



# Senate Policy on “Holds”: Action in the 110<sup>th</sup> Congress

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## Summary

When the Honest Leadership and Open Government Act (S. 1, 110<sup>th</sup> Congress) was signed into law on September 14, 2007, Section 512 of that statute specifically addressed the issue of secret “holds.” Holds are a longstanding custom of the Senate that enabled Members to provide notice to their party leader of their intent to object on the floor to taking up or passing a measure or matter. Their potency as a blocking, delaying, or bargaining device is linked to Senators’ ability to conduct filibusters or object to unanimous consent agreements or requests. The new holds process outlined in Section 512 is designed to constrain the frequency of anonymous holds and promote more openness and transparency with respect to their use. Ultimately, it is up to the majority leader of the Senate—who sets the chamber’s agenda after consulting various people—to decide whether, or for how long, he will honor a colleague’s hold.

This report will be updated if circumstances warrant a revision.

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## Introduction

On September 14, 2007, President George W. Bush signed into law the Honest Leadership and Open Government Act (S. 1, 110<sup>th</sup> Congress). The bill addressed a wide variety of topics such as ethics, campaign finance, and lobbying. S. 1 also made a number of procedural revisions affecting the Senate, one which is the focus of this report. Section 512 of Title V of the new law (P.L. 110-81) specifically dealt with the issue of “holds.” Holds are an informal custom of the Senate that, until enactment of S. 1, were mentioned neither in chamber rules or precedents nor in any statute. A hold, as one Senator explained, is “a notice by a Senator to his or her party leader of an intention to object to bringing a bill or nomination to the floor for consideration.”<sup>1</sup> Their potency as a blocking, delaying, or bargaining device is linked to Senators’ ability to conduct filibusters or object to unanimous consent agreements or requests. To be sure, it is ultimately up to the majority leader of the Senate—who sets the chamber’s agenda after consulting various people—to decide whether, or for how long, he will honor a colleague’s hold. If the majority leader cannot get unanimous consent to bring up a measure or matter, then he can make a motion to call it up. That motion is subject to extended debate, but no Senator can, under the practices of the Senate, prevent the majority leader from making that motion.

The controversy that precipitated enactment of Section 512 involved secret or anonymous holds. Two Senators in particular worked for years to end the practice of lawmakers placing secret holds on measures or matters. Their goal was not to eliminate holds but to infuse the custom with transparency and accountability so Senators would know which of their colleagues had holds on various bills or nominations. Knowing which Senator(s) has a hold on a measure or matter enables senatorial advocates of those proposals to meet with the “holder” to discuss whether, or under what circumstances, the hold might be lifted.

In 2006, for example, these two proponents of ending secret holds succeeded in winning adoption of an amendment to an ethics, lobbying, and rules reform package (S. 2349) that would end the practice by establishing a new standing order of the Senate. Like Section 512 of S. 1, their amendment required the majority and minority leaders to recognize a hold—called a “notice of intent to object to proceeding”—only if it was provided in writing by a Member of their caucus. Moreover, noted a former party leader, “for the hold to be honored, the Senator objecting would have to publish his objection in the *Congressional Record* 3 days after the notice is provided to a leader.”<sup>2</sup> One of the principal authors of the amendment provided this explanation of their proposal:

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<sup>1</sup> *Congressional Record*, vol. 148, April 17, 2002, p. S2850. Two other views of holds are provided by a former Senate Majority Leader and a Republican Senator. As the majority leader stated: “In many instances, Senators put holds on a bill, not to prevent its coming up, but to alert the respective party floor staffs, that they want to be notified before the bill is called up. They may have amendments. They may want to be notified when it is coming up. So it is not always for the purpose of keeping a bill from coming up.” See *Congressional Record*, vol. 133, December 9, 1987, p. 34449. The GOP Senator said: A hold is “a notice that a Senator wishes to be on the floor when the matter which is the subject of his interest is considered so he might protect his rights.” He added: Within reason, it means that “my leader, or the floor manager or whomever is responsible, is obligated by the traditions and customs of this body to call me up on the telephone and say, ‘You better get over here if you want to be protected. If you are going to exercise your hold, that means come over here and object or come over and debate the motion.’ It happens thousands of times a year.” See *Congressional Record*, vol. 132, February 20, 1986, p. S1465.

