

# RECENT DEVELOPMENT

## THE SECRET HOLDS ELIMINATION ACT

### I. INTRODUCTION

Before the legislative recess in summer 2006, the Senate Committee on Homeland Security and Governmental Affairs unanimously approved the Federal Funding Accountability and Transparency Act,<sup>1</sup> designed to provide the public with a searchable online database listing all federal grants and contracts.<sup>2</sup> Despite bipartisan support, the bill stalled after being placed on the legislative calendar, blocked by secret holds placed by senators who refused to publicly identify themselves. Outraged, bloggers on a number of different websites—from the liberal TPMuckraker to the conservative Porkbusters—initiated a campaign to discover the identity of the anonymous senators, asking readers to call their own senators to inquire about the source of the hold.<sup>3</sup> Eventually, the bloggers revealed Senators Ted Stevens (R-Alaska) and Robert Byrd (D-W. Va.) to be responsible.<sup>4</sup> Stevens and Byrd subsequently lifted their holds, and the bill passed the Senate unanimously.<sup>5</sup>

One senator has described the hold as “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,” which “effectively prevents the Senate leadership from attempting to bring the matter before the Senate.”<sup>6</sup> Some senators publicly disclose their holds, as well as their motivations for placing them.<sup>7</sup> However, senators often place holds in secret, with no one but Senate leadership knowing the identity of the holding senator.<sup>8</sup> Because senators frequently employ this so-called “silent filibuster”<sup>9</sup> anonymously, relatively

---

<sup>1</sup> Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, 120 Stat. 1186 (codified as amended at 31 U.S.C. § 6101 (2006 & Supp. II 2008)).

<sup>2</sup> See ABC News, Brian Ross and the Investigative Team, *And the Mystery Senator Is . . .*, THE BLOTTER, (Aug. 30, 2006, 5:30 PM), [http://blogs.abcnews.com/theblotter/2006/08/secret\\_senate\\_h.html](http://blogs.abcnews.com/theblotter/2006/08/secret_senate_h.html).

<sup>3</sup> Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 649-50 (2009) (citing N.Z. Bear, *Who Is The Secret Holder?*, PORKBUSTERS (Aug. 31, 2006), <http://porkbusters.org/secrethold.php>; TPMuckraker's "Secret Hold" Tally, TPMUCKRAKER, [http://tpmmuckraker.talkingpointsmemo.com/secret\\_hold.php](http://tpmmuckraker.talkingpointsmemo.com/secret_hold.php) (last visited Nov. 3, 2010)).

<sup>4</sup> Bear, *supra* note 3.

<sup>5</sup> See 152 CONG. REC. 17,544 (2006) (statement of Sen. Bill Frist (R-Tenn.)).

<sup>6</sup> 148 CONG. REC. 4901-02 (2002) (statement of Sen. Charles Grassley (R-Iowa)).

<sup>7</sup> For example, Senators Wyden (D-Or.) and Grassley make all of their holds public, placing formal statements in the Congressional Record identifying and explaining each hold. See Press Release, Sen. Chuck Grassley, Wyden/Grassley Lead Bipartisan Effort to End Senate Secret Holds (Apr. 27, 2010), [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=26335](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=26335).

<sup>8</sup> See C. Lawrence Evans & Daniel Lipinski, *Holds, Legislation, and the Senate Parties 2* (Apr. 2005) (unpublished manuscript), <http://wmpeople.wm.edu/asset/index/clevan/oxford>.

<sup>9</sup> See, e.g., Janet Hook, *Busting the Silent Filibuster*, CQ WEEKLY, Nov. 13, 1993, at 3095, available at <http://library.cqpress.com/cqweekly/WR103402923>.

little information is available about the frequency of holds.<sup>10</sup> Holds, particularly those of the anonymous variety, have drawn criticism for decades<sup>11</sup> and have inspired numerous unsuccessful attempts at reform.<sup>12</sup> In recent months, a number of legislators have advocated changing several longstanding Senate rules,<sup>13</sup> placing a particular emphasis on the secret hold.<sup>14</sup> Recently, Senators Ron Wyden (D-Or.), Chuck Grassley (R-Iowa), and Claire McCaskill (D-Mo.) introduced the Secret Holds Elimination Act (“SHEA”),<sup>15</sup> which would require senators to publicly disclose all holds within one session day of placement.

This Recent Development explores the anonymous hold and its impact on the legislative process in the Senate. Part II summarizes the evolution and use of the hold. Part III describes the need for reform, and Part IV describes past efforts to modify rules governing the use of the hold. Part V outlines the changes proposed by SHEA. Part VI analyzes SHEA’s likelihood of success, ultimately finding it to be an improvement upon current rules that will nonetheless fail to end the use of the anonymous hold.

---

<sup>10</sup> One scholar described studying the hold as “a formidable research problem,” comparing it to “counting moonbeams or weighing fairy dust.” *Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process: Hearing before the S. Comm. on Rules and Admin.*, 111th Cong. 33 (2010) [hereinafter *2010 Committee Hearing*] (statement of G. Calvin Mackenzie, The Goldfarb Family Distinguished Professor of Government, Colby College), available at [http://rules.senate.gov/public/?a=Files.Serve&File\\_id=1c0706bd-b4ff-4f17-87f1-15ebc92bec39](http://rules.senate.gov/public/?a=Files.Serve&File_id=1c0706bd-b4ff-4f17-87f1-15ebc92bec39); see also *Requiring Public Disclosure of Notices of Objections (“Holds”) to Proceedings to Motions or Measures in the Senate: Hearing on S. Res. 151 Before the S. Comm. on Rules and Admin.*, 108th Cong. (2003) [hereinafter *2003 Committee Hearing*] (statement of C. Lawrence Evans, Professor of Government, College of William and Mary), available at [http://rules.senate.gov/public/?a=Files.Serve&File\\_id=69045c4a-91d7-4f6a-97a9-82423befc948](http://rules.senate.gov/public/?a=Files.Serve&File_id=69045c4a-91d7-4f6a-97a9-82423befc948); WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 31685, PROPOSALS TO REFORM “HOLDS” IN THE SENATE 1 (2007) [hereinafter 2007 CRS REPORT].

<sup>11</sup> See, e.g., Hook, *supra* note 9; Howard M. Metzbaum, Op-Ed., *Senate, Heal Thyself*, WASH. POST, Feb. 16, 1983, at A19.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> Other targets include the filibuster and the two-hour rule, which requires unanimous consent of all senators for committees to keep working two hours after the Senate is gavelled into session. See, e.g., Paul Kane, *Democrats Seek to Deflate Filibusters*, WASH. POST, Feb. 12, 2010, at A25 (describing proposals by Sens. Tom Harkin (D-Iowa), Jeanne Shaheen (D-N.H.) and Tom Udall (D-N.M.) to reform the filibuster); Paul Kane, *Newer Members Aim to Fix a ‘Broken’ Senate*, WASH. POST, Mar. 27, 2010, at A01 (quoting Sen. Claire McCaskill (D-Mo.) denouncing the two-hour rule as “an antiquated, dumb rule”).

