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I would like to thank the Chairman and the members of the Committee for this opportunity to appear before you to discuss Senate procedure, the practice of the hold, and S. Res. 151 – the proposal introduced by Senators Grassley and Wyden to make public the use of the hold by members of the Senate.

First, some background. The nature and history of the hold are somewhat mysterious, but early forms of the practice probably surfaced a century or more ago as filibustering became an accepted aspect of the Senate legislative process and the chamber grew increasingly reliant on unanimous consent agreements to facilitate the consideration of floor business. During the 1970s, the incidence of filibusters and threatened filibusters grew markedly. As a result, the unanimous consent agreements crafted by Senate leaders became more complex and numerous. And to better predict when Senators might object to requests for unanimous consent, party leaders on both sides of the aisle chose to regularize the process through which Members signal objections to bringing a matter to the floor – an informal custom that now is called the hold. Holds, then, are inseparable from the filibuster and the process of unanimous consent. And proposals aimed at altering how the practice is actually used are best considered within the broader context of filibusters, threatened filibusters, cloture votes, and associated scheduling tactics.

There is a lot of hyperbole about the hold. Some have asserted that holds now provide individual Senators with a de facto veto power over legislation and nominations. Major bills, they claim, are routinely derailed in secret at the whim of a single Senator. According to one of our most prominent Senate observers, "The hold has become an obnoxious and embarrassing symbol of an institution run amok, catering single-mindedly to the whims of 100 ego-driven prima donnas (in *Roll Call*, July 29, 1999)."

Maybe, maybe not. It is highly difficult to gauge the actual content or consequences of the practice because information about holds is seldom made public. Indeed, as is reflected by the topic of this morning's hearing, the key backers of a measure within the chamber may not know the identity of the holders or the precise nature of the objection.

Along with two colleagues – Daniel Lipinski of the University of Tennessee and Keith Larson of the College of William and Mary – I have collected evidence about the hold requests from Senate Republicans for 1977-78 and 1981-82. These materials were drawn from the personal papers of former Senator Howard Baker, who was Republican Leader at the time. Our information is only for one party and covers just a brief period from twenty years ago. Still, the number, content, and disposition of these holds are fully consistent with much of what has been said and written about the practice since that time. I believe that this information can provide

some useful perspective for considering current proposals for reform. In my view, six points should be emphasized.

First, use of the hold is commonplace. In 1977-78, only three Republican Senators did not place holds on legislation, and in 1981-82 only 10 did not employ the tactic (and one of them was Majority Leader Baker). In both Congresses, hundreds of measures were targeted to some extent by hold requests. Over the past two decades, the hold has been a central fact of life in the Senate, and Senators Grassley and Wyden are to be commended for raising important questions about the consequences of the practice.

Second, the hold is a mode of communication, rather than a procedural prerogative. The hold process typically begins with a Member, either personally or through staff, contacting the floor assistant to the Majority or Minority Leader (depending on the party of the prospective holder) and placing a request pertaining to the scheduling of some matter on the floor. Often these communications take the form of a letter, but on occasion hold requests are transmitted through informal conversations. During Howard Baker's tenure as Republican Leader, his staff responded in writing to hold requests, typically stating that the request had been duly noted and initialed next to the targeted item on a master copy of the Senate Calendar. The hold, then, should be viewed as a signal from one or more Senators to the leadership of some level of concern or possible obstructionism. In certain instances (and we do not know for sure how often), the leadership does not share the names of the holders with the lead sponsors of the targeted matter.

The wording of S. Res. 151 appears straightforward on first reading: "A Senator who provides notice to party leadership of his or her intention to object to proceeding to a motion or matter shall disclose the notice of objection (or hold) in the Congressional Record in a section reserved for such notices not later than 2 session days after the date of the notice."

But exactly what kinds of communications are covered by this definition. Does the notice have to take the form of a letter? If a Member mentions privately to a leader that he or she likely will object to a unanimous consent request to proceed with a matter, does that conversation need to be noted in the *Congressional Record*? S. Res. 151 could be tightened up to make the definition of a hold more precise – perhaps by requiring written requests of a certain form. One possible consequence, however, would be for Members to find more informal and private ways to communicate threatened obstructionism to their leaders, making the hold process even less accountable.

Third, holds often are bargaining tactics and the content of a hold request will vary depending on the bargaining context. A request may take the form of an unambiguous attempt to kill a bill or nomination – that is, the Senator signifies opposition to any floor action on the matter. Other requests, however, may ask that floor action on a measure be postponed, perhaps to allow time for further negotiations. Still other communications are primarily requests for notification about floor developments on a matter. A Senator simply wants to be kept in the loop. The following is a sample of the kinds of requests that were sent to Senator Baker during his time in the leadership:

Requests for a hold, but with no additional information
Requests that no unanimous consent agreements be entered into or that a bill not be brought up
Requests that a bill not be taken up until a certain date
Requests that a bill not be taken up until some action has occurred
Requests for notification about negotiations for a unanimous consent agreement or the scheduling of a bill
Statements reserving the right to offer amendments or object to unanimous consent agreements
Requests to be consulted on any motions
Requests that earlier holds or requests for information be disregarded.

Chairman Lott would know for sure, but my guess is that the contents of hold requests in recent Congresses also vary a lot. What is generically referred to as "the hold" actually refers in practice to a wide range of requests, indicating different levels of opposition and different likelihoods of obstructionism down the line.