<sup>2</sup> *Congressional Record*, vol. 152, March 28, 2006, p. S2458.

Our proposed standing order would provide that a simple form be filled out, much like we do when we add co-sponsors to a bill. Senators would have a full 3 session days from placing the hold to submit the form [to their respective party leader]. The hold would then be published in the CONGRESSIONAL RECORD and the Senate Calendar. It is just as simple as that.<sup>3</sup>

Nothing in the author’s amendment required the majority leader to honor a formal notice of intent to object to proceeding (or hold) or any other “message” by a Member that he or she intends to oppose any unanimous consent request to take up a measure or matter. S. 2349 required enactment into law before the new holds policy could take effect, but the 109<sup>th</sup> Congress adjourned before this could occur. With the passage of S. 1 in 2007, the Senate adopted—for the first time ever—a formal and statutory policy limiting the ability of Senators to place anonymous holds.

## **Limits on Secret Holds: The New Policy**

The new holds policy in Section 512 is titled “Notice of Objecting to Proceeding.” Its fundamental purpose is to promote more openness and transparency in the holds process. Section 512 is neither a Senate rules change nor a standing order of the Senate, except as to the establishment of “notice of intent” calendars by the Secretary of the Senate. Instead, Section 512 is directive to the majority and minority leaders of the Senate stating that before a hold is recognized by them, certain procedures must be observed by Senators. In effect, it is the responsibility of each Member to comply with the terms of the new policy. There is no enforcement device or method to ensure compliance, except the stipulation that party leaders shall not honor a “notice of intent” (or hold) if Senators do not follow the specified procedures. (The majority and minority leaders consult regularly about the Senate’s agenda, and keep each other apprised of Members who have placed holds on measures or matters.) Section 512 states:

(a) In general—The Majority Leaders and Minority Leaders of the Senate or their designees shall recognize a notice of intent of a Senator who is a member of their caucus to object to proceeding to a measure or matter only if the Senator—

(1) following the objection to a unanimous consent to proceeding to, and, or passage of, a measure or matter on their behalf, submits the notice of intent in writing to the appropriate leader or their designee; and

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<sup>3</sup> *Ibid.*, March 8, 2006, p. S1874. During a colloquy on the proposal, a Senator asked for a clarification of the amendment’s intent with respect to what she called a “temporary hold.” She stated: “Let me give you a specific example. Occasionally, bills will be discharged from their authorizing committees. These are not necessarily on the calendar. They are discharged from the committee, and the bill will be hotlined on both of our sides to see if there is any objection. Obviously, putting a temporary stay on the consideration of a discharged bill in order to allow a few hours for review or even a day for review is completely different from the practice of secretly killing a bill by putting an indefinite anonymous hold.” In response, one of the main authors of the amendment agreed with the Senator, and remarked that “we make very clear that it is not our intention to bar those consults. We like to use the word ‘consult,’ which is a protected tool for a Senator as opposed to the question of a hold. I think perhaps another way to clarify it is a consult is sort of like a yellow light. You put up a little bit of caution—that we need a bit of time to take a look at it. A hold is a red light when you are not supposed to go forward. We don’t want people to be able to exercise those holds in secret.... In fact, to ensure that we have this kind of [consult] procedure ... , we call for 3 days before an individual has to put in the CONGRESSIONAL RECORD that they have a hold on a matter.” *Ibid.*, p. S1874.

(2) not later than 6 session days after the submission under paragraph (1), submits for inclusion in the Congressional Record and in the applicable calendar section described in subsection (b) the following notice:

'I, Senator XXXX, intend to object to proceedings to XXXX, dated XXXX for the following reasons XXXX.'