<sup>14</sup> See, e.g., Editorial, *A Senate in the Thrall of Secrecy: Time to Overcome an Abuse of Power*, WASH. POST, May 24, 2010, at A18 (quoting Senator Grassley asserting that “this is the time” to do something about secret holds); Editorial, *Toward a More Open Senate*, L.A. TIMES, Aug. 2, 2010, at A16 (noting that in April Senators Barbara Boxer (D-Cal.) and Dianne Feinstein (D-Cal.) circulated a letter to Senate leadership urging them to end the practice of secret holds).

<sup>15</sup> S. 3657, 111th Cong. § 1.2(b) (2010).

## II. DEVELOPMENT AND USE OF THE HOLD

Experts disagree about the precise origins of the hold.<sup>16</sup> Regardless of its early history, according to Donald A. Ritchie, Historian of the United States Senate, the modern form of the practice developed during the 1950s as a courtesy, allowing a senator more time to arrive at the Senate chamber to object in person, to familiarize himself with legislation, or to negotiate changes with a bill's sponsor.<sup>17</sup> By the 1970s, the use of holds had become much more widespread as a means of stalling legislation.<sup>18</sup> This change developed largely as a byproduct of the Senate's increasing individualism and partisanship.<sup>19</sup> Moreover, as the Senate faced a growing volume of legislation, leaders increasingly relied upon unanimous consent agreements, motions setting terms for debate on a particular measure that may be delayed or blocked by a single dissenting senator, further contributing to an escalation in the use of holds.<sup>20</sup> As one congressional staffer explained, by the 1980s the hold "became, in fact, a veto," preventing measures from coming to the floor for a vote.<sup>21</sup> In that decade, former Senator Howard Metzenbaum (D-Ohio) placed holds on such a vast number of bills—up to twenty at any given time<sup>22</sup>—that Senate leadership began consulting his office before scheduling floor action on any measures.<sup>23</sup>

Today, senators use holds to accomplish a variety of goals: to obtain more time to learn about or to negotiate details of a particular measure, to ensure that Senate leadership notifies the holding senator before floor debate begins, to express substantive objections to bills and nominations, to retaliate against another senator, or to obtain concessions, often on unrelated mat-

---

<sup>16</sup> Compare, e.g., 2003 Committee Hearing, *supra* note 10 (statement of Professor C. Lawrence Evans) (stating that the hold likely emerged a century or more ago), with 2003 Committee Hearing, *supra* note 10 (statement of Hon. Walter J. Stewart, Secretary of Senate Emeritus), available at [http://rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord\\_id=972303c8-306b-474f-8ff3-1dca1dc73c6f&Statement\\_id=89eff221-1f4e-4c81-a30b-af1aa6c77a31&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=1983a2a8-4fc3-4062-a50e-7997351c154b&MonthDisplay=6&YearDisplay=2003](http://rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord_id=972303c8-306b-474f-8ff3-1dca1dc73c6f&Statement_id=89eff221-1f4e-4c81-a30b-af1aa6c77a31&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=1983a2a8-4fc3-4062-a50e-7997351c154b&MonthDisplay=6&YearDisplay=2003) (dating the hold back to 1789).

<sup>17</sup> Carl Hulse, *Senate May End Its Tradition of Blocking Bills in Secret*, N.Y. TIMES, Aug. 2, 2007, at A13.

<sup>18</sup> 2007 CRS REPORT, *supra* note 10, at 2.

<sup>19</sup> *Id.* By contrast the Senate of the 1950s and 1960s was considered a more communitarian institution, with senators less inclined to use rules to gain procedural advantage and more likely to defer to senior members. *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 130 (1989).

<sup>22</sup> Jacqueline Calmes & Rob Gurwitt, *Profiles in Power: Leaders Without Portfolio*, CQ WEEKLY, Jan. 3, 1987, at 11, available at <http://library.cqpress.com/cqweekly/WR100409350>.

<sup>23</sup> Carroll J. Doherty, *Senate Caught in the Grip of Its Own 'Holds' System*, CQ WEEKLY, Aug. 15, 1998, at 2241, available at <http://library.cqpress.com/cqweekly/WR19980815-33HOLDS001>. Metzenbaum's extensive use of the hold prompted Senator Carl Levin (D-Mich.) to remark that his office had "a box for Republican holds, one for Democrats, and one for Senator Metzenbaum." 2007 CRS REPORT, *supra* note 10, at 4.

ters.<sup>24</sup> Slang names have developed to distinguish different types of holds. For instance, a senator placing a “Mae West” hold is open to negotiation, whereas a “chokehold” is intended to kill a bill.<sup>25</sup> Although the hold has been described as a “formidable weapon for minority control,”<sup>26</sup> use of holds is common even among senators in the majority party.<sup>27</sup>

The Senate majority leader, who schedules Senate business in consultation with minority leaders,<sup>28</sup> bears ultimate responsibility for determining whether and for how long to observe a hold.<sup>29</sup> Current rules direct Senate leaders to stop recognizing a senator’s hold if that senator fails to follow a specific procedure, which includes making public his identity within six days.<sup>30</sup> However, for reasons that will be discussed below, these rules have been largely ineffective; in practice, a hold may remain anonymous for much longer than six days.<sup>31</sup>

Senate leaders generally refrain from disclosing the identity of a senator placing a hold, although no formal rules prevent them from sharing this information.<sup>32</sup> Senate leaders tend to observe holds for a number of reasons. Honoring a hold serves as a courtesy to the leader’s Senate colleagues<sup>33</sup> and reflects a desire not to aggravate other senators, whose votes might prove essential on future legislation.<sup>34</sup> In some instances, holds may provide the majority leader a convenient excuse to avoid bringing to the floor measures that the leader himself disfavors.<sup>35</sup> Perhaps most importantly, Senate leaders recognize that refusing to honor holds may seriously impede the Senate’s

<sup>24</sup> See 2007 CRS REPORT, *supra* note 10, at 2 (discussing the use of holds as a form of retaliation and a way of gaining concessions); Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,”* 53 ADMIN. L. REV. 1, 21 (2001) (describing the hold as a means of expressing opposition to a particular nominee or gaining leverage on unrelated matters); Brian Friel, *Wrestling with Holds*, NAT’L J., Jan. 13, 2007, at 47 (discussing the use of holds as a way of expressing objection to a bill); Hulse, *supra* note 17 (discussing the use of the hold as a means of both lodging substantive objections and gaining concessions).

<sup>25</sup> See Hulse, *supra* note 17.

<sup>26</sup> Denning, *supra* note 24, at 20.

<sup>27</sup> Evans & Lipinski, *supra* note 8, at 7 (finding widespread use of the hold among the majority party in the 97th Congress, 1981–1982); Norman Ornstein, *Senators are Putting Chokehold on Bush Administration Picks*, ROLL CALL, Aug. 13, 2001, at 7 (“Democrats have held up Democratic nominees just as Republicans are now holding up ones from their party.”).

<sup>28</sup> 2007 CRS REPORT, *supra* note 10, at 1.

<sup>29</sup> *Id.* at 14. Current rules governing anonymous holds are discussed in greater detail below. See *infra* Part IV.B.

