



The Journal of Civic Information

Volume 4 | Number 1

March 2022

Journal homepage: <https://journals.flvc.org/civic/>

ISSN (online): 2641-970X

No Secret Holds Barred: A Case Study in Failed Transparency Measures from the U.S. Senate

Shawn Musgrave *

Article Information

Received: Nov. 6, 2021

Accepted: March 2, 2022

Published: March 31, 2022

Keywords

Freedom of information
Right to information
Government transparency
Secret holds

Abstract

More than a decade after it was supposedly abolished in the U.S. Senate, the “secret hold”—a mechanism that allows a single senator to stall or kill a bill without revealing the fact of his or her opposition, much less the rationale—remains a fixture of the Senate’s parliamentary procedure. This study analyzes the Congressional Record, official Senate calendars, and other public sources to demonstrate that senators continue to flout their transparency obligations under the current disclosure system for holds, as indicated by the implausibly small number of holds that are made public as required. Whereas prior studies suggest that hundreds of holds are typically placed within each two-year session of Congress, just 150 holds in total were identified in the public record across 14 years and eight sessions of Congress. One alternative is a system modeled on Senate financial disclosures.

* Shawn Musgrave, J.D., is the First Amendment Fellow at Reveal from The Center for Investigative Reporting. Please send correspondence about this article to Shawn Musgrave at shawnmusgrave@gmail.com.

To cite in Bluebook: Shawn Musgrave, *No Secret Holds Barred: A Case Study in Failed Transparency Measures from the U.S. Senate*, 4(1) J. CIVIC INFO 1 (2022).

To cite in APA: Musgrave, S. (2022). No secret holds barred: A case study in failed transparency measures from the U.S. Senate. *Journal of Civic Information*, 4(1), 1-25.

DOI: 10.32473/joci.v4i1.130763

Published under Creative Commons License CC BY-NC, Attribution NonCommercial 4.0 International.

Table of contents

| | |
|-------------------------------------------------------------------------------------|----|
| Introduction | 3 |
| The history and practice of the ‘secret hold’ | 3 |
| Democratic tradeoffs of secret holds | 6 |
| Methodology | 7 |
| Baseline prevalence of secret holds | 8 |
| Failed efforts to abolish secret holds | 9 |
| Section 512 (2007): ‘Half measures’ instead of ‘real reform’ | 9 |
| <i>Enactment of Section 512</i> | 9 |
| <i>Inefficacy of Section 512</i> | 10 |
| Sen. McCaskill’s abstinence pledge: ‘we pledge that we will not place secret holds’ | 14 |
| S.Res. 28 (2011): ‘We think we have plugged the holes.’ | 15 |
| <i>Enactment of S.Res. 28</i> | 15 |
| <i>Inefficacy of S.Res. 28</i> | 17 |
| An alternative model based on Senate financial disclosures | 22 |
| Conclusion | 25 |

Introduction

In fall 2012, Paul Manafort had a problem.

Manafort, who would go on to lead former President Donald Trump’s election campaign and later plead guilty to being an unregistered lobbyist for the Ukrainian government,¹ needed to kill a particular Senate resolution calling for the release of former Ukrainian prime minister Yulia Tymoshenko from prison.² Given Manafort’s mandate to burnish Ukraine’s democratic image and head off possible U.S. sanctions, the resolution would be an unwelcome black eye for Manafort and his clients. So Manafort “engaged in an all-out campaign to kill or delay the resolution,” including by successfully lobbying senators to place a secret hold on it.³ During this campaign, Manafort’s team discussed how senators’ holds on the resolution might remain anonymous, in violation of the Senate Rules.⁴ These holds on the Tymoshenko resolution remained secret until Manafort’s indictment five years later. Even then, only one of the senators Manafort claimed to have “lined up” to place holds was identified by name in court filings — Sen. Richard Lugar, R-Ind., who by then was no longer in office.⁵ After Lugar withdrew his hold for “humanitarian reasons,” Manafort and the unnamed senators were outmaneuvered, and the Tymoshenko resolution ultimately passed.⁶

The Tymoshenko resolution episode illustrates the anti-democratic potential of the secret hold: a highly motivated party like Manafort could ask around until he or she found senators willing to silently blockade a matter without having to explain why to their colleagues, constituents at home, or watchdogs in the press and civil society. The secret hold turns each senator into a potential stealth gatekeeper, and their actions can remain anonymous even through a federal corruption probe.

This article will first explain the history and reasoning for secret holds, explain an expected baseline of how many holds should be issued each year based on restrictions imposed on the Senate, and then show how secret holds continue despite the restrictions. The article concludes with a suggestion for an alternative model.

The history and practice of the ‘secret hold’

Understanding why secret holds remain so pervasive requires examining how holds operate in practice and how they came to be so common despite being relatively new to Senate procedure. In turn, understanding secret holds requires a brief review of the Senate’s reliance on unanimous consent agreements, which give holds their power.

¹ Plea Agreement, *United States v. Manafort*, No. 1:17-cr-00201 (D.D.C. Sept. 14, 2018), ECF 422, https://storage.courtlistener.com/recap/gov.uscourts.dcd.190597/gov.uscourts.dcd.190597.422.0_17.pdf.

² S.Res.466, A resolution calling for the release from prison of former Prime Minister of Ukraine Yulia Tymoshenko, 112th Cong. (2012), <https://www.congress.gov/bill/112th-congress/senate-resolution/466>. See also Todd Ruger, *Manafort Memos Reveal Influence Campaign*, ROLL CALL (Sept. 14, 2018), <https://www.rollcall.com/2018/09/14/manafort-memos-reveal-influence-campaign>.

³ Superseding Crim. Information 19, *United States v. Manafort*, No. 1:17-cr-00201 (D.D.C. Sept. 14, 2018), ECF 419, https://storage.courtlistener.com/recap/gov.uscourts.dcd.190597/gov.uscourts.dcd.190597.419.0_2.pdf.

⁴ Gov’t Sentencing Mem., Ex. 441 at 24, *United States v. Manafort*, No. 1:17-cr-00201 (D.D.C. Feb. 26, 2019), ECF 528-2, <https://storage.courtlistener.com/recap/gov.uscourts.dcd.190597/gov.uscourts.dcd.190597.528.2.pdf>.

⁵ Superseding Crim. Information 12, *supra* note 3.

⁶ See Ruger, *supra* note 2.

A hold is “simply a threat of a filibuster.”⁷ In more detailed and practical terms, as defined by a Senate glossary, a hold is an “informal practice by which a senator informs Senate leadership that he or she does not wish a particular measure or nomination to reach the floor for consideration.”⁸ A senator typically conveys such notice of objection “by calling the Republican or Democratic cloakroom and stating (and later backing this up with a written notice) that he wants a hold placed on a particular bill.”⁹

Like the Senate filibuster, holds draw their power from the modern Senate’s reliance on unanimous consent of the chamber to get anything done. Indeed, “holds can be understood as information-sharing devices predicated on the unanimous consent nature of Senate decision-making.”¹⁰ The Senate was originally designed to prioritize extended debate, but if the Senate “strictly observed every rule, it would become mired in a bog of parliamentary complications,” such as extended quorum calls and unlimited debate time.¹¹ Since at least the post-World War II period, the Senate has conducted its business primarily via unanimous consent agreements by which all senators agree to dispense with the chamber’s standing rules.¹² These unanimous consent agreements vary in complexity, from simply agreeing not to reading a given bill aloud to the more complex, extensively negotiated unanimous consent agreements that touch on such logistics as the order in which measures are considered or limits on debate and amendments.¹³ Senate leadership orchestrates these negotiations via the “hotlining system,” in which party leaders poll their respective members to confirm no senator will object to a unanimous consent agreement once it is offered on the floor.¹⁴ By placing a hold, a senator tells chamber leadership that they will gum up the works of unanimous consent if the matter is brought to the floor. Since, as Senate Minority Leader Mitch McConnell, R-Ky., recently quipped, the Senate “requires unanimous consent to turn the lights on before noon,”¹⁵ a hold can be a powerful threat.

As unanimous consent agreements became the norm for Senate procedure, holds became the norm, too.¹⁶ Although the term’s precise origins have not been pinpointed, “hold” was common parlance among senators and their staff by at least the late 1960s.¹⁷ The hold became increasingly

⁷ TOM DASCHLE & CHARLES ROBBINS, *THE U.S. SENATE: FUNDAMENTALS OF AMERICAN GOVERNMENT* 93 (2013).

⁸ *Hold*, Glossary, Senate.gov, <https://www.senate.gov/about/glossary.htm#H>.

⁹ MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 286-87 (4th ed. 2018).

¹⁰ WALTER J. OLESZEK, CONG. RESEARCH SERV., R43563, “HOLDS” IN THE SENATE 1 (2017), <https://crsreports.congress.gov/product/pdf/R/R43563>.

¹¹ WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 260 (9th ed. 2014).

¹² WALTER J. OLESZEK, CONG. RESEARCH SERV., RL33939, *THE RISE OF SENATE UNANIMOUS CONSENT AGREEMENTS* 5 (2008), <https://crsreports.congress.gov/product/pdf/RL/RL33939>.

¹³ OLESZEK, *CONGRESSIONAL PROCEDURES*, *supra* note 13, at 264. *See also generally* VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 96-548, *THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION* (2019), <https://www.everycrsreport.com/reports/96-548.html>.

¹⁴ *See* TREVOR CORNING ET AL., *INSIDE CONGRESS: A GUIDE FOR NAVIGATING THE POLITICS OF THE HOUSE AND SENATE FLOORS* 72 (2017).

¹⁵ Carl Hulse, *Biden Endorses Filibuster Rule Changes*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/us/politics/mcconnell-filibuster-senate.html>.

¹⁶ *Hearing on Senate Resolution 151: Requiring Public Disclosure of Notices of Objections (“Holds”) to Proceedings to Motions or Measures in the Senate Before the S. Comm. on Rules & Admin.*, 108th Cong. (2003) (testimony of Walter J. Stewart, Secretary of the Senate Emeritus), <https://web.archive.org/web/20030820015852/http://rules.senate.gov/hearings/2003/061703stewart.htm>.

¹⁷ C. Lawrence Evans & Daniel Lipinski, *Holds, Legislation, and the Senate Parties* 4 (prepared for Conf. on Senate Parties, Univ. of Oxford, Apr. 2005), <https://wmpeople.wm.edu/asset/index/clevan/oxford>.

formalized over the twentieth century, along with the practice of keeping holds secret.¹⁸ President Lyndon Johnson, who served as Senate Minority Leader and then Majority Leader in the 1950s, is credited with the “innovation” of anonymizing holds: Johnson apparently insisted that “the name of the person placing the hold be kept secret.”¹⁹ During Johnson’s tenure and until the mid-1970s, the hold was typically a means of ensuring a senator had time to provide input on a given measure, rather than an obstructionist filibuster by other means.²⁰ But by 1973, these schedule-oriented holds had become so common and so extended that Sen. Robert Byrd, D-W.Va., then the Senate Majority Whip, grumbled that staffers were placing holds without their respective senator’s awareness and “sometimes the ‘hold’ being insisted upon [was] for a week, 2 weeks, 3 weeks, a month, or 6 weeks[.]”²¹ By the late 1970s, obstructionist holds were a fixture of the chamber and “a serious impediment to moving measures to the floor.”²² By 1996, Democratic Leader Tom Daschle, D-S.D., fumed at the proliferation, saying there were “holds on holds on holds. There are so many holds, it looks like a mud wrestling match.”²³

With increasing formalization has come a rough typology of holds, although many straddle multiple categories.²⁴ There are informational holds, by which a senator requests to be notified or consulted in advance of any action or consideration on a given measure. “Choke” holds are an explicit threat to filibuster a matter if it is taken up or included in a unanimous consent agreement, and thus are aimed at permanently obstructing a particular matter. Blanket holds, by contrast, obstruct an entire category of matters, such as all pending nominations to a particular agency or department. The “Mae West” hold—named for the famed actress and sometimes called the “come look me over” hold²⁵—aims to invite a bill sponsor to drop by the holder’s office to discuss lifting the hold, and so “intend[s] to foster negotiation and bargaining between proponents and opponents” of the target measure or nomination.²⁶ Retaliatory holds are placed as political payback against a colleague (perhaps in retribution for placing a hold of their own), the White House, or a particular agency, and do not necessarily reflect opposition to the targeted bill or measure. Any hold, if placed anonymously, qualifies as a secret hold.

