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Congress's Transformative Republican Revolution in 2001-2006 and the Future of One-Party Rule

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Congress’s Transformative “Republican Revolution” in 2001-2006 and the Future of One-Party Rule

Charles Tiefer

I. INTRODUCTION

Until recently, the law of Congressional rules and procedures precluded one party’s leadership, absent a popular mandate, from arrogating Congress’s power in order to enact an undiluted ideological agenda. Congressional procedure sets up, in each of its three forums—Senate, House, and conference—veto-gates and obstacles to one-party ideological agendas. Senate Rule XXII requires 60 votes, often considered the most formidable supermajority requirement in the entire government, for the cloture necessary to overcome extended debate on Supreme Court nominees or on bills; House procedure empowers the offering of alternative proposals on bills, which can readily outbid, for centrist votes, extreme leadership versions; and conference procedures provide for minority participation, scope limits, and sunshine rules preventing leaderships from circumventing the Senate and House by trying to slip large-scale new matters through in conference.

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This article discusses how, in 2001-2006, a "Republican Revolution"\(^5\) transformed the law of Congressional rules and procedures to allow that party to implement an ideological agenda.\(^6\) The transformed Congress carried forward the more unsubtly proclaimed preliminary effort\(^7\) of 1995-2000.\(^8\) Majority leaderships swung the Supreme Court right by Senate confirmation of Alito and Roberts under the threat of a "nuclear option."\(^9\) They metamorphosed the tax system into a regressive form by moving trillions of dollars in unpaid-for tax cuts for the top brackets.\(^10\) And, they enacted whole categories of industry-indulgent or otherwise conservative legislation epitomized by warping of health care (Medicare\(^11\) and Medicaid\(^12\)) and bankruptcy law,\(^13\) the 2004 omnibus corporate tax giveaway, and infringements of civil liberties like the Patriot Act\(^14\) and the Detainee Treatment Act.\(^15\)

General observers did sound alarms about Congress in 2001-2006,\(^16\) but they addressed themselves more to background political conditions and

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tactics rather than the complex transformation in the law of Congressional rules and procedures. I have been an observer of that law\textsuperscript{17} as counsel in Congress in 1979-95\textsuperscript{18} and as author of a thousand-page treatise on Congressional procedure.\textsuperscript{19} Analyzing Congressional procedure will explain why the Democratic majorities after 2007, although of course halting conservative ideological action, might only interrupt the resort to, rather than outright eradicate, the new procedural structure developed in 2001-2006. Down the road, the next Republican majority may try to resume ideological achievements via resumed resort to the recently developed “one-party” procedure. Hence, combat over such procedure may well characterize the years to come.

Part II starts with a fuller background on what led up to, and framed, the 2001-2006 transformation, and what to look for overall in its separate elements. Strong procedural barriers to activist legislative agendas developed during the conservative coalition era of 1937-1963.\textsuperscript{20} After that, in the reform and post-reform eras from the 1970s on, party programs could move on the impetus of big electoral mandates,\textsuperscript{21} but absent that, must proceed only on a somewhat moderated basis. Congressional polarization,\textsuperscript{22} generally seen as a force for stalemate,\textsuperscript{23} and the obstacles and veto-gates\textsuperscript{24} of the Congressional procedure system, blocked most ideological party agendas.\textsuperscript{25} What political scientists described as “conditional party government” created potentially effective majority party


\textsuperscript{19} CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE (1989) [hereinafter CONGRESSIONAL PROCEDURE].


\textsuperscript{21} Examples include Roosevelt’s New Deal (after the 1932 sweep), Johnson’s Great Society (after 1964); the post-Watergate Congressional reforms (after the 1974 Democratic Congressional sweep); and Reagan’s conservative program (after the 1980 Republican sweep).


\textsuperscript{23} “If the presence of moderate legislators affects the ease of compromise, we should observe the following relationship: the greater the polarization of partisan elite, the greater the frequency of legislative gridlock.” SARAH A. BIND, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 25 (2003) (italics in original).


\textsuperscript{25} This was true even in the unified governments of the Carter (1977-80) and early Clinton (1993-94) periods.
leaderships, but without, under the extant Congressional procedure, the power to move whole unbalanced ideological agendas. 26

Overall, the 2001-2006 procedural transformation allowed majority party leaderships to overcome the barriers to action in all three forums—Senate, House, and conference—even absent an electoral mandate to do so. Parts III and IV start with the Senate, and the changes by which the Republican leadership could move their ideological agenda despite the Senate 60 vote requirement for cloture.

Part III begins with the Senate majority leadership victory in the key Congressional procedural “war” 27 of recent years 28 for the legal world, 29 specifically, the war over whether the barriers 30 would hold against a conservative 31 swing in the Supreme Court. 32 In 2005-2006, Majority Leader Frist won this “war” by preparing the “nuclear option,” a mere majority-vote way to break the 60 vote requirement, 33 cowing Democrats into yielding to the Alito and Roberts confirmations. 34 This displayed both the current significance of the procedural transformation, and its implications for future conservative drives.


28 Keith E. Whittington, Presidents, Senators, and Failed Supreme Court Nominations, 2006 SUP. CT. REV. 401.


30 Less significant than the filibuster and the 60-vote requirement for cloture, but of great historical significance, is the Senate’s “blue slip” procedure, allowing Senators to withhold permission for confirmations to courts in their state. Brandon P. Denning, The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process, 10 WM. & MARY BILL RTS. J. 75 (2001).


34 David S. Law, Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma, 26 CARDOZO L. REV. 479 (2005).
Part IV continues with the other key breaching of the Senate 60-vote barrier, for the trillions in unpaid-for tax cuts for the top brackets enacted primarily in 200135 and 2003,36 with further notable tax cuts in 2004 and 2006. While there is an overall major phenomenon of fast tracks37 and other ways of obviating the 60-vote barrier for specific subject areas, the contemporary transformation of tax lawmaking38 stands out59 for abuse of the Budget Act’s “reconciliation”41 procedure and its “Byrd rule.”42

Its particular, aspects in 2001-2006 started with the unprecedented firing of the Senate Parliamentarian in 2001.43 Then came the entrenching circumventions like sunsets and gimmicks,44 and the tax bills’ potent

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35 I have discussed the 2001 tax cut’s Congressional procedure in How to Steal a Trillion, supra note 10.
43 The termination is discussed in Charles Tiefer, Out of Order: The Abrupt Dismissal of the Parliamentarian Threatens to Rip Apart the Fragile Fabric of Senate Procedure, LEGAL TIMES, May 14, 2001 [hereinafter Out of Order].


Part VI completes the trilogy of fora by turning from the Senate and the House to the “third house of Congress,” the conference committee. Traditional conference procedure, by allowing minority as well as majority participation, provides limits as to how much one party’s leadership can circumvent via that “third house.” However, during 2001-2006, as leading political scientists observed, “[t]he degree to which Republicans exclude Democrats from conference deliberations is unprecedented in the modern era . . . .”\footnote{Eric Schickler \& Kathryn Pearson, \textit{The House Leadership in an Era of Partisan Warfare}, in \textit{Congress Reconsidered} 207, 211 (Lawrence C. Dodd \& Bruce I. Oppenheimer eds., 2005).} Republicans regularly moved novel legislative versions outside what either chamber sent to conference, such as the design of the Medicare

\footnote{Eric Schickler \& Kathryn Pearson, \textit{The House Leadership in an Era of Partisan Warfare}, in \textit{Congress Reconsidered} 207, 211 (Lawrence C. Dodd \& Bruce I. Oppenheimer eds., 2005).}
law of 2003 or the 2006 tax cut’s Roth IRA title. The recast conference procedure brought conservative overriding of the electorate’s centrist preferences, and a nadir of transparency, accountability and deliberation.51 This, too, holds portents for future conservative drives.

Some might assume that the Democratic party’s turn at Congress’s helm starting in 2007 automatically ended for good the prior transformation of Congressional procedure. The foregoing sets the stage for a deeper analysis of what tends toward recurrence in Congressional alteration. Transmuted procedural structures do recur, even when interrupted, and there are signs this might occur with the 2001-2006 transformation.

The conclusion discusses ways to parry and to counter this. Sound Congressional PAYGO budget procedure and stability in Senate confirmation procedures that would keep at bay the return of the “nuclear option” may come back in fashion. So may approaches of fair competition between alternative versions on the House floor and two-party participation in conferences. So while this account of the under-apprehended recent revolution in the law of Congressional procedure utters more than a few notes in a voice of doom, it also sounds a note of hope.

II. CONGRESS’S “REPUBLICAN REVOLUTION” OF 2001-2006: CONTEXT AND OVERVIEW

A. Background Context52

To oversimplify, Congressional procedure’s history for the past century reflects a tension between letting party leaders achieve their agendas—and retaining the capacity of a sufficiently supported floor opposition to stand up. Saving for later the details of Senate, House, and conference procedural history, in the New Deal of 1933-36, Democrats implemented an electoral mandate by progressive legislating.

Then, from the late 1930s to the early 1960s, a conservative coalition took control in both chambers, putting into operation a different procedural system. This system used the seniority-based committee chair posts in both the Senate and House, the House Rules Committee, and an invincible

filibuster in the Senate, to block for decades a resumption of the drive for the second New Deal and meaningful civil rights laws.\(^{53}\) There followed, from 1964 through the mid-1970s, the Great Society and “Congressional reform” eras. The prior procedural dominance of the conservative coalition broke down, as committee chairs lost some of their bastion of seniority and yielded greater roles to the party caucus and junior members. The House subordinated the Rules Committee to the majority; the Senate first broke the filibuster to pass the Civil Rights Act of 1964 and then, by 1975, reduced the requirements for cloture to just 60 votes. Conference committees faced more accountability to the chamber, including by new open meetings (“sunshine”) rules.

Then, the Congress settled down to the procedural “postreform” period lasting through 1994. During this time, the former bastions of the conservative coalition yielded more of their power. A limited stream ensued of usually moderate-to-progressive, yet occasionally conservative, outcomes, roughly reflecting the elections.\(^{54}\) In the Senate, the filibuster remained a potent constraint on action by less than a 60-vote majority. In the House, the minority’s ability to obtain votes on alternatives proved highly meaningful. For example, in 1981, the House minority Republicans won the floor struggle to enact President Reagan’s taxing and spending-cut agenda.\(^{55}\)

In 1994-2000, the contemporary transformation started with the preliminary phase of the Republican Revolution. Congressional Republicans were led by House Speakers Gingrich and Hastert and Senate Majority Leaders Dole and Lott. In 1995-96, they tried to move an ideological agenda, but they could not overcome President Clinton’s veto. Moreover, their seeming electoral mandate evaporated after the 1996 reelection of Clinton, for thereafter they lacked a claim to overwhelmingly represent the public will.

\(^{53}\) Not the (Truman) Democrats in 1949-50, nor the top-heavy Democratic majority of 1959-60, nor even the (Kennedy) Democrats of 1961-63, could get through their desired programs of economic or civil rights reform. CONGRESSIONAL PROCEDURE supra note 19, at 50.

\(^{54}\) For example, Democrats moved limited agendas in the first two years of Presidents Carter and Clinton and in the years after their Congressional election success in 1986, while Republicans moved a substantial agenda in the first two years of President Reagan. WILLIAM C. BERMAN, AMERICA’S RIGHT TURN: FROM NIXON TO CLINTON 42, 91-95, 165-68 (2d ed. 1998) (addressing Carter, Reagan, and Clinton, respectively).

\(^{55}\) Conferences remained constrained by scope and sunshine rules and by minority participation.
However, in Congressional procedure terms, they did begin to work out procedures for moving an ideological agenda to serve their newly realigned and unified conservative base. Conservative ideologues no longer saw their procedural road to ideological results in the approach of the bipartisan conservative coalition in the previous generation. They no longer aspired primarily to block progressive action and to cut spending programs. Rather, they themselves wanted dramatic legislative action, directed by the Republican leadership.

The Republican leadership in Congress increasingly represented a polarized electoral base of two distinct conservative constituencies. Economic conservatives, the well-off and the conservative-leaning business heads (especially from “pariah” businesses like tobacco), funded the party and operated a high-powered lobbying structure. And, social conservatives formed the party’s activist base, important in general elections.

Mobilizing its economic and social conservative base required the leadership to deliver on a package of measures outside the electorate’s and the Congress’s preference midpoint, as to the Supreme Court, tax cuts, entitlements, industry’s interests, and, after 9/11, being “tough” on civil liberties. From 1995 on, to move the agenda desired by their narrow but intense conservative constituencies required Republican leaders to become procedural radicals. They clamped down on Democrats’ minority rights,

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56 For example, in the Senate, conservatives moved towards a procedural way for a bare majority, lacking the votes for cloture, to push through large unpaid-for tax cuts. How to Steal a Trillion, supra note 10, at 433-34.

57 That base consisted of the conservative South, shaking off its formerly Democratic balance. This change was symbolized by Republican leaders Gingrich, Lott and Frist from what had been, a decade or two before, the Democratic bastions of Georgia, Mississippi and Tennessee.

58 That is, they no longer saw their goal as merely to block and stymie progressive bills, such as for floor gatekeepers like committee chairs and the House Rules Committee to thumb their nose at the majority-party leadership. Accordingly, conservatives now turned against their former support for minority rights, such as the intensive use made of the filibuster by their own Helms wing of the Senate Republicans in the 1970s. CONGRESSIONAL PROCEDURE, supra note 19, at 729-30; Ann Cooper, The Senate and the Filibuster: War of Nerves—and Hardball, 36 CONG. Q. WKLY. REP. 2307 (1978).

59 They proved capable of disciplining Republican moderates, particularly because reapportionments (as to the House) and regional polarization (as to the Senate as well) fashioned many districts and states in which Republicans had little concern about independents or Democrats in (little-contested) general elections but much concern for social conservatives in (potentially contested) primaries.