<sup>30</sup> See Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 512(a), 121 Stat. 735, 759 (codified as amended at 2 U.S.C. § 30b (Supp. II 2008)); see also *infra* Part IV.B.

<sup>31</sup> See *infra* notes 88-91 and accompanying text.

<sup>32</sup> STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 112 (1989). Publicizing this information would likely alienate the senator in question and potentially lead him to obstruct consideration of the matter, further delaying the Senate schedule. See *id.* at 111–12.

<sup>33</sup> WALTER J. OLESZEK, CONG. RESEARCH SERV., RL 34255, SENATE POLICY ON “HOLDS”: ACTION IN THE 110TH CONGRESS 8 (2008) [hereinafter 2008 CRS REPORT].

<sup>34</sup> See SMITH, *supra* note 32, at 111.

<sup>35</sup> See *id.*

ability to conduct its business within the time constraints under which the Senate operates.<sup>36</sup> Given the Senate's great reliance on unanimous consent agreements,<sup>37</sup> alienating another senator may also significantly undermine a leader's ability to keep Senate business running smoothly.<sup>38</sup> When the majority leader ignores a senator's hold, that senator may object to a unanimous consent request to call up the measure and may employ a variety of parliamentary techniques, most notably the filibuster, to cause gridlock in Senate work.<sup>39</sup> Although majority leaders occasionally bring legislation to the floor for consideration despite a hold, especially in cases involving essential or high-priority matters,<sup>40</sup> Senate leaders hesitate to ignore holds on non-essential legislation.<sup>41</sup>

### III. NEED FOR REFORM

Publicly announced holds can be beneficial to the democratic process. Such holds serve purposes similar to the filibuster, providing a tool that senators in the minority party may use to protect minority interests and to force the majority party to address its concerns.<sup>42</sup> Holds may give party leaders advance notice of potential objections to proposed measures and thus help the Senate to conduct its business more efficiently by allowing disagreements to be worked out before a measure reaches the floor.<sup>43</sup> Moreover, a temporary hold may help to promote a more careful and thorough lawmaking process, allowing a senator time to adequately research a matter and discuss it with other concerned parties before voting.<sup>44</sup>

---

<sup>36</sup> See 2007 CRS REPORT, *supra* note 10, at 1; see also SINCLAIR, *supra* note 21, at 131 (“As long as members are willing to back their holds with actual extended debate, the leaders are faced with an impossible situation when floor time is short.”).

<sup>37</sup> Senate dependence on unanimous consent agreements stems from the lack of general restrictions on debate or amendments and the three-fifths majority required for cloture, as well as pressure to use floor time efficiently. See SARAH BINDER & STEVEN SMITH, *POLITICS OR PRINCIPLE?* 150–51 (1997).

<sup>38</sup> Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 204 (1997).

<sup>39</sup> See 2007 CRS REPORT, *supra* note 10, at 1.

<sup>40</sup> See SMITH, *supra* note 32, at 111.

<sup>41</sup> MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 85 (2008); Doherty, *supra* note 23 (quoting Sarah Binder, “[i]t often comes down to whether the leader is willing to call the bluff of a colleague . . . . Sometimes you don’t want to risk putting off a member of your party.”).

<sup>42</sup> According to a former secretary of the Senate, the hold serves as an example of the Senate tradition of “protection of minority rights,” with senators sometimes placing holds in order “to keep the dialogue going, or to force a dialogue when that member feels that previous discussions have been deficient.” See 2003 Committee Hearing, *supra* note 10 (statement of Walter J. Stewart).

<sup>43</sup> See Doherty, *supra* note 23. Former Senate Parliamentarian Robert Dove has asserted that holds “are in many ways a favor to the leadership by letting them know how senators feel about a bill . . . [which] lets them know how to plan their time.” Hook, *supra* note 9.

<sup>44</sup> See 2003 Committee Hearing, *supra* note 10 (statement of Walter J. Stewart) (noting that holds can help to promote “careful and unhurried deliberation”).

However, holds, especially those placed in secret, may also be employed for less constructive purposes. The failure of current Senate rules to require transparency in the placement of holds increases the likelihood of abusive holds, contributes to gridlock within the Senate, and renders legislators unaccountable for their actions.

#### A. *Secrecy Increases the Likelihood of Abuse*

Because it places such great power in the hands of individual senators, the hold is susceptible to abuse. Senator Dianne Feinstein (D-Cal.) has recalled incidents in which holds “were put on virtually everything that came out of a committee . . . [and] Members put holds on every bill another Member had to make a point.”<sup>45</sup> Certainly, even publicly disclosed holds may be used for purposes which may be viewed as objectionable, as for example, when Senator Larry Craig (R-Idaho) openly held 850 Air Force promotions in 2003, demanding cargo planes for the Idaho Air National Guard.<sup>46</sup>

Anonymity helps facilitate even more abusive uses of the hold, however, enabling senators to kill legislation or avenge some perceived wrong without being forced to publicly explain or defend their action. For example, after finally discovering the source of an anonymous hold on his bill, one senator recalled being told

I have no objection to your bill at all . . . 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 the committee.<sup>47</sup>

The recent confirmation of Audrey Fleissig to the federal bench provides a striking example of hold misuse. Though the Judiciary Committee unanimously approved Fleissig, an anonymous hold delayed her confirmation vote for four months.<sup>48</sup> When the Senate finally voted on her nomination, it approved Fleissig 90 to 0.<sup>49</sup> The Fleissig example suggests that senators feel comfortable placing secret holds not only on legislation, but also on nominations, that they refuse to publicly filibuster or actually vote against.

#### B. *Secrecy Contributes to Government Inefficiency and Gridlock*

Anonymity not only contributes to the potential for abuse of holds, but also produces tremendous inefficiencies within the Senate. When senators

<sup>45</sup> 153 CONG. REC. S221 (daily ed. Jan. 8, 2007).

<sup>46</sup> Hulse, *supra* note 17.

<sup>47</sup> 133 CONG. REC. 34449 (1987) (statement of Sen. Exon (D-Neb.)).

<sup>48</sup> See Mark Arsenault, *Nomination Delaying Tactic Irks Senators*, BOSTON GLOBE, June 22, 2010, at A1.

<sup>49</sup> *Id.*

supporting a particular measure cannot identify the source of a hold, they cannot negotiate or address the concerns of the senator blocking the measure. Moreover, secret holds can lead to games of “procedural ‘hide and seek,’”<sup>50</sup> in which senators and their staffs waste precious time attempting to locate the anonymous senator.