The hold—whether placed in secret or publicly—remains a powerful tool in the modern senator’s parliamentary kit. For example, in March 2020, Sen. Bernie Sanders, D-Vt., very publicly threatened to place a hold on the coronavirus stimulus package unless his demands for “stronger conditions . . . on the \$500 billion corporate welfare fund” were met.²⁷ Similarly, in June

¹⁸ WALTER J. OLESZEK, CONG. RESEARCH SERV., RL31685, PROPOSALS TO REFORM “HOLDS” IN THE SENATE 1 (2011).

¹⁹ Testimony of Walter J. Stewart, *supra* note 17.

²⁰ GREGORY KOGER, *FILIBUSTERING 173-76* (2010). *See also* AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS 75* (2010) (“Over time, however, the hold morphed from an instrument of courtesy and reciprocity into a device of obstruction and delay.”).

²¹ 119 CONG. REC. S42,797 (1973).

²² STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 110* (1989).

²³ OLESZEK, *PROPOSALS TO REFORM “HOLDS” IN THE SENATE*, *supra* note 21, at 2.

²⁴ This rough typology comes from OLESZEK, “HOLDS” IN THE SENATE, *supra* note 10, at 1-2. Evans & Lipinski, *supra* note 18, offer another three-fold typology: “unrestricted” holds, temporary holds, and requests for “notification or consultation.” STEIGERWALT, *supra* note 21, at 77, offers two broad categories for holds on judicial nominations: opposition-based and strategic.

²⁵ 157 CONG. REC. S305 (2011) (remarks of Sen. Ron Wyden, D-Ore.).

²⁶ OLESZEK, “HOLDS” IN THE SENATE, *supra* note 10, at 2.

²⁷ Sen. Bernie Sanders, *Press Release: Reacting to Republican Threats to Hold Coronavirus Package Hostage, Sanders Prepared to Place Hold Over Corporate Welfare* (Mar. 25, 2020), <https://www.sanders.senate.gov/newsroom/press-releases/reacting-to-republican-threats-to-hold-coronavirus-package-hostage-sanders-prepared-to-place-hold-over-corporate-welfare>.

2020, Sen. Mike Lee, R-Utah, placed a hold on a bill to modify the Paycheck Protection Program, only “allowing the legislation to pass by unanimous consent” after he got some “additional clarity.”²⁸ And in 2021, following the election of President Joe Biden, senators from both parties placed holds on many of his nominees, including choices for Secretary of Commerce,²⁹ Secretary of the Interior,³⁰ the head of the Central Intelligence Agency,³¹ and Commissioner of U.S. Customs and Border Protection.³²

Democratic tradeoffs of secret holds

Before documenting how unsuccessful the Senate has been in eliminating secret holds, it is worth pausing to acknowledge that some legislators and scholars have praised both holds generally and even the secret hold specifically. Holds are part of the mythic tradition of “Senatorial courtesy,” particularly when applied to judicial nominees.³³ The hold is part of the “minority tool kit,” a means by which senators in the minority party (or mavericks in the majority party) can extract concessions from those in the dominant bloc.³⁴ Holds can serve useful agenda-setting and “early warning system” functions, alerting Senate leadership in advance of objections to a particular bill or nominee, and thus foster targeted negotiation.³⁵ Secret holds, specifically, offer advantages for Senate leadership. As majority leader, President Johnson apparently saw utility in negotiating “directly with [the holder] without what he saw as the further complications of publicity,” and he saw “no reason to have to explain his inside dealings to the press and public.”³⁶ Similarly, placing a secret hold preserves flexibility to change position upon further consideration or modifications that mitigate a senator’s objections.³⁷ Finally, there are some who question whether secret holds are really secret in practice for those who want to unmask them.³⁸

²⁸ Thomas Burr, *Senate Extends Program to Help Small Businesses After Utah’s Sen. Mike Lee Drops Hold on Bill*, SALT LAKE TRIB. (June 4, 2020), <https://www.sltrib.com/news/politics/2020/06/03/sen-mike-lee-holds-up>.

²⁹ See Sen. Ted Cruz, *Press Release: Sen. Cruz Called on Colleagues to Vote Against Raimondo’s Nomination, Stop Embrace of China, and Defend U.S. Interests* (Mar. 2, 2021), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-called-on-colleagues-to-vote-against-raimondo-and-146s-nomination-stop-embrace-of-china-and-defend-us-interests>.

³⁰ See REUTERS, *U.S. Senate Majority Leader Schumer Moves to Bring Haaland Nomination to Final Vote* (Mar. 9, 2021), <https://www.reuters.com/article/us-usa-haaland-senate/two-senators-put-hold-on-bidens-nomination-deb-haaland-to-head-u-s-interior-department-idUSKBN2B11UG>.

³¹ Jordan Williams, *Cruz Puts Hold on Biden’s CIA Nominee*, THE HILL (Mar. 6, 2021), <https://thehill.com/homenews/senate/541958-cruz-puts-hold-on-bidens-cia-nominee>.

³² Eileen Sullivan, *A Democratic Senator is Bottling up Biden’s Customs and Border Protection Nominee*, N.Y. TIMES (July 22, 2021), <https://www.nytimes.com/2021/07/22/us/politics/wyden-border-nominee.html>.

³³ See CONG. RESEARCH SERV., RL31948, *EVOLUTION OF THE SENATE’S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY* 4 (2008), https://www.everycrsreport.com/files/20090513_RL31948_41bee01a6c89786edc1a2ab694defc91a8185e05.pdf.

³⁴ W. LEE RAWLS, *IN PRAISE OF DEADLOCK* 50-51 (2009).

³⁵ Evans & Lipinski, *supra* note 18, at 4. See also CHRIS DEN HARTOG & NATHAN W. MONROE, *AGENDA SETTING IN THE U.S. SENATE* 102 (2011).

³⁶ Testimony of Walter J. Stewart, *supra* note 17.

³⁷ 152 CONG. REC. S2,455 (2006) (remarks of Sen. Jeff Sessions, R-Ala.).

³⁸ See, e.g., Mark A. Calabria, *Obsession with Senate “Holds” Is Misguided*, Cato Institute (Jan. 6, 2011), <https://www.cato.org/blog/obsession-senate-holds-misguided>; Testimony of Walter J. Stewart, *supra* note 17 (“In the legislative arena, if one works hard enough, it is usually quite possible to find out who is behind a particular secret hold.”). However, reformers opposed to secret holds have rebutted this position repeatedly. See, e.g., 157 CONG. REC.

This article does not aim to end the debate over the relative advantages of secret holds, although the author sides with those who liken them a “courtesy granted to senators at the expense of our democracy.”³⁹ Rather, this article takes the Senate’s rejection of secret holds at three recent junctures, reviewed below, as sufficiently compelling evidence that the practice should be eliminated. Fostering trust in our public institutions requires government reform measures that are more than nominal rules. As one senator chided his colleagues in 2019, “it is at least awkward for Members of the country’s chief rule-writing body, the U.S. Senate, to expect Americans to follow the rules we write for them when we don’t follow our own written rules.”⁴⁰

Methodology

This study’s empirical method is simple: To assess whether reforms have been effective at eliminating secret holds, it tallies all notices of holds published by senators in official sources and compares this tally to a conservative baseline, discussed in the next subsection. The tally of hold notices is compiled from searches of the Congressional Record and the official Senate calendars since the reforms were enacted in 2007 (i.e., from the 110th session of the U.S. Congress to the present 117th Congress). As further evidence that secret holds continue to be deployed to kill or stall legislation, nominations, and other matters, this study also reviewed media reports, senators’ press releases, and other public sources.

First, the Congressional Record and the official Senate calendars were reviewed to identify holds that were made public in compliance with transparency reforms. As discussed in further detail below, the disclosure measures require senators to publish notices in both the Congressional Record (all holds regardless of subject matter) and the official Senate calendars (the Senate Executive Calendar for holds placed on nominations and the Senate Calendar of Business for holds placed on bills, resolutions, and similar legislation). Since these notice requirements are duplicative, searching both sources will identify all holds published in compliance with the enacted disclosure systems. With respect to the Congressional Record, senators must publish notices using uniform scripted language, such that keyword searches would identify compliant notices. These keyword searches were performed using the online version of the Congressional Record⁴¹ as well as the commercial ProQuest Congressional database.⁴²

The current disclosure system also requires senators to place a hold notice in dedicated sections of the Senate Executive Calendar and the Senate Calendar of Business, which are available online.⁴³ The official Senate calendars were searched in two ways. First, the final issue

S309 (remarks of Sen. Grassley) (“It is easier said than done to push [holds] out into the open using formal Senate procedures. It is kind of like trying to wrestle down a greased hog.”).

³⁹ *Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process*, Hearing Before the S. Comm. on Rules & Administration, 111th Cong. 329 (2010) (statement of Sen. Claire McCaskill, D-Mo.), <https://www.govinfo.gov/app/details/CHRG-111shrg62210/CHRG-111shrg62210>.

⁴⁰ 165 CONG. REC. S1,428 (2019) (remarks of Sen. Lamar Alexander, R-Tenn.).

⁴¹ Congressional Record, Library of Congr., <https://www.congress.gov/congressional-record>.

⁴² ProQuest Congressional, ProQuest, <https://congressional.proquest.com/congressional>.

⁴³ Calendars & Schedules, U.S. Senate, https://www.senate.gov/reference/Index/Calendars_schedules.htm. Senate calendars are also available on the U.S. Government Publishing Office’s govinfo website: Congressional Calendars, U.S. Gov’t Publishing Off., <https://www.govinfo.gov/app/collection/ccal>.

of the Executive Calendar and the Calendar of Business for each year were reviewed.⁴⁴ Second, since, as discussed below, the reforms allow a senator to remove hold notices from the calendars under certain circumstances—such that some holds do not appear in the final annual issue—individual daily calendars were reviewed to locate hold notices corresponding to holds identified in the Congressional Record.

Finally, public sources were reviewed to identify evidence that senators continue to place secret holds. Keyword searches were conducted on news media databases, government websites, and the Congressional Record.