60 This is treated in VEERING RIGHT, supra note 14. A bit more precisely, these included swinging the Supreme Court right, the social conservatives’ number one desire; sweeping regressive tax cuts, the economic conservatives’ number one desire; revising entitlements like Medicare and Medicaid in an ideologically conservative way; helping businesses with unpopular issues like reducing bankruptcy rights, maximizing drug company profits, and avoiding FDA regulation of tobacco; and later, after 9/11, strategically trading off civil liberties protections for the political aura of being “tough” on national security (as conservatives had hitherto credentialled themselves as “tough” on crime).
and cabined the choices of their own party's key swing-vote moderates and centrists.

B. 2000 (and 2004): No Mandate

After some preliminary pioneering of new procedures in 1995-2000, the election of 2000 marked the true start of the new day in the law of Congressional procedure. Of course, now a Republican President took office, lifting from the Congressional Republicans their greatest constraint in 1995-2000, namely, President Clinton's veto. Moreover, President Bush could, and would, send ideological Supreme Court and lower court nominations to the Senate for attempted confirmation.

The election of 2000 also wielded a different, subtler influence on Congressional procedures. When Bush took office, he did so not just without a mandate, but with the opposite of a mandate: He lost the popular vote and only took office only with the 5-4 decision in Bush v. Gore. Rather, the election of 2000 had the peculiarity that the Presidential “winner” had negative coattails. The Republican majority in the Senate, which two years earlier held the decent (if far below filibuster-proof) figure of 55-45, withered in 2001 to a feeble 50-50. Even that overstated its strength, for within six months, Sen. Jeffords' party switch delivered the Senate majority to the Democrats. Even later, after re-election in 2004, he still lacked a majority of the popular vote, and after brief popularity, plummeted in the polls in 2005-2006 as the Iraq war soured.

President Bush’s elections in 2000 and 2004 did not do sufficient good for his House leadership either, which could not move its ideological bill versions unless it could preclude defections by moderates voting for centrist alternatives. Nor would regular conference procedures help sufficiently. Congressional procedure must change to make it happen. So

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61 Conversely, President Bush would provide policy leadership and direction, such as in his deciding which kind of enormous unpaid-for tax cuts would occur in the first law (in 2001), and which in the later laws (2003, 2004, and 2006). Joseph J. Schatz, Tax Cuts Redux, CONG. Q. WKLY. REP. 412 (2006); 60 CONG. Q. ALMANAC 13-3 (2004); 59 CONG. Q. ALMANAC 17-3 (2003); 57 CONG. Q. ALMANAC 18-3 (2001).

62 There it stayed until President Bush just barely won it back (with a major boost from 9/11) for a 51-49 majority after 2002—still very far short of a filibuster-breaking juggernaut. Democrats had found it all but impossible, with a better margin in 1993-94, to get controversial Clinton bills through. Beth Donovan, Democrats' Overhaul Bill Dies on Senate Procedural Votes, 52 CONG. Q. WKLY. REP. 2757-58 (1994); David S. Cloud, GOP and Interest Groups Dig in to Dump Gift Ban in Senate, 52 CONG. Q. WKLY. REP. 2854-55 (1994).

63 Again, to recall the experience of 1994, the minority had killed major measures coming back from conference even though these stayed within traditional conference constraints, let alone what would happen had they gone beyond. David S. Cloud, GOP and Interest Groups Dig In to Dump Gift Ban in Senate, 52 CONG. Q. WKLY. REP. 2854-55 (1994).
he could not move a conservative agenda over obstacles the way Reagan had in 1981, namely, on his own popular strength.

Congressional leaders—at least, since "Czar" Cannon a century ago—have not come right out and said, like Louis XIV, "l'etat, c'est moi," or like Boss Hague of Jersey City, "I am the law." Congressional leaders who take power by altering procedures want to present this as "business as usual," just circumventing minority "obstruction." Specifically in 2001, Congressional Republicans needed to seize procedural power beyond the limits of legitimacy, preferably cloaked in obscurity and deniability. On the one hand, they did not have the votes for substantive action under existing procedure, nor the mandate for procedural change on the other hand.

III. THE "NUCLEAR OPTION" FOR CONFIRMING CONSERVATIVE JUSTICES

A. Origins of the Nuclear Option

1. Confirmation Controversy

Since the First Congress, the Senate respected minority rights on judicial confirmations, early embodied in the "blue slip" procedure. Confirmations of lower court justices and Supreme Court justices have a long and controversial history, although usually not nearly as controversial as of late. In the 1980s, the nomination of Scalia, and the promotion to Chief Justice of Rehnquist, were the last times Supreme Court ideologues got virtual passes.

In recent decades, judicial confirmations increasingly became the locus of battle between social conservatives and the opposed groups. The Republican Party built itself up on the recruitment of social conservatives by promises such as to move the judiciary to the right.64 Starting in 2001, the Senate conservative activist effort changed procedural direction from merely holding back (Clinton's) unacceptable nominees to pushing through (Bush's, Rove's, and Ashcroft's) ideological ones.

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64 By the 1990s, social conservatives formed the activist base of the Congressional Republican party. The party particularly sought an alliance between conservative evangelicals and conservative Catholics. The ideological struggle over the courts headed its list of issues, intensifying when a centrist bloc on the Court held firm in the early 1990s against overruling Roe v. Wade. VEERING RIGHT, supra note 14. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).
2. The Nuclear Option Takes Shape

In 2003-2004, a broad Republican plan took shape—initially for all issues, not just judges—by which a bare majority of the Senate could overcome at will Rule XXII’s requirement of 60 votes for cloture. The intellectual author of the effort was Marty Gold, undoubtedly the most respected Republican procedural strategist, whose expertise went back to the time of Senator Howard Baker as minority (and later majority) leader.65

Gold published a full-length article in 2004 on the full-length justification of the nuclear option, with 434 footnotes to Senate history, in the Harvard Journal of Law and Public Policy in 2004.66 Strikingly, the Gold blueprint does not in the least limit itself to nominations. That is, Gold’s blueprint concerns the Senate procedures that apply to all matters (bills and nominations alike). On the contrary, it refers throughout to its use as to any Senate matter at all. It does not make the slightest suggestion that the nuclear option only, or even initially, relates to, say, the President’s power to nominate or something else different about judges. So although subsequently, in 2005, Frist solely threatened the nuclear option in connection with judges, it is not an inference at all, but simply repeating what is written, to say that Gold’s justification readies the nuclear option for any matter, not just judges.

The Gold blueprint consists of a majority Senator receiving recognition and stating to the Senate chair about any matter that “‘Debate on this matter having proceeded for ‘x’ hours, I make the point of order that any further debate is dilatory and not in order.’”67 A Presiding Officer friendly to the Senate Republicans—say, a vice president like Cheney—would sustain the point of order. An appeal would be tabled. As Gold says, “If a simple majority voted to table the appeal, the Senate would affirm the Presiding Officer’s ruling and thus allow Senators to cut off debate under the terms of the point of order.”68

65 Gold authored the first simplified manual of Senate procedure, later expanded to the first full-length introduction (aside from the 200 or so pages in my own treatise) to Senate procedure. His book has this interesting comment: “Once the nomination is pending, it can be debated. In a relatively rare number of instances, nominations have been filibustered.” MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 154 (2004).
66 See Gold & Gupta, supra note 33. This would have become one of the most influential law review articles on government operations in history had the nuclear option been fully triggered, and, even as events went, should probably win the prize for most influential article of its year.
67 Gold & Gupta, supra note 33, at 260.
68 Id.
Senate Majority Leader Frist replaced Lott, bringing a greater willingness to make procedural changes of a non-institutionalist nature. The Senate Republicans sent other messages along the same lines in 2003-2004. The "nuclear option" became tied in the near term to the judicial nominee war, dubbed at first by Senate Republican aides as "the Hulk," referring to the green brute cartoon character on the necktie of Senator Stevens the night he first spouted such an idea.

Press coverage up to the 2004 election, and then after the election, reflected the increasing interest in the threat of the nuclear option as to the judicial nominee issue. And, in the 2004 election, Senate Republicans gained 4 seats, including the one formerly held by Minority Leader Daschle. Frist and social conservatives could not do what they wanted and still respect 60 vote cloture, but now had enough votes that even with some defections they would have the solid majority to win the anticipated "all-out war" over resort to the nuclear option.

B. Showdown

In 2005, Majority Leader Frist prepared to use the nuclear option on the judicial nominee issue. Specifically, he prepared to bring on a showdown
in spring 2005 over extremist nominees for the appellate courts. Triggering the nuclear option would accomplish the overthrow of the cloture rule with respect to a nominee not for the Supreme Court, paving the way for the new procedure to have its real significance when the Supreme Court vacancies opened up (as they soon did for Roberts and Alito). He could obtain, from Bush and well-organized social conservatives, just as much support for the procedure change on a mere circuit court "test case." Meanwhile, the opposition had less ability to mobilize a relatively indifferent public when the particular slot in play did not yet concern the Supreme Court at all, let alone moving the Court right.

Then tension built in February, March and April.77 Minority Leader Reid had promised, if Frist pushed the transformation through, to shut down Senate business (aside from national security and the like), adding to the tension.

Then, a series of discussions among a so-called "Gang of 14" Senators, seven from each party, achieved a compromise subscribed by those 14, who held the balance of power for either side to win.78 On the one hand, they would not vote for a "nuclear option." On the other hand, besides arranging for not filibustering three current controversial Bush appellate court nominees, they pledged only to filibuster future nominees in "extraordinary circumstances."

With the announcements by O'Connor that she would resign, and the death of Rehnquist, it became apparent what this encompassed. It assured no filibustering, and so no 60 vote requirement. The very high "extraordinary circumstances" standard turned out to protect even Alito, with views like (albeit a less combative image than) Scalia, and who took the place of a swing justice, making him what political scientists call a "critical nomination."79

C. Implications of the Nuclear Option

Few theories propounded at a leadership level would endanger Senate procedure more than Gold’s, namely, that any majority leader can use at will, with legitimacy, the "nuclear option" to cut a hole in the Senate’s fundamental Rule XXII requirement of 60 votes to end debate. Gold

78 For an analysis of the immediate interpretations and reactions, see Charlie Cook, Frist, Reid Lost When Gang of 14 Took Over, NAT’L J., May 28, 2005.
79 For a discussion of such a "critical nomination," see Law & Solum, supra note 9, at 81, 81 n.83, and sources cited.
provides a history of the filibuster and cloture, with particular reference to precedents for cloture reform and changes.\textsuperscript{80} Gold goes through two different historical stories to make his case for the procedural legitimacy of using to "nuclear option" to implement majority-vote cloture. First, he goes through what may be called the "Great Struggle" from the 1950s to 1975, ultimately successful, to reduce the vote requirement from two-thirds to 60. This is one of the great stories of Senate history, and does indeed raise the question of what it takes for legitimacy in such a step. As for the 1953-1975 struggle, it did follow, in the very final round in 1975, something like the sequence of steps of the nuclear option—the Chair's ruling against filibuster backed by the appeal resolved by mere majority vote. Second, he goes through what purports to be "Later Models to Change Senate Procedure by Precedent" in the 1970s and 1980s. These concern small matters not comparable to sizable exceptions to the 60 vote requirement.

Upon careful study, the Gold article does the opposite of persuading that Frist was about to act legitimately. A knowledgeable observer will distinguish the twenty year Great Struggle, achieved in an impressively bipartisan way and after a national electoral reform mandate in 1974, versus the mere snapping of Frist's fingers, backed by a transient one-party 51-vote majority, that Gold proposes. The Great Struggle had the array of proofs of legitimacy so palpably lacking for Frist's move. Frist's move represented one party imposing its will; in contrast a bipartisan coalition waged the Great Struggle from beginning to end, with the final stage a model of bipartisan legitimacy.\textsuperscript{81} The Great Struggle implemented the country's long-term desire to shake off an abuse that had frustrated civil rights for a century. Frist's move served shallow political expedience at the service of a narrow ideological group—polls showed that between a majority and two-thirds of the public opposed the nuclear option.\textsuperscript{82}

The difference in legitimacy has enormous practical as well as normative implications. Because of its legitimacy, the Great Struggle

\textsuperscript{80} The history has received extensive consideration elsewhere, including in my own treatise. It shows basically that the filibuster in a modern sense goes back only to the late 1800s, not the whole nineteenth century, and that its precise shape was the subject of much contention and occasional change in the 1900s. \textit{See SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE} (1997), and sources cited.

\textsuperscript{81} It consisted of a Democratic majority leader respected for fairness and restraint, Mike Mansfield, receiving the key ruling from a Republican Vice President who had served his party sufficiently as a national leader, Nelson Rockefeller, to be chosen as Vice President to restore the honor of executive office after Watergate. \textit{CONGRESSIONAL PROCEDURE, supra} note 19, at 704.

\textsuperscript{82} Law & Solum, \textit{supra} note 9, at 70 n.55.
achieved stability in Senate procedure. Afterwards each political party, when it obtained majority status, declined to resort again to the 1975 steps, despite the continuing frustrations of minority party filibuster. The Great Struggle did the opposite of leaving Senate procedure vulnerable on a slippery slope. Rather, the struggle’s special legitimacy led both parties to respect the outcome as legally ending the matter in a safe place, however inconvenient and even sometimes intensely majority-frustrating the results.

Hence, the future implications of Frist’s “nuclear option” to force the confirmations of Alito and Roberts go beyond the Supreme Court turning right. As a practical matter, Frist’s move may not merely have cut one loophole at the time for majority confirmation, it cut one in a way that facilitates repeat recourse down the road.

Also alarming, the nuclear option stands ready to cut loopholes in the 60-vote requirement on whatever type of matter conservative ideologues may choose. Senate Republicans, with a bare majority, might go beyond saying that the “nuclear option” existed only as to judges. Rather, they may say that national security measures, too, require only a majority vote to bring debate to a close. And so on, for whatever legislation is needed for other “special” reasons.