The resulting gridlock can prove particularly problematic in the context of the confirmation process. Use of holds contributes significantly to delays in filling positions within the executive and judicial branches that require Senate confirmation. In 1997, then-Senate Minority Leader Tom Daschle (D-S.D.) observed the prevalence of such holds, joking that nominees whose appointments had not been subject to holds “ought to feel lonesome.”<sup>51</sup> In the first year of the Obama administration, it took the Senate an average of 60.8 days to confirm the President’s nominees, and 64 of the 326 nominees for cabinet department and executive agency positions remained pending at the end of Obama’s first year in office.<sup>52</sup> Obama nominees for federal circuit judgeships have waited an average of 116 days between approval by the Senate Judiciary Committee and Senate confirmation.<sup>53</sup> Anonymous holds contribute to this slowdown in Senate action.<sup>54</sup> As of the end of May 2010, 120 nominations for executive and judicial appointments remained stalled, with the vast majority due to anonymous holds.<sup>55</sup>

Extended vacancies in key offices within federal agencies may leave career employees without sufficient direction<sup>56</sup> and may lead to agency inaction, reducing the likelihood that those agencies will be able to address significant problems.<sup>57</sup> Delays in confirming nominees to the federal judiciary leave significant numbers of federal judgeships unoccupied for extended periods of time, overcrowding the dockets of sitting judges, lengthening the waiting time for trials and appeals, and generally producing a state of affairs that the late Chief Justice Rehnquist predicted would “erod[e] the quality of justice that traditionally has been associated with the federal judiciary.”<sup>58</sup>

<sup>50</sup> 144 CONG. REC. 14130 (1998) (statement of Sen. Wyden).

<sup>51</sup> Lawrence J. Goodrich, *Capitol Humor: Does Rep. Arney Wear Matching Socks?*, CHRISTIAN SCI. MONITOR, Nov. 28, 1997, at 4. According to Senator Daschle, holds on nominations had become a virtual status symbol for senators. “I have no holds. I’m going to have to pick out a nominee to get to know him or her a lot better. It works that way. . . . ‘Hello, I’m your holder. Come dance with me.’” *Id.*

<sup>52</sup> See ANNE JOSEPH O’CONNELL, CENTER FOR AMERICAN PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA’S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 2 (2010), available at [http://www.americanprogress.org/issues/2010/04/pdf/dww\\_appointments.pdf](http://www.americanprogress.org/issues/2010/04/pdf/dww_appointments.pdf).

<sup>53</sup> Arsenault, *supra* note 48.

<sup>54</sup> See 2010 Committee Hearing, *supra* note 10, at 5 (statement of G. Calvin Mackenzie) (use of the hold in the confirmation process has become an “epidemic”).

<sup>55</sup> Editorial, *Senate Tradition at Its Worst*, BOSTON GLOBE, June 26, 2010, at A8.

<sup>56</sup> See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, at 941-43 (2009).

<sup>57</sup> See *id.* at 938-41.

<sup>58</sup> *Delay in Approving Judicial Nominees Angers Rehnquist*, WALL ST. J., Jan. 2, 1998, at 40.

Furthermore, the prospect of having one's confirmation held indefinitely may lead qualified individuals to withdraw from consideration or discourage them from accepting a nomination altogether.<sup>59</sup>

### C. *Secrecy Inhibits Accountability*

When elected officials operate under the cloak of anonymity, voters cannot hold those representatives accountable for their actions. The knowledge that their identities will remain secret when placing holds may embolden senators to act without regard for the wishes of the voters who elected them.<sup>60</sup> Moreover, this lack of accountability may lead to an erosion of public faith in government, breeding distrust of elected officials and destroying citizens' confidence in the legislative process.<sup>61</sup> In the words of Senator Wyden, the secret hold "carries the odor of back room deals, abuse of privilege, and a body that cares more about individual personal desires than those of the American people."<sup>62</sup> The secret hold's deleterious effects on accountability and efficiency, as well as striking examples of its abuse, make it a ripe area for reform.

## IV. PAST ATTEMPTS AT REFORM

The Senate and its leaders have adopted some limited reforms concerning the hold over the past few decades, but none have proven successful at bringing meaningful transparency to the Senate practice.

### A. *Early Efforts*

In 1982, Majority Leader Howard Baker (R-Tenn.) decreed that during the final two weeks of the legislative session, "holds will be honored only sparingly and under the most urgent circumstances."<sup>63</sup> The following year, Majority Leader Baker joined with Minority Leader Robert Byrd (D-W. Va.)

<sup>59</sup> See Norman Ornstein, *Slow Confirmation Process is Hurting U.S. Government*, ROLL CALL, June 24, 2009, available at 2009 WLNR 12062010 (arguing that when senators delay confirmations for political purposes, "it reduces the pool of top-flight people willing to serve; when they see what happens to their friends or peers, the attraction of government declines").

<sup>60</sup> Charles Pope, *Wyden Wants Senators to Throw Their Fits in Public*, OREGONIAN, June 9, 2010, available at [http://www.oregonlive.com/politics/index.ssf/2010/06/oregons\\_ron\\_wyden\\_and\\_iowas\\_ch.html](http://www.oregonlive.com/politics/index.ssf/2010/06/oregons_ron_wyden_and_iowas_ch.html) (quoting Rutgers political science professor Ross Baker describing the secret hold as "a shield to protect senators from embarrassment").

<sup>61</sup> A poll conducted in 2009 found that a vast majority of voters rate making the federal government more open (79%) and accountable (83%) to citizens as important priorities, with 40% of respondents deeming these reforms to be among the most important priorities. Press Release, Lake Research Partners & Topos P'ship, *New Poll Shows Broad Support for Economic Recovery Package and Tough Government Accountability Measures* (Feb. 1, 2009), available at <http://www.openthegovernment.org/otg/stimulustransparencypollresults.pdf>.

<sup>62</sup> 143 CONG. REC. 19,900 (1997).

<sup>63</sup> 128 CONG. REC. 28,790 (1982).



to resolve that, henceforth, a hold would merely entitle a senator to notification that a bill would be called up.<sup>64</sup> In 1985, members of the Senate reached an informal agreement to allow other senators to learn the identity of a colleague who had placed a hold on a bill.<sup>65</sup> However, leaders failed to enforce these policies, and the use of holds, including anonymous holds, continued.<sup>66</sup>

More than a decade later, in 1999, Majority Leader Trent Lott (R-Miss.) and Minority Leader Tom Daschle sent a joint letter informing all senators that a new policy regarding holds would be enacted.<sup>67</sup> Under the policy, all senators wishing to place a hold would be required to convey their concerns to the sponsor of the legislation as well as the committee of jurisdiction and submit written notification to their respective party leader.<sup>68</sup> Prematurely heralded as the end of secret holds,<sup>69</sup> the new policy, which did not constitute an official rule and included no enforcement mechanism, failed to hinder the use of anonymous holds.<sup>70</sup>

Still pursuing reform, in 2003, Senate Majority Leader Bill Frist (R-Tenn.) and Minority Leader Daschle sent a letter to their colleagues that set forth a new policy requiring a senator placing a hold on a bill to notify within seventy-two hours the bill's sponsor, as well as the senior party member on the committee with jurisdiction over the bill.<sup>71</sup> Like earlier efforts, this policy had little effect, prompting one senator to remark that it "had more holes in it than Swiss cheese."<sup>72</sup>

The utter failure of each of these early attempts to eliminate anonymous holds stemmed in part from the absence of any enforcement mechanism.<sup>73</sup> Moreover, these efforts did not alter the fundamental dynamics within the Senate that caused leaders to observe holds in the first place: Senate leaders continued to rely upon the cooperation of other senators in order to accomplish their own legislative goals,<sup>74</sup> and individual senators retained the power

<sup>64</sup> SINCLAIR, *supra* note 21, at 131.