A kneejerk critique of this methodology is the pesky “absence of evidence” versus “evidence of absence” issue that plagues researchers across fields. In this study, however, where public disclosure is an explicit requirement of the reforms under examination, this is not a concern. That is, absence of evidence is itself the evidence that these pro-transparency reforms have failed. Further, key architects of the reforms to abolish secret holds have pointed to the glaring absence of public disclosures to demonstrate that secret holds continue unabated.⁴⁵ This methodology searches for absence of evidence that holds have been disclosed in the public record, and it finds a damning absence of evidence.

Baseline prevalence of secret holds

Having settled on a methodology for tallying public holds, we must establish a baseline to compare against. That is, if measures meant to bring holds out in the open were effective, how many holds should we find in the public record? Obviously, it is inherently difficult to quantify processes that are secretive by design. But based on the few empirical studies conducted on secret holds it seems safe (and almost certainly over-conservative) to set a rough baseline of at least 100 hold notices published per two-year session of Congress.

This baseline number comes from three archival studies and one media study. One archival study based on the papers of President Lyndon Johnson from his time as Senate Majority Leader identified more than 350 holds placed during the 84th Congress (1955-1956) alone; these holds were submitted by nearly forty Democratic senators either individually or in combination with colleagues.⁴⁶ Another archival study of former Senate Republican Leader Howard Baker, R-Tenn., identified more than 536 holds submitted by thirty-five Republican senators during the 95th Congress (1977-78) and 472 holds submitted by forty-four Republican senators during the 97th Congress (1981-82).⁴⁷ A third archival study of former Republican Leader Bob Dole, R-Kan., identified 2,655 holds placed by Republican senators from the 99th (1985-1986) through the 104th (1995-96) Congresses, an average of more than 440 holds per Congress.⁴⁸ During this time “essentially all Republican senators placed holds,” and the authors identified just two Republican

⁴⁴ The Senate’s Executive Calendar tracks treaties and nominations, while the Senate’s Official Calendar of Business tracks bills, resolutions, and other items of legislative business. See CONG. RESEARCH SERV., 98-438, THE SENATE’S EXECUTIVE CALENDAR (2017), available at <https://crsreports.congress.gov/product/pdf/RS/98-438>.

⁴⁵ See, e.g., 161 CONG. REC. S7,786 (2015) (remarks of Sen. Wyden).

⁴⁶ Ross Butters, *The Secret to Secret Senate Holds: Historical Analysis and Quantification of the Impact of Holds* 15, Table 2 (May 2013) (unpublished B.A. thesis, Ohio State Univ.), https://kb.osu.edu/bitstream/handle/1811/63983/1/Ross_Butters_Thesis.pdf.

⁴⁷ Evans & Lipinski, *supra* note 20.

⁴⁸ Nicholas O. Howard & Jason M. Roberts, *The Politics of Obstruction: Holds in the U.S. Senate*, 40 LEGISLATIVE STUD. Q. 273 (May 2015). The authors published their data online at http://web.archive.org/web/20200531012041/https://apw.polisci.wisc.edu/APW_Papers/holds_wisconsin.pdf.

senators who failed to place a single hold during this period—one of whom served only four months in the Senate.⁴⁹ Finally, a media study focused on judicial nominations to federal appellate courts relied on newspaper reports to identify nearly 100 holds from 1985 to 2006, an average of 8 or 9 holds per Congress just in this narrow category of nominees.⁵⁰

Based on these studies, a baseline of 100 holds per two-year Congress is quite conservative. It is less than one-third the lowest frequency identified in the available archival studies. Additionally, the archival studies suggest the practice is widespread across senators, such that we should expect to see holds in the public record from many senators rather than a select few. Further, we should expect at least a handful of holds per Congress just for federal appellate judicial nominees, in addition to holds on nominees to lower courts and executive branch agencies.

Failed efforts to abolish secret holds

Secret holds have been the target of various reform efforts for decades, at least as far back as 1985.⁵¹ This article focuses on the three most recent attempts—two binding measures enacted in 2007 and 2011 that established a mandatory disclosure system for holds and one voluntary pledge in 2010 to refrain from placing secret holds. These measures garnered supermajority (and even near-unanimous) support and generated glowing press coverage. But they failed to end secret holds in practice, as demonstrated by original analysis of the Congressional Record and media reports.

Section 512 (2007): ‘Half measures’ instead of ‘real reform’⁵²

Enactment of Section 512

The first of the binding measures to address secret holds was enacted in 2007 via Section 512 of the Honest Leadership and Open Government Act of 2007,⁵³ which passed the Senate overwhelmingly by a vote of 83 to 14.⁵⁴ Spearheaded by Senators Chuck Grassley, R-Iowa, and Ron Wyden, D-Ore., Section 512 barred Senate leadership from honoring anonymous holds and required senators to announce holds to their colleagues and the public. Grassley and Wyden had been pushing for this kind of public notice system since at least 1997, having proposed, in turn, a

⁴⁹ *Id.* at 279.

⁵⁰ STEIGERWALT, *supra* note 21, at 85. Out of these eleven sessions of Congress, there were two sessions in which no media reports were found regarding holds on circuit court nominees and five sessions in which ten or more holds were reported on by the media. Note, again, how this study is limited not only to holds placed on judicial nominees to federal circuit courts — and so the study does not include holds placed on legislation, nominations to executive-branch agencies, or even nominations to lower federal courts — but is further limited to holds on federal circuit nominations that actually attracted press coverage.

⁵¹ *See generally* OLESZEK, PROPOSALS TO REFORM “HOLDS” IN THE SENATE, *supra* note 21. Oleszek reviews other reform attempts, including to impose time limits on holds, abolish holds entirely, impose more uniform procedures, prohibit “blanket” holds, and require more than one senator to place the hold.

⁵² 153 CONG. REC. S11,743 (2007) (remarks of Sen. Grassley).

⁵³ Pub. L. 110–81, 121 Stat. 735 (2007).

⁵⁴ S. Roll Call Vote 294 on S.Res. 1, 110th Cong. (Aug. 2, 2007).

standing order, a revision to the Senate Rules, and a freestanding statute to smoke out secret holds.⁵⁵

Section 512 required senators to submit holds—dubbed “notices of intent to object to proceeding”—in writing not just to their party leaders, but also to the Congressional Record and a new section of the Senate official calendars.⁵⁶ A senator could avoid filing these notices if they withdrew their hold within six session days,⁵⁷ and could remove their hold from the Senate Calendar by filing a subsequent notice of withdrawal.⁵⁸

But Section 512 had a truck-sized loophole, which was introduced in conference and baffled Grassley and Wyden⁵⁹: its public disclosure requirements were triggered only when one senator objected to a unanimous consent agreement on the floor on behalf of another senator.⁶⁰ That is, Section 512 did not apply to all holds, just those that actually resulted in an objection on the floor by a senator other than the original holder. This restriction was puzzling since, as Grassley, noted, “the mere threat of a hold prevents unanimous consent requests from being made in the first place,” particularly if the senator who placed the hold is a member of the majority party.⁶¹ After Section 512 passed, Grassley lamented, “Once again, I feel like half measures have been substituted for real reform.”⁶²

Inefficacy of Section 512

Unsurprisingly, Section 512, which went into effect in September 2007, failed to stamp out secret holds. The first hold disclosed under Section 512 demonstrates its limitations. In early October 2007, Sen. Dianne Feinstein, D-Calif., filed the first notice of a hold in the Congressional Record and the Senate Calendar.⁶³ Notably, Feinstein was a co-sponsor of the bill—the Campaign Disclosure Parity Act, S.223, which would require Senate candidates to file campaign contribution reports in electronic form, as was already required for candidates for the House of Representatives and the presidency.⁶⁴ Similar measures had been stymied by secret holds in the past.⁶⁵ And in the months before Section 512 went into effect, S.223 was reported unanimously out of committee⁶⁶

⁵⁵ OLESZEK, PROPOSALS TO REFORM “HOLDS” IN THE SENATE, *supra* note 21, at 7. For Grassley’s summary of his and Wyden’s prior attempts, *see also* 153 CONG. REC. S11,742 (2007).

⁵⁶ Pub. L. 110–81 at § 512(a).

⁵⁷ *Id.* § 512(b)(2).

⁵⁸ *Id.* at § 512(c).

⁵⁹ *See Examining the Filibuster*, *supra* note 46, at 325 (statement of Sen. Wyden) (Section 512 “came back from conference riddled with loopholes. The practice of secret holds has continued.”).

⁶⁰ Pub. L. 110–81 at § 512(a)(1).

⁶¹ 153 CONG. REC. S11,742 (2007).

⁶² *Id.*

⁶³ *Id.* at S12,419; U.S. SEN. CALENDAR OF BUSINESS: FINAL ISSUE 127, 110th Cong. (Jan. 2, 2009),

<https://www.govinfo.gov/content/pkg/CCAL-110scal-S2/pdf/CCAL-110scal-S2.pdf>.

⁶⁴ Campaign Disclosure Parity Act, S.223, 110th Cong. (2007).

⁶⁵ *See* Lisa Rosenberg, *Will McConnell Block Noncontroversial Electronic Filing Bill Again?* Sunlight Foundation (Apr. 25, 2012) (“Unfortunately, the deciding factor will be Mitch McConnell. For reasons he has never adequately explained, he has been behind the secret holds and poison pill amendments that have blocked [prior versions of S.223] for years.”); Bob Biersack, *Senate Electronic Filing—If Everybody Loves it, Why Hasn’t it Happened?* OpenSecrets.org (Apr. 25, 2012), <https://www.opensecrets.org/news/2012/04/senate-electronic-filing-if-ever>.

⁶⁶ *See* Sen. Comm. on Rules & Admin., *Press Release: Senate Rules Committee Approves Campaign Electronic Filing Bill* (Mar. 28, 2007), <https://web.archive.org/web/20070425192521/http://rules.senate.gov/newsroom/PR07/032807feinstein.htm>.

but blocked twice from passing by unanimous consent, both times when a Republican senator objected on behalf of unnamed colleagues.⁶⁷

After Section 512 took effect, Feinstein brought S.223 back up for unanimous consent. Republican Sen. John Ensign, R-Nev., then-chairman of the National Republican Senatorial Committee, objected after offering an amendment that would expand S.223 to require organizations that file Senate ethics complaints to disclose their donors.⁶⁸ Feinstein considered Ensign's proposal a non-germane "poison pill" to the bill,⁶⁹ and she objected in turn.⁷⁰ The author of S.223, Sen. Russ Feingold, D-Wis., said Ensign had outed himself as the heretofore anonymous holder, a successful "first test," Feingold claimed, of Section 512's "deterrent effect" against secret holds.⁷¹ Two transparency watchdog groups came to the same conclusion,⁷² but Ensign told reporters he could not remember whether he had placed holds on the bill.⁷³ For her part, Feinstein suggested the true holder against S.223 "should become apparent" because of Section 512's disclosure requirements.⁷⁴

At the end of this saga, it was Feinstein who publicly and unequivocally announced a hold pursuant to Section 512, and on a bill she championed, at that. A few days after (maybe) outing himself, Ensign sought unanimous consent to consider his amendment to S.223,⁷⁵ and a Democratic senator objected without comment.⁷⁶ Pursuant to Section 512, Feinstein subsequently explained in a letter printed in the Congressional Record that her colleague had objected on her behalf.⁷⁷ Feinstein placed the hold on S.223 because she believed Ensign's proposed amendment would "prevent the timely passage of the underlying bill before the 2008 election."⁷⁸ Feinstein's hold was the last action on S.223. It would take another decade before electronic filing for Senate candidates' financial disclosures would become the rule.⁷⁹

The dueling holds placed on S.223 illustrate Section 512's fundamental limitation—beyond the narrow circumstances in which its disclosure requirements were even triggered. Namely, Section 512 relied on individual objectors to out themselves on a one-off basis whenever they place a hold. Feingold framed the likely unmasking of Ensign as the holder as a vindication of Section 512. But Ensign never actually answered whether Feingold was correct, and no other

⁶⁷ 153 CONG. REC. S4,565 (2007) (Sen. Lamar Alexander, R-Tenn., objecting "on behalf of a Republican Senator"); *Id.* at S5,156 (Sen. Jim Bunning, R-Ky. objecting "on behalf of the Republican side").

