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Governing Under an Equally Divided Senate

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Public Policy

After the election of two Democratic Senate candidates in the Georgia runoff elections on January 5, 2021, the Senate this year will be equally divided between 50 Democratic Senators (and those caucusing with them) and 50 Republican Senators. Governing in an equally divided Senate presents several challenges regarding the internal rules of the Senate, the makeup and control of committees, and the control of Senate business, including both legislation and the consideration and approval of nominations. In this alert, we look at the applicable principles and historical precedents concerning an equally divided Senate, and consider the implications for governing in the coming congressional term.

An Equally Divided Senate

First, it is important to note that we are not yet at the point of an equally divided Senate. The Senate seat of outgoing Senator David Perdue (R-Ga.) is currently vacant because Sen. Perdue's term expired at the end of the last Congress, and the election of Senator-elect Jon Ossoff (D-Ga.) has not yet been certified. Senator Kelly Loeffler (R-Ga.), conversely, continues to serve in the Senate because she was appointed to the remainder of the term of former Senator Johnny Isakson (R-Ga.), who resigned due to health reasons, pending the results of the recent special election. Because Senator Isakson's original term would not have expired until 2023, Senator Loeffler will continue to serve until Senator-elect Raphael Warnock (D-Ga.) is sworn in to take her place. Georgia's Secretary of State Brad Raffensperger recently stated that he intends to certify the results of both runoff elections as soon as possible, but he did not provide a specific date.

Adding to the complications, Senator Kamala Harris (D-Cal.) continues to serve in the Senate, but she will vacate that office on January 20, 2021, when she is sworn in as Vice President, if not earlier. California Governor Gavin Newsom has indicated that he will appoint California's Democratic Secretary of State Alex Padilla to fill the vacancy, but there may be a short period of time in which the seat is unoccupied. In 2009, for example, then-Senator Joe Biden (D-Del.) resigned from the Senate on January 15, and his replacement, Senator Ted Kaufman (D-Del.), was sworn in on January 16. In short, it is not as of now exactly clear when the Senate will shift from the current Republican control to be evenly divided, but it should be sometime in the coming weeks.

After all the certifications, appointments, swearing into office of the new Senators, and caucusing, the chamber will be equally divided. Under the Constitution, Vice President Harris will preside as the President of the Senate and "shall have no Vote, unless they be equally divided" in a tie vote. This provision gives the Democratic Senators the final vote necessary to

control the body. Vice President Harris's tie-breaking vote will be especially consequential in the early days of this Congress, when the Senate will likely adopt internal rules and procedures to address the 50-50 split.

History as a Guide

The Senate has faced this situation only a handful of times, and the ability to control the organizing resolutions at the start of the Congress can have significant implications. For example, during the Great Senate Deadlock of 1881, Republican Senators sought to woo Senator William Mahone, an independent, to support their organizing resolutions. When Senator Mahone eventually sided with the Republicans, he was rewarded, [according to the Senate historian](#), with the ability to “chair the powerful Agriculture Committee, control selection of Senate officers, and have a major say in the distribution of executive branch patronage jobs in his state.”

More recently, the Senate took a wholly different approach when the 2000 elections resulted in an equally divided Senate. Rather than trying to cajole support for one party's organizing resolutions, the Senate leaders negotiated an unprecedented agreement to share power. The agreement, negotiated by then-Senate Republican Leader Trent Lott (R-Miss.) and then-Senate Democratic Leader Tom Daschle (D-S.D.), included a Senate resolution adopted at the start of the Congress and further refinements adopted throughout the five months in which it operated (until a Senator switched caucuses, handing the majority to the Democratic Senators).

The 2001 power-sharing agreement contained a number of novel provisions:

- Senate committees had an equal number of Democratic and Republican members, with the chairs of the committees held by the party that had the tie-breaking vote of the Vice President (Vice President Al Gore until January 20, 2001, and Vice President Dick Cheney thereafter).
- Committee budgets and office space allocations were equally divided between the parties.
- If a measure were not reported from a committee because of a tie vote, the leader of either party could seek to discharge the measure from the committee, subject to a vote of the full Senate.
- The leaders agreed not to “fill the amendment tree,” a procedural maneuver by Senate leaders that precludes other Senators from offering amendments to legislation on the floor.
- The agreement permitted either party's Senators to serve as the presiding officer of the chamber.

(A Congressional Research Service [report](#) provides additional details on the agreement.)