<sup>65</sup> Diane Granat, *Procedural Changes Adopted: Senators Seeking to Improve 'Quality of Life'*, CQ WEEKLY, Dec. 7, 1985, at 2569, available at <http://library.cqpress.com/cqweekly/WR099405845>.

<sup>66</sup> For example, in 1986, secret holds stalled a Grassley-sponsored bill addressing governmental fraud. Grassley asserted that "it took [him] months to find out the sources of the holds." Doherty, *supra* note 23.

<sup>67</sup> Letter from Sen. Trent Lott & Sen. Tom Daschle to all senators (Feb. 25, 1999), reprinted in 145 CONG. REC. 3547 (1999).

<sup>68</sup> *See id.*

<sup>69</sup> *See* Editorial, *No More Secret 'Holds'*, WASH. POST, Mar. 10, 1999, at A22.

<sup>70</sup> *See* 153 CONG. REC. S11743 (daily ed. Sept. 19, 2007) (statement of Sen. Grassley) ("[T]his policy . . . was quickly forgotten or ignored by Senators, and the people who could enforce it actually did not enforce it."); Norman J. Ornstein, *Extortion is Legal in the Senate: It's Called "The Hold,"* ROLL CALL, July 29, 1999 ("It is now clear that even that limited 'reform' was a sham.")

<sup>71</sup> 2007 CRS REPORT, *supra* note 10, at 9-10.

<sup>72</sup> 153 CONG. REC. S11743 (daily ed. Sept. 19, 2007) (statement of Sen. Grassley).

<sup>73</sup> *See* 2003 Committee Hearing, *supra* note 10 (statement of Dr. Sarah Binder) ("[I]nformal efforts [to reform the hold] have been plagued by loopholes and by the lack of an enforcement mechanism.")

<sup>74</sup> *See* 2003 Committee Hearing, *supra* note 10 (statement of Dr. Steven S. Smith).

to make credible threats of objecting to unanimous consent agreements and thereby obstruct the Senate's ability to accomplish its work within serious time constraints.<sup>75</sup> As a result, Senate leaders continued to honor the holds of senators who failed to identify themselves, despite these informal policies requiring disclosure.

### B. 2007 Reform

The first and only formal statutory policy restricting the use of secret holds came in 2007, when President George W. Bush signed into law the Honest Leadership and Open Government Act.<sup>76</sup> This legislation addresses the matter of anonymous holds in section 512 of title V, which directs Senate majority and minority leaders not to recognize a hold—or “notice of intent to object to proceeding”—unless the senator placing the hold follows a specified procedure.<sup>77</sup> Under that procedure, after a senator, or a colleague acting on his behalf, makes a formal objection to a unanimous consent agreement, the holding senator must submit a “notice of intent”—or hold letter—in writing to the Senate leader of his party or the leader's designee.<sup>78</sup> No more than six session days after submitting a notice of intent, the senator who placed the hold must submit a notice, stating the senator's name and specifying the reasons for that senator's objection to the measure, to be printed in the Congressional Record and in the Senate calendar.<sup>79</sup> Only then may the majority or minority leader recognize a hold placed by a member of his caucus.<sup>80</sup> If a senator withdraws his hold before the six-day period expires, he need not have the letter printed in the Congressional Record.<sup>81</sup> A senator may remove his own hold by submitting a notice to be included in the Congressional Record.<sup>82</sup> If a senator publicly objects to a unanimous consent request to proceed with a measure, he is not required to adhere to the process outlined in section 512.<sup>83</sup>

---

<sup>75</sup> See *id.* (“The problem is that senators’ ability to object to unanimous consent agreements, backed by the threat of delay through extended debate, remains untouched, and leaders must seek advance warning of objections whether or not sponsors and committees are notified about a hold.”); see also SMITH, *supra* note 32, at 112 (arguing that the 1982 reform failed “primarily because threatened objections to proceeding with measures still had credibility, the severity of time constraints had not changed, and the political incentives for senators to press their cases remained”).

<sup>76</sup> See Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified as amended in scattered titles of U.S.C.); see also 2008 CRS REPORT, *supra* note 33, at 1.

<sup>77</sup> § 512(a), 121 Stat. at 759 (codified as amended at 2 U.S.C. § 30b (Supp. II 2008)); see also 2007 CRS REPORT, *supra* note 10, at 10.

<sup>78</sup> § 512(a)(1), 121 Stat. at 759.

<sup>79</sup> § 512(a)(2), 121 Stat. at 759.

<sup>80</sup> § 512(a), 121 Stat. at 759.

<sup>81</sup> § 512(b)(3), 121 Stat. at 759.

<sup>82</sup> § 512(c), 121 Stat. at 759.

<sup>83</sup> 2007 CRS REPORT, *supra* note 10, at 11.

Supporters of section 512 set forth two primary justifications for allowing an initial period of anonymity before requiring disclosure. First, according to one of the provision's sponsors, the period gives a senator ample time to submit the required disclosure form for publication in the Congressional Record.<sup>84</sup> Second, the six-day period provides a senator time to investigate a proposed measure without being criticized or pressured by interest groups or voters for holding up action on the bill or nomination.<sup>85</sup> Though Senator Wyden, a key advocate of the reform, had hoped for a shorter notification time period, he accepted the six-day rule, noting that "[i]t's a start."<sup>86</sup>

Shortly after the Honest Leadership and Open Government Act was signed into law, a coauthor of the original legislation admitted that "I don't know how [the final version of section 512] is going to work."<sup>87</sup> The answer, unfortunately, has been not very well, as section 512 has proven largely ineffective at curbing the use of secret holds. Senators have used the practice of "rotating" or "rolling" holds, whereby a senator hands off a hold to a like-minded colleague before the six-day rule obligates him to identify himself, in order to evade the new self-disclosure requirement.<sup>88</sup> Furthermore, the rule's permitted six-day period of anonymity begins only after another senator makes a formal objection to a unanimous consent request to proceed on the floor of the Senate on behalf of the anonymous senator.<sup>89</sup> Consequently, if a senator privately reveals his intent to object to proceeding on a measure to a Senate leader and the leader, acting on that information, prevents the measure from reaching the floor, the objecting senator can effectively stall the legislation without ever publicly disclosing his identity.<sup>90</sup> Finally, no enforcement mechanism or sanctions for violating the identification rule exist.<sup>91</sup> The effectiveness of the policy thus depends upon senators

---

<sup>84</sup> The initial version of the bill had allowed three days and, according to Senator Grassley, "[t]he intent [was] not that it is somehow legitimate to keep a hold secret for 3 days, but we wanted to give Senators ample time to get their disclosure to the floor to be entered into the RECORD." 153 CONG. REC. S10690 (daily ed. Aug. 2, 2007) (statement of Sen. Grassley). Despite his support for the three-day period of anonymity, Grassley declared it "absurd to think that Senators need over a week to send an intern down to the floor with this simple form." *Id.*

<sup>85</sup> 2008 CRS REPORT, *supra* note 33, at 4.