⁶⁸ *Id.*

⁶⁹ *Id.* at S12,419.

⁷⁰ *Id.* at S11,997.

⁷¹ *Id.* at S11,998 (remarks of Sen. Feingold) ("As far as I know, this was going to be the first test of the new rule on secret holds, and I was looking forward to learning who the real objector was, as the rule requires, if an objection was made on behalf of an unidentified Senator. . . . Senator Feinstein and I can cite this as the first time this was successfully forced in the case of a secret hold.").

⁷² Campaign Finance Institute, *Press Release: Senator John Ensign Obstructs Bill to Provide Timely Electronic Disclosure of Senate Campaign Contributions* (Sept. 26, 2007), http://www.cfinst.org/press/PReleases/07-09-26/Senator_Ensign_Obstructs_Electronic_Disclosure.aspx; Sunlight Foundation, *Electronic Filing Bill Blocked Yet Again* (Sept. 24, 2007), <https://sunlightfoundation.com/2007/09/24/electronic-filing-bill-blocked-yet-again>.

⁷³ LAS VEGAS REVIEW-JOURNAL, *Standoff Blocks Action on Campaign Reforms*

(Sept. 26, 2007), <https://www.reviewjournal.com/news/standoff-blocks-action-on-campaign-reforms>.

⁷⁴ *Id.*

⁷⁵ 153 CONG. REC. S12,207 (2007).

⁷⁶ *Id.* (Sen. Max Baucus, D-Mont., objecting).

⁷⁷ *Id.* at S12,446.

⁷⁸ *Id.*

⁷⁹ Kate Ackley, *Senate E-Filing Launches New Era in Campaign Disclosures*, CQ ROLL CALL (Sept. 21, 2018), <https://www.rollcall.com/2018/09/21/senate-e-filing-launches-new-era-in-campaign-disclosures>.

senator (beside Feinstein) came forward to file the hold disclosure required under Section 512. Rather, in this episode, the only person who followed Section 512 was Feinstein, the senator for whom transparency was politically expedient.

The Congressional Record and Senate Calendar reflect just how ineffective Section 512 was at stemming secret holds. Section 512 was in effect for a bit more than three years: from September 2007 in the 110th Congress through the end of the 111th Congress in early January 2011. In total, senators disclosed just 27 holds across both sessions.⁸⁰ Compared to our conservative baseline of 100 holds per two-year session of Congress, this is an implausibly meager yield of disclosed holds. In the 110th Congress, only six holds were disclosed in the public record—five on legislation and one on an executive agency nomination—and just three of these holds were printed in the corresponding Senate calendar. In the 111th Congress, the numbers remained suspiciously low: just twenty-one holds were placed in the public record—six on legislation and fifteen on executive agency nominations—and only seven of these holds were printed in the appropriate Senate calendar.

Holds disclosed under Section 512 by notice method.

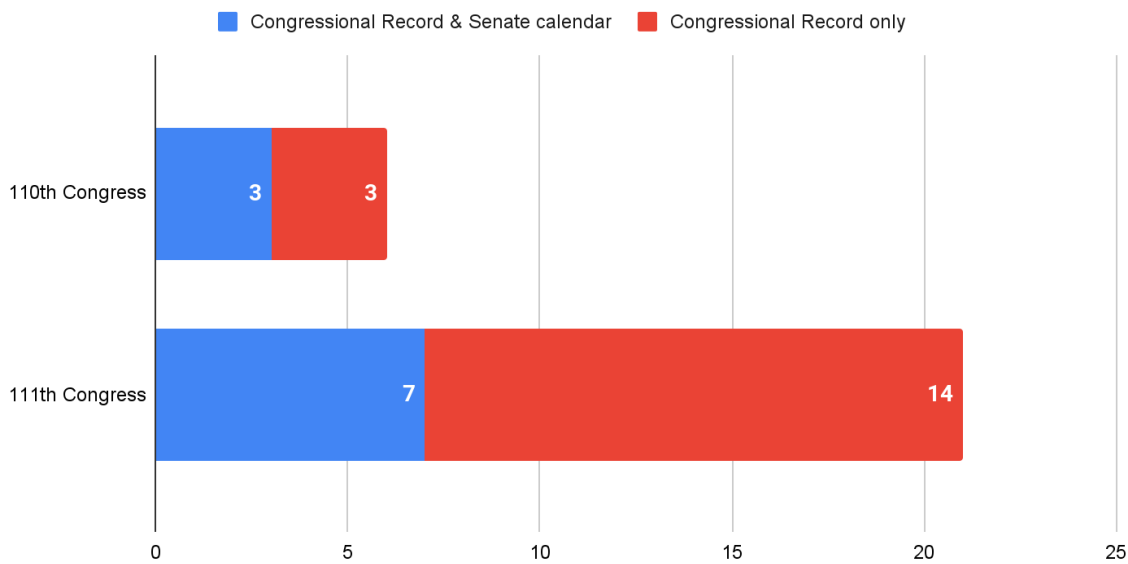


Fig. 1: Holds disclosed under Section 512 in the 110th and 111th Congresses by notice method.

Notably, across the two sessions, there was not a single disclosed hold on nominations to any level of the federal judiciary. In the 110th Congress, there were five disclosed holds on legislation and one on an executive agency nomination. In the 111th Congress, there were six disclosed holds on legislation and fifteen on executive agency nominations. All nomination holds were for executive agency posts, whereas the newspaper study discussed above identified an average of eight or nine holds per Congressional session on federal appellate court nominees.⁸¹

⁸⁰ See Appendix A for a listing of all such holds and corresponding citations to the Congressional Record, available for download accompanying this article at the Journal of Civic Information.

⁸¹ STEIGERWALT, *supra* note 21.

Holds disclosed under Section 512 by matter type.

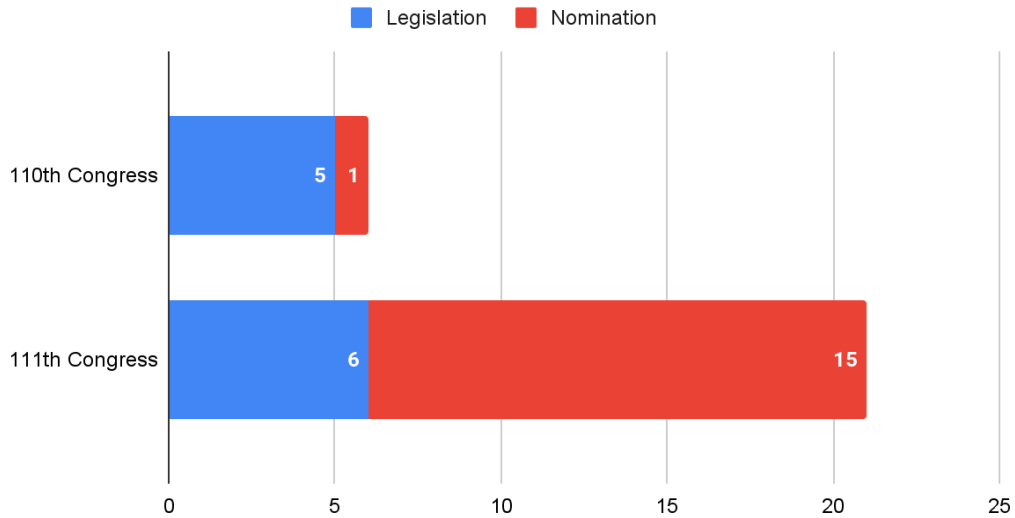


Fig. 2: Holds disclosed under Section 512 in the 110th and 111th Congresses by type of matter.

The cohort of senators who disclosed holds also demonstrates Section 512’s shortcomings. The archival studies discussed above suggested most senators place at least one hold in a given session of Congress,⁸² but just eight senators account for the twenty-seven holds announced during the 110th and 111th Congresses. Sen. Grassley alone disclosed more than half (fourteen public holds), followed by Sen. Coburn (seven public holds), and another six senators who disclosed one hold each. Even more suspiciously (if anecdotal), one senator observed in prior archival studies to place numerous holds—Sen. Orrin Hatch, R-Utah—announced no holds pursuant to Section 512 in either session of Congress.⁸³

| Senator | Number of Disclosed Holds |
|------------------|---------------------------|
| Chuck Grassley | 14 |
| Tom Coburn | 7 |
| Ron Wyden | 1 |
| Lisa Murkowski | 1 |
| John Kerry | 1 |
| Dianne Feinstein | 1 |
| Russ Feingold | 1 |
| Larry Craig | 1 |
| Total | 27 |

Fig. 3: Holds disclosed under Section 512 in the 110th and 111th Congresses by Senator.

⁸² See, e.g., Howard & Roberts, *supra* note 55 (“Are there patterns of hold behavior by individual senators? In some ways the answer to this question is no, as holds were ubiquitous for these congresses.”)

⁸³ Sen. Hatch placed at least one hold in every Congress examined by the two studies, i.e., the 95th, 97th, 99th, 100th, 101st, 102nd, 103rd, 104th Congresses. See *id.* at Fig. 4 to 9; Evans & Lipinski, *supra* note 20, at Fig. 1 and Fig. 2.

It is unlikely—based on the total number of holds announced, the nature of the holds, and the correspondingly tiny and skewed cohort of senators—that the holds publicly noticed under Section 512 captured anything close to the totality of holds placed during this period. Such slim data on publicly announced holds in the wake of Section 512 reflect just how narrowly its disclosure requirements applied and how few senators complied even when Section 512 was triggered.⁸⁴

Few in Congress or the Capitol ecosystem pretended Section 512 meaningfully addressed secret holds. Senators continued to accuse the opposing party of anonymously blocking legislation.⁸⁵ Some organizations called on the public to contact their senators to get them on record as to whether they placed secret holds on particular legislation.⁸⁶ One of the most active government civil society watchdogs, Citizens for Responsibility and Ethics in Washington (CREW), called on the Senate Select Committee on Ethics to either discipline senators for continuing to hide their holds or else declare that Section 512 was “nothing more than a public relations stunt.”⁸⁷ The committee’s chief counsel responded that investigating potential violations of Section 512 was beyond its jurisdiction since Section 512’s secret hold provisions were not enshrined in the Senate Rules or a standing order.⁸⁸ Not only was Section 512 bizarrely narrow, then, but it had no enforcement mechanism.

