

Priority Recognition in the U.S. Senate Does Mitch McConnell ***really*** have the power to demand that he be allowed to always **speak first**?

By Joseph Elfelt, @mappingsupport
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TL;DR Under a 1915 precedent, VP Harris is not required to always let McConnell speak first. Harris can give priority recognition to minority leader Schumer to speak first. The same precedent states that decisions on recognition cannot be appealed.

If the two