<sup>86</sup> Hulse, *supra* note 17.

<sup>87</sup> 153 CONG. REC. S11742 (daily ed. Sept. 19, 2007) (statement of Sen. Grassley). The final legislation contained several significant changes from the original proposal. *See id.* at S11743. In earlier debate, Senator Grassley noted that the modifications made the legislation "so liberal that it is practically meaningless what we are doing about secret holds." 153 CONG. REC. S10689 (daily ed. Aug. 2, 2007) (statement of Sen. Grassley).

<sup>88</sup> Senator Sheldon Whitehouse (D-R.I.) dubbed this practice "hold laundering." *See Secret Holds: Will Congress Finally End Them?*, WASH. POST, May 10, 2010, at A16. As Senator George Voinovich (R-Ohio) explained, "[A senator] puts his hold on, and you go to this guy and he says, 'Oh, I took my hold off!' But the son of a gun's got somebody else to hold it. Then you go to that guy: 'Oh, but I took that off.' And the other guy's got it! They've got this little game they play around you." Friel, *supra* note 24.

<sup>89</sup> 2008 CRS REPORT, *supra* note 33, at 4.

<sup>90</sup> *Id.* at 3.

<sup>91</sup> *Id.* at 2.

voluntarily disclosing their holds and Senate leaders refusing to honor a senator's hold if he fails to comply with the six-day notification rule.

### C. Other Proposals for Reform

Several members of Congress have advocated limiting or eliminating the secret hold, without addressing use of the hold in general.<sup>92</sup> However, other reformers have called for more comprehensive changes to the practice. One such proposal by a former member of the Senate advocates requiring at least sixteen senators to place a hold on a bill,<sup>93</sup> while other proposals have called for a time limit on holds.<sup>94</sup> A few reformers have raised the possibility of abolishing the practice entirely.<sup>95</sup>

Some argue that any real reform to the practice requires a fundamental change to Senate rules, reasoning that without such a change, senators could continue to threaten a filibuster, thus achieving the same effect as a hold.<sup>96</sup> Accordingly, some have argued that changes should be made to the motion to proceed to bring a bill up for consideration, which is debatable on non-privileged matters,<sup>97</sup> and thus subject to filibuster.<sup>98</sup> Supporters of this approach have urged eliminating debate,<sup>99</sup> requiring a simple majority vote,<sup>100</sup> or instituting a two-hour time limit on debate for the motion to proceed.<sup>101</sup> Another proposal involves altering Senate rules to require multiple senators

<sup>92</sup> For example, Senator Grassley maintained that while he “do[es] not argue with an individual Senator blocking a bill . . . [he does] not think it should be secret.” 153 CONG. REC. S11742 (daily ed. Sept. 19, 2007); *see also* 153 CONG. REC. S221 (daily ed. Jan. 8, 2007) (statement of Sen. Feinstein) (“[T]he era of the *anonymous* hold ought to be put to rest with a big sign that says ‘rest in peace.’” (emphasis added)); 143 CONG. REC. 19900 (1997) (statement of Sen. Wyden) (emphasizing that his proposed reform did not involve any fundamental change to the hold other than adding a notification requirement); Alan K. Ota & Niels Lewniewski, *Getting a Grip on Secret Holds*, CQ WEEKLY, May 17, 2010, at 1180, *available at* <http://library.cqpress.com/cqweekly/weeklyreport111-000003664035> (Sen. McCaskill “hope[s] to offer a proposal to eliminate *secret* holds later this year.” (emphasis added)).

<sup>93</sup> Hook, *supra* note 9 (proposal of former Sen. James Exon).

<sup>94</sup> *See, e.g.*, Metzenbaum, *supra* note 11 (suggesting that a hold should automatically expire in two to three weeks absent “special circumstances”); Ornstein, *supra* note 27 (“There is no good reason why any hold . . . on an executive nominee should be allowed to last more than 45 or 60 days.”).

<sup>95</sup> *See, e.g.*, 2007 CRS REPORT, *supra* note 10, at 5; Ornstein, *supra* note 70 (“It is past time to return [the practice] to its original function, or to jettison it altogether.”).

<sup>96</sup> *See, e.g.*, Evans & Lipinski, *supra* note 8, at 26-27 (“Absent fundamental changes to the filibuster . . . efforts to reform the hold are mostly a waste of time.”).

<sup>97</sup> GOLD, *supra* note 41, at 27.

<sup>98</sup> *See* 2003 Committee Hearing, *supra* note 10 (statement of Professor C. Lawrence Evans).

<sup>99</sup> *See id.* (“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.”).

<sup>100</sup> *See id.* (statement of Dr. Steven S. Smith).

<sup>101</sup> *See id.* (statement of Dr. Sarah Binder).

to object to a unanimous consent agreement.<sup>102</sup> Advocates of these approaches view such broader changes as necessary to meaningfully reform the anonymous hold.

#### V. THE MOST RECENT PROPOSAL: THE SECRET HOLDS ELIMINATION ACT

The Secret Holds Elimination Act (“SHEA”)<sup>103</sup> was introduced in the Senate on July 27, 2010 by Senators Wyden, Grassley, and McCaskill.<sup>104</sup> Senators Wyden and Grassley, two longtime proponents of reforming the secret hold,<sup>105</sup> introduced an earlier version of SHEA as a Senate resolution<sup>106</sup> on April 27, 2010.<sup>107</sup> This initial version would have amended the Standing Rules of the Senate to require public disclosure of a hold, in both the Congressional Record and Senate calendar, two session days after placement, regardless of whether the measure had been formally brought to the floor.<sup>108</sup>

This early version of SHEA bore some similarity to a reform proposed by Senators Wyden and Grassley more than a decade ago, which would have enacted a new standing order of the Senate requiring senators to place a notice in the Congressional Record within two session days of placing a hold.<sup>109</sup> The Senate adopted that proposal as an amendment to an appropriations bill,<sup>110</sup> but the provision was eliminated in conference.<sup>111</sup> A similar measure, which would have required publication within three days, was adopted as an amendment to an ethics reform bill in 2006,<sup>112</sup> though, ironi-

---

<sup>102</sup> *Id.* (“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.”).

<sup>103</sup> S. 3657, 111th Cong. (2010).

<sup>104</sup> 156 CONG. REC. S6341 (daily ed. July 27, 2010).

<sup>105</sup> See 2008 CRS REPORT, *supra* note 33, at 1 (describing efforts by Sen. Wyden and Sen. Grassley to end secret holds).

<sup>106</sup> S. Res. 502, 111th Cong. (2010).

<sup>107</sup> 156 CONG. REC. S2711 (daily ed. Apr. 27, 2010). On May 3, Senators Wyden and Grassley offered this earlier version as an amendment to the financial services reform bill. See 156 CONG. REC. S3047 (daily ed. May 3, 2010); see also Press Release, Sen. Chuck Grassley, Push to End Secret Holds Continues (May 7, 2010), [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=26484](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=26484). This amendment appeared likely to pass, but Wyden withdrew it after another senator introduced an amendment to the amendment that would require completion of a fence along the U.S.-Mexico border. See Editorial, *Stuck in the Dark; The Senate’s Attempt for a More Open Government May Fail Again, Thanks to Sen. DeMint*, WASH. POST, May 17, 2010, at A12.