Sen. McCaskill’s abstinence pledge: ‘We pledge that we will not place secret holds’

In 2010, in light of the clear toothlessness of Section 512, Sen. Claire McCaskill, D-Mo., launched a supplemental, voluntary measure: She recruited individual senators to sign a pledge to abstain from placing secret holds. Her efforts stemmed from repeatedly getting nominations blocked on unanimous consent motions, which McCaskill attributed to secret holds that were not being disclosed under Section 512. In April 2010, about halfway through the 111th Congress, McCaskill sent letters to Senate leadership regarding the apparent failure of Republican senators to identify themselves after placing holds on dozens of nominees.⁸⁹ “This is a game we need to quit playing. The secret hold needs to end,” McCaskill said on the Senate floor.⁹⁰

Following this episode, McCaskill began gathering colleagues’ signatures on a pledge not to place secret holds.⁹¹ A supermajority of sixty-nine senators signed the pledge by June 2020—

⁸⁴ See also OLESZEK, “HOLDS” IN THE SENATE, *supra* note 10, at 4.

⁸⁵ For example, in July 2008, Sen. Dick Durbin, D-Ill., accused Republicans of placing secret holds on multiple bills. See 153 CONG. REC. S7,555 (2008).

⁸⁶ See, e.g., Zachary Roth, *Senate GOPer Blocking Appointment of Key Bailout Overseer: We Need Your Help!* TALKING POINTS MEMO (Dec. 1, 2008), <https://talkingpointsmemo.com/muckraker/senate-goper-blocking-appointment-of-key-bailout-overseer-we-need-your-help>; Michael Smallberg, *Calling All Detectives*, PROJ. ON GOV’T OVERSIGHT (Dec. 2, 2008), <https://pogoblog.typepad.com/pogo/2008/12/calling-all-detectives.html>.

⁸⁷ Melanie Sloan (CREW executive director), Letter to Sen. Select Comm. on Ethics, Ex. 1 (Dec. 2, 2009), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022049/05_24_10%20Letter%20DeMint.pdf.

⁸⁸ John C. Sassaman (Chief Counsel, Sen. Select Comm. on Ethics), Letter to Melanie Sloan (Apr. 9, 2010), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022049/05_24_10%20Letter%20DeMint.pdf.

⁸⁹ 156 CONG. REC. S,2787 and S3,385 (2010).

⁹⁰ *Id.* at S2,788.

⁹¹ Sen. Claire McCaskill, *Press Release: Senators Pledge Not To Place Secret Holds On Legislation Or Nominees* (Apr. 22, 2010), https://web.archive.org/web/20100505025925/http://mccaskill.senate.gov/?p=press_release&id=905. A copy of the signed letter (as of June 23, 2010) is available at

an impressive majority, albeit far fewer than the 83 that voted in favor of Section 512 years before.⁹² Notably, Sen. Robert Byrd, who voted for Section 512 and had complained about the proliferation of holds decades earlier, declined to sign McCaskill's pledge "because it does not differentiate between temporary and permanent holds."⁹³

Of course, the McCaskill pledge did not eliminate secret holds, as the above data analysis regarding the 111th Congress demonstrates. Nor could it have done so. Even setting aside the impossibility of enforcing a voluntary pledge against a secret practice, a pledge signed by two-thirds of senators has no effect on the remaining third. And any senator (whether they signed the letter or not) could deploy anonymous holds as long as Senate leaders continued to honor them. A few months after sending the letter to Senate leadership, McCaskill noted with frustration that one of her bills could still be killed by a secret hold.⁹⁴ Indeed, at the end of the 111th Congress, a single senator used a secret hold to nix a popular whistleblower protection bill.⁹⁵

S.Res. 28 (2011): 'We think we have plugged the holes'⁹⁶

Enactment of S.Res. 28

The real value in Sen. McCaskill's pledge was in building public momentum and a voting bloc strong enough to revise the Senate Rules, which requires a two-thirds supermajority.⁹⁷ Her letter called on Senate leadership to consider revising Senate guidelines "to bring a clear and definitive end to secret holds."⁹⁸ From spring to fall 2010, the Senate Committee on Rules and Administration heard testimony on secret holds from McCaskill, Grassley, and Wyden as part of a series of hearings on reforming the filibuster. Seizing this momentum, Grassley and Wyden revived prior proposals to revise the Senate Rules directly by various measures introduced in the

<https://media.npr.org/assets/news/2010/06/23/secretholds.pdf>.

⁹² Sen. Claire McCaskill (@clairemc), June 24, 2010, <https://twitter.com/clairemc/status/16961169327> ("Another senator supports ending secret holds. . . . Now we have 69."). See also J. Taylor Rushing, *President's Ally: Expectations Were Set Too High After Obama's 2008 Election*, THE HILL (July 16, 2020), <https://thehill.com/homenews/senate/109171-presidents-ally-expectations-were-set-too-high-after-2008>.

⁹³ See *Examining the Filibuster*, *supra* note 46 (statement of Sen. Robert Byrd). See also 156 CONG. REC. S3,532 (2010) (remarks of Sen. Byrd) ("When a small minority—often a minority of one—abuses senatorial courtesy and misuses anonymous holds to indefinitely delay action on matters, then I am as adamant as any of my colleagues in insisting that senators should come to the Senate floor and make their objections known. . . . But I also believe that there are situations when it is appropriate and even important for senators to raise a private objection to the immediate consideration of a matter with the leadership and to request a reasonable amount of time to try to have concerns addressed. . . . Certainly, public disclosures are not necessary every time senators want to slightly alter the Senate schedule for the coming week. Certainly, public disclosures are not necessary every time senators request consultation or advanced notification on a matter coming to the floor.").

⁹⁴ 156 CONG. REC. S8,472 (2010).

⁹⁵ Marian Wang, *Which Senator Secretly Sabotaged the Popular Whistleblower Protection Bill?* PROPUBLICA (Jan. 10, 2011), <https://www.propublica.org/article/which-senator-secretly-sabotaged-the-popular-whistleblower-protection-bill>; Tom Devine, *Who Killed the Whistle-Blower Bill?* L.A. TIMES (Jan. 10, 2011), <https://www.latimes.com/archives/la-xpm-2011-jan-10-la-oe-devine-whistleblower-20110110-story.html>.

⁹⁶ 157 CONG. REC. S304 (2011) (remarks of Sen. Wyden upon passage of S.Res. 28).

⁹⁷ U.S. Sen. Rules, Rule XXII. See also RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES (2013), <https://sgp.fas.org/crs/misc/R42929.pdf>.

⁹⁸ See the McCaskill pledge letter, *supra* note 100.

111th Congress, but none passed.⁹⁹ By the end of 2010, other prominent lawmakers agreed it was necessary to revise the Senate Rules to root out secret holds. Notably, Sen. Arlen Specter, D-Pa., who had served in the Senate for three decades, proposed eliminating secret holds in his final Senate address at the close of the 111th Congress: “Requiring a senator to disclose his or her hold to the light of day would greatly curtail this abuse.”¹⁰⁰

When the 112th Congress convened in January 2011, the Senate quickly and almost unanimously passed S.Res. 28,¹⁰¹ which Sen. Wyden called the “the Wyden-Grassley-McCaskill resolution to end secret holds.”¹⁰² S.Res. 28, which established a new standing order of the Senate that remains part of the current Senate Rules,¹⁰³ beefed up the Section 512 disclosure scheme in four key ways.

First, S.Res. 28 expanded the scope of holds subject to disclosure. Rather than triggering only upon an actual objection on the Senate floor (which was the giant loophole in Section 512), S.Res. 28 covers any hold upon its submission to Senate leadership.¹⁰⁴ “Our approach requires objections to a hotline be publicly disclosed, even for bills or nominations that never get called up on the floor,” Wyden explained.¹⁰⁵

Second, S.Res. 28 shortened the disclosure period by requiring senators to publish their notice of intent to object in the Congressional Record and the relevant calendar within two session days (rather than six session days under Section 512).¹⁰⁶ The prior six-day window particularly irked Sen. Grassley, who had observed after the passage of Section 512 that six days “is more than enough time to kill a bill at the end of the session.”¹⁰⁷ In theory, this shorter window under S.Res.

⁹⁹ See, e.g., S.Res. 502, Eliminating Secret Holds, 111th Cong. (2010); 156 CONG. REC. S2,711 (2010); 156 CONG. REC. S3,039 (2010) (proposing a revision to Rule VII of the Senate Rules). Their proposal, in turn, was killed by a poison pill amendment requiring completion of a 700-mile border fence. See Washington Post Editorial Board, *The Senate Should Override Jim DeMint and Limit ‘Secret Holds,’* WASH. POST (May 24, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303788_pf.html; S. 3657, To establish as a standing order of the Senate that a senator publicly disclose a notice of intent to objecting to any measure or matter, 111th Cong. (2010); 156 CONG. REC. S4,154 and 156 CONG. REC. S3,684 (2010) (proposing a new standing order of the Senate).

¹⁰⁰ 156 CONG. REC. S10,852 (2010). See also Shira Toeplitz, *Arlen Specter Says Goodbye*, POLITICO (Dec. 21, 2010), <https://www.politico.com/story/2010/12/arlen-specter-says-goodbye-046679>.

¹⁰¹ S.Res. 28, A resolution to establish as a standing order of the Senate that a senator publicly disclose a notice of intent to objecting to any measure or matter, 112th Cong. (2011). Only four senators voted against the resolution: Sen. Jim DeMint, R-S.C., Sen. John Ensign, R-Nev., Sen. Mike Lee, R-Utah, and Sen. Rand Paul, R-Ky. 157 CONG. REC. S326 (2011). Another four senators did not cast a vote. *Id.*

¹⁰² 157 CONG. REC. S304.

¹⁰³ A standing order of the Senate “operates with the same authority as a standing rule and is enforceable on the Senate floor in the same way.” GAIL E. BAITINGER, CONG. RESEARCH SERV., RL30788, PARLIAMENTARY REFERENCE SOURCES: SENATE (2019). It is unclear why S.Res. 28 was drafted to enact a standing order rather than as an outright revision to the Senate Rules, as Wyden, Grassley, and McCaskill all favored in the 111th Congress.

¹⁰⁴ S.Res. 28(a)(2) (Senate leadership shall recognize a hold if the holder “submits the notice of intent to object in writing to the appropriate leader and grants in the notice of intent to object permission for the leader or designee to object in the senator’s name”).

¹⁰⁵ 157 CONG. REC. S304 (2011).

¹⁰⁶ S.Res. 28 § 2 (Senate leadership shall recognize a hold if the holding senator submits it in writing and “not later than 2 session days after submitting the notice of intent to object to the appropriate leader, submits a copy of the notice of intent to object to the Congressional Record and to the Legislative Clerk for inclusion in the applicable calendar section”).

¹⁰⁷ CONG. REC. S11,743 (2007) (remarks of Sen. Grassley). See also *id.* at S11,744 (letter from Sen. Grassley to Sen. Feinstein objecting to conference changes to Sec. 512).

28 would let fewer holds go undisclosed, particularly when combined with the expanded scope of holds subject to disclosure.

Third, S.Res. 28 clarified the category of holds that were subject to disclosure. Section 512 somewhat ambiguously addressed objections “to a measure or matter.”¹⁰⁸ S.Res. 28 enumerates a long list of matters to which it applied, including: bills, resolutions, joint resolutions, concurrent resolutions, conference reports, nominations, and “amendments between the Houses.”¹⁰⁹

Finally, S.Res. 28 modified the language of the written disclosure notice, particularly by removing the requirement that a senator provide an explanation for their hold.¹¹⁰ Thus, while covering a broader scope of holds, it reduced the level of detail required in the disclosure itself.