(b) Calendar—

(1) IN GENERAL—The Secretary of the Senate shall establish for both the Senate Calendar of Business and the Senate Executive Calendar a separate section entitled 'Notice of Intent to Object to Proceeding'.

(2) CONTENT—The section required by paragraph (1) shall include—

(A) the name of each Senator filing a notice under subsection (a)(2);

(B) the measure or matter covered by the calendar that the Senator objects to; and

(C) the date the objection was filed.

(3) NOTICE—A Senator who has notified their respective leader and who has withdrawn their objection within the 6 session day period is not required to submit a notification under subsection (a)(2).

(c) Removal—A Senator may have an item with respect to the Senator removed from a calendar to which it was added under subsection (b) by submitting for inclusion in the Congressional Record the following notice:

'I, Senator XXXX, do not object to proceed to XXXX, dated XXXX.'

To summarize, the formal process to curb secret holds is triggered when certain steps are followed by a Senator. These steps apply in limited circumstances and could be bypassed in at least two ways: (1) if Senators, on their own initiative, publicly state that they have holds on measures or matters or, alternatively, they simply object on their own to a unanimous consent request to call up a measure or matter; or (2) they privately inform their party leader of their intent to block floor consideration of certain measures or matters, and the majority leader never requests that they come up. As a Senator stated, the "mere threat of a hold prevents unanimous consent requests [to take up measures or matters] from being made in the first place."<sup>4</sup> The principal features of Section 512 specify the exact steps for making a secret hold public.

- The process begins when any Senator states that he or she, on behalf of a colleague, is objecting to a unanimous consent request—commonly made by the majority leader or the majority floor manager—to proceed to or pass a measure or matter.
- That colleague must then submit a notice of intent (a hold) letter to the appropriate party leader (or their designee) specifying the reason(s) for his or her objection(s) to a certain measure or matter.

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<sup>4</sup> *Congressional Record*, vol. 153, September 19, 2007, p. S11743.

- Not later than six session days after submission of the “notice of intent” letter, the Senator placing the hold submits the notice to be printed in the *Congressional Record* and in a separate section of the appropriate calendar.
- The majority leader and the minority leader (or their respective designee) are then obliged to recognize a hold placed by a Member of their caucus. (“Recognition” does not mean that the majority leader—who schedules the Senate’s business—must honor the hold.)
- A Senator may withdraw his or her hold prior to the expiration of the 6-session-day period. He or she is then under no obligation to have their hold letter printed in the *Congressional Record* and noted in the appropriate Senate calendar.
- To remove their hold from the appropriate Senate calendar, a Senator submits a notice for inclusion in the *Congressional Record* stating that he or she no longer objects to proceeding to a measure or matter.

Worth underscoring is that under the terms of Section 512, a Senator is required to disclose his or her hold only after another lawmaker formally objects on their behalf to a unanimous consent request to proceed to a measure or matter. If the Senator who is the “true” objector wants to continue with the Section 512 process, he or she must then submit a notice of intent letter to their party leader. Then the six-session-day clock begins to tick. (Just when the six-session-day period starts and ends may require specific parameters.) Until an objection is made on the floor of the Senate, a secret hold could exist for days, weeks, or months without any knowledge of that reality by the sponsors and advocates of bills or nominations.

It is also useful to note that a Senator who publicly objects on his or her own behalf to a unanimous consent request to proceed to or pass a measure need not follow the Section 512 process. The disclosure has occurred publicly and Members know who is the objector. Thus, the name of the objector would not be required to be published in the *Congressional Record* or the appropriate calendar of the Senate.

Several reasons account for the six-day lapse before Senators are obliged to transmit a notice of intent letter to their party leader. The six days gives Members time to study a measure or matter; receive feedback from affected state agencies, if any; or, if necessary, draft an amendment to a measure that addresses their specific concerns. For example, on bills that are “hotlined”—special telephone lines in Members’ offices to inform them of the two party leaders’ intent to pass legislation by unanimous consent unless lawmakers object within a certain time period—Senators might take exception to a bill’s prompt consideration on the floor because they want several days to review the measure. The six days enable Senators to research and decide what their reaction to a measure should be without being criticized for delaying action on a bill or subjected to outside special interest pressure for having a hold on a group-backed bill when the end result might be senatorial approval of the legislation.

