: *L'impossible présidence impériale*, Paris, Editions du CNRS, 2014.

Abstract: The leadership of the U.S. Senate is an impossible task, often compared to "herding cats". The Majority Leader has very few formal powers and constantly bargains with his colleagues. The rules make the Leader a mere consensus-builder, acting merely as the agent of his Caucus. The relative passivity of Majority Leaders in the context of the partisan and individualistic Senate reinforced that conclusion. However, the 2013 filibuster reform decided by the Democratic Majority Leader Harry Reid, calls for a more nuanced assessment of leadership in the U.S. Senate. The "conditional agency framework" (Strahan, 2007) is closer to the actual role of a Majority Leadership that can act as an independent cause under certain circumstances.

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[1] The key to this lack of organization is to be found in the Constitution. It provides for a presiding officer, the vice-president, who may vote only when the Senate is equally divided (Article 1, section 3). The political separation of the Senate from its presiding officer has had a significant effect on the procedural development of the institution. Since the president of the Senate is not a senator, he very rarely participates in floor debates. He is usually replaced. Either by a president *pro tempore* – the senior senator of the majority party – or, as is most often the case, a junior member who takes up this chore as part of his "apprenticeship" of senate ways. He has mostly ministerial and ceremonial duties, even though ruling from the chair may occasionally prove decisive.

[2] Thanks to a rule adopted in 1914 – Rule XII(4) –, unanimous consent agreements were considered orders to the Senate to be enforced by the presiding officer. That's why they became the most frequently used tool of the majority leader for orchestrating floor activity.

[3] Committees are weaker in the Senate than in the House. Rules make it thus easier to report a bill out of committee and to the floor in the upper chamber.

[4] The Johnson "Treatment" was captured by famous pictures of a face-to-face discussion between Lyndon Johnson and the chairman of the Foreign Relations Committee, Theodore F. Green, in 1957. These pictures are available on the *New York Times* website: http://www.afterimagegallery.com/nytjohnson.htm (accessed in August 2014). Two journalists, Evans Rowland and Robert Novak, described the "Treatment" thus: "*The Treatment could last ten minutes or four hours. It came, enveloping its target, at the Johnson Ranch swimming pool, in one of Johnson's offices, in the Senate cloakroom, on the floor of the Senate itself — wherever Johnson might find a fellow Senator within his reach. Its tone could be supplication, accusation, cajolery, exuberance, scorn, tears, complaint and the hint of threat. It was all of these together. It ran the gamut of human emotions. Its velocity was breathtaking, and it was all in one direction. Interjections from the target were rare. Johnson anticipated them before they could be spoken. He moved in close, his face a scant millimeter from his target, his eyes widening and narrowing, his eyebrows rising and falling. From his pockets poured clippings, memos, statistics. Mimicry, humor, and the genius of analogy made The Treatment an almost hypnotic experience and rendered the target stunned and helpless*" in *Lyndon Johnson : The Exercise of Power*, New York, New American Library, 1966, p.104.

[5] Some individual senators are known to be in favor of reform. They regularly came up with reform proposals but none of them were ever taken up by the Leadership and successfully voted on. Tom Harkin (Democrat from Iowa) has championed filibuster reform since the early 1990s. Recently, Tom Udall (Democrat from New Mexico) and Jeff Merkley (Democrat from Oregon) have been the lead reformers.

[6] Senators place "holds" requests via their party's leader. Thus members of the minority do not directly approach the Majority Leader. But both the Majority and Minority Leaders usually work together on the consideration of a given bill

[7] As early as 1973, senator Robert Byrd (a Democrat from West Virginia who later became known for his defense of Senate's values) complained about senators exploiting holds and creating problems for the majority leadership. By late 1982, Howard Baker was fed up and announced on the floor that he would no longer treat holds as binding. Bob Dole would say the same thing in the 1990s. The fact that the issue had to be addressed repetitively reflected the basic logic of the situation: floor leaders needed to plan floor sessions and clear legislation with their colleagues, which created an opportunity for individual and factional obstructionism.

[8] The data is available on the Brookings website: http://www.brookings.edu/blogs/brookings-now/posts/2013/11/chart-recent-history-of-senate-cloture-votes-to-end-filibusters (accessed in August 2014). Cloture votes are imperfect ways of measuring obstruction however. Many bills are never on the floor because of the anticipation of obstruction. This imperfect instrument remains the only tool to measure obstruction though.

[9] The "tree" is a diagram presenting the permissible amendments during a floor debate (Oleszek, 2011). Senate precedents identify the types of amendments that may be pending simultaneously during floor debate. These precedents stipulate that when an amendment to a bill is offered, it can be followed by a substitute amendment and a perfecting amendment to the first amendment. The original amendment is called "first degree amendment" and the other two are "amendments in the second degree". No amendment in the third degree is allowed.

[10] The negotiations were led by Rules Committee leaders Charles Schumer (Democrat from New York) and Lamar Alexander (Republican from Tennessee) and produced commitments from both leaders. The Republican Leader, Mitch McConnell, promised to only rarely filibuster a motion to proceed and to endorse a change in the rules banning secret holds. Harry Reid, the Democratic Leader, promised to protect minority-party opportunities to offer amendments. Both Leaders agreed to refuse to pursue the "constitutional" option to reform (cf below) in the 112th and 113th Congresses. Both Leaders also agreed to support legislation to reduce the number of executive branch positions subject to Senate confirmation (so as to avoid obstruction).

[11] There remains genuine and deep disagreement among senators about how they can exercise their power to determine their own rules because the Constitution is silent about it (Article 1, section 5 merely provides that "each house may determine the rules of its proceedings"). Both the House and Senate assume that a simple majority is implied to be the standard decision rule. Over the decades, the Senate has acquired 44 standing rules, many of which have been amended several times.

[12] The rule also indicates that three-fifths of all elected senators is required to invoke cloture on all other matters. Democrats achieved two-thirds of the seats only in the 88th and 89th Congresses (1963-1966). But since 1980, when the Republicans won a Senate majority for the first time since the early 1950s, the mean size of the minority party has been nearly 46. Only for half a year in 2009, after the seating of Al Franken (Democrat from Minnesota) in July and before the special election of Republican Scott Brown (Massachusetts) in January 2010, did the majority party hold 60 seats – a three-fifths majority – in the Senate

[13] Indeed, his views did not have the force of a ruling in response to a point of order. It was just merely advisory.

[14] The great tactical advantage here is to succeed in changing the application of the rules, by a ruling of the presiding officer rather than by changing the standing rules. It avoids a filibuster on a resolution to change the rules, which would be difficult to circumvent under the Rule XXII requirement of a two-thirds majority for cloture on a measure that changes the standing rules.

[15] It has hovered below 10% over the past few years. A recent Gallup poll (January 2014) showed that only 7 percent of Americans have "quite a lot" or a "great deal" of confidence in the country's legislative branch. This is the lowest approval of the past forty years. When Gallup started measuring confidence toward Congress, in 1973, it stood at 42%. See: http://www.usnews.com/news/blogs/ballot-2014/2014/06/19/poll-congressional-popularity-tanks (accessed August 2014).

[16] So far the reform has sped up the confirmation of Obama's judicial nominees, especially in states with two Democratic Senators. See Burgess Everett, "How Going Nuclear Unclogged the Senate", Politocp, August 22, 2014: http://www.politico.com/story/2014/08/how-going-nuclear-unclogged-the-senate-110238.html (Accessed August 2014).