As the Congressional Research Service found, and a history professor summed up, “[I]t seems to me almost inevitable that the same argument being made now for eliminating the filibuster on judicial nominations will...”

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83 Democrats in 1993-94 left 60-vote cloture alone, even when a Republican filibuster not merely doomed their centerpieces but then left them vulnerable to electoral defeat from the ironic criticism, coming from the party that had prevented them from doing anything, that they were a “do-nothing” Congress. Democrats in 1977-80 left 60-vote cloture alone, even when a Republican filibuster blocked centerpieces of their legislative program. Republicans in 1981-86 left 60-vote cloture alone, even when a predominantly Democratic filibuster blocked the centerpiece of their social conservative effort.

CONGRESSIONAL PROCEDURE, supra note 19, at 738-40; How to Steal a Trillion, supra note 10, at 431-32, 432 n.107.

84 At the outset, nothing about the events of 2005 suggests why a Republican majority leader in the same situation in the future—i.e., wanting to move a Republican President’s ideological judicial nominees—would not repeat what Frist did.

85 To illustrate, suppose the political balance of 2001-06 recurred with a Republican president and limited Senate Republican majority, who wanted to move some highly controversial national security measure akin to the 2002 authorization for the Iraq war. Suppose this time, the Democrats, disbelieving Administration propaganda, exercised their rights to require the Administration to seriously negotiate a bipartisan version.

86 E.g., trade agreement approvals involving the President’s foreign powers, or appropriations needed to keep the government going, through the A-to-Z of rationalizations relating, whether more or less each time, in some way to Article II, for the President and his majority party to get what they want through the Senate by a bare majority without compromise.

87 John Stanton, CRS: Ending Filibusters Would Cause Dramatic Senate Change, CONGRESSIONAL DAILY, Apr. 12, 2005.
be made for legislative filibusters. Among conservative groups, the pressure on Congress for this will keep rising.\textsuperscript{88}

IV. RECONCILIATION FOR UNPAID-FOR TAX CUTS

\textit{A. Overall}

It challenges even the most legally sophisticated observers to understand what and how Congressional Republicans did to the tax system. The rush of mammoth tax cuts primarily for the upper brackets evaded comprehension about just how they occurred or what they were. This is no accident. For the big bills of 2001, 2003, 2004, and 2006, what Senate and House Republicans initially moved in committee or on the floor gave only a limited sign of what ultimately eventuated. That came suddenly out of a closed-door conference, and was rapidly hustled with a minimum of debate or even sunshine to the signing ceremony. Lobbyists for the benefited well-off interests could follow the developments, but it facilitated passage that the broad electorate of middle-class and less affluent taxpayers not be able to. So, the majority party used budget process devices that obscured the absolute scale, the time frames, and the cuts’ regressivity.

Congressional Republicans developed the procedures analyzed here to make up for the absence of a popular mandate for regressive tax cuts. As the surpluses of the frugal 1990s vanished in 2001, passing the tax cuts of 2003, 2004, and 2006, still required unpaid-for loading of the debt which zoomed to its staggering $10 trillion level of 2007. Further necessitating the procedures used, those tax laws worked on a highly ideological basis, imperiling, at many levels, the broad economic center of the electorate.\textsuperscript{89} Enacting such an agenda without a mandate meant circumventing strong congressional procedural barriers, above all, the Senate’s 60-vote requirement that traditionally precluded such narrowly beneficial ideological enactments that were at odds with bipartisan centrist wisdom.

The tax cuts’ passage depended on the Budget Act process of reconciliation. This part discusses this process from 1974 to 2000, and then the 2001 Act’s breaking ground. (A reader seeking a fuller treatment

\textsuperscript{88} David Hess, \textit{Imagining a Senate Without the Limitations of a Filibuster}, \textit{CONGRESSIONDAILY}, May 10, 2005 (quoting Robert McElvaine, a history professor at Millsaps College in Jackson, Mississippi).

\textsuperscript{89} This ranged from those soon to be heavily burdened with the sword-of-Damocles AMT to those eternally paying the never-cut payroll taxes on basic wages. \textit{See} Piketty & Saez, \textit{supra} note 45, at 3, 23; Lee, \textit{supra} note 45; Lederman & Mazza, \textit{supra} note 45; Sugin, \textit{supra} note 45.
of this may go to my 2001 *How to Steal a Trillion*.

Congress enacted the 1974 Budget Act in response to a preceding seven-year budget war in which congressional failure to control budget deficits had ceded undue power, and the high ground in budget debates, to Presidents. In 1974, Congress had no interest in facilitating unpaid-for tax cuts, any more than in unpaid-for spending increases. That reconciliation procedure provided the equivalent of cloture by 50 votes (not 60) to facilitate bills that reduced the deficit by cutting spending or raising taxes.

In 1981, President Reagan pushed through a large spending cut reconciliation act, followed by a large tax cut bill (not, itself, a reconciliation bill). The 1981 spending cut reconciliation bill contained many extraneous sections that went beyond the budget savings cited for its facilitated reconciliation procedure, leading later to a rule forbidding such extraneous provisions in reconciliation bills—the Byrd rule. A corollary of the Byrd rule was the obligatory temporariness of tax cut provisions in reconciliation bills. Reconciliation procedures, with their 50 vote cloture and their Byrd Rule restrictions, applied only to debt-reducing (typically deficit-reducing) bills, which meant no unpaid-for tax cuts, but did allow tax increases, revenue-neutral tax reform, or paid-for tax cuts.

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91 The Presidents were Lyndon Johnson (as he failed to pay the cost of the Vietnam War) and Richard Nixon (as he claimed a power to impound spending to implement his own notions of the purse, without regard to Congress enacting laws under constitutional and democratic spending procedure).
92 Rather, the original Act contained its little-noticed reconciliation procedure in section 310 only to facilitate deficit control, not to diminish the Senate's consensus requirements for controversial bills such as spending increases or tax cuts. *How to Steal a Trillion*, supra note 10, at 428-29.
93 The Senate approves the annual Congressional budget resolution under procedures like cloture (time limits on debate, and, germaneness limits on amendments). The budget resolution may contain reconciliation instructions. When it does, the reconciliation bill implementing those instructions passes under procedures like cloture.
94 Tax cuts must match not only the specific time-limited budget authority provided in the budget resolution, but also must not increase a deficit for a fiscal year beyond that covered by the reconciliation measure, which has become ten years in duration. Lance T. LeLoup, *Parties, Rules, and the Evolution of Congressional Budgeting* 153, 187 (2005).
95 For a shorthand, this is usually described as the reconciliation bill being deficit-reducing. If the budget is in surplus, however, then the bill would be surplus-increasing rather than deficit-reducing. Either way, the bill's effect is to lower, not raise, the national debt.
96 All the biggest tax laws of the next two decades obeyed the clear-cut rules about the occasions for reconciliation: 1981 (tax bill not reconciliation), 1987 (paid-for (revenue-neutral) reconciliation), 1993 (tax increase reconciliation), and 1997 (paid-for tax cut reconciliation). The 1987 flat tax bill was a reconciliation bill, and, its tax cuts were paid for—it was revenue-neutral. In 1993, Congressional Democrats enacted a reconciliation tax increase bill to reduce the deficit. After Republicans won the
### THE PROCEDURE OF THE 2001-2006 TAX CUTS

<table>
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<tr>
<th>Year</th>
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<th>Abuses/ Gimmicks</th>
<th>Regressivity</th>
<th>Senate floor</th>
<th>House floor</th>
<th>Conference</th>
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<tr>
<td>2001</td>
<td>Trillion-dollar unfounded cuts</td>
<td>Estate tax abolished—then to spring back in 9 years</td>
<td>Reconciliation for trillions in unfounded cuts.</td>
<td>Trillions in cuts for top brackets and estate tax</td>
<td>Reconciliation (so 50 votes do)</td>
<td>Near-closed rule</td>
<td>Democrats largely excluded; juggling boosts regressivity</td>
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<tr>
<td>2003</td>
<td>Cuts taxes on dividends and capital gains</td>
<td>Large cuts, near-sunsetted to meet $350 billion limit</td>
<td>If extended, $1 trillion cost to 2013</td>
<td>$93K for filers over $1 million; less than $100 to 53% of filers</td>
<td>Reconciliation (so 50 votes do)</td>
<td>Closed rule</td>
<td>Democrats excluded⁹⁹</td>
</tr>
<tr>
<td>2004</td>
<td>9% corporate tax cut</td>
<td>Juggled dates to fake paying for cuts</td>
<td>E'TI as cover for corporate tax cut</td>
<td>Omnibus giveaways to well-off corporations</td>
<td>No reconciliation Sen. Dems. join conference</td>
<td>Closed rule</td>
<td>Tobacco buyout, w/o FDA. Not reconciliation.</td>
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<tr>
<td>2006</td>
<td>Extended cuts on dividends, capital gains</td>
<td>Very short-term patch on middle class AMT</td>
<td>Roth tax cut &quot;pays&quot; for other tax cuts</td>
<td>$43K for filers over $1 million; $20 to middle income</td>
<td>Reconciliation (so 50 votes do)</td>
<td>Near-closed rule⁹⁹</td>
<td>Democrats excluded Whole Roth title starts in conference</td>
</tr>
</tbody>
</table>

1994 congressional elections, they sought in the next three Congresses to use the channel of reconciliation bills for unpaid-for tax cuts. Clinton’s veto blocked this. In 1997, by contrast, Clinton made a deal with the Congressional Republicans for a reconciliation bill capital gains tax cut, paid for by savings in entitlement spending. *How to Steal a Trillion, supra* note 10, at 420-23.

⁹⁷ ROBERT GREENSTEIN, RICHARD KOGAN, & JOEL FRIEDMAN, CTR. ON BUDGET & POLICY PRIORITIES, NEW TAX CUT LAW USES GIMMICKS TO MASK COSTS; ULTIMATE PRICE TAG LIKELY TO BE $800 BILLION TO $1 TRILLION (June 1, 2003), http://www.cbpp.org/5-22-03tax.htm.


⁹⁹ The rule allowed one Democratic substitute and one motion to recommit with instructions. 61 CONG. Q. ALMANAC 15-5 (2005). Republicans could allow just those two alternatives, principally
For the 2001 tax cut bill, "EGTRRA," as for the later ones, the description in this section will give an overall context and then focus on Senate procedure, with further discussion of these bills in the next sections which treat House and conference procedure. In 2001, President Bush came into office determined that the Congress would enact a giant tax cut along his ideological lines. This obliged Senate Republicans to use procedures for shutting down opposition with only 50 votes, not 60, i.e., reconciliation. Technically, they purported to establish this as legitimate by offering reconciliation instructions as an amendment to the budget resolution in 2001, approved 51-49. The conference on the budget resolution specified the final tax cut total of $1.35 trillion. In an extraordinary action, the Senate Majority Leader discharged the Senate Parliamentarian, apparently due primarily to his refusal to support reconciliation for the tax bill. This was the unique occasion in Congressional history of the majority leader sacking the umpire for refusing to accept an honest ruling, and a step that brands this as illegitimate in much the same way as the "nuclear option."

In the Senate, the 50-Senator Republican majority used fully the procedural clout of the illegitimately obtained reconciliation. Their majority leadership could avoid seeking consensus not merely with the minority party, as with ordinary Senate procedure based on 60-vote cloture, but even with Senate moderates of their own party. Instead, they providing AMT relief, because the pressure for Republican centrists to vote for such alternatives was ingeniously relieved by a separate measure, considered by critics a "fig leaf," to provide by a freestanding bill the AMT relief in the amendments. The freestanding bill would depend on Democrats not filibustering. Not having full AMT relief in the reconciliation bill left room in that bill's scoring for larger tax cuts for the top brackets. Joseph J. Schatz, Tax Bills Move Through House, 63 CONG. Q. WKLY. REP. 3318 (2005); Edmund L. Andrews, House Completes Vote on Tax Cuts for $95 Billion, N.Y. TIMES, Dec. 9, 2005, at A1.


My own account in LEGAL TIMES (Out of Order, supra note 43), may be supplemented with Andrew Taylor, Senate's Agenda to Rest on Rulings of Referee Schooled by Democrats, 59 CONG. Q. WKLY. REP. 1063, 1064 (2001).
followed Bush's will to maximize the benefits going to the very highest brackets.\footnote{104}

They then conducted a conference that excluded House Democrats and took a series of outrageous steps, secure in the knowledge that after conference, reconciliation procedure assured enactment. The tax cut introduced a host of associated abuses which will become clearer as the next tax bills are discussed, namely, large-scale regressivity, artificial "sunsets"\footnote{105} and phase-ins, gimmicks to create illusions, and the like. For procedural purposes, above all, the abuse of reconciliation, like the threat of the "nuclear option," made a tremendous change in Senate procedure. The procedural changes meant the majority party leadership could move the enormous measures of an ideological agenda even without an electoral mandate or 60 votes.

\textbf{C. 2003, 2004, and 2006}

Moving the enormous 2003 unpaid-for tax cut on dividends and capital gains, the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA), on an ideological basis by 50-vote reconciliation fostered a number of abuses so severe that observers began calling them "pathologies." By now, the illusion cultivated in 2001 that surpluses would pay for tax cuts lay far in the past.\footnote{106} So the Senate majority leadership accepted the $350 billion ceiling laid down during the passage of the budget resolution in 2003 by a swing group predominantly of Republican moderates.