Furthermore, although Section 512’s goal, as already noted, is to promote more openness in the holds process, Senators have numerous private ways to inform party leaders of their opposition to measures or matters. These types of private “messages”—personal letters, telephone calls, hallway chats, e-mails, and so on—could be characterized as the functional equivalent of secret holds. If the majority leader is out “running on the National Mall [and] another senator comes running by and shouts as he passes, ‘I’m going to block that bill.’ Is that a hold? Senators are

always going to find a way to signal their concerns to the leadership," noted a legislative scholar.<sup>5</sup> A recent example occurred at the start of the 110<sup>th</sup> Congress when a Senator on February 5, 2007, sent a "Dear Colleague" letter to all Members. The letter's purpose was to communicate to all Senators "a list of principles I will use to evaluate new legislation in the 110<sup>th</sup> Congress. I also want to give you advance notice I intend to object to consideration of legislation that violates these common sense principles."<sup>6</sup>

The newness of Section 512 means that there is not yet much information or evidence of how the policy for limiting secret holds is to be implemented in practice. As one of the Senate's principal advocates for ending anonymous holds said shortly after S. 1 was signed into law, "I have to tell my colleagues that I don't know how [Section 512] is going to work."<sup>7</sup> A section-by-section analysis of S. 1 was inserted in the *Congressional Record* by the relevant committee chair to provide some legislative history regarding the procedures for constraining secret holds.<sup>8</sup> Time, experience, and ongoing parliamentary familiarity with the new procedures seem likely to answer various questions that surely will arise as to Section 512's practical application. Among several questions or issues about Section 512 that might require answers are the following, mentioned in no special order of priority.

## Section 512: Selected Issues

### Retroactive Application

Will the new statutory policy apply retroactively to holds placed on measures or matters prior to S. 1's enactment into law? A recent bill sets this question in bold relief. A measure to require Senators to file their campaign finance reports electronically has been the subject of a hold at least since March 2007, according to press accounts. As a journalist reported, "For months, liberal bloggers and activists have been agitating to unmask the mystery senator who has been blocking action, by means of a secret 'hold,' on a key campaign finance disclosure bill. Now they may finally get their wish [with enactment into law of S. 1]."<sup>9</sup>

When a unanimous consent request was made on September 24, 2007, to take up the bill (S. 223) requiring the electronic filing of campaign finance reports, a Senator objected. Yet it was not clear whether the Senator in fact had placed a secret hold on the bill.<sup>10</sup> (To be sure, the Senator might have previously and privately informed party leaders that he would object to calling up S. 223.) The Senator's staff denied that the Member had an anonymous hold on the bill, and GOP leadership aides stated that Republican objections to the bill did not "amount to a 'hold'."<sup>11</sup> On the other hand, one Senator stated that the Member who objected publicly "has made it plain that he is the one holding up the bill by insisting on offering an unrelated amendment" requiring outside organizations that file ethics complaints against Senators to list donors who have

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<sup>5</sup> Brian Friel, "Wrestling With Holds," *National Journal*, January 13, 2007, p. 47.

<sup>6</sup> The letter is available from the author of this report.

<sup>7</sup> *Congressional Record*, vol. 153, September 19, 2007, p. S11742.

<sup>8</sup> *Ibid.*, August 2, 2007, p. S10711.

<sup>9</sup> Eliza Newlin Carney, "No Hiding Place," *National Journal*, September 22, 2007, Inside Washington.

<sup>10</sup> Emily Pierce, "Mystery Still Surrounds Filing Hold," *Roll Call*, September 26, 2007, p. 1.