Inefficacy of S.Res. 28

And yet, despite its near-unanimous support and expanded scope, S.Res. 28 did not eliminate secret holds. Over the decade since S.Res. 28 was enacted, there has been a steady stream of media coverage and public comments from senators regarding the persistence of secret holds. Today, media reports even often fail to note that secret holds are not permissible.

In May 2011, four months after S.Res. 28 passed, an anonymous senator placed a hold on the nomination of President Obama’s deputy budget director.¹¹¹ At the end of 2011, Sen. Patrick Leahy, D-Vt., accused Republicans of “using anonymous holds to block progress at filling judicial vacancies.”¹¹²

In 2012, a senator reportedly placed a brief hold on a veterans benefits bill.¹¹³

In 2013, one senator lamented that “so-called secret holds ... still exist today,”¹¹⁴ and Majority Leader Harry Reid accused Senate Republicans of blocking “scores and scores of nominations by secret holds and procedural hurdles.”¹¹⁵ The same year, CREW sent a fresh letter to Senate leadership that chronicled the nominations and bills blocked by secret holds since the enactment of S.Res. 28 and called for the Senate Select Committee on Ethics to be granted jurisdiction to investigate and sanction senators for placing secret holds.¹¹⁶

In 2014, Sen. Jay Rockefeller, D-W.Va., placed a secret hold on a bill to strengthen the Freedom of Information Act.¹¹⁷

¹⁰⁸ Section 512, *supra* note 64.

¹⁰⁹ S.Res. 28 § 1(a)(1).

¹¹⁰ *Id.* at § 1(a)(3).

¹¹¹ Erik Wasson, *GOP’s Secret Hold Puts Obama’s Higginbottom Nomination in Trouble*, THE HILL (May 15, 2011), <https://thehill.com/policy/finance/161295-gops-secret-hold-puts-higginbottom-nomination-in-trouble>.

¹¹² 157 CONG. REC. S8,771 (2011) (“The secret holds and obstructive blocks remind me of the Republican pocket filibusters that blocked more than 60 of President Clinton’s judicial nominations from Senate consideration.”).

¹¹³ Jamie Reno, *Which Senator Put a Hold on Veterans Benefits Bill?* DAILY BEAST (Sept. 27, 2012), <https://www.thedailybeast.com/which-senator-put-a-hold-on-veterans-benefits-bill>.

¹¹⁴ 158 CONG. REC. S8,656 (2012).

¹¹⁵ 159 CONG. REC. S2,440 (2013). *See also* 159 CONG. REC. S7,563 (2013) (remarks of Sen. Reid) (“Democrats have broken filibusters of 66 of the President’s nominations. Republicans have blocked or delayed more than that with secret holds and procedural holds.”).

¹¹⁶ Melanie Sloan (CREW executive director), Letter to Sen. Majority Leader Harry Reid & Sen. Minority Leader Mitch McConnell (Jan. 16, 2013), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022615/011613_Secret_Holds_Reid_McConnell_Letter.pdf.

¹¹⁷ Julian Hattem, *Rockefeller Under Fire for Blocking FOIA Bill*, THE HILL (DEC. 5, 2014), <https://thehill.com/policy/technology/226182-rockefeller-under-fire-for-blocking-foia-bill>.

In 2015, Sen. Wyden blasted his colleagues for not following S.Res. 28, noting that the single disclosed hold in the Senate calendar at the time was for a hold Wyden himself had placed.¹¹⁸ As he explained, several senators had recently placed holds on a bill “but not one of those senators made their objection public through the [S.Res. 28] notice requirements.”

In 2016, a veterans benefits bill fell “victim to . . . a combination of anonymous holds and the majority leader’s decision not to bring it to the floor.”¹¹⁹ The same year, Sen. Sanders reportedly placed a secret hold on several nominations to the Postal Board of Governors at the request of postal unions.¹²⁰ Later in 2016, a senator claimed an anonymous hold was placed on another bill regarding urban search and rescue improvements.¹²¹ The same year, frustrated at unannounced holds on more than a dozen nominees that had been recommended favorably by the relevant committees, including some holds that “have been in place for over a year,” Senate Democrats named Sen. Ted Cruz, R-Texas, as the secret holder.¹²² (Sen. Tom Cotton, R-Ark., had announced holds the previous year on some of these nominations, and placed the appropriate statements in the Congressional Record.) The Democrats brought unanimous consent motions on the nominations despite the holds, and Republicans voiced objections on behalf of Sen. Cruz and Sen. Richard Shelby, R-Ala., the (seeming) secret holders.¹²³

In 2017, a senator claimed government accountability legislation that passed unanimously in the House of Representatives was blocked in the prior Congress by an anonymous hold.¹²⁴ Also in 2017, a senator publicly accused a “secret holder” of holding up confirmation of a Department of Interior assistant secretary.¹²⁵

In 2018, a senator blamed secret holds for delaying the confirmation of another Department of Interior assistant secretary who had been approved by committee the year before.¹²⁶ That year, Sen. Rand Paul reportedly placed at least two holds without publicly announcing them: one on military aid to Israel and the other on legislation to sanction the Boycott, Divestment, Sanctions (BDS) movement.¹²⁷

In 2019, Grassley and Wyden reminded their colleagues—both on the Senate floor¹²⁸ and in a “Dear Colleague” letter¹²⁹—that S.Res. 28 remained in force and forbid the use of secret holds. But senators ignored their chiding. In May 2019, a senator placed an anonymous hold on the

¹¹⁸ 161 CONG. REC. S7,786 (2015).

¹¹⁹ 162 CONG. REC. S3,820 (2016) (remarks of Sen. Jon Tester, D-Mont.).

¹²⁰ Jon Hill, *With No Remaining Governors, the U.S. Postal Service Delivers Itself Into Uncharted Waters*, THE STREET (Dec. 19, 2016), <https://www.thestreet.com/politics/with-no-remaining-governors-the-u-s-postal-service-delivers-itself-into-uncharted-waters-13930115>. See also Brian McNicoll, *Opinion: Post Office Loses Another \$5.1 Billion; Bernie Continues to Prevent Help*, THE HILL (Dec. 20, 2016), <https://thehill.com/blogs/congress-blog/economy-budget/311113-post-office-loses-another-51-billion-bernie-continues-to>.

¹²¹ 162 CONG. REC. S6,201 (2016) (remarks of Sen. Rob Portman, R-Ohio).

¹²² 162 CONG. REC. S558-63 (2016) (remarks of Sen. Amy Klobuchar, D-Minn.).

¹²³ *Id.*

¹²⁴ 163 CONG. REC. S334 (remarks of Sen. Eric Sasse, R-Nev.).

¹²⁵ 163 CONG. REC. S7,817-8 (2017) (remarks of Sen. Dan Sullivan, R-Alaska) (“I certainly hope the secret holder is going to come to the Senate floor, speak to the American people, and say: Here is why I am secretly holding this guy, even though he is very well qualified[.] . . . Tell us who you are; tell us what the problem is.”).

¹²⁶ Hannah Northey, “*Where is Everybody?*” *Senators Ask of Missing Trump Picks*, E&E NEWS (Mar. 5, 2018), <https://www.eenews.net/stories/1060075443>.

¹²⁷ Nahal Toosi, *Rand Paul Under Fire for Blocking Israel Bills*, DAILY BEAST (Nov. 30, 2018), <https://www.politico.com/story/2018/11/30/rand-paul-israel-military-aid-congress-senate-1036943>.

¹²⁸ 165 CONG. REC. S1,749 (2019).

¹²⁹ Sen. Chuck Grassley & Sen. Ron Wyden, *Dear Colleague Letter: Senate Requirements for Disclosure of Hold* (Mar. 6, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-wyden-memo-colleagues-secret-holds>.

nomination of the Commandant of the Marine Corps—the branch’s top post.¹³⁰ And for months starting in June 2019, a handful of unnamed Republican senators held up a retirement savings bill which had passed the House overwhelmingly.¹³¹ Grassley, who supported the bill, speculated to reporters that there were “as many as six” holders “with different reasons for doing it.”¹³² Senators and commentators suggested that Sen. Cruz, Patrick Toomey, R-Pa., or Sen. Lee might have placed the holds,¹³³ but none of these legislators submitted the requisite announcement in the Senate Calendar or timely announced their opposition on the Senate floor. Only in November 2019—months after the House passed the bill and Senate supporters indicated they wished to proceed by unanimous consent—did Sen. Toomey formally lodge an objection on the Senate floor.¹³⁴

In 2020, Sen. Paul reportedly placed a hold on an anti-lynching bill that had overwhelmingly passed the House, and kept the hold in place for months without publicly announcing it until he was outed by the media.¹³⁵ The same year, Sen. Dan Sullivan, R-Alaska, placed a hold on the nomination of an Air Force General, who would be the first Black chief of a military branch, reportedly as leverage to pressure the Air Force to base aircraft in his state, without disclosing the hold under S.Res. 28.¹³⁶

In 2021, President Joe Biden’s nomination for Attorney General was briefly blocked by a secret hold.¹³⁷ The holder, Sen. Tom Cotton, subsequently identified himself and the nominee

¹³⁰ Megan Eckstein, *Moran, Burke Confirmed as Next CNO, VCNO; Alaska Senator Holds Up Berger Confirmation as Commandant*, USNI NEWS (May 24, 2019), <https://news.usni.org/2019/05/24/moran-burke-confirmed-as-next-cno-vcno-alaska-senator-holds-up-berger-confirmation-as-commandant> (“Three sources confirmed to USNI News that [Sen. Dan] Sullivan [R, Alaska] was the senator who had placed a hold on Berger’s nomination due to local Alaska issues. Sullivan’s office did not provide any comments to USNI News when reached.”). Sullivan dropped his opposition in early June 2019. See Leo Shane III, *Senator Drops Opposition to Marine Corps Commandant Nominee*, MILITARY TIMES (June 5, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/06/05/senator-drops-opposition-to-marine-corps-commandant-nominee>.

¹³¹ Doug Sword, *Retirement Bill Remains Stalled Amid Republican Holds in Senate*, CQ ROLL CALL (June 4, 2019), <https://www.rollcall.com/2019/06/04/retirement-bill-remains-stalled-amid-republican-holds-in-senate>.

¹³² *Id.*

¹³³ *Id.*; James Lange, *Opinion: The Hidden Money Grab In The SECURE Act*, FORBES (June 11, 2019), <https://www.forbes.com/sites/jlange/2019/06/11/the-hidden-money-grab-in-the-secure-act>; Brian Anderson, *SECURE Act Stall: 2 Reasons it’s Still Stuck in the Senate*, 401K SPECIALIST (Aug. 27, 2019), <https://401kspecialistmag.com/secure-act-stall-2-reasons-its-still-stuck-in-the-senate> (naming Cruz, Toomey, and Lee as the reported holders and erroneously indicating that holds “don’t have to be publicly disclosed”).

¹³⁴ 165 CONG. REC. S6,463 (2019).