Implications for the New Congress

It is not at all clear whether today's political environment can support a power-sharing agreement like the compromise struck in 2001. The leaders are different, the climate is more partisan, and the tools employed by the Senate majorities have dramatically changed since 2001. For example, precedential rulings in 2013 and 2017 reduced the number of votes necessary to end a filibuster of executive branch and judicial nominees, lowering the threshold from 60 votes to a simple majority. Additionally, there has been a significant reduction in the

open amendment processes on the Senate floor. In the 107th Congress, the Senate conducted [390](#) roll call votes on amendments; there were only [67](#) such votes in the most recent Congress.

In 2001, the Senate also had a significant group of very moderate members, including Senator Lincoln Chafee (R.I.), Senator Joe Lieberman (Conn.), Senator Arlen Specter (Pa.), and Senator Jim Jeffords (Vt.). Each of these Senators later left their respective parties, either switching parties or becoming independents. (Indeed, Sen. Jeffords's move to become an independent caucusing with the Democratic Senators in mid-2001 ended the divided Senate that year.) Although they are fewer in number today, the Senate still has key moderates, including Senator Joe Manchin (D-W.V.) and Senator Susan Collins (R-Me.), who are always candidates to oppose moves by their own parties that they view as too aggressive. Senator Manchin, for example, has already indicated that he would oppose any efforts by a Democratic Senate to eliminate the 60-vote threshold to end a filibuster on legislation or efforts to expand the size of the Supreme Court.

An evenly divided Senate will also elevate the importance of procedures that require only a simple majority, rather than the 60-vote threshold needed to overcome a legislative filibuster. As noted above, filibusters on presidential nominees can now be ended by a simple majority vote, and Democratic control of the Senate strongly increases the likelihood that President-elect Biden's nominees will be confirmed.

More significantly, the budget reconciliation process only requires a majority to enact potentially sweeping changes in taxes and spending policy. Under the Congressional Budget Act of 1974, if Congress passes a budget resolution and committees create legislation to effectuate the tax and spending plans outlined in the budget resolution, the resulting legislation – which “reconciles” the law to the priorities created in the budget resolution – is subject to special rules in the Senate that limit the debate and preclude a filibuster. As a result, only a simple majority is needed to pass the legislation. For example, in 2010, Congress used the reconciliation process to pass the second half of President Obama's health care plan after the death of Senator Edward Kennedy (D-Mass.) and the subsequent election of Senator Scott Brown (R-Mass.) made it impossible for the Democratic Senate to achieve a 60-vote majority to overcome a filibuster. Budget reconciliation was also used to pass President Trump's tax reform package in 2017.

Approving nominations or passing legislation in an evenly divided Senate is nonetheless perilous. It will require that the Democratic majority remain united with no defections and no absences, and it may require the Vice President to abandon executive branch business and come to the Senate to cast a tie-breaking vote. Indeed, in prior instances, both of these considerations were major factors in conducting Senate business. In the 1881 deadlock, Democratic Senators were able to forestall certain Republican plans when several Republican Senators were absent. During the 2001 power-sharing arrangement, Vice President Cheney broke two tie votes on amendments to a budget resolution, but on other occasions, tie votes caused legislation to fail because the Vice President did not vote.

The importance of moderates in a closely divided Senate suggests that an equally divided Senate will be a moderating force for legislation in the Senate. Nonetheless, Democratic leaders also need to be cautious about moderating too much, which could risk losing the support of more progressive Democratic Senators. Democratic Leader Chuck Schumer (D-N.Y.) will have to walk a careful balance that maintains support from moderate Democratic Senators, perhaps

gains some votes from moderate Republican Senators, and does not lose the support of the progressive end of the Democratic caucus. This is a tall task.

As we have seen in the past, intra-party fractures often bring down legislation. In 2017, the Republican-controlled Senate was unable to garner a majority – or even a tie that could have been broken by Vice President Pence – when it considered the Health Care Freedom Act. Senator John McCain (R-Ariz.) joined two other Republican Senators in voting against the measure. This year, Senator Manchin and other moderates will likely play a similar role of deciding which pieces of legislation pass or fail.

We may also see the return of various Senate “gangs,” in which a bipartisan group of Senators seeks to craft compromise legislation that can achieve support from a majority of Senators in the broad middle of the political spectrum, from both political parties. Most famously, the “Gang of Eight” Senators in 2013 created comprehensive immigration legislation that passed the Senate by a wide margin, 68 to 32.

Given all these factors, we expect that Vice President Harris will need to resolve ties on key votes, similar to the tie-breaking votes cast by Vice President Cheney concerning the budget. A critical early indicator of the Senate’s approach to the 50-50 split will be whether Democratic Leader Chuck Schumer (D-N.Y.) and Republican Leader Mitch McConnell (R-Ky.) negotiate a power-sharing agreement, and if they do, the procedures and rights that it creates. It seems likely, nonetheless, that former Senator and new Vice President Harris will continue to spend a good deal of time in the Capitol.

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