Even so, JGTRRA became the third largest tax cut in United States history (after those of 2001 and 1981). Thanks to the still-controversial\footnote{107} 50-vote reconciliation, the Senate majority leadership won 50-50 votes

\begin{footnotes}
\footnotetext[104]{By votes of 49-49 and 50-50, Senate Republicans brushed aside a proposal to reduce the top bracket's relief to use the proceeds for more middle-income taxpayers—not just thereby brushing off the Democrats, but steamrolling the amendment's sponsor, Senator McCain, and four Republican moderate defectors who joined him. \textit{How to Steal a Trillion}, supra note 10, at 441.}
\footnotetext[105]{For example, the conference report nominally stayed under its ten-year ceiling of $1.3 trillion. But, it found a way to take an extra $130 billion or so—a gigantic sum—over the first nine years, by seemingly letting rates zoom all the way back to pre-legislation levels for that tenth year. \textit{How to Steal a Trillion}, supra note 10, at 443-44.}
\footnotetext[106]{The Bush Administration emptied the Treasury with the 2001 tax cut, the military build-up after 9/11, and the war in Iraq—all unpaid-for. Moreover, its drive for 2004 reelection meant that far from curbing spending, it would enact large new spending programs, such as by Medicare warping with its unaffordably excessive payouts for the drug and insurance companies.}
\footnotetext[107]{The ranking Democrat on the Senate Budget Committee, Senator Kent Conrad, noted that "Republicans should not even use the reconciliation's procedural protections to move a tax cut bill because lawmakers intended to use the process to reduce deficits, not increase them." Patti Mohr, \textit{Technical Mistake Sidetracks Senate Tax Cut Debate}, \textit{TAX NOTES TODAY}, May 13, 2003, LEXIS, 2003 TNT 92-1.}
\end{footnotes}
(with Vice President Cheney’s tiebreaker), first on its centerpiece of an exclusion of corporate dividends from the personal income tax, and then on Senate bill passage. The form taken by the tax cut, of a straight cut in the personal income tax rate on dividends, besides other glaring flaws, abandoned Bush’s much-touted legal rationale—to simplify the “double taxation” of corporate and personal taxation—since the bill’s form did not integrate the two at all. The conference excluded Democrats, exacerbated the bill’s substantive flaws, and moved its product again by reconciliation’s 50-50 split (again with the Cheney tiebreaker).

The pathologies of the 2003 cut began with the unprecedented use of tax cut “sunsets”—deadlines after which particular tax cuts would partly or completely lapse and rates would return to pre-cut levels. Sunsets’ fuzzy math, unpredictability, and instability, made a mockery of the classic virtues looked for in tax lawmaking. They created momentum for future extensions—as the 2003 law did receive in 2006—exacerbating their unpaid impact on other national priorities and on the debt, with critics warning that the ultimate price tag for this bill alone (on top of 2001’s) might be $800 billion to $1 trillion. And they created a potent political dynamic between the majority party’s ideological core and its top-bracket constituency, wresting the traditional heart of governance—representation about taxation—from the centrist electorate. The 2003 and 2001 tax cuts, together, markedly worsened income inequality.

In the 2004 tax cut, the American Jobs Creation Act (AJCA), the Senate took a break from the reconciliation juggernaut. That does not mean the

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112 See, e.g., Viswanathan, supra note 44; Kysar, supra note 44; Evans, supra note 90; Gale & Orszag, supra note 44.
113 GREENSTEIN, KOGAN, & FRIEDMAN, supra note 97.
114 The final 2003 law worsened the inequality compared to the initial Presidential proposal, which, in turn, was worse even than his 2001 law, which had set the previous record for worst; it would provide an average of $93,000 for tax filers over $1 million, while the bottom 53 percent of filers would receive less than $100 apiece. McCaffery & Cohen, supra note 46.
115 See, e.g., Piketty & Saez, supra note 45, Lee, supra note 45; Lederman & Mazza, supra note 45; Sugin, supra note 45.
116 The engine for moving the 2004 cut in corporate income taxes did not come from reconciliation, but from the need to move a repeal of export subsidies in order to come into compliance with international trade law. 60 CONG. Q. ALMANAC 13-3 (2004).
The Future of One-Party Rule

bill moved without procedural distortions, but rather that these occurred on the House floor (by a closed rule) and in the exclusion of House Democrats from conference—to be discussed in later sections.

For the 2006 cut, the Tax Increase Prevention and Reconciliation Act (TIPRA), Senate Republicans returned to unpaid-for use of reconciliation, for 50-vote approval both for the initial passage of a Senate bill and what emerged from conference. Part of the distortion in the 2006 bill consisted of its focus on extending the sunned dividend and capital gains tax cuts to 2010, and the lengths it went to arrange this regressive result. These lengths included gimmicky shifts in the timing of corporate tax payments, and the dedication to this purpose of the savings, chiefly from Medicaid, taken from the poorest.

Also, the 2006 bill exacerbated the Republicans' tendency to make only one-year-at-a-time patches for the Alternate Minimum Tax (AMT) liability that otherwise would hit the upper middle class due to the tax's key measures not being indexed for inflation. It was well understood and used by the Republicans that the AMT fell most heavily on Democratic states. Expending all amounts available for tax cutting on extending a couple years out the cuts in dividend and capital gains taxes took these sums away from extending the patch on the AMT, ensuring that the AMT increase would bedevil efforts of Democrats in 2007 and thereafter to placate their own upper middle class constituents.

However, the most striking feature of the 2006 cut consisted of the aggravated fiction of using one tax cut for the wealthy to "pay" for other tax cuts for the wealthy. A provision removed the income limits from conversions of traditional IRAs to Roth IRAs. This would bring in $6 billion in revenue in 2010–2011, counted as an offset to "pay" for the dividend tax exclusion. However, the Roth provision would lose the Treasury large net amounts the new Roth IRAs pay out tax-free in decades

117 In fact, the bill illustrated how tax bill passage would normally work in the Senate, absent the abuse of reconciliation: Senators angry about specific provisions filibustered the 2004 bill. The Republicans needed a consensus with Democrats for the 60-vote cloture needed to pass the bill. Elmore Wesley, What a Long, Strange Trip It's Been for ETI Repeal, 105 TAX NOTES 295 (2004).

118 JOEL FRIEDMAN & AVIVA ARON-DINE, CTR. ON BUDGET & POLICY PRIORITIES, TAX RECONCILIATION AGREEMENT DISTORTED BY OBSESSION WITH CAPITAL GAINS AND DIVIDEND TAXES (May 11, 2006), http://www.cbpp.org/5-10-06tax.htm.

119 More than half of the amounts brought out of exclusion by the AMT consisted of state and local income taxes more prevalent in Democratic states (California, New York, etc.) than Republican ones (Texas, Florida, etc.). For treatment of the AMT and the significance of the Bush tax cuts not addressing it, see William G. Gale & Peter R. Orszag, An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004, 45 B.C. L. REV. 1157, 1165-66 (2004), and sources cited.
to come. Again Democrats complained, fruitlessly, that the bill wrongfully distorted the budget process.120

V. HOUSE FLOOR: CLOSED RULES

In 2001–2006, the majority leadership changed floor procedure by extensive use of closed or almost-closed special rules for moving ideological versions of key bills without competition from alternative versions. Together with other anti-accountability changes like frequent post-midnight votes, the DeLay/Hastert leadership used these closed rules to force versions through that, in a traditional House floor contest, would lose in votes determining the chamber’s preference mid-point. The waves of ideological versions moved this way included industry-favored health care and bankruptcy warping, corporate tax giveaways, and infringements of civil liberties.

A. Background

For over a century since “Czar” Cannon, House floor procedure has reflected the tension between leadership power and floor mid-point preferences.121 Ultimately, the House settled down to the procedural “postreform” balance lasting to 1995.122 During the first stage of the “Republican Revolution” in 1995–2000, the majority party under Speaker Gingrich mixed some populist promises of more open floor contests with preliminary groundwork—what one study termed the “cannonizing” of Speaker Gingrich—for 2001–2006 procedures.124

120 Sheryl Gay Stolberg, House Votes to Extend Investor Tax Cuts for 2 Years, N.Y. TIMES, May 11, 2006, at ClO.

121 An early era of conservative party leadership rule peaked with Speaker “Czar” Cannon and, to a somewhat chastened extent, persisted until 1932. After a brief dynamic period of progressive New Deal enactment, the conservative coalition’s procedural pattern took over. This lasted in full strength until the early 1960s and, giving temporary substantive ground to the Great Society of the mid-1960s, only finally gave way to the procedural reform era of the early 1970s. CONGRESSIONAL PROCEDURE, supra note 19, at 194-97.

122 During this time, the House’s procedural system reduced the unaccountable power of the former bastions of the conservative coalition to pass a limited stream of usually moderate, yet occasionally conservative, enactments. CONGRESSIONAL PROCEDURE, supra note 19, at 50-55, 197, 260-61.

123 See Shockley, supra note 8.

124 At this time there was less incentive to abandon the populism and to clamp down quite so hard. The need to obtain Clinton’s signature led to legislative results through moderate, bipartisan products rather than ideologically extreme, one-party products, epitomized in the bipartisan capital gain tax cut of 1997. How to Steal a Trillion, supra note 10, at 433, 433 n.114.
The special rules reported by the House Rules Committee constituted the central cockpit of House floor procedure change.\textsuperscript{125} For most major bills coming to the House floor, the Rules Committee reports a resolution, or special rule, prescribing the floor procedure. The special rule requires a House vote to take effect, which it receives all or almost all the time.

A key change starting in the reform era concerned the forms of House procedure prescribed by special rules.\textsuperscript{126} Until the late 1970s, the vast majority of these were simple “open” rules, allowing any (germane) amendments. Revenue bills received very few “closed” rules, which precluded amendments (although almost always allowing one minority alternative). Then, in the postreform era, House Democrats pioneered the “modified open” or “restrictive” rule, with diverse features structuring floor procedures, including sometimes restricting amendments. With this structuring, but not closing, of floor procedure, progressive Democratic party proposals often squared off against Republican conservative alternatives, in a more or less fair, if crude, contest for the chamber’s preference midpoint.\textsuperscript{127} The 2000 election brought to a head the political trends, previously described, that shaped the ensuing procedure.\textsuperscript{128}

\textsuperscript{125} In the conservative coalition era, a group of Southern Democrats and Republicans held sway over the Rules Committee. During the reform era, changes in rules and procedures subordinated the Rules Committee to the majority-party leadership. The literature on House rules is voluminous. Prior studies are cited in the more recent ones. \textit{See, e.g., Bryan W. Marshall, Rules for War: Procedural Choice in the US House of Representatives} (2005); \textit{Party, Process, and Political Change in Congress: New Perspectives on the History of Congress} (David Brady & Mathew McCubbins eds., 2005).


\textsuperscript{127} The outcomes often depended upon the extent of crossover voting from both parties’ centrists, the “boll weevils” and the “gypsy moths.” By and large, this process still did not spread closed- or almost-closed rules, nor deprive the minority of its right to offer an alternative. In fact, some very major legislation came out of alternatives that the Republican minority could offer, and win on with the help of conservative Democrats. This included the sweepingly comprehensive Reagan budget cut and tax cut bills of 1981, and a comprehensive Republican overhaul of the criminal code which instituted the tough sentencing guidelines.


\textsuperscript{128} Republican Party leaders signaled the shift by disciplining the key figures through the awarding of committee chairs. The discipline broke up bipartisanship between chairs and their Democratic counterparts. They harnessed such chairs to the promotion of a one-party agenda. Barbara Sinclair, \textit{Parties and Leadership in the House}, in \textit{The Legislative Branch} 224, 240 (Paul J. Quirk \& Sarah A. Binder eds., 2005).
B. 2001-2006

From 2001 on, the Republican leadership of DeLay and Hastert clamped down on the House floor by increasing use of closed and almost-closed rules, effectively precluding the minority party even from offering an alternative proposal. This both shielded all their members from the public accountability from voting on such alternatives, and kept their own party’s centrists from defecting to such alternatives—often thereby turning a likely defeat into victory.

Various comprehensive studies give overall accounts of this transformed procedure and confirm the illustrative nature of key examples. Journalist Juliet Eilperin, who covers Congress for the Washington Post, published a 2006 book on partisanship in the House. She contrasted the vow of the incoming House Rules Chair in 1995 to have 70 percent open and unrestricted rules with the fact that “just 22 percent of the rules reported out by the House Rules Committee were open” in the 108th Congress [2003-2004].

Going deeper than the statistical increase, Eilperin studied specific examples of “more and more closed rules,” by which the Republican leadership puts forth its version on a “take it or leave it” basis.

Political scientists similarly noted that “Republican leaders . . . have increasingly denied Democrats the opportunity to offer floor amendments, and by 2003, 76 percent of all rules governing debate on the House floor were restrictive.” Don Wolfensberger, a leading scholar of House procedure, said that “[b]y the 107th Congress [2001-2003] . . . the Republicans had far exceeded the Democrats’ worst excesses in restricting floor amendments.” A comprehensive statistical study by Rules Committee Democrats came in Broken Promises: The Death of Deliberative Democracy. In the 108th Congress (2003-2004), the study


130 Eilperin noted that the House leadership, while turning out many House chairs (like Leach) after their six-year term limit, “decided David Dreier could remain Rules Committee chair during the 109th Congress because the panel amounted to an arm of the leadership.” Id. at 84.

131 As an illustration, Eilperin gives an important banking bill for which the Republican leadership would not even allow an amendment by Representative James Leach (R-Iowa), one of the most universally-respected Republicans and the former chair of the Banking Committee. Id. at 54-55.

132 Id. at 54 (quoting Representative Gil Gutknecht (R-Minn.)).

133 Schickler & Pearson, supra note 50, at 211.

134 John H. Aldrich & David W. Rohde, CONGRESSIONAL COMMITTEES IN A PARTISAN ERA, in CONGRESS RECONSIDERED, 249, 266 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2005) (internal citation omitted).

