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Mr. Chairman and Members of the Committee: I am pleased to have this opportunity to address the Committee on Senate Resolution 151, a resolution introduced by Senator Grassley for himself and others that would require public disclosure of notices of objections (or "holds") to proceedings to motions or matters in the Senate. This resolution, also known as the Wyden-Grassley initiative, proposes a change in Senate Rule 7 to require senators to publicly disclose their holds in the *Congressional Record* not later than two days after placing a hold. Although I fully agree with the intent of this reform to end the secrecy that often accompanies senators' holds, I have some reservations about the approach taken in the resolution. For the reasons offered below, I would favor a more forceful effort to limit the obstructive bite of holds—one that would temper the excesses of individualism in the Senate, yet preserve the right of a minority to conduct extended debate.

Background

As is commonly noted, the right of senators to place "holds" on legislative measures and executive and judicial nominations is not formally recognized in the standing rules of the Senate. Holds—or the ability of a single senator to block the majority leader from calling up legislative measures and nominations—arise in the Senate because of the chamber's reliance on unanimous consent agreements and debatable motions to proceed to schedule business and organize debate on the Senate floor. Lacking a previous question motion, a simple majority is powerless under Senate rules (except under special conditions) to determine whether and when to proceed to consider a measure or matter on the Senate floor. By placing a hold on a measure, a senator is registering his or her intention to object when the majority leader seeks unanimous consent. Although nothing in Senate rules binds either the majority or minority leader to honor his colleagues' holds, such objections typically delay action because leaders are loathe to upset colleagues whose cooperation will be needed in the future. Leaders can ignore holds, but to proceed in face of opposition they would customarily then have to pass a motion to proceed, which is subject to a filibuster.

As the weight of Senate business and ideological and partisan conflict over major issues have increased since the 1970s, holds have been transformed. Where previously holds were predominately used for senators to obtain advance notification before measures would be brought to the floor, by the 1980s holds had been turned into single-senator vetoes. Judge

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[1] The views expressed in this statement are those of the author and should not be ascribed to the trustees, officers, or staff members of the Brookings Institution.

major issues. But eliminating the secrecy of holds is unlikely to reduce senators' use of holds to take nominees hostage for often unrelated policy or political demands. As documented over the past few years by the Brookings-AEI Presidential Appointee Initiative, such hostage-taking during the confirmation process exacerbates confirmation delay and diminishes the morale of appointees. Because most such nominations garner little public attention, eliminating the secrecy of holds on nominations is unlikely to take the bite out of such holds. Only the most egregious of such hostage-taking—such as those hundreds of Air Force officers—is likely to be diffused by eliminating the secrecy of holds.

What does this mean for the committee's consideration of holds reform? It is unlikely that a single reform will address both of the problems that have arisen from the use of holds. Killing two birds with one stone may make fun sport for some, but it is a tricky thing to do with Senate rules. Even the most direct route of restraining holds-- limiting debate on the motion to proceed-- is unlikely to ameliorate the impact of holds on nominees. Because the motion to proceed to executive session is not debatable, nominations blocked by holds would not be affected by a debate limit on the motion to proceed. Although critics of the hold are typically concerned about both its impact on legislation and nominations, a single reform is unlikely to secure change on both types of matters. The committee should bear in mind this wrinkle when evaluating the reach of potential reforms.