<sup>108</sup> See S. Res. 502; see also Press Release, Sen. Chuck Grassley, *supra* note 7.

<sup>109</sup> 143 CONG. REC. S9872 (daily ed. Sept. 24, 1997).

<sup>110</sup> National Defense Authorization Act, S. 2057, 105th Cong. § 1083 (as referred to S. Comm. on Nat’l Sec., Oct. 21, 1998).

<sup>111</sup> 2007 CRS REPORT, *supra* note 10, at 8.

<sup>112</sup> Legislative Transparency and Accountability Act, S. 2349, 109th Cong. § 114 (2006).

cally, an anonymous senator placed a hold on the amendment for a time.<sup>113</sup> Congress adjourned before enacting the legislation.<sup>114</sup>

In its current form, SHEA would establish a standing order of the Senate directing Senate leaders to recognize only those holds of senators who have submitted written notice to the leader and granted the leader permission to object in the senator's name.<sup>115</sup> Additionally, no more than one session day after submitting notice of intent to object, the holding senator must submit a written notice of intent to object to proceeding for publication in the Congressional Record and the Senate calendar.<sup>116</sup> Any senator who has submitted a notice of intent to object for publication in the Congressional Record may have his hold removed by submitting another notice for publication in the Congressional Record stating that he no longer objects.<sup>117</sup> Under SHEA, if a senator notifies his leader of his intent to object but fails to submit the required notice for inclusion in the Congressional Record and Senate calendar, the legislative clerk<sup>118</sup> shall list the senator in the applicable section of the Senate calendar.<sup>119</sup>

## VI. EFFECTIVENESS OF THE PROPOSED REFORM

Though far from a complete solution to the problem of secret holds, SHEA represents a marked improvement over the existing policy in three important respects. First, SHEA substantially shortens the time allowed for placing notice in the Congressional Record and Senate calendar from six days to one day.<sup>120</sup> Current Senate rules, which give a senator six days before he must disclose his hold, make it possible for senators to use a rolling hold to remain anonymous, taking turns holding a particular measure without disclosing their identities, provided that each individual senator drops his hold within the relevant six-day period.<sup>121</sup> By dramatically shortening the inter-

<sup>113</sup> Lisa Caruso, *Irony Alert*, NAT'L J., Apr. 1, 2006, at 3.

<sup>114</sup> 2008 CRS REPORT, *supra* note 33, at 2.

<sup>115</sup> See S. 3657, 111th Cong. § 1(a)(3) (2010). The notice shall take the form: "I, Senator XXXXXXX, intend to object to XXXXXXX, dated XXXXXXX. I will submit a copy of this notice to the Legislative Clerk and the Congressional Record within 1 session day and I give my permission to the objecting Senator to object in my name." *Id.*

<sup>116</sup> See *id.*

<sup>117</sup> See S. 3657 § 1(c).

<sup>118</sup> The responsibilities of the legislative clerk include preparing the legislative calendar of the Senate, supervising votes, and reading aloud all matters brought to the floor. See ELLEN GREENBERG, *THE HOUSE AND SENATE EXPLAINED: THE PEOPLE'S GUIDE TO CONGRESS* 16 (rev. ed. 1996).

<sup>119</sup> See S. 3657 § 1(d). Under SHEA, the legislative clerk shall list in the Senate calendar the name of a senator who has placed a notice of intent to object, if that senator fails to submit the required notice, within one session day after the Senate leader makes the objection on the senator's behalf. *Id.*

<sup>120</sup> Compare S. 3657 § 1(a), with Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 512(a), 121 Stat. 735, 759 (codified as amended at 2 U.S.C. § 30b (Supp. II 2008)).

<sup>121</sup> Editorial, *Secret Holds; Will Congress Finally End Them?*, WASH. POST, May 10, 2010, at A16.

vening period allowed between hold placement and disclosure, SHEA should make coordination of such rolling holds much more difficult.

Moreover, this change would have no negative consequences because the existing six-day period serves no meaningful purpose. The primary justification set forth for granting the six-day period under the current policy has been that the window gives a senator time to submit his disclosure form for inclusion in the Congressional Record and the Senate calendar.<sup>122</sup> However, submission of a hold to the Congressional Record and Senate calendar entails minimal effort by a senator or his staff and merely requires presentation of a short written statement.<sup>123</sup> It has also been argued that the current intervening period enables senators to hold legislation for up to six days in the interest of learning more about the matter without facing criticism for delaying the legislative process.<sup>124</sup> Such an argument, however, assumes that voters and interest groups would be alert to, and have fairly strong objections to, a brief delay in an already lengthy legislative process, which seems unlikely in most cases. On the contrary, given the prevalence of holds in the Senate,<sup>125</sup> interested citizens and groups would likely view such holds as a common feature of Senate lawmaking. Only when holds extended for a significant period of time would senators likely face serious accusations of obstructionism.<sup>126</sup> SHEA, which addresses only disclosure and places no time limits on holds, would not alter senators' current ability to hold legislation in order to evaluate its content. Rather, it simply requires that they do so in public.<sup>127</sup> Thus, shortening the allowed period from six days to one day would not disrupt any important legislative functions.

Second, SHEA requires a senator placing a hold to identify himself whether or not the measure has been brought up for floor consideration. Unlike the current rules, in which the six-day period allowed for publishing notice of a hold begins to run only after a measure has been brought to the floor for consideration and an objection has been made,<sup>128</sup> SHEA's one-day

---

<sup>122</sup> See 153 CONG. REC. S10690 (daily ed. Aug. 2, 2007) (statement of Sen. Grassley).

<sup>123</sup> See S. 3657 § 1(a)(3) (providing the specific language for the notice).

<sup>124</sup> 2008 CRS REPORT, *supra* note 33, at 4.

<sup>125</sup> See 2007 CRS REPORT, *supra* note 10, at 2.

<sup>126</sup> According to Senator Grassley, "[b]eing transparent about a hold doesn't hurt . . . I've been putting a statement about any hold that I've placed in the Congressional Record for nearly 10 years now, and I haven't once been bloodied or battered." Stephanie Woodrow, *A Senate Without Secret Holds: How Different?*, ROLL CALL, March 30, 2006, available at [http://www.rollcall.com/issues/51\\_103/news/12717-1.html](http://www.rollcall.com/issues/51_103/news/12717-1.html).

<sup>127</sup> As one of SHEA's co-sponsors, Senator Claire McCaskill, explained, "It is certainly any senator's prerogative to object to the consideration of legislation or a nomination should they need additional time to express their concerns or get additional information, but it is unacceptable for that process to be done in secret." Press Release, Claire McCaskill, McCaskill Column: Fighting Secrecy in Congress (June 29, 2010), [http://mccaskill.senate.gov/?p=press\\_release&id=1012](http://mccaskill.senate.gov/?p=press_release&id=1012).