135 DEATH OF DELIBERATIVE DEMOCRACY, supra note 127.
found that of 130 pertinent rules "36 were closed, 64 were restrictive, and only 28 were open." If anything, the numbers understated the developments.\textsuperscript{136}

The use of closed or almost-closed rules to force through major, diverse bills on this "take it or leave it" basis marked an undemocratic change in House floor norms. For a century after 1890,\textsuperscript{137} the House generally followed the democratic norm of not using the closed rule except for the handful of major revenue and related bills from the House Ways and Means Committee, and even for these, the House allowed the minority to offer one substitute alternative. What happened in the 2000s went far beyond that experience. Now, as described with particular reference to environmental bills, "Under the Republicans, closed rules were standard. Amendments were generally limited to those offered by Committee members, sponsored by Republicans, or ones assured of failure when sponsored by Democrats."\textsuperscript{138} Other observers said "the party leadership increasingly employs 'closed rules' on important legislation. . . . use of closed rules has greatly increased [and] the pattern of usage strongly points to the leadership's desire to protect moderates from awkward votes."\textsuperscript{139}

\textbf{C. Examples}

Illustrative examples of the new diverse use of the closed or almost-closed rule range from infringements on civil liberties, to Medicare and bankruptcy law, to corporate giveaway bills. Infringements of civil liberties top the list. Of course, the 2000s brought 9/11 and the need for the House to enact new legislation to restrike the balance between strengthening intelligence and preserving civil liberties. It is hard to imagine any bills more important to the law for the House to consider fully with amending allowed, since there may not be any other forum to consider alternative ways to preserve civil liberties.\textsuperscript{140}

\textsuperscript{136} The more important the bill, the more likely its rule would be restrictive or closed rather than open. And, many of the rules classified as "restrictive" could, on close examination, be considered almost-closed, and thus, as a practical matter, effectively closed. \textit{See, e.g., Death of Deliberative Democracy}, supra note 127, at 17 (2003 Medicare rule allowed only one sure-to-be defeated amendment, and, was thus effectively closed).

\textsuperscript{137} Snyder & Ting, supra note 47, at 171 ("Until 1973, tax bills were reported by the Ways and Means Committee under a closed rule"); Timothy Stoltzfus Jost, \textit{Governing Medicare}, 51 ADMIN. L. REV. 39 (1999); Kirk J. Stark, Note, \textit{The Elusive Transition to a Tax Transition Policy}, 13 AM. J. TAX POL'Y 145 (1996). Admittedly, there were exceptions, such as the more diverse use of closed rules during the New Deal Congress of 1933-34.

\textsuperscript{138} Rosenberg, supra note 49, at 243.

\textsuperscript{139} HACKER & PIERSON, supra note 16, at 154.

\textsuperscript{140} The legal community understands the fragility of civil liberties in such a time of grave national concern. Courts can only do so much. They cannot consider, refine, and enact alternatives. At most, they can decide on the validity of rules, but not rewrite or overhaul them.
This period’s kickoff for such legislation came with the USA PATRIOT Act, from an initial draft prepared by Attorney General Ashcroft immediately after 9/11, with many outlandish excesses. The House Judiciary Committee, which marked up the bill on October 3, achieving an amazing bipartisan 36-0 unanimity for a package that would strengthen intelligence and law enforcement without Ashcroft’s outlandish excesses.

Yet House procedure let Ashcroft triumph. He treated with disdain even the senior conservative Republicans on House Judiciary, with far more experience legislating on this subject than he, by going over their heads to a one-on-one meeting with Speaker Hastert. Hastert sent the Ashcroft version to the House floor under a closed rule that barred offering of the balanced House Judiciary bipartisan alternative, so it never received consideration.

Five years later, the same dynamic operated again. The House considered a military tribunal measure, the Detainee Treatment Act, primarily as to the White House’s desire, after major setbacks in the Supreme Court, to continue to deal outside of historic legal norms with the problem of the Guantanamo detainees. This measure made unprecedented inroads in the Great Writ of habeas corpus, affronting centrist Senate Republicans. The Republican leadership insisted on a closed rule; as a senior Democrat commented, “nor did the House Rules Committee make in order any of the 15 amendments that Democrats offered to address [what] . . . most offend[s] our democratic values and violate[s] our most fundamental traditions.” Again, it would not matter that the bipartisan mid-point preference of the House chamber might have approved an alternative less destructive of civil liberties. The majority leadership’s use in small part a confluence of strategic and psychological factors, especially the heightened atmosphere of national terrorism and the rapid growth of White House power. The administration’s extreme proposals, in both military and intelligence matters, were repeatedly approved by Congress as part of a political dynamic that left Ashcroft in control.

141 Attorney General Ashcroft had an extreme grab-bag wish list of measures unleashing surveillance even in matters unrelated to counterterrorism or counterintelligence. He pushed this forth on September 19, for which he testified in support on September 24 and 25, 2001. VEERING RIGHT, supra note 14, at 96.

142 Even House Majority Leader Dick Armey, who supported the bipartisan package, later commented that Ashcroft was “out of control.” VEERING RIGHT, supra note 14, at 97.

143 Ashcroft won over the one-time junior high school gym coach by the hysterical plea that the next terrorist attack could occur at any moment and no one understood it like he did. VEERING RIGHT, supra note 14, at 97; Robert Dreyfus, John Ashcroft’s Midnight Raid, ROLLING STONE, Nov. 22, 2001, at 47.

144 “[T]he Rules Committee heavily rewrote the bill and presented to the House a new version greatly expanding the government’s power to search people’s homes without notice.” Milligan, supra note 6.

of the closed rule kept House members in line for the ideological version, since, denied any right to vote for an alternative, they must vote for the leadership version or be branded as "soft" on (if not outright tolerant of) terrorism.

As with the those addressing civil liberties infringements, time and again the House considered bills that mattered to industry pursuant to closed or almost-closed rules. The 2003 warping of Medicare combined the new drug benefit with radical changes in the (non-drug) Medicare program, the so-called "Medicare Modernization Act." Critics bitterly opposed the highly slanted form in which the bill came to the House floor. This featured a channeling of healthier and wealthier seniors out of the traditional program into a heavily-subsidized private insurance industry version, and a dearth of controls on drug company charges—two aspects draining away the lifeblood of traditional Medicare into the coffers of Republican-allied drug and insurance interests. 146

The House leadership squeezed this outrage through the House floor via an almost-closed rule at 2:30 a.m., timed too late for news, by 216-215, after what the New York Times called a "House debate . . . [that] was brief, partisan and bitter." 147 As Eilperin notes of its almost-closed rule, Democrats "proposed thirty-six amendments to the Medicare prescription drug bill, of which the Republicans allowed one." 148 It affronted democratic norms to shut down the House floor, via an almost-closed rule, to dictate this most important legislation (tax cuts aside) of the entire 2001-2006 period.

The bankruptcy reform bill came out of a similar procedural background. 149 To protect the industry version from centrist proposals, "[t]he Rules Committee approved a closed rule . . . which drew the ire of Democrats, who accused Republicans of hijacking the debate process in 'the people's house.'" 150

Perhaps the peak of procedural power through the new closed rules came in the 2004 tax cut. Unlike the other tax cuts—of 2001, 2003, and 2006—for this bill the Republican leaderships could not afford the extra

146 Oliver et al., supra note 11, at 312.
148 EILPERIN, supra note 129, at 54.
149 Eilperin describes the bankruptcy bill as "a case study of how GOP leaders have become more restrictive over time. During the 105th Congress they allowed twelve amendments on the floor. By the 109th Congress they allowed none on a nearly identical bill." EILPERIN, supra note 129, at 54.
power from reconciliation.\textsuperscript{151} Congress needed to pass a limited bill to obey a WTO ruling against the U.S. tax system's export subsidies. Republicans could seize this vehicle and load it with enormous and diverse corporate tax cuts. By the closed rule, the House Republican leadership devised their bill without fear of competing with a responsible alternative.

That bill bought the significant Senate Democratic support needed (absent reconciliation) in conference and for cloture.\textsuperscript{152} Ironically, the absence of reconciliation,\textsuperscript{153} while procedurally disadvantageous overall, gave the Republicans room for giveaways. The bill need not satisfy the Senate's "Byrd rule" forbidding, in reconciliation, extraneous provisions or permanent tax cuts.\textsuperscript{154}

Such a gambit faced its most severe potential challenge from House Democrats and budget-minded Republicans, listening to experts\textsuperscript{155} aghast at a permanent corporate bonanza out of the nation's limited revenue stream,\textsuperscript{156} and offering a responsibly limited export fix. To forestall this, the House Republican leadership imposed a completely closed rule, forbidding any Democratic amendments at all. A closed rule, on such an outsized bill fostering diverse policies, earned a denunciation.\textsuperscript{157} The extraneous and permanent giveaways included a tobacco buyout sought for years by growers, uncoupled from the vital linkage of FDA regulation of tobacco, defeating perhaps the last best chance to regulate the "pariah"

\textsuperscript{151} So, unlike the other bills, their power to move an ideological version of this 2004 bill came disproportionately from use of a closed rule precluding House floor votes on alternatives. 60 CONG. Q. ALMANAC 13-7 (2004).

\textsuperscript{152} The support it bought included that of Minority Leader Tom Daschle, who could not, during his tight Senate re-election race (that he narrowly lost), turn down giveaways for his state's interests. Dan Morgan, House Passes Corporate Tax Bill; Measure Would Provide Breaks to Businesses, Tobacco Quota Buyouts, WASH. POST, Oct. 8, 2004, at A5.

\textsuperscript{153} The 2001 and 2003 tax cuts for the top personal brackets had emptied the Treasury of funds to pay in a reconciliation bill for the corporate tax cuts for the Republicans' business supporters.

\textsuperscript{154} To satisfy the looser criterion of nominal revenue-neutrality, the bill merely needed an illusion of payments ("offsets") via timing gimmicks—phasing in permanent revenue-losers later (to hide, by illusion, their long-term losses) while sunsetting the revenue-raisers (to hide, again by illusion, the reality of long-term losses). Jill Barshay & Kathryn A. Wolfe, Special Interests Strike Gold in Richly Targeted Tax Bill, 62 CONG. Q. WKLY. REP. 2434, 2436 (2004) (chart: "Offsets," and text, "[d]elayed effective dates and early sunsets . . . were designed to limit the cost, but some budget watchdogs say the estimates are understated").

\textsuperscript{155} For bipartisan and independent leading experts' comments like "just replaces one bad subsidy to corporations with another one," "will lead to even more outrageous corporate tax avoidance," and "the worst, most pork-laden tax bill . . . slapped together at the last minute by passing out these goodies," see Elmore Wesley, Tax Policy Experts Speak Out on American Jobs Creation Act, 2004 TAX NOTES TODAY, Oct. 25, 2004, LEXIS, 2004 TNT 206-2.


industry with its politically strong, albeit addictively lethal, mass-market product. 158

Another striking example, the 2005 reconciliation bill or “Deficit Reduction Act” (DRA), demonstrated what closed rules could do to move ideological inroads in the hitherto sacrosanct Medicaid guarantee of health care for the poor. Following Bush’s ideological lead, the House leadership fashioned a bill with cuts to Medicaid that directly transformed the program to undermine that guarantee. A version that later 159 came to the House floor only slightly reduced the scale of the cuts. But, it still accomplished the conservatives’ objectives, not just to making savings, but to reshape the nature of Medicaid. It authorized the states to scale back Medicaid services and impose new copayment and premium fees on the poor. The leadership pushed this through with a completely closed rule—no amendments allowed at all—in the wee hours of Saturday morning, “217 to 215 at 1:45 a.m., in a vote orchestrated by GOP leaders to allow as many Republicans as possible to vote against the budget-slashing measure.” 160

In conference, the same leadership procedural power prevailed on the changes as to the poor: 161 “[L]ike the House bill, the final version allowed states to require co-payments and premiums for Medicaid recipients, saving $1.9 billion over five years . . . . States also got some flexibility in designing Medicaid benefit packages, a top conservative demand.” 162

158 This ratified, perhaps permanently, a 5-4 Supreme Court decision hobbling the FDA’s ability to deal with Big Tobacco. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

159 Republican moderates balked at the first version with exceptional firmness, forcing the leadership, most unusually, to pull the bill on Nov. 10 from floor consideration and change its provisions. Carl Hulse, House Leaders Postpone Vote on Budget Bill, N.Y. TIMES, Nov. 11, 2005, at A1.


161 As Professor Rosenbaum writes:

From a broad perspective, the DRA represents an about-face to four decades of federal Medicaid policy. In effect, the message of the legislation is that the federal government will continue to help states . . . but that this help will come at a high price . . . [that] includes new standards that clamp down harshly on the classes of persons entitled to receive help, states’ ability to help the near-poor with at least moderate coverage, and place pressure on states to cut benefits . . . [in ways] that invite enthusiastic enactment by political and ideological foes of extensive assistance to low income populations.

Rosenbaum, supra note 12, at 47.

VI. CONFERENCES AS A ONE-PARTY THIRD CHAMBER OF CONGRESS

Conference committees have always enjoyed great power under Congressional procedure rules, within limits, and have long been labeled the “third house of Congress.” However, only with the procedure changes of 2001-2006 have the majority leaderships obtained power to move one-party ideological bills. This section starts with the significance of conferences, and then turns to the changes of 2001-2006 overall and with specific examples.163

A. Significance of Conferences

To enact a law, the House and Senate must agree to pass a single, identical version. Though they have several ways to reach agreement, for most major bills, they do so by use of a conference committee—delegations typically from the House and the Senate committees on each bill. Congressional procedure facilitates enacting the products of conferences, in contrast to the high obstacles and veto-gates faced by the products of all prior stages.164

Although the roles of conferences fluctuate, it always remains fundamental that Congressional procedure facilitates enactment of the conference product.165 The biggest (and best known) factor consists of the procedure166 called the “all or nothing” rule on conference reports for both

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163 The prime abuse—the exclusion of the minority party from the conference—exacerbates an old potential that also got especially strained in 2001-06—that the conferences could report new versions unrelated to the choices of either chamber, without accountability in passage. CONGRESSIONAL PROCEDURE, supra note 19, at 814-17 (addressing the methods by which conferees may obtain passage of a measure outside the scope of the conference).

164 In effect, congressional procedure defines that point as when Congress has manifested sufficient joint will that this should end the period of holding back enactment, and signal the opposite will to forge ahead with enactment.