¹³⁵ Zach C. Cohen, *Why Congress Hasn’t Made Lynching a Hate Crime*, NATIONAL JOURNAL (June 2, 2020), <https://www.nationaljournal.com/s/707236?unlock=DAKP6B88C9EZ0C4H>. See also Blake Montgomery, *Rand Paul Thinks Lynching Is ‘Awful’—but He Still Objected to Making It a Hate Crime*, DAILY BEAST (June 4, 2020), <https://www.thedailybeast.com/rand-paul-thinks-lynching-is-awful-but-he-still-objected-to-making-it-a-hate-crime>; John Wagner & Mike DeBonis, *Sen. Paul Acknowledges Holding up Anti-Lynching Bill, Says He Fears It Would Be Wrongly Applied*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/powerpost/sen-paul-acknowledges-holding-up-anti-lynching-bill-says-he-fears-it-would-be-wrongly-applied/2020/06/03/29b97330-a5bf-11ea-b619-3f9133bbb482_story.html.

¹³⁶ Joe Gould et al., *Historic Nomination of First Black Service Chief to Move Forward After Lawmaker Lifts Secret Hold*, DEFENSE NEWS (June 3, 2020), <https://www.defensenews.com/breaking-news/2020/06/03/historic-nomination-of-first-black-service-chief-to-move-forward-after-lawmaker-lifts-secret-hold>; Dermot Cole, *Sullivan Secretly Blocked Nomination of Air Force Chief of Staff Since Early May*, ANCHORAGE PRESS (June 9, 2020), https://www.anchoragepress.com/columnists/sullivan-secretly-blocked-nomination-of-air-force-chief-of-staff-since-early-may/article_8d7e0c3e-aaa9-11ea-a260-8fed59da7298.html.

¹³⁷ 167 CONG. REC. S1,002 (remarks of Sen. Dick Durbin) (“I sincerely hope that whoever is holding his nomination on the other side can be persuaded to give him his chance.”)

was confirmed.¹³⁸ Later that summer, seven unnamed Republican senators placed holds on an emergency spending measure due to objections over using funds to relocate Afghan families as U.S. troops withdrew from Afghanistan.¹³⁹ In fall 2021, Sen. Ted Cruz went public with his threat to place holds on virtually every State Department nominee over his opposition to a Russian gas pipeline;¹⁴⁰ months went by without any ambassadors getting confirmed, but Cruz never disclosed any holds pursuant to S.Res. 28. In November 2021, Sen. Hawley announced he was lifting his hold on Biden’s NATO ambassador nominee, a hold which was likewise never disclosed.¹⁴¹ Hawley reportedly had additional holds “on at least five other nominees, for multiple leadership positions in the State Department and one leadership position in the Department of Defense.”¹⁴² At the end of 2021, Sen. Tom Cotton confirmed on the Senate floor that he had been blocking numerous U.S. Attorney nominations over a dispute with Sen. Dick Durbin dating back to a hearing several months earlier.¹⁴³

In addition to news reports demonstrating the persistence of secret holds, data compiled from the Congressional Record and the Senate calendar further demonstrate the inefficacy of S.Res. 28. In the intervening decade and six sessions of Congress—from the beginning of the 112th Congress in January 2011 to the middle of the 117th Congress in March 2022—a total of just 123 holds were disclosed, i.e., just a few more than the conservative baseline of 100 holds we might expect to see in each individual session.¹⁴⁴

¹³⁸ Jordain Carney, *Garland’s AG Nomination Delayed by GOP Roadblocks*, THE HILL (Mar. 3, 2021), <https://thehill.com/homenews/senate/541542-garlands-ag-nomination-delayed-by-gop-roadblocks>.

¹³⁹ Katherine Tully-McManus, *Infrastructure Leaves the Station, but No Guarantee of Getting to the Destination*, POLITICO (July 29, 2021), <https://www.politico.com/newsletters/huddle/2021/07/29/infrastructure-leaves-the-station-but-no-guarantee-of-getting-to-the-destination-493776>.

¹⁴⁰ Dan Spinelli, *Biden Is Taking Forever to Get His Ambassadors Confirmed. You Can Thank Ted Cruz for That*, MOTHER JONES (Oct. 28, 2021), <https://www.motherjones.com/politics/2021/10/joe-biden-ambassadors-ted-cruz-donald-trump-obama-flake-mccain>.

¹⁴¹ Laura Kelly, *Hawley Lifts Hold on Biden’s Pick for NATO Envoy, Teeing up Confirmation*, THE HILL (Nov. 18, 2021), <https://thehill.com/homenews/senate/582204-hawley-lifts-hold-on-bidens-pick-for-nato-envoy-teeing-up-confirmation>.

¹⁴² *Id.*

¹⁴³ 167 CONG. REC. S8,950-51. See also Morgan Keith, *Sen. Tom Cotton Refused to Confirm US Attorney Nominees in Blue States Until Sen. Dick Durbin Apologized for Interrupting Him 9 Months Ago*, BUSINESS INSIDER (Dec. 12, 2021), <https://www.businessinsider.com/tom-cotton-confirm-us-attorney-nominees-dick-durbin-interrupted-2021-12>.

¹⁴⁴ See Appendix A for a listing of all such holds and corresponding citations to the Congressional Record, available for download accompanying this article at the Journal of Civic Information.

Holds disclosed under S.Res. 28 by notice method.

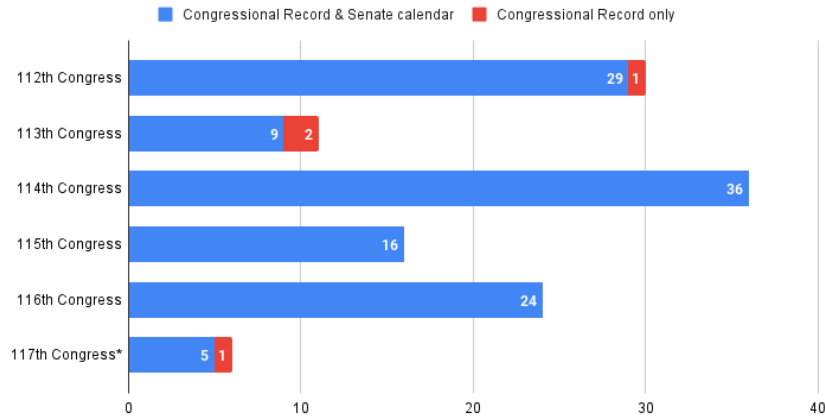


Fig. 4: Holds disclosed in the 110th, 111th, 112th, 113th, 114th, 115th, 116th & 117th Congresses under S.Res. 28 by notice method.

Data for the 117th Congress are current as of a search of the Congressional Record and Senate calendars conducted on March 21, 2022.

The type of matter subject to a disclosed hold has fluctuated somewhat from one session of Congress to another, but nomination holds have dominated overall. Notably (and implausibly), in the 113th Congress, not a single senator disclosed a hold on legislation. Also implausibly based on prior observations, not a single hold has been disclosed under S.Res. 28 with respect to nominees to the federal appellate judiciary, and just a single hold on a nomination to the federal district courts. All remaining nomination holds were for executive branch nominees. Four treaties were also subject to holds in the 116th Congress.

Holds disclosed under S.Res. 28 by matter type.

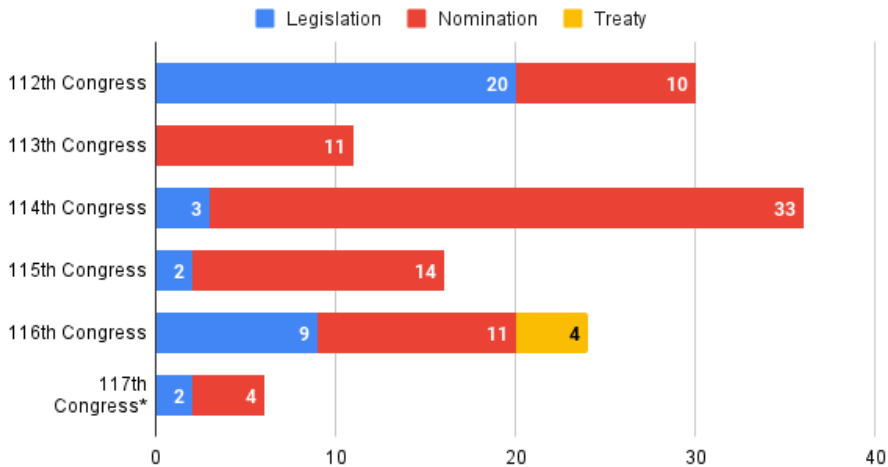


Fig. 5: Holds disclosed in the 110th, 111th, 112th, 113th, 114th, 115th, 116th & 117th Congresses under S.Res. 28 by type of matter.

Data for the 117th Congress are current as of a search of the Congressional Record and Senate calendars conducted on March 21, 2022.

As with Section 512, holds disclosed under S.Res. 28 have been overwhelmingly skewed toward a small cohort of senators. Grassley alone accounts for more than half (71 holds—including 20 holds he placed in a single day in August 2015 on Foreign Service nominees), and Wyden another significant portion (16 holds). In total, just twenty senators have announced holds in the ten years since S.Res. 28 was passed.

| Senator | Number of Disclosed Holds |
|--------------------|---------------------------|
| Chuck Grassley | 71 |
| Ron Wyden | 16 |
| Rand Paul | 5 |
| Tammy Duckworth | 5 |
| Tom Coburn | 4 |
| Jacky Rosen | 3 |
| Tom Cotton | 3 |
| Bill Cassidy | 3 |
| Orrin Hatch | 2 |
| Barbara Mikulski | 1 |
| Claire McCaskill | 1 |
| James Lankford | 1 |
| Jon Kyl | 1 |
| Mark Kirk | 1 |
| Johnny Isakson | 1 |
| Kirsten Gillibrand | 1 |
| Jim DeMint | 1 |
| Mike Braun | 1 |
| Barbara Boxer | 1 |
| John Boozman | 1 |
| Total | 123 |

Fig. 6: Holds disclosed in the 110th, 111th, 112th, 113th, 114th, 115th, 116th & 117th Congresses under S.Res. 28 by Senator. Data for the 117th Congress are current as of a search of the Congressional Record and Senate calendars conducted on March 21, 2022.

Available public data make clear that S.Res. 28 has failed to stem the practice of placing secret holds. Martin Oleszek, who has written extensively about holds, recently observed that “secret holds in the Senate are alive and well.”¹⁴⁵ Similarly, as Grassley summarized in 2019, “it happens every day that people put a hold on a bill or a nominee and don’t put their statement in the public record.”¹⁴⁶

¹⁴⁵ Martin Oleszek, Email to author (Feb. 20, 2020).

¹⁴⁶ Sen. Chuck Grassley, *Press Release: ICYMI: Grassley Explains Secret Holds in Congress* (Dec. 22, 2019), <https://www.grassley.senate.gov/news/news-releases/icymi-grassley-explains-secret-holds-congress>.

An alternative model based on Senate financial disclosures

If the Senate is serious about eliminating the secret hold, it is time to consider another approach. One potential alternative is to replace the ad hoc reporting system under S.Res. 28 with a routine, universal reporting system similar to the one used for financial disclosures.

The current reporting system for holds under S.Res. 28 relies on each senator to out himself or herself on a hold-by-hold. The Senate’s financial disclosure system—which operates under the umbrella financial disclosure requirements for high-ranking federal officials—operates very differently. Rather than rely on senators to file ad hoc reports only when potential conflicts of interest arise or when they make a suspiciously timed stock sale, the financial disclosure system requires every senator to routinely report all their sources of income and recent financial transactions. The financial disclosure system also clearly designates the entity responsible for ensuring compliance with the rules. Although far from perfect, this financial disclosure system has facilitated a greater degree of public accountability on financial matters than the current holds disclosure system under S.Res. 28.