Strengths and weaknesses of S. Res. 151

With these caveats in mind, I turn to the reforms in detail. As noted by the Congressional Research Service, efforts to reform holds have been suggested repeatedly over the past thirty years. Some efforts are aimed at reducing opportunities for senators to place holds and making it easier for leaders to ignore their colleagues' lone objections. Efforts by both Democratic and Republican leaders over the past twenty years to limit debate on the motion to proceed fall in this category. Other efforts, such as the Wyden-Grassley initiative, leave in tact senators' opportunities to place holds, and target instead their anonymity. Both approaches would require changes in Senate rules, and none of the reform efforts have come near securing the two-thirds majority necessary to invoke cloture on resolutions changing Senate rules. Given senators' reluctance to alter the rules, majority leaders reaching back at least to the late 1970s have attempted more informal efforts to rein in the practice of holds-- particularly at the end of the congressional session. The most recent such effort-- in response to the Wyden-Grassley initiative-- was a joint memorandum from the majority and minority leaders in 1999 encouraging all senators to notify committee chairs of their legislative holds. Although undertaken with good intentions, such informal efforts have been plagued by loopholes and by the lack of an enforcement mechanism.

This brings us to the question of S. Res. 151. The resolution would amend Senate Rule 7 to require any senator who objects to a bill or nomination to disclose his or her hold in the *Congressional Record* within two session days. The direct impact of the rule change would be to eliminate the secrecy of the hold. As such, the reform does not aim to eliminate holds. However, by making transparent the origin of the hold, clearly the intention is to *indirectly* make it harder for senators to unduly delay measures and nominations. Given that much of the delay caused by holds is due to the frequent inability of senators to determine who has placed the hold, knowing up front who is responsible would ostensibly facilitate negotiations with that senator. Much of the political chicanery involved in the secret hold would be eliminated, improving the

Additional reforms

Given these reservations, I want to encourage the committee to consider additional procedural reforms to take the bite out of holds.

Limits on the motion to proceed. Perhaps no potential Senate reform recurs more frequently on the Senate's agenda than the suggestion that the motion to proceed be subject to a two-hour debate limit (evenly divided between the majority and minority leaders). Support for this reform has come from both parties, and has been endorsed in the past by Senator Byrd, former Senators Boren and Domenici, and others. The bipartisan Joint Committee on the Organization of Congress endorsed such a change in 1993, as did earlier renditions of Senate reform panels in the 1980s.

The motion to proceed is today (outside the morning hour on new legislative days) a debatable motion and thus can be filibustered. By placing a hold on a measure, a senator is in effect threatening that he or she will likely contest any effort to take up the measure on the Senate floor. Although limiting debate on the motion to proceed would still allow a hold to block Senate action if the leaders are intent on securing a unanimous consent agreement, limiting debate on motions to proceed creates an alternative avenue for leaders wishing to call up legislative matters. As a Congressional Research Service report in 1993 made clear, "any procedure tending to enable the leadership routinely to secure floor consideration of chosen measures could hardly avoid diminishing the potential force of 'holds.'" The direct consequence of limiting debate on the motion to proceed outside the morning hour will likely be to take the bite out of holds. Unless an obstructing senator can secure the support of a majority of the Senate, the senator will be unable to exploit the hold as a single-senator veto. The CRS report concludes appropriately: "It seems unlikely that any attempt to limit the practice of holds can be highly effective if it leaves intact the present resources of individual Senators in this area."

To be sure, limiting debate on the motion to proceed reduces the number of opportunities within the legislative process for a minority to block measures with a filibuster. However, filibusters will still be possible on the bill, amendments, and conference motions, thereby preserving a minority's right under current rules to extended debate. Limiting debate on the motion to proceed leaves in tact the chamber's heavy reliance on supermajorities to amend and pass legislative and executive business. This reform, however, will not reduce the use of holds on nominations, as the motion to proceed to the executive session in non-debatable under today's Senate rules.

Less-than-unanimous consent. The Senate should consider making it harder for a single senator to object to a request by the majority leader to call up a measure or limit debate or amendments. By requiring perhaps three to five senators to object to unanimous consent requests, the Senate would go a long way toward reducing the ability of a single senator to veto measures with a hold. This reform would not explicitly recognize the right of senators to place holds and would address the impact of the hold on both legislative measures and nominations. Moreover, the reform would hardly tamper with the right of a minority to extended debate, as an overwhelming majority would still be necessary to adopt time limitation agreements. The reform