165 I myself conducted the empirical survey still relied upon for the conclusion that the vast majority of bills that go through conference do reach enactment, and I conducted a leading analysis of the factors, some obvious, some not, by which Congressional procedure makes this so. Grossman, supra note 4, at 253 n.5, 256 n.11, 257 n.14 (citing and quoting CONGRESSIONAL PROCEDURE, supra note 19).

166 After conference, the vote on the House and Senate floors to approve the conference report is an “all or nothing” vote. There are effectively no amendments, no alternatives, and no opportunity to vote to do anything but decide (vote “up or down”) whether to make the conference report law. There are certain technical possibilities, such as that the first chamber to consider the conference report can vote to recommit it to conference. And, in the Senate, the conference report can be filibustered. In practice, these possibilities do not often matter, although the opportunity to filibuster in the Senate does sometimes affect the calculation in conference about how extreme the conference product can be. CONGRESSIONAL PROCEDURE, supra note 19, at 763-64.
the House and the Senate floors. Nothing else in Senate procedure matches this powerfully constricting “all or nothing” procedure.  

Historically, the conference procedure closely followed the committee procedure, with its norm of membership and participation by both parties, rather than being a one-party process under majority leadership domination. Indeed, for much of the twentieth century, conferences did not merely obey the rule of participation by both parties, they responded to committee minority input as much as to the majority leadership. Even in the post-reform era after 1974, conference versions from major committees, like (consistently) Appropriations and Armed Services and (sometimes) the tax-writing committees, responded to committee minority input as much as to ideological leadership.

Once the Republicans took over after 1995, on the House side, they began to reduce the role of House Democrats in conference. But, this did not occur on the Senate side. The Senate Democrats’ role kept the process resembling tradition, for the conferences with bipartisan Senate delegations kept the House minority informed and led to more adherence to scope and sunshine rules than if all minority conferees were excluded.

B. Transformation of 2001-2006 by Exclusion of Minority Conferees

167 Even when 60 Senators vote for cloture on a bill, those who would change that bill have the right to offer one or many germane amendments and alternatives, whereas those who would change a conference report cannot offer any amendments regardless of germaneness or amount of voting support.

168 In the long period, roughly 1938-74, of independent committee leaderships, the power of the conference committee often belonged as much or more to those committee leaderships—sometimes even to a bipartisan committee leadership sometimes more attuned to the conservative coalition than to the majority party. To take a well-known example, for many years, the conference committees that wrote the final versions of major tax laws did the bidding of the legendary House committee chair, Wilbur Mills, and of Senate committee chairs, above all the masterful Russell Long, not the chamber leaderships. To take another, President Johnson got his Great Society legislation out of bipartisan conferences, not from majority leadership dictation. Overall, in the 1960s and 1970s, the conferences typically accepted as much or more input from senior minority members of the committee, with whom chairs formed long-term close relations, as from the relatively distant and non-intrusive party leaders like McCormack and Albert in the House and Mansfield in the Senate. CONGRESSIONAL PROCEDURE, supra note 19, at 49-53, 791-95 (addressing overall procedural history and conferee procedural history, respectively).

169 Again, the tax-writing process furnishes examples. The famous flat tax of 1986 resulted more from inclusive and bipartisan visions of Senate Chairman David Durenberger (R-Minn) and House Chairman Dan Rostenkowski (D-Ill.) than from their respective party leaderships. The result was centrist reform, not ideological extremism, in the tax-writing process.

170 In the 1990s, the absence of Senate Democratic outrages (in contrast with 2003-04) reflects that the Senate majority leaderships of Dole and Lott preserved regular participatorial rights for conferences on bills destined for actual enactment. Even in 1995-2000, the Senate side tended to continue giving the Democrats the traditional full role.
1. Overall

In 2001-2006, conferences took a different line than ever before in modern times. Starting with the supremely potent conference on the 2001 trillion-dollar unpaid-for tax cut, Republicans not only excluded all House Democrats, but now, too, excluded almost all Senate Democrats except for two bill supporters. As a result, the closed-door, no-sunshine conference could, and did, make decisions on the purely ideological basis desired by the party leaderships. Strikingly, these conference decisions redistributing hundreds of billions of dollars took place in just the four days of May 23-26, 2001.\(^{171}\)

Effectively, the conference swelled the tax cuts for the wealthy by an extra $130 billion, by taking ten years’ cuts in just nine years. It phased out AMT relief after the 2004 election, a nasty blow to the upper middle class in Democratic states.\(^{172}\) And, it arranged the phase-ins and sunsets for the benefit of the very richest, by phasing in estate tax relief early while doing the opposite for the pittance of middle class relief as to the marriage penalty and the higher education deductions.\(^{173}\)

When Republicans retook the Senate starting in January 2003, they instituted majority-only conferences with a vengeance. Congressional Quarterly brought the phenomenon into view with its important 2003 article, *The Might of the Right: Democrats Cry Foul As GOP Fills Conference Committees With Party Faithful.*\(^{174}\) CQ’s article explained that Republicans “are indisputably running the highest profile conference committees this fall with a heavy hand,” and specifically, “[o]n Medicare, they have shut out all the Democratic conferees but the two [Senate] members they view as most accommodating. . . .”\(^{175}\) After the passage of the Medicare bill at the end of 2003, in early 2004 *Roll Call*, a Capitol Hill newspaper, headlined that the “Conference Battle Escalated,” with “bitter feelings over the GOP’s decision to exclude Democrats from conference committees.”\(^{176}\)

\(^{171}\) Doubtless this set all-time records for the speed, nontransparency, and breathtaking scale on which the stacked conference played reverse Robin Hood to take from the poor and middle class to give to the rich.

\(^{172}\) This started the process, completed in the 2006 tax cut, of monopolizing future revenue available for tax relief to put the upper middle class in Democratic states, who would pay the unfair and ultra-complex AMT, into a political trap. *How to Steal a Trillion*, supra note 10, at 444-45.

\(^{173}\) Id. at 445-46.


\(^{175}\) Id.

This continued in 2005-2006. By 2006, the New York Times editorial page could treat the transformation in conferences as now familiar, and make the increasingly understood link between exclusive majority conferences and burgeoning lobby corruption scandals. A key bill’s conference version “provide[s] the health insurance industry with a $22 billion windfall . . . . written by House and Senate lawmakers and staff members in closed-door, Republican-only bargaining sessions—one of the ‘conference committees’ for settling differences in final legislation that are themselves becoming part of the Capitol’s influence-peddling scandal.”

This highlighted two other conference abuses in the wake of the exclusion of minority conferees. First, the two chambers’ rules both confine what conferees change to the “scope of the differences” between the House and Senate versions. This means that the conference should only address subjects, and the differences over those subjects, that are “in conference,” and not inject “new subjects.” Such restrictions on conferences go back literally centuries in some form, the purpose of conferences since the medieval ones of the Commons and the Lords being to work out differences, not to circumvent the chambers’ own floors. However, from 2003 on, with the deliberate planned exclusion of minority conferees, came increased majority leadership capacity to use conference action on new subjects, not properly in conference, to enact ideological agendas.

Second, the other abuse consisted of circumventing the rules to provide scrutiny and accountability for conference and their reports. Since the 1970s Congress imposed a “sunshine rule” that meetings of conference committees must remain open to the press and public (absent certain immaterial exceptions like national security). In those decades, the sunshine rule became a vital way for the press to keep the public informed about what conferences did controversially, and thereby to check conference action. By terming all the conference negotiations “informal,” and excluding minority members, neither the off-conference members, nor the press nor public, had any opportunity even to find out what transpired.

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178 The points of order against a conference report for this have ways of manipulation or circumvention, particularly with the connivance of the majority leadership, who, in turn, may initiate and direct the entire project of the enactment of such “new subjects” through this undemocratic backdoor process. CONGRESSIONAL PROCEDURE, supra note 19, at 817-33.
179 Grossman, supra note 4, at 258-59 (citing CONGRESSIONAL PROCEDURE, supra note 19).
until too late to matter.\textsuperscript{180} Another circumvented accountability rule is the rule that a conference report lay over for three days before a vote.\textsuperscript{181}

Combining the exclusion of the minority, out-of-scope new matter, and shutting down sunshine, the majority leadership uses conferences to exercise extraordinary leverage on the moderates of their party, as well as on the minority. The withholding of information about new ideological measures inserted in conference starved any countervailing efforts by the press or public. The abuse even developed of the so-called “airdropped” provisions put into the conference report (often at leadership direction) after the conferees had voted for a version without it. “Airdropping” occurred on the eve of unstoppable final passage—virtually giving the leadership a way to stamp its desired giveaways, “hereby enacted”—prompting a specific outcry and reform in 2007.\textsuperscript{182}

These changes constituted dramatic alterations of conference procedure. They were not for implementing the basic reasons why conferences enjoy augmented power to overcome veto-gates and Congressional barriers—to compromise differences so that the actual will of the two chambers’ floors can become law. Rather, they dramatically contradicted those basic reasons.\textsuperscript{183}

\textsuperscript{180}The exclusion of minority conferees neatly solved this issue: when the majority party decided it would do the work of conference in “informal” meetings that excluded the minority party, since these did not constitute “meetings,” that also obviated the requirement that the work occur in the sunshine. Ironically, the conference negotiations most requiring sunshine, due to the absence of (minority) members with diverse views to provide independent scrutiny, least received it.

\textsuperscript{181}This takes on critical significance as the conference negotiations occur without sunshine or minority presence, for the three days become the first (as well as last) means of information for those other than majority conferees—the minority, press, public, and even potentially opposing members of the majority. Yet, the House Rules Committee systematically shortened or eliminated this minimal means for the members and public even to find out what Congress enacted. DEATH OF DELIBERATIVE DEMOCRACY, supra note 127, at 40-44.

\textsuperscript{182}For example, the ranking House Democrat on the Appropriations Committee published this denunciation:

\begin{quote}
After the conferees met and signed the 2006 Defense appropriations conference report, Senate Majority Leader Bill Frist (R-Tenn.) insisted on adding to the bill 40 pages of legislation immunizing drug companies from any liability for vaccines, turning a provision to prepare for a flu pandemic into an unreviewed gift to the pharmaceutical industry without a vote of the conference committee.
\end{quote}


\textsuperscript{183}Conference reports enjoy augmented power so that once the House and Senate agree to pass “conferenceable” versions of a bill, the compromise that comes out of conference will become law. These procedural changes, however, had nothing to do with assuring that a law ensued from a conference’s compromises. Quite the contrary, they created strong capacities and incentives for the conference report to consist of something other than a compromise of the House and Senate version, namely, an ideologically extreme version from the majority leaderships that neither the Senate nor the House had sent to conference.
2. Key Examples

The most striking example (apart from the 2001 tax cut) of the potency of the transformed conference procedure consisted of the 2003 Medicare rewrite. This conference excluded all House Democrats and all but two majority-supporting Senate Democrats. In its substance, the conference product radically alienated not just virtually all House Democrats, but many House Republicans as well. Accordingly, the House majority leadership, to adopt the conference report, put on perhaps the single most striking display of procedural abuse of the entire 2001-2006 period.

It famously extended the vote, the period when debate recordation ceases, which by strict precedent does not extend significantly past fifteen minutes, “for an unprecedented nearly three hours in order to transform 215 to 219 absolute majority against the bill into a 220 to 215 majority to pass it.” The majority leadership no longer guided a legislature with rules to consider a conference report, and instead ran it as a hapless group to be manhandled in the dark of the night until its weakest members succumbed. This was not isolated: the majority leadership repeatedly forced its close and unpopular votes after midnight, quite literally a mockery of “sunshine” notions.

This Medicare conference version cut new ground, different substantively from either the House or Senate versions, on many points. One way to summarize this lay in the Medicare conference version’s unpaid-for cost. The House and Senate pre-conference versions were budgeted and pledged not to cost more than $400 billion over ten years.

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184 Jaenicke & Waddan, supra note 11, at 237.
185 During the three hour Medicare vote, the majority leadership extorted one key vote by making a crude and naked threat against the prospects for the Congressman’s son, and this raised serious questions of House ethics. 60 CONG. Q. ALMANAC 5-5 (2004).
186 As Eilperin analyzes:

The Medicare vote was not the only time in recent years House leaders have decided national policy late in the night, well past reporters’ daily deadlines. From May to July of 2003, for example, they passed a major tax cut bill at 1:56 a.m., cut Head Start funding in a 12:57 a.m. vote, and approved $87 billion for the war in Iraq at 12:12 a.m. Two years later GOP leaders held open a vote approving the Central American Free Trade Agreement for more than an hour . . . after midnight. . . . [for] a margin of 217 to 215. Sherrod Brown argued in an opinion piece that these late-night votes amounted to a “subversion of democracy” because the public cannot observe the legislative wrangling that produces these narrow victories.

To get through, the conference version had to sustain the fiction that it would fit its supposed $400 billion price tag, but it clearly did not. In January 2004, OMB announced that it projected the cost at $534 billion—35 percent over budget. Especially because of the intense ambivalence about the pricetag among House conservatives who voted for the conference report, "[m]embers of both parties have acknowledged that if the administration's estimates had been known . . . significant changes would likely have been required in the final provisions of H.R. 1."188

Another way to summarize this lay in how the new conference procedure served the influential drug industry's unpopular stances.189 All this had occurred without sunshine, for the Medicare conference held no real public sessions.190

The 2003 tax cut, "JGTRRA," furnishes another example of the new conference procedure. Conference consisted of private negotiations between the Republican House and Senate chairs Thomas and Grassley. "Thomas and Grassley had already brokered a deal by the time the House agreed to go to conference," and when the conference held a purely ceremonial meeting as "a formality," ranking Senate Democrat "Baucus declined to attend the event, saying later that 'no Democrat was ever consulted . . ."191 That conference produced a version of unprecedented

187 The fiction was sustained by the infamous step of directing the Chief Actuary for Medicare to withhold estimates despite his statutory obligation and Congressional queries, triggering a high-level legal dispute over the Administration having pushed, and exceeded, the limits of executive privilege. The GAO found the withholding illegal. U.S. GEN. ACCOUNTING OFFICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES—CHIEF ACTUARY'S COMMUNICATIONS WITH CONGRESS B-302911 (Sept. 7, 2004).