Clearly, explicit requests for a hold or requests that no unanimous consent agreements be entered into fall within the definition in S. Res. 151. Simple requests for notification or to be consulted in the crafting of unanimous consent agreements and other motions are probably not covered by the resolution. But there are gradations of language between these two extremes that are routinely entered on the marked calendars of the leadership and that can effectively derail a measure. For instance, consider a request that a bill or nomination not be brought up on the floor until certain negotiations occur between certain Members. The possibility of obstructionism is clear, but the signal falls short of an "intent to object to proceeding to a motion or matter…." In my view, the problem here is that Senators Grassley and Wyden are attempting to formally regulate via the rules how Members use what essentially is an informal bargaining tactic.

Fourth, the name of the Senator formally requesting a hold may not reveal who is actually seeking to block a matter. Hold letters often are signed by more than one individual, and individual bills and nominations often are targeted with holds by groups of Senators. During the 1970s, for instance, Senator James McClure chaired the Senate Steering Committee, an informal faction of Republican Members that often sought to block Democratic initiatives. During this period, the Steering Committee functioned as a clearinghouse of sorts for Republican holds. In May 1978 alone, Senator McClure placed over 70 holds on pending legislation. The prime movers behind most of these holds, however, almost certainly were other members. By most accounts, Howard Metzenbaum played a similar role for Senate Democrats during the 1980s. Mandating that the signatories of hold letters be made public may simply create incentives for Senators to channel their requests through coalition leaders or other designated objectors, essentially gutting the intent of S. Res. 151.

Fifth, the hold is not a de facto veto power. The power of a hold derives entirely from the perception that it is a threatened filibuster. There is no requirement that Senate leaders honor a hold – the hold is not even mentioned in the rule book. Interestingly, for over two thirds of the holds placed on legislation during 1977-78 (and here I am referring to explicit holds, not temporary holds or requests for notification), the targeted measures eventually passed the Senate

in some form. For 1981-82, this percentage was substantially lower – less than a third of the targeted measures eventually passed the chamber. Tracing the legislative fate of a bill can be difficult and my calculations here are preliminary. But it is clear that Senate leaders have a lot of discretion in choosing how to respond to a hold. If the leadership wants to proceed with a matter, it can simply schedule the bill or nomination and then invite any holders to come to the floor and filibuster. The hold appears to be most effective on secondary matters, particularly as a recess or adjournment nears. A hold from just one or two Members on major legislation early in a session is unlikely to be honored unless the holders can back up their request with the 41 votes necessary to defeat a cloture motion.

Six, under the right conditions the hold can strengthen the hand of Senate leaders. The current hold process serves as an early-warning system for possible dilatory behavior down the line. With a hold, a Senator is signaling to the leadership that he or she may object to a unanimous consent request, enabling the leadership to orchestrate the discussions and adjustments necessary to facilitate the legislative process. Sometimes it may be in the interest of the holder and the leadership not to share this information with other Senators.

The hold also can provide the leadership with additional leverage for keeping the floor agenda focused on major matters or the party agenda. According to media accounts, for instance, Majority Leader Baker generally honored holds on secondary matters during 1981-82 in part because he wanted to focus the chamber's attention on the main legislative priorities of the Reagan administration. Moreover, I recall several instances from my time as a House staffer when House committee chairs complained vociferously about the impact of the hold on conference committee deliberations between the chambers. A House conferee, they claimed, would request that an item be placed in the conference report, only to have a Senate conferee respond, "We would like to help you out but can't because an anonymous colleague has placed a hold on that provision." I am not arguing that this tactic is laudable, but rather that the consequences of the hold for Senate leaders and the chamber as a whole can be complex.

It is possible that the adoption of the Grassley-Wyden proposal will further raise the visibility of the problems associated with anonymous holds and thereby alter expectations about what constitutes appropriate behavior by Senators. Indeed, their tenacious efforts over the years to publicize the practice have probably helped reduce the general toleration for anonymous holds. Similarly, this hearing may help educate Senators and the public about the impact of threatened obstructionism on the consideration of important legislation and nominations.

In my view, however, the language of S. Res. 151, in and of itself, is vague and unenforceable. The most effective and straightforward way to ensure that Members know the identity of holders is for the leadership in each party to refuse to keep the information private. And the best way to ensure that holds placed by individual Senators do not derail legislation or nominations supported by a wide majority is for the leadership simply to call these bluffs and bring such matters to the floor.

If the members of this committee choose to alter the hold practice through a formal rules change, the most effective approach would be to eliminate debate on the motion to proceed. The credibility of a hold derives from its status as a threatened filibuster – that is, as a threat of

extended debate. Since the hold primarily relates to the decision to call up legislation and nominations, making the motion to proceed non-debatable would eliminate the filibuster threat at this stage of the process and indirectly address the problems that many Senators associate with holds – anonymous or otherwise.

Making the motion to proceed non-debatable also would not undermine the Senate's tradition of relatively unrestricted deliberation. There are actually six distinct junctures at which an individual bill can be filibustered in the Senate – on the motion to proceed to the matter, on the committee substitute if there is one, on the bill itself, and on three motions relating to conference deliberations with the House. Curbing or eliminating debate on the motion to proceed would go a long way toward addressing the problems associated with holds, while still providing individual Senators with five debatable motions for protecting their procedural rights.