<sup>11</sup> *Ibid.*, p. 17.



contributed \$5,000 or more to the organization.<sup>12</sup> Another Senator, citing Section 512’s immediate applicability to Senate proceedings, said in six legislative days “we must know who it is” who placed the hold on S. 223.<sup>13</sup> (Section 512 became effective when the President signed S. 1 into law.)

Three days later, on September 27, the same Senator who objected to bringing up S. 223 asked unanimous consent to call up that bill but with the stipulation that only his aforementioned amendment would be made in order for floor consideration. He observed that “there are anonymous outside groups who are filing ethics complaints” for political reasons and the Senate needs “to know that” and transparency is “the best way to find that out.”<sup>14</sup> A Senator objected to that request on behalf of the chair of the reporting committee. Then, in a first for the Senate, Section 512 was formally invoked when the chair of the relevant committee of jurisdiction sent a letter to the majority leader. The letter stated in part:

As you know, under the provisions of the Honest Leadership and Open Government Act of 2007 (section 512 of P.L. 110-81), a Senator is required to submit a “Notice of Intent to Object” letter when another Senator objects to a unanimous consent request on his/her behalf. Please consider this letter as my notice of intent to object ... [to a colleague’s] proposed [non-germane] amendment to S. 223, the Senate Campaign Disclosure Parity Act....<sup>15</sup>

As required by Section 512, the letter identified the Senator placing the hold, the date the objection was filed, and the reason(s) for objecting to proceeding to a measure or matter. The Senator’s letter was printed in a new “Notice of Intent” section of the *Congressional Record*. Subsequently, the *Calendar of Business* of the Senate included the Senator’s objection in the required section entitled “Notice of Intent to Object to Proceeding.” Recall that Section 512 calls upon the Secretary of the Senate to establish such a section in both the *Calendar of Business* and the *Executive Calendar*. Since enactment of Section 512, no Senator has come forward to state affirmatively and explicitly that he or she has a hold on S. 223.<sup>16</sup> Moreover, it is not clear if other Senators have indicated to their respective party leader that they would object to calling up the campaign bill.

Under the terms of Section 512, and this point is made in the above-cited letter, a Senator is required to disclose his or her hold only after another lawmaker—on behalf of a fellow colleague—objects to a unanimous consent request to proceed. Then the six-session-day clock begins to tick. (Just when the six-session-day period starts and ends may require additional clarification.) Until an objection is made, a secret hold could exist for days, weeks, or months

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<sup>12</sup> *Congressional Record*, vol. 153, September 24, 2007, p. S11998.

<sup>13</sup> *Ibid.*, p. S11997.

<sup>14</sup> *Congressional Record*, vol. 153, September 27, 2007, p. S12207.

<sup>15</sup> *Congressional Record*, vol. 153, October 2, 2007, p. S12419. This notice of intent letter was inserted in the *Congressional Record* by the majority leader. The next day the author of the letter also placed it in the *Congressional Record*, p. S12561.

<sup>16</sup> It might be worth noting that Section 512 specifically references holds placed by a Senator. It does not address the case of a group of Senators who object to proceeding to a measure or matter. If the willingness to block a measure or matter is the collective decision of an informal or formal group Members, there might be uncertainty as to which group member is expected to transmit a “notice of intent” letter to their party leader. In such a case, it seems likely that the relevant party leader would lodge an objection on behalf of a number of Members who oppose the legislation or nomination. The leader’s objection on behalf of a group of Members would not appear to initiate the provisions of Section 512, which focus on “a Senator.”

without any knowledge of that reality by the sponsors and advocates of bills or nominations. To be sure, Senators can publicly announce their holds in whatever way or forum they prefer.<sup>17</sup> Some Senators have a policy of always publicly announcing their holds.

## Scope of Coverage

Section 512 addresses measures or matters. Past practices regarding the placement of holds on measures or matters appear likely to continue in effect, but this issue might give rise to questions that require clarification. The Senate’s tradition of holds has long been an informal practice, so there is relatively little detailed public information about this custom. For example, there is no official public Senate record of who places holds; how many holds are placed by Senators on different types of bills, nominations, or other matters; how long holds are honored by the majority leader; the differences among hold requests; the frequency of holds during different periods of a legislative session; or which Senators are more or less likely to place holds, such as majority or minority lawmakers, senior rather than junior Senators, or liberal versus conservative Members.