188 Lee et al., supra note II, at 323.

189 "Pharmaceutical manufacturers . . . prevailed on all three of their priority issues: no direct administration of benefits by the federal government, no explicit cost control measures, and no legalization of drug reimportation." Oliver et al., supra note II, at 318.

190 Grossman states:

The effects of flouting the sunshine rules can be seen in the approach to two major pieces of legislation in 2003: the Medicare and energy bills. The conference committees for both measures each held two public meetings—the opening and closing sessions of the committees. However, reportedly little substantive work took place at those meetings; the bills were reported to have been written largely in secret sessions, which only senior conferees belonging to the majority party were allowed to attend. These conferees justified their practices by claiming that the secret meetings did not constitute "official" conference sessions and thus were not covered by the sunshine rules, yet the conference committee reports were shaped almost entirely in these meetings.

Grossman, supra note 4, at 263-64 (citation omitted).

intricacy, if not outright deviousness, in terms of sunsets, gimmicks, and skewed provisions. 192

Thus, this conference used its $350 billion budget to benefit the very top brackets the most and everyone else the least, and then set up the sunsetting pattern to assure further large helpings for well-off businesses in guaranteed upcoming legislation. As in 2001, in 2003 the conference on a reconciliation tax cut functioned as a third chamber of Congress beholden only to the majority leaderships, with the minority excluded and no sunshine or accountability about the result. 193

TIPRA provides another pointed example of the transformed conference procedure. A Capitol Hill newspaper, The Hill, summed up the exclusion from conference of Democrats in its headline, After Numerous Delays, GOP Strikes Major Deal on Tax Cuts. 194 In order to accomplish the untoward budgetary sorcery of extending for extra years the cuts in dividends and capital gains for the top brackets, the Republican conferees must break the scope rules for conference in two directions. "The conference agreement omits more than a dozen other tax-cut provisions that were in both the House- and Senate-passed reconciliation bills, such as the extension of the research and experimentation tax credit and the higher-education tuition deduction."195

A more astounding 2006 surprise came in the provision purporting to pay for one tax cut for the wealthy (on dividends) by another tax cut for the wealthy (Roth IRA conversion). Neither the House nor the Senate version had included this troubling gimmick. 196 This was the ultimate

192 Notably, to hold the cost down, it technically sunsett ed a huge benefit for business, known as bonus depreciation, on December 31, 2004. It also sunsett ed the very popular child tax credit, 10-percent bracket, and marriage penalty relief provisions on the same day. "This arrangement sets up the depreciation provisions to be included in a larger package of tax-cut extensions, with that package now virtually assured of enactment in 2004." GREENSTEIN, KOGAN & FRIEDMAN, supra note 97, at 7.

193 Like the 2001 conference, it acted to maximize regressiveness and income inequality, and to use the power of reconciliation to move controversial enactments without an electoral mandate directly counter to the original intent of the Budget Act, worsening rather than curbing deficits. FRIEDMAN & ARON-DINE, supra note 118.


195 FRIEDMAN & ARON-DINE, supra note 118, at 1. This came from crude gaming of reconciliation for the now-common purpose (albeit one that mocked the Budget Act’s original intent) of maximizing the drain on the Treasury from provisions that could not pass by regular means, while leaving the more sensible provisions out of reconciliation because those could, by contrast, pass by regular means. 62 CONG. Q. ALMANAC 19-3, 19-10 (2006).

196 The provision allowed filers with an income over $100,000 to convert regular IRAs to Roth IRAs in 2010. Wesley Elmore, Reconciliation Deal Reached, but “Trailer” Bill Holds Up Progress, 111 TAX NOTES 623 (2006).
transformation of Congressional procedure.\textsuperscript{197} By May 2006, this last installment of unpaid-for tax cuts for the wealthy had no popular mandate at all, for ‘‘[p]olitical winds have shifted greatly since [bill consideration started], as approval ratings for Bush and the Republican-controlled Congress have plummeted.’’\textsuperscript{198} The majority leadership just depended upon the new procedures.

VII. WILL THE TRANSFORMED PROCEDURE MERELY BE INTERRUPTED BY DEMOCRATIC CONGRESSES?

A. Democrats Starting in 2007

Some might assume that having the Democratic Party at the helm of Congress starting in 2007 will terminate for good the prior transformation of Congressional procedure. Developments from 2001-2006 had limited formalization, with neither codified rules nor all that many parliamentary rulings.\textsuperscript{199} And the Democratic leaderships will not themselves resort to the peculiarly conservative elements.\textsuperscript{200} As for the features of House and conference procedure, the Democrats might not so easily relinquish all the new procedures of 2001-2006. They may have temptations to use closed rules and majority-only conference participation. But, still, they would hardly make the same intensity of use of these; their party and issue dynamics afford them less advantage from the kind of approaches delivering to coalitions of narrow industry or other conservative constituencies that served the Republicans.\textsuperscript{201}

\textsuperscript{197} First it abused the Budget Act as a provision losing dozens of billions of dollars over the long term scored as revenue-raising in the short term. Then, it abused conference procedure in being inserted in the conference report although neither chamber had even vetted it, let alone passed it. And, third, it performed these abuses in order to further abuse reconciliation to circumvent the Senate’s procedures and get more deficit-increasing tax cuts through without the chance for entirely-justified critics to debate this at proper length.

\textsuperscript{198} Schor, supra note 194.

\textsuperscript{199} The developments of 2001-06 did not produce a codified rules change, like the House’s Reed Rules of the 1890s or the Senate’s rewrites of the cloture rule, Rule XXII, in 1975 and 1978. Many of the developments of 2001-06 did not even produce precedential rulings. For example, while Majority Leader Frist came to the brink of the “nuclear option,” he did not actually trigger it, and the agreement of the Gang of 14 that resolved that issue did not establish precedents for rulings by the Senate Chair in the future. Law & Solum, supra note 9, at 62 n.33, 63 (providing and analyzing the text of the agreement).

\textsuperscript{200} In controversies over Republican judicial nominations, the Senate Democratic majority leader will hardly use the “nuclear option” to break up his own party’s resistance. Nor will the Senate Democrats move large unpaid-for reconciliation tax cuts for the upper brackets.

\textsuperscript{201} The Democrats’ issues, like minimum wages and global warming, usually depend upon a broad-based groundswell of support through open and inclusive processes, rather than on intense lobbying pressure through a post-midnight, no-amendments, no-notice-to-the-minority approach. For treatments of Speaker Pelosi’s movement of such issues, see, e.g., Richard E. Cohen, Power Surge, NAT’L J., July
So, some may hope that, in terms of its likelihood of recurrence, what this article describes amounts to no more than an evanescent set of tactics or maneuvers temporarily exploited by Congressional Republicans. Such temporary tactical sets can evaporate with little or no residue after their prime occasion.\textsuperscript{202}

\textbf{B. Likelihood of Recurrence}

Some indications, however, suggest that the Congressional procedural transformation of 2001-2006 has the capacity to return after the Republicans regain majority leaderships with an ideological agenda. First, the notion of a Congressional procedural structure that may go into temporary eclipse after a particular electoral result, yet revive later after a mere period of interruption, has plenty of historical precedent.\textsuperscript{203} Of particular pertinence, during the heyday of the conservative coalition from 1937 to the reform era, some of its hallmarks waxed and waned with the strength of progressives in the elections.\textsuperscript{204} After each progressive campaign, the conservative coalition procedures resumed.\textsuperscript{205} Congressional conservatives who suffer a temporary loss of dominance, thus, can regain and resume procedures that give them outsized power.

Moreover, the fundamental political conditions for the procedural transformation of 2001-2006 may have abated only temporarily. The question is not of predicting whether or when ideological Republicans may

\begin{footnotes}
\item[202] For a relatively recent example, a warfare-by-special-investigation-of-presidents broke out between the branches in the late 1980s and 1990s, involving parallel inquiries about Presidents by special prosecutors and Congressional investigating committees. It climaxed in the Clinton impeachment trial of 1999. Since then, in its more intense aspects, it largely lapsed, and may well represent one of these kinds of temporary tactical sets that differ from permanent or recurrent structures of Congressional procedure. Tiefer, \textit{The Specially Investigated President}, supra note 17.
\item[203] When House Republicans implemented the Reed Rules, they fiercely antagonized House Democrats, who let much of the procedural system of the Reed Rules lapse when they took the Speakership. But, after that interruption, when House Republicans regained a majority, they re-implemented the Reed Rules, and moreover, that system basically persisted from that time forward. \textsc{Eric Schickler}, \textsc{Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress} (2001); \textit{Congressional Quarterly, Origins and Development of Congress} 106-110 (Robert A. Diamond ed., 1976).
\item[204] Progressives made some temporary progress combating conservative coalition procedures after the elections of 1948, and 1958, and, of course, President Johnson temporarily steamrolled over the conservative coalition after 1964 in advancing his Great Society program. \textit{Congressional Procedure}, supra note 19, at 49-50, 256-60 (discussing the history of overall Congressional procedure and the history of House procedure, respectively).
\item[205] Rather phenomenally, they came back strongly in the late 1960s, by leadership of House Rules Committee Chairman Colmer of Mississippi and with conservative chairs of other committees. These chairs held the liberal body of the party at bay, until the reforms of the 1970s. \textit{Congressional Procedure}, supra note 19, at 64-66, 259 n.20 (discussing chairs and Colmer).
\end{footnotes}
again have the White House and slender majorities in one or both Houses of Congress. The question is instead, when Republicans do have something like 2000—i.e., majority leadership without a popular mandate—will the Congressional procedural transformation of 2001-2006 return?

As previously noted, the background to 2001-2006 lay in “conditional party government,” namely, a polarized electorate with the conservative strength concentrated under the Republican leadership rather than dispersed in a bipartisan coalition. Typically, it advantages a relatively unified party with an ideological agenda, like the Republican Party, for its leadership to have consolidated procedural power. That party will face the lack of broad support in the electorate for much of its agenda, notably the parts appealing to intense interests like the upper tax brackets and the “pariah” business interests like tobacco. So, the Republican majority leadership will have reason again to seek a procedural structure like that of 2001-2006, especially if they have the White House, and even if they only control one chamber.

C. Democratic Reforms

Democrats, and centrists of either party, do have an influence on Congressional procedure beyond simply passively waiting for when the structure of 2001-2006 will recur. What effect these reforms can have deserves study under three headings: budget; judges; and House and conference procedures.

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206 While that must be left to the imponderables of national politics, given the close divisions of the electorate manifested in every pair of elections from 1994-96 on, results like those of 2000 (and 2002, and 2004) may recur at some point.

207 It will want ways to overcome Senate Democratic resistance without 60 votes and to manage House and conference procedure so as not to have to compete in the sunshine against alternative proposals closer to the midpoint of electoral preferences.

208 They may use some of the procedures of 2001-06, even if they lack control of one of the chambers, as in 2001-06 (Republican President and Senate, Democratic House) or June 2001-02 (Republican President and House, Democratic Senate). With or without a majority in the Senate, they will want to move their matters—bills and judicial nominees—without 60 votes. And, they will want to exclude, to the extent possible, the Democrats from conference delegation.

Although this article has not focused upon Congressional procedure in June 2001-02, the limited period of the Democratic Senate, it bears mention that the Republicans were far from legislatively stymied. They obtained the USA Patriot Act, the renewal of Presidential fast track trade agreement authority, and the resolution authorizing war with Iraq. These items manifested their capacity to move matters that would reinforce their strengths and entrench their gains down the road. 57 CONG. Q. ALMANAC 14-3 (2001); 58 CONG. Q. ALMANAC 9-3, 18-3 (2002).
1. Budget Procedure

House Democrats took a big step procedurally at the start of 2007 reinstating a strong budget "Pay as you go" or PAYGO requirement that bills cutting taxes or raising spending be paid for (by raising taxes or cutting spending). Predictably, in 2007, the Bush Administration, Congressional Republicans, and like-minded groups (e.g., the Heritage Foundation) challenged the new House rule for obliing them to propose ways to pay for extension of expiring Bush tax cuts. In response, supporters of PAYGO pointed to its success in controlling deficits—and the large deficit problem after the Bush tax cuts of 2001-2006.

PAYGO represents an important beginning in what could become a long war to build up budget procedures as a bulwark against a return of 2001-2006’s use of the budget process to increase (through unpaid-for tax cuts), not reduce, the deficit. Down the road, Republicans will continue to seek to escape budget procedures requiring that tax cuts for the upper brackets be paid for, and, conversely, to desire budget procedures facilitating any such tax cuts.

Moreover, as the Baby Boom generation ages, age-related entitlements, notably Medicare and Medicaid (for those elderly who are poor) and Social Security, will put increasing spending burdens on the budget. Congressional Republicans started a series of efforts to channel this in a politically preferred way in the 1990s. This includes industry-friendly health care approaches, namely, capping traditional Medicare and moving healthier and wealthier seniors (with government- and tax-deduction-funded support) into private for-profit health care. It also includes putting such expenditures into a confined budget structure so their increasing costs only pressure to expenditure-cutting, and leave intact the drive for more tax cuts for the top brackets, or at least not lead to reconsideration of previous tax cuts.

Maintaining a Congressional PAYGO system starts a counter-dynamic against such efforts. It avoids segregating entitlement spending from tax

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209 PAYGO had operated in the 1990s, when it preserved the hard-won efforts to bring down the Reagan deficits by tax increases and spending cuts during the G.H.W. Bush (1989-92) Administration from erosion by premature tax cut or spending bills. How to Steal a Trillion, supra note 10, at 431, 431 n.104.


cuts in a way that would facilitate more unpaid-for tax cuts for the wealthy, as in 2001-2006. Rather, those who want such tax cuts must move overt ways to pay for the cuts, such as overtly to cut back on Medicare coverage.