The Senate has required its members to routinely disclose details of their income and other financials for decades, first in its Standing Rules and then by legislation. In 1968, the Senate adopted revisions to the Senate Standing Rules requiring all senators to file annual reports regarding their income and property holdings.¹⁴⁷ Public financial disclosures became a legal requirement in 1978 under the Ethics in Government Act, which the Senate also adopted as part of the Standing Rules.¹⁴⁸ In addition to making it a crime for any senator to fail to file a truthful annual disclosure, the Ethics in Government Act also expressly designated the Senate Select Committee on Ethics as the internal compliance overseer.¹⁴⁹

The Senate’s annual financial disclosure requirement was bolstered in 2012 by the STOCK Act (“Stop Trading on Congressional Knowledge” Act), which required expedited reporting for large financial transactions and expanded the public’s access to disclosure reports.¹⁵⁰ Recognizing that senators and other federal government officials might be tempted to profit off nonpublic information obtained in the course of their duties, Congress amended the Ethics in Government Act to require federal officials to report large sales of stocks or bonds within 30 days of the transaction.¹⁵¹ Further, the STOCK Act updated public filing requirements in light of the Internet: the Secretary of the Senate must allow senators to file both annual disclosures and transaction

¹⁴⁷ 114 CONG. REC. S7,406-07 (adopting S.Res. 266, which revised the Senate Standing Rules to include Rule XLIV, “Disclosure of Financial Interests”), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1968-pt6/pdf/GPO-CRECB-1968-pt6-5.pdf>. See also S.Res. 110, Official Conduct Amendments, 95th Cong. (1977); CONG. RESEARCH SERV., SENATE SELECT COMMITTEE ON ETHICS: A BRIEF HISTORY OF ITS EVOLUTION AND JURISDICTION, RL30650 (2019).

¹⁴⁸ Pub. L. No. 95-521, 5 U.S.C. app. §§101-111. See also Standing Rules of the Senate, Rule XXXIV (“For purposes of this rule, the provisions of title I of the Ethics in Government Act of 1978 (Pub. L. 95521) shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.”).

¹⁴⁹ 5 U.S.C. app. §§ 104, 109(18).

¹⁵⁰ Pub. L. No. 112-105, 126 Stat. 291 (2012); See generally JACK MASKELL, THE STOCK ACT, INSIDER TRADING, AND PUBLIC FINANCIAL REPORTING BY FEDERAL OFFICIALS, CONG. RESEARCH SERV., R42495 (2013), <https://sgp.fas.org/crs/misc/R42495.pdf>; JACK MASKELL, FINANCIAL DISCLOSURE BY FEDERAL OFFICIALS AND PUBLICATION OF DISCLOSURE REPORTS, CONG. RESEARCH SERV., R43186 (2013), <https://sgp.fas.org/crs/misc/R43186.pdf>.

¹⁵¹ Pub. L. No. 112-105 § 6. See also Sen. Select Committee on Ethics, Dear Colleague letter regarding STOCK Act (Apr. 17, 2012), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=7618C0B3-EC89-47C0-8553-D11C7192CFAD.

reports online and must post all financial reports online within 30 days of receipt.¹⁵² As under the Ethics in Government Act, the STOCK Act designated the Senate Select Committee on Ethics as the “supervising ethics office.”¹⁵³

To be clear, the Senate’s financial disclosure system under the Ethics in Government Act and the STOCK Act has many critics. Government watchdog Public Citizen has called it “an insufficient check on government corruption” because the mandatory reports, while online, are only searchable by name rather than compiled into a downloadable database that would “make monitoring of stock trading activity more robust and in real time.”¹⁵⁴ The Center for Responsive Politics has criticized that many of the reporting bands for asset value are incredibly wide or have no upper limit, such that a Senator might report certain assets as worth “more than \$1 million” that might be worth hundreds of millions or even billions of dollars.¹⁵⁵ Similarly, the Campaign Legal Center has questioned whether the Ethics in Government Act and STOCK Act can handle “financial portfolios [that] are large and complex,” such that “it becomes more difficult for ethics officials, and in turn the public, to discern potential conflicts of interest.”¹⁵⁶ There is limited and mixed evidence as to whether the STOCK Act has had any impact at all on legislators’ actual trading behavior,¹⁵⁷ and one of the STOCK Act’s architects called it a “useful tool to combat corruption, but it isn’t sufficient.”¹⁵⁸

Even acknowledging these limitations, the Senate financial disclosure system has yielded at least *some* measure of accountability and oversight, unlike the openly flouted disclosure system for holds. Looking first at technical compliance alone, the Senate Select Committee on Ethics receives and posts online thousands of disclosure reports each year.¹⁵⁹ While just a couple dozen senators have ever filed a notice of intent to object in the Congressional Record, every single senator is on record as to their income and transactions under the routine reporting system.

Turning to accountability, where the Select Committee on Ethics quibbled on whether it even had jurisdiction to investigate violations of Section 512 and seemingly has never investigated

¹⁵² Pub. L. No. 112-105 § 8. Senate disclosure reports are available online at <https://efdsearch.senate.gov/search>.

¹⁵³ *Id.* at § 2 (defining the term “supervising ethics office” as having “the meaning given that term in section 109(18) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(18))”, i.e., the Senate Select Committee on Ethics).

¹⁵⁴ Caralyn Esser, Bryan Kappe & Prateek Reddy, Public Citizen, *Personal Financial Disclosure Requirements for Public Officials* (May 2019), <https://www.citizen.org/wp-content/uploads/personal-financial-disclosures-june2011.pdf>. The Center for Responsive Politics compiles the data from each Member’s reports at <https://www.opensecrets.org/personal-finances/>.

¹⁵⁵ Ctr. for Responsive Politics, *About the Personal Finances Data & CRP’s Methodology*, <https://www.opensecrets.org/personal-finances/methodology>.

¹⁵⁶ Delaney Marsco, *At 40 Years Old, the Ethics in Government Act is in Need of a Tune-up*, Campaign Legal Center (Oct. 26, 2018), <https://campaignlegal.org/update/40-years-old-ethics-government-act-need-tune>.

¹⁵⁷ See, e.g., William Belmont et al., *Relief Rally: Senators as Feckless as the Rest of Us at Stock Picking*, NBER Working Paper No. w26975 (Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574439;

Ruidi Huang & Yuhai Xuan, *‘Trading’ Political Favors: Evidence from the Impact of the STOCK Act* (June 2019) (unpublished working paper), <https://ssrn.com/abstract=2765876>; Ian Cherry et al., *Change in Capitol: How a 60 Minutes Exposé and the STOCK Act Affected the Investment Activity of U.S. Senators* (2017) (prepared for the 28th Annual Conf. on Financial Economics & Accounting), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905309; Jeanne L. Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159 (2014).

¹⁵⁸ Tyler Gellasch, *I Helped Write the STOCK Act. It Didn’t Go Far Enough*, POLITICO (Mar. 25, 2020), <https://www.politico.com/news/magazine/2020/03/25/congress-stock-trade-148678>.

¹⁵⁹ In 2021, the Senate Select Committee on Ethics received 3,876 public financial disclosure and periodic disclosure of financial transactions reports. Annual Report of the Sen. Select Committee on Ethics, 117th Congress, Second Session (Jan. 31, 2022), https://www.ethics.senate.gov/public/_cache/files/9a2ce840-718c-409b-891f-42f5ebf6f365/annual-report-for-2021.pdf.

violations of S.Res. 28, it has investigated and censured senators over financial disclosure violations, such as it did with Sen. Robert Menendez, D-N.J., in 2018.¹⁶⁰ In 2020, when the press reported—based on his publicly filed financial transaction reports—that Sen. Richard Burr, R-N.C., dumped around \$1 million in stocks after being briefed about coronavirus projections,¹⁶¹ Burr actually referred himself to the Select Committee on Ethics for an independent review.¹⁶² (Notably, Burr was one of just three senators who voted against the STOCK Act in 2012, a vote which he defended on the claim the legislation was at least partly duplicative of laws forbidding members of Congress from insider trading.¹⁶³) The Burr episode illustrates how the routine financial disclosure system, imperfect as it is, facilitates both formal and informal oversight over the Senate. The public reporting system allowed the media and civil society to scrutinize Burr's actions, in addition to the Select Committee and other formal authorities.¹⁶⁴

A disclosure system for holds modeled on the financial disclosure system might take the form of monthly or quarterly reports submitted by senators to the Senate Select Committee on Ethics. Each senator would indicate on this report all bills, nominations, and other matters, if any, for which the senator placed a hold during the reporting period, as well as any prior holds which the senator removed during the reporting period. If the senator did not place or remove any holds during the reporting period, they would submit a report attesting as much. Like financial disclosure reports, each senator's hold reports would be published online for constituents, the press, civil society watchdogs, and campaign opponents to scrutinize. And failure to file an accurate report would be subject to the same penalties currently imposed for violations of the financial disclosure requirements. Imperfect as it would certainly be, this would be a far superior system to the current system which is so demonstrably flouted.

Conclusion

Despite bipartisan condemnation of secret holds and the enactment of rules forbidding them, senators continue to file secret holds and Senate leaders apparently continue to honor them. It took decades to enact Section 512 and S.Res. 28, and so it is disappointing to see just how ineffective they have proven in practice. But it is better to be disappointed and move on to examine other, more effective replacements than to ignore the current system's glaring inadequacies.

¹⁶⁰ Sen. Select Committee on Ethics, Public Letter of Admonition of Sen. Robert Menendez (April 26, 2018), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=49C12C75-7A26-4FE6-B070-19FCEF4D7532.

¹⁶¹ Robert Faturechi & Derek Willis, *Senator Dumped Up to \$1.7 Million of Stock After Reassuring Public About Coronavirus Preparedness*, PROPUBLICA (March 19, 2020), <https://www.propublica.org/article/senator-dumped-up-to-1-7-million-of-stock-after-reassuring-public-about-coronavirus-preparedness>.

¹⁶² Letter from Sen. Richard Burr to the Chairs of the Sen. Select Committee on Ethics (Mar. 20, 2020), <http://web.archive.org/web/20210307215212/https://www.burr.senate.gov/imo/media/doc/Ethics%20Review%20Request%20March%202020%202020.pdf>.

¹⁶³ Franco Ordoñez, *N.C. Sen. Burr Defends 'No' Vote on Insider Trading Act*, MCCLATCHY (Feb. 7, 2012), <https://www.mcclatchydc.com/news/politics-government/article24723682.html>.

¹⁶⁴ The same day that Sen. Burr referred himself to the Select Committee, watchdog group Common Cause also filed an ethics complaint for violations of the STOCK Act against him and a handful of other senators. Common Cause, *Press Release: DOJ, SEC & Ethics Complaints Filed Against Senators Burr, Feinstein, Loeffler & Inhofe for Possible Insider Trading & STOCK Act Violations* (Mar. 20, 2020), <https://www.commoncause.org/press-release/doj-sec-ethics-complaints-filed-against-senators-burr-feinstein-loeffler-inhofe-for-possible-insider-trading-stock-act-violations>.