Available public materials on the custom appear to suggest that holds may be placed on various types of measures or matters—although there is no definitive list, so far as is known, of the various measures and matters that over time have been the subject of holds. Party records are likely to be incomplete and lack important information. “Hold” letters may also be housed in the personal papers or archives of former party leaders.<sup>18</sup>

A Senator may remove a hold at any time, and Section 512 specifies the procedure for removing a public hold from the Senate’s two calendars. The lifting of a hold by a Member does not prevent other Senators from putting holds on the same measure or nomination.

With Section 512’s adoption, it is not certain whether some or all of the past practices on holds will still be observed. Whether these past practices are fully known is not clear because of, as mentioned, the traditional secrecy surrounding the practice. For example, extant public information on holds indicates that they have been placed on certain privileged business, such as conference reports.<sup>19</sup> In 2002, for instance, it was reported that a Senator had placed a secret hold on a Justice Department authorization conference report.<sup>20</sup> If Section 512 applies to conference reports, can holds also be placed on a related bicameral matter: amendments between the chambers, which are also privileged matters? Holds on privileged business seem less likely to be honored, or honored for any lengthy period, because the motion to take them up is non-debatable.

Unclear, too, is whether the new policy on holds would continue to apply to various non-privileged business, such as the selection of conferees. As former Senator William S. Cohen, R-Me., wrote, “I wanted to be appointed a conferee ... and [Armed Services] Chairman [John] Stennis was unlikely to add my name to the list if I made such a request. I put a ‘hold’ on the

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<sup>17</sup> See, for example, Tim Starks, “Senate Panel OKs Surveillance Bill,” *CQ Today*, October 19, 2007, p. 1.

<sup>18</sup> See an unpublished paper by C. Lawrence Evans and Daniel Lipinski, “Holds, Legislation, and the Senate Parties,” April 2005. This report analyzed almost 1,000 holds found in the personal papers of former Senate Majority Leader Howard Baker, TN. The author has a copy of the Evans-Lipinski paper and will make it available upon request.

<sup>19</sup> For a list of privileged measures or matters, see Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington: GPO, 1992), pp. 1034-1035.

<sup>20</sup> Jennifer A. Diouhy, “Justice Department Authorization Signals ‘New Era of Oversight,’ Tighter Control of FBI Security,” *CQ Weekly*, October 5, 2002, p. 2599.

naming of conferees ... , which upset Chairman Stennis.”<sup>21</sup> Secret holds have made it difficult at times for the Senate to agree to the usually routine motion to go to conference with the House to iron out bicameral disagreements on legislation: “Mr. President, I move that the Senate insist on its amendments [or disagree to the House amendments], request a conference with the House on the disagreeing votes thereon, and that the Chair be authorized to appoint conferees.” Any Senator can object to this unanimous consent request, and the floor manager would then have to make three separate motions (insist or disagree, request, and authorize). Each motion is subject to a filibuster, noted a former Senate parliamentarian, and require “three separate cloture votes to close debate, and that takes a lot of time. It basically stops the whole process of going to conference.”<sup>22</sup> In 2007, on a bill (S. 378) to improve court security, a proponent of the measure stated that “we are being blocked from going to conference” by an anonymous hold.<sup>23</sup>

### Three Other Possible Issues

First, a topic that might require additional clarity is whether holds can still be applied to a class of related measures or matters. Recall that the language of Section 512 requires the following notice: “I, Senator XXXX, intend to object to proceedings to XXXX.... ” Accordingly, would it still be possible for a Senator to place a hold on all judicial nominations or treaties pending on the Executive Calendar, or on all measures on the General Orders Calendar dealing with a specific topic reported by one of the standing committees? Or is it the intent of Section 512 to require Senators to disclose their reasons as to why they are objecting for each measure or matter?