This long war will have some painful battle fronts for Democrats, too. The Bush tax cuts of 2001-2006 deliberately made only the very shortest-term patches on the inflation-escalated burdens of the AMT on the upper middle class in Democratic states. Under PAYGO, House Democrats seeking to extend the patch on AMT must find ways to fund it. This is a major political challenge. Moreover, whatever funding sources they tap for this, they cannot use for funding other legislative priorities, such as education and expanded health care.

2. Judges

With Alito and Roberts pushing the Supreme Court to the right for a very long time in the future, discussions of the Congressional procedure for future judicial nominations may seem like locking the barn door after the horses have escaped. But, of course, the judicial confirmation struggles begin anew every Congress and every Presidency. Turnover and vacancies will continue in the circuit and district courts. Even new Supreme Court vacancies will occur when, for example, Justice Stevens retires.

It is entirely predictable that Congressional Republicans will direct their procedural efforts in line with which party holds the White House. Should a Democratic President take office, they will surely resume their effort during the Clinton Administration to hold back Democratic nominations. Conversely, as long as a Republican President makes ideological nominations, they will renew their efforts of 2001-2006 to overcome Senate Democratic resistance. If they retake the Senate during the tenure of a Republican President, they may even renew preparations for the “nuclear option.”

The topic of judicial confirmation procedure is too large to treat as a whole in a short space. Rather, the particular point of interest is the central question of what, in light of 2005-2006 experience, is the future of the threat of the “nuclear option.” Certainly, it accomplished President Bush’s and Senate Majority Leader Frist’s immediate goals. On the other hand, it did not produce a permanent change in the institution’s rules, so that, in terms of Rule XXII, the power to filibuster future nominations remains alive and well in the rules absent a renewed threat of the nuclear option.

212 See Gale & Orszag, supra note 44, and sources cited about the AMT.
So, the question concerns the likelihood and efficacy of such a renewal. To be concrete, hypothesize that a Republican President takes office, with a 51-vote Senate majority, and resumes making conservative ideological nominations. Democrats filibuster. The Republican Majority Leader considers whether to threaten the nuclear option. What does the debate look like at that point?

On the Republican Leader's side, the Marty Gold article gets dusted off, with its scenario for the nuclear option and its recitation of asserted precedents. The Republican Leader describes what took place in 2005-2006 as a vindication of the nuclear option, with the Gang of 14 agreement described as a way to control those who would filibuster nominees. Just as the Gold article likens use of the nuclear option to the successful Senate-rule-change campaigns of the past, so the Republican Leader would describe 2005-2006 as one of those demonstrations of a contemporary successful campaign.

To describe this scenario makes it sound like the Democrats and centrists who might want to filibuster an ideological nomination but who abhor the nuclear option can do nothing but mark time and wait until the fatal blow inevitably falls upon them. However, there is a counter-story in Senate procedural history to the Gold version. To the contrary, the Senate historically resists radical rules changes, and its history reflects more a pattern of stabilization and resistance to new changes, than a version which makes the "nuclear option" seem inevitable.

For example, a more realistic picture—a picture of the Senate working toward, and achieving, stability on the specific subject of filibuster and cloture—comes from the decades following the 1975 change in Rule XXII. During this period, "post-cloture" filibustering lasted a few years. This effort served to firm up the Senate's sense that with an end to the Great Struggle in 1975, now, it could settle into a stable pattern.

Starting on the eve of the 1975 change, and then continuing with intense force afterwards, the Senate faced a real procedural challenge from Senator James Allen, who was very conservative, and who led a small group, mostly of like-minded Senators. Allen used a series of extraordinary delaying tactics to hold back progressive measures, epitomized in the "post-cloture" filibuster. By these tactics, even after 60 Senators voted cloture, a handful of conservatives could still hold back an unwanted measure (particularly on the eve of adjournments).


Gold describes this as Majority Leader Byrd triggering the equivalent of the nuclear option. Gold & Gupta, supra note 33, at 262-64. But all other accounts simply describe Byrd as bringing this aberration to an end, followed by the Senate's orderly adoption of a reform rule. Fisk & Chemerinsky, supra note 2, at 210.
Then came the period 1981-82, when the Republicans took the majority with Senator Howard Baker as Majority Leader. A lengthy filibuster ultimately came to an end after the final voting of cloture when Majority Leader Baker stepped in and closed down the attempted post-cloture filibuster. Baker’s measured, highly institutionalist approach starkly contrasted with the notions in Gold’s article. Time and again in the 1980s and 1990s, both parties preserved and vindicated the concept of 60 vote cloture, usually, albeit not inevitably, tempered by self-restraint by the minority party. Thus, in a very real sense, the entire period from the end of the post-cloture filibuster in the late 1970s, to the early 2000s, built up a sense of stability for Senate cloture and filibuster procedure.

Some might say that this has no significance for the next time a Republican Majority Leader considers using the “nuclear option” threat the way Frist did. After all, the previous decades of stability did not stop Frist, so further stability from 2005 on would not stop a successor of his. However, there are countervailing pressures in these situations. When Frist made his credible threat to invoke the “nuclear option,” Minority Leader Reid made an equally credible threat to filibuster all non-essential items in the majority party’s agenda thereafter. Frist’s threat had credibility, but so did Reid’s, despite the inherent unattractiveness of an obstructionist “do-nothing” stance.

During this time, the lengthy filibuster by Senator Lowell Weicker (R-Conn.) resisted an anti-busing measure (Helms-Johnston). This is analyzed in detail in CONGRESSIONAL PROCEDURE, supra note 19, at 738-40.

On the one hand, he tolerated lengthy obstruction by Weicker, which effectively demonstrated that social conservatives could not move their agenda through the Senate. On the other hand, his ultimately ending the Weicker filibuster demonstrated that order in the Senate could be vindicated in a traditional way without anything remotely like the “nuclear option.”

Senate Democrats did not use their filibuster to deny President Bush in January 1991 his authorization for the Persian Gulf War, nor to deny confirmation to Justice Thomas. On the other hand, when Minority Leader Dole used the filibuster to defeat key items of the Clinton/Senate Democratic agenda in 1993-94, Senate Democrats made no effort to use the “nuclear option” or otherwise crush it. The same was true in 1995-96 when Senate Democrats, now in the minority, resisted regulatory reform by filibuster.

Taking the scenario of the “nuclear option” in isolation, nothing about a period of stability prevents its steps: the point of order that further debate is dilatory in a particular situation (e.g., a stalled ideological judicial nomination without 60 Senators to vote cloture), and the appeal from the Chair’s ruling decided by majority vote.

Frist’s had credibility because of the powerful support from his party’s base for moving ideological nominees, and his own Presidential ambitions for which he sought to enlist that base.

The credibility of Reid’s threat was not primarily because of how the progressive base of his party felt about judicial nominees.
sense of stability about Senate procedure fostered over all those years of regularity since 1975.

The nuclear option is about the balance of pressures, and the struggle for public support about legitimacy, at the crucial moment. The nuclear option may well be kept at bay, even then, if until then, both parties work within the established rules and norms and demonstrate that they can make a go of it that way.

3. House and Conference Procedure

Speaking very generally, for all the differences between the changes in House floor procedure, and the changes in conference procedure, in 2001-2006, they have much in common when analyzing the issue of whether they will recur. The chief House floor change (closed rules to preclude alternatives to ideological versions), and the chief conference change (excluding the minority party from negotiations), share common effects and common mechanisms. Both the floor and the conference changes let the majority leadership keep one-party top-down rule. And, both the floor and the conference changes directly operate to reduce minority party rights. But they also indirectly operate to diminish the independence of moderates within the majority party.222

The Democrats will face much temptation to legitimate, to some degree, the Republicans' changed 2001-2006 procedural playbook. House Democrats ran into this from the outset, in early 2007. They moved their symbolically significant agenda of the first “100 hours” with restricted rules and elicited Republican complaints about Democratic hypocrisy as to minority rights.223

On the other hand, in 2007 Congressional Democrats set out with changes in formal rules, and pledges about practices, to put the conference, and House floor, procedures of 2001-2006 behind them. As to conferences, Democrats in both chambers made formal rule changes. The House rules package of January 2007 had a “civility” title that requires

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222 They effectively strip these factions of the option of joining with the minority party and pushing House floor or conference actions closer to the chamber’s (or conference’s) preference midpoint, even when these moderates or centrists would prefer those to their own party leadership’s ideological version. And, both these procedures arise through visible exercises of authority taken by the majority leadership and acquiesced in by those moderate or centrist factions: closed rules approved on the House floor by party-line votes, and conference negotiations among small groups constituted by the conference majority leadership in concert with the majority-party leadership for which the results get approved by the majority-party conferees by party-line votes.

223 Christian Bourge, House Republicans Now Raise Cries of Being Excluded, CONGRESsDAILY, Jan. 3, 2007. Regardless of whether Democrats engage less in the procedures of 2001-06 (i.e., make sparing use of closed rules or closed-door majority-only conference negotiations), Republicans will complain so loudly as to rally their own base and obscure the issue for the centrist press.
“full and open debate” in conferences, and creates a point of order against conference reports changed from what the conferees agreed upon and signed.224 Similarly, the Senate adjusted its rule on “out of scope” provisions in conference reports.225 And, a “Sense of the Senate” provision called for full participation of all conferees in (i.e., not excluding the minority from) conference debates. As for the House floor, the same “civility” title mandated that recorded votes cannot be held open, as on the Medicare bill, “for the sole purpose of reversing the outcome of such vote.” Speaker Pelosi also pledged generally not to preclude amendments.

Backing up the limited formal changes was the sense that Congressional Democrats may well not feel so much temptation or necessity to follow the 2001-2006 pattern.228 And Senate Democrats, who fought against exclusion from conference, may adhere, on principle, to their expressed norm not to exclude Republicans from conference.229

225 Senate Democrats Move to Strengthen to Ethics Package, CONGRESSDAILY, Jan. 5, 2007. Senator Kennedy also told a bipartisan Senate meeting that “Democratic leaders and chairmen must include their Republican counterparts in conference negotiations.” Greta Wodele, Senate Opens With Both Parties Pledging Bipartisanship, CONGRESSDAILY, Jan. 4, 2007.
226 Section 515 of S.1 provided:

SEC. 515. SENSE OF THE SENATE ON CONFERENCE COMMITTEE PROTOCOLS.
It is the sense of the Senate that—
(1) conference committees should hold regular, formal meetings of all conferees that are open to the public;
(2) all conferees should be given adequate notice of the time and place of all such meetings;
(3) all conferees should be afforded an opportunity to participate in full and complete debates of the matters that such conference committees may recommend to their respective Houses . . . .

S. 1, 110th Cong. § 515 (2007).
227 Cohn, supra note 224.
228 For one thing, Democratic initiatives generally depend more on drawing on diverse, scattered support rather than narrow bases or lobbies like the Republicans’ base in the top brackets or the pariah industries (like tobacco). Allowing relatively open floor challenges and conference negotiations, and allowing sunshine in general, posed a lethal threat to the Republican approach of 2001-06 arranged to occur literally “in the dark” after midnight. It does not pose so lethal a threat to the Democratic efforts from 2007 on.
229 An interesting example consisted of Senator DeMint (R-S.C.) scorning a direct invitation to participate in conference, interested only in an outcome guarantee:

Sen. Jim DeMint, R-S.C., said he would continue to block a conference on lobbying and ethics reform until he receives a guarantee that his earmark-disclosure language will not be changed by the conference committee.
For another, running the House floor and conferences on the basis of exclusions involves a tradeoff between how tightly a leadership can discipline its own party's most centrist, moderate faction, compared to how much the leadership can recruit some support from the other party's centrist, moderate faction. House Democrats eschew that degree of discipline. Thus, House Democrats naturally sustain relatively more open and inclusive floor and conference procedures. In other words, rather than immune centrist Democrats within walls of closed procedures to prevent defections to alternatives, House Democratic leaders' open procedures invite support from Republican moderates as a way to make up for such defections.

Such reasons lead Democrats not to follow the changes of 2001-2006, and instead to sustain the more open and inclusive traditional floor and conference procedure. Observers like Thomas Mann at Brookings thought the rules changes of 2007 had strength because "[t]he House has been so egregiously run for a number of years that it was seen as contributing both directly and indirectly to the [2006] election results .... There really is a strong political incentive to try to do business differently."233

VII. CONCLUSION

Congressional procedure devolved in 2001-2006 toward a form of one-party top-down control by the majority leadership. The main changes of

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DeMint also rejected Senate Majority Leader Reid's offer to put him on the conference committee.

"The majority leader is trying to be clever, but I wasn't born yesterday," DeMint said. "Everybody knows Democrats are going to control the conference, 4 to 3 . . . ."


231 They give their chairs and committee members a more secure and independent status, and allow their moderates and conservatives to keep faith with electorally hard-to-hold constituencies.

232 Christian Bourge, Success Is Not Judged by Bills Alone, Democrats Argue At Six-Month Mark, CONGRESSDAILY, June 26, 2007 ("Van Hollen said Republicans have succeeded on procedural matters because Democrats have brought more openness to the process.").

those years—the "nuclear option" threat for judges, reconciliation for unpaid-for tax cuts, widespread use of closed House rules, and exclusion of the minority from conferences—made ideological conservative action possible without a mandate. But, the changes occurred without legitimacy, at cost to democratic accountability.

Only time will tell whether the turn back to traditional Congressional procedures after the election of 2006 represents a permanent return or just an interruption. Hopefully, democracy in Congress is like the classical figure Antaeus, who, although wrestled and hurled down, could always recover, and renew the fight, from regrounding himself in his source of strength. For Congress, that source is not behind closed doors with narrow interests and their ideological causes. It is found from opening the doors, openly choosing among alternatives, paying as you go, and regrounding strength from being in touch with the people.