<sup>128</sup> See Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 512(a), 121 Stat. 735, 759 (codified as amended at 2 U.S.C. § 30b (Supp. II 2008)).

period would begin at the time the hold is placed with Senate leadership.<sup>129</sup> Under current rules a senator may privately submit notice of intent to object to a Senate leader and, if the leader subsequently prevents the measure from going to the floor, the holding senator need not publicly disclose his identity.<sup>130</sup> SHEA would close this loophole by starting the clock on the allowed period of anonymity from the moment that the senator submits notice of intent to object to Senate leadership.

Third, SHEA does not rely entirely upon individual senators submitting the required notice for publication, instead establishing a mechanism by which, under certain circumstances, a hold may be published in the Senate calendar when a senator fails to comply with the self-disclosure mandate. Current rules do not provide for publication in the event that the senator placing a hold does not, as required, submit his name for inclusion in the Congressional Record.<sup>131</sup> In contrast, SHEA creates an automatic publication mechanism triggered when a leader makes an objection on behalf of another senator. SHEA instructs the legislative clerk to list in the Senate calendar the name of any senator who has placed a notice of intent to object if that senator neglects to do so himself within one session day after the leader makes an objection on his behalf.<sup>132</sup> SHEA therefore provides a more effective enforcement mechanism than the current policy. It no longer demands that busy Senate leaders monitor whether senators have published the required notice, placing this burden instead upon the legislative clerk. Moreover, if this automatic publication does occur, it should eliminate the possibility for rotating holds to be used to evade identification once a formal objection has been made on a senator's behalf. The one-day period within which the legislative clerk must disclose the identity of the senator begins to run when the objection is made,<sup>133</sup> after which the senator must publish notice in order to remove a hold.<sup>134</sup> SHEA does not relieve the legislative clerk of responsibility for submitting the holding senator's name for publication if that senator subsequently removes the hold. Thus, SHEA would make it impossible for senators to use a rotating hold to preserve anonymity once a formal objection has been made, because removing the initial hold would require disclosure.

Despite these considerable improvements, SHEA remains an imperfect solution as it, like previous attempts at reform, relies upon individual sena-

---

<sup>129</sup> See S. 3657, 111th Cong. § 1(a)(2)(B) (2010); see also Press Release, Sen. Chuck Grassley, Bill to Eliminate Secret Holds is on the Senate Calendar (July 28, 2010), [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=27850](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=27850).

<sup>130</sup> See *supra* notes 89-90 and accompanying text.

<sup>131</sup> See § 512, 121 Stat. at 759.

<sup>132</sup> S. 3657 § 1(d). After the leader objects, this provision effectively grants a senator one day in which to disclose his hold before automatic publication occurs, even if that senator already failed to meet the one-day self-disclosure requirement.

<sup>133</sup> *Id.*

<sup>134</sup> See S. 3657 § 1(c).



tors and Senate leaders to comply with its requirements.<sup>135</sup> Although SHEA's sponsors claim that all holds will be "automatically printed in the Congressional Record after one session day, whether the bill or nomination has been brought up for floor consideration or not,"<sup>136</sup> this contention may be at odds with the actual text of the bill. While SHEA requires a senator to submit notice for publication within one day of placing a hold with Senate leadership,<sup>137</sup> it provides for automatic publication only after a Senate leader has made an objection on the holding senator's behalf.<sup>138</sup> As a result, no automatic publication would occur if the leader never brings the measure to the floor and, consequently, never actually makes an objection. If this is indeed the case, SHEA will continue a major problem that exists under the current Senate rules<sup>139</sup>—a problem that has no clear solution.

Even mandating publication of a notice of intent by the legislative clerk immediately upon its submission to a Senate leader would be unlikely to completely eradicate anonymous holds, as such a policy would still rely upon individual senators and Senate leaders to disclose to the legislative clerk both the existence of an objection and the identity of the objector. To evade such a requirement, senators could informally express their objections to certain measures, which may persuade a leader to avoid bringing them up, or Senate leaders could simply refuse to transmit formal notices for publication. Alternatively, senators might designate one of their colleagues to act as a surrogate, placing holds on behalf of others in order to obscure the identity of the true objectors.<sup>140</sup>

As long as senators possess the ability to object to a unanimous consent agreement or to employ a filibuster and Senate leaders control a crowded legislative agenda, the possibility will remain that senators may privately convey an intent to object to a request to proceed and that Senate leaders will honor these functional equivalents of holds by refusing to bring certain measures to the floor. Thus, to be truly effective, any effort to end the secret hold would need to address these underlying issues. Because it fails to do so, SHEA appears unlikely to achieve meaningful reform.

---

<sup>135</sup> See *supra* notes 88-91 (discussing how the current rules depend upon senators disclosing their holds and upon Senate leaders continuing to honor only properly disclosed holds).

<sup>136</sup> Press Release, Sen. Chuck Grassley, Bill to Eliminate Secret Holds is on the Senate Calendar (July 28, 2010), [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=27850](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=27850).

<sup>137</sup> S. 3657 § 1(a)(2)(B).

<sup>138</sup> S. 3657 § 1(d).

<sup>139</sup> See *supra* notes 89-90 and accompanying text.

<sup>140</sup> See 2010 Committee Hearing, *supra* note 10, at 60 (statement of G. Calvin Mackenzie), available at [http://rules.senate.gov/public/?a=Files.Serve&File\\_id=cb71dedf-93ab-4300-b7c8-d4e61bde8be4](http://rules.senate.gov/public/?a=Files.Serve&File_id=cb71dedf-93ab-4300-b7c8-d4e61bde8be4) ("One can imagine there might be a Senator Hold, who if you wanted to have a hold but did not want to have it identified with you, you might go to this Senator and he or she would willingly stand up and take the heat for that.").

## VII. CONCLUSION

If enacted, the Secret Holds Elimination Act may help to shed some light on Senate holds, but it will not bring complete transparency to this murky aspect of the legislative process. SHEA's improvements upon the current policy may reduce the prevalence of anonymous holds by rendering the use of rolling holds more difficult, requiring disclosure of a hold upon placement, and providing a mechanism for automatic publication in certain cases. Unfortunately, however, SHEA contains a number of loopholes inviting exploitation. Those determined to avoid exposure would likely continue to find ways to bypass the disclosure requirements, as they have evaded the mandates established by previous attempts at reform. As past efforts have shown, any reform measures that largely depend upon good-faith compliance by individual senators and their leaders, as SHEA does, are unlikely to succeed. The motivation for individual senators to employ anonymous holds in order to block legislation or to extract concessions without attracting public scrutiny would remain, as would senators' ability to threaten to obstruct Senate business by objecting to unanimous consent agreements or mounting a filibuster. Likewise, SHEA would not alter Senate leaders' incentives to honor such holds, as leaders would continue to rely upon the cooperation of their colleagues and to fear credible threats of obstructionism. Unless it alters these fundamental dynamics, any effort to completely eradicate anonymous holds seems doomed to fail. Thus, SHEA appears unlikely to achieve the "elimination" of secret holds promised by its ambitious title.

—*Alexandra Arney\**

---

\* B.A. Northwestern University, 2008; J.D. Candidate, Harvard Law School, Class of 2011.