Second, the majority leader, as noted earlier, is the “decider” when it comes to honoring holds. Often, the majority leader will honor holds, at least for a period of time, both as a courtesy to colleagues and as recognition that ignoring a hold could trigger time-consuming dilatory tactics in an institution that is typically workload packed and deadline -driven. On the other hand, if the majority leader places holds on his own behalf—on pending judicial nominations, for example—there are few, if any, effective ways to override the majority leader’s decision. How, too, are Members to know if the majority leader has anonymous holds on measures or matters if he does not ask unanimous consent to call them up? Furthermore, if a Senator placing a hold is a member of the majority party, the majority leader might not even ask unanimous consent of the Senate to take up a measure or matter. The result: no public disclosure of which Senator has a hold on the bill. As a Senator said:

For instance, it is not clear to me what would happen if the minority leader asked unanimous consent to proceed to a bill and the majority leader objected on his own behalf to protect his prerogative to set the agenda but also having the effect of honoring the hold of another member of the majority leader’s caucus. Or what if the majority leader asked unanimous consent to proceed to a bill and the minority leader objects but does not specify on whose behalf, even though a member of the minority party has a hold. Would the minority Senator with the hold then be required to disclose the hold? I don’t know. It is not very clear.<sup>24</sup>

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<sup>21</sup> Sen. William S. Cohen, *Roll Call, One Year in the United States Senate* (New York: Simon and Schuster, 1981), p. 293.

<sup>22</sup> Carl Hulse and Robert Pear, “Feeling Left Out on Major Bills, Democrats Turn to Stalling Others,” *New York Times*, May 3, 2004, p. A18.

<sup>23</sup> *Congressional Record*, vol. 153, August 3, 2007, p. S10887.

<sup>24</sup> *Ibid.*, September 17, 2007, p. S11743.

Third, Section 512, as already mentioned, obligates Senators to specify their reasons for objecting to consideration of a measure or matter in a notice of intent (a hold) letter sent to their party’s leader. Multiple reasons influence why Senators might place a hold on a bill or nomination. Sometimes a hold is employed to achieve purposes completely unrelated to action on the specific bill or nominee. Senators may place holds on bills or nominees they support because they want to gain bargaining “leverage” on an unrelated matter with the Administration, a colleague, a committee chair, or the other chamber. As one Senator told a colleague who asked why he had placed a hold on his bill:

I have no objection to your bill at all, Senator, but another Senator who chairs a committee has a hold on one of my bills, and, therefore, I looked up and down the list to see what bills were under his jurisdiction and I found yours. And so I put a hold on the bill reported out of committee.<sup>25</sup>

A Senate party leader remarked that there have been times when holds have been applied to “every piece of a committee’s legislation ... by an individual or group of senators, not because they wish to be involved in consideration of those bills, but as a means of achieving unrelated purposes or leverage.”<sup>26</sup>

Senators might use a “retaliatory hold” against Members who are blocking floor consideration of their preferred legislation. Senators might be requested to place holds by House members, executive officials, or lobbyists. In specifying why they are placing holds per the instructions contained in Section 512, are Senators expected to have complete discretion as to how many reasons and how much detail they provide in their notice-of-intent letters? Or might the two party leaders expect a reasonable amount of pertinent information—either stated in the notice of intent letter or through other non-public ways—on which they can make or evaluate their scheduling decisions?

## Concluding Observations

Section 512 is a work in progress. Some time needs to pass before a reasonable assessment can be made of its impact and influence on senatorial decision-making and behavior. Experience in implementing Section 512 will no doubt provide clarity and perspective as to how the new provision is working in practice and whether it is fulfilling its fundamental purpose: to infuse greater transparency in the holds process. Like any new change, Section 512 might also have unforeseen consequences. For example, holds do not have to be made public for six Senate session days following an objection to proceeding to a measure or matter. One implication is that there might be a surge of secret holds during the final few days of a legislative session, “more than enough time to effectively kill a bill or nominee in complete secrecy,” said a Senator.<sup>27</sup>

Senators might organize a “revolving” hold. Once an objection under Section 512 is made to a unanimous consent request, then one Member, then another, and so on might place a hold on a measure or matter but then remove it prior to the expiration of the six-session-day period. (Each

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<sup>25</sup> *Congressional Record*, vol. 133, December 9, 1987, p. 34449.

<sup>26</sup> Carroll J. Doherty, “Senate Caught in the Grip Of Its Own ‘Holds’ System,” *Congressional Quarterly Weekly Report*, August 15, 1998, p. 2242.

<sup>27</sup> *Ibid.*

lawmaker would still need to file a notice of intent letter with their party’s leader.) Simply the possibility that one or more Senators appear willing to stall action on a measure or matter might dissuade the majority leader from even trying to proceed to a bill or nomination. Under this parliamentary scenario, none of the Senators who oppose a bill or nomination would have to publicly disclose that they had a hold on the measure or matter. (It is also unclear whether an individual Senator—prior to the end of the six-session-day period—could lift his or her hold and then reimpose it repeatedly following a colleague’s objection on his or her behalf to a unanimous consent request made pursuant to the provisions of Section 512).

Section 512 also might promote greater use of public holds. Outside special interests, for example, might encourage Senators to use the new holds process to demonstrate their support for the group’s agenda priorities. In the judgment of one congressional scholar, “We could easily imagine different interest groups seeking out senators to go public with objections and say, ‘This is an opportunity for you to highlight an issue that’s important to our constituency.’”<sup>28</sup> Senators, in short, may welcome the chance to admit and trumpet to the press, media, and their constituents that they have a hold on certain measures or matters. The hold, as political scientists would say, could be a form of position-taking and credit-claiming that might enhance Senators’ re-election prospects.

On the other hand, Section 512 might produce a decline in the use of holds. “I assume people will think twice before it is publicly distributed that they are stopping legislation,” remarked a former Senate parliamentarian.<sup>29</sup> A Senator did not see it this way, however. “If I don’t agree with [a bill], why am I going to let it go?” he asked. The members think [Section 512] will intimidate people into not holding bills, but it doesn’t bother me.”<sup>30</sup> Needless to say, to make an assessment of whether public holds might increase or decline given the enactment of Section 512 is problematic because of its limited applicability. Senators have a wide array of techniques—which are akin to secret holds—to inform party leaders of their intent to block action on measures or matters. Senators, too, have always been able to make their holds public.

To conclude, over the years, various Senators and party leaders have tried different ways to infuse more accountability and uniformity in the use of holds and to make clear that they are not a veto on the majority leader’s prerogative of proposing measures or matters for Senate consideration.<sup>31</sup> Party leaders understand that holds function as an “early warning system” by alerting them to potential problems in scheduling measures or matters. They also recognize that holds are less than sacrosanct as legislative circumstances change, such as the approach of deadlines or the need to enact “must pass” legislation. Still, it goes without saying that holds are a prominent feature of the contemporary Senate. Members realize their political and policy potential both as a form of “silent filibuster” and as a bargaining device. Holds influence the lawmaking and confirmation processes, and the statutory policy seems certain to shed additional light on this heretofore largely behind-the-scenes custom. As a key proponent of ending secret holds said about Section 512, “It’s a start.”<sup>32</sup>

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<sup>28</sup> Brian Friel, “Wrestling With Holds,” *National Journal*, January 13, 2007, p. 47.

<sup>29</sup> Stephanie Woodrow, “A Senate Without Secret Holds: How Different?” *Roll Call*, March 30, 2006, p. 46.

<sup>30</sup> Hulse, “Senate May End Its Prized Secrecy In Blocking Bills,” p. A13.

<sup>31</sup> See CRS Report RL31685, *Proposals to Reform “Holds” in the Senate*, by Walter J. Oleszek.

<sup>32</sup> Hulse, “Senate May End Its Prized Secrecy In Blocking Bills,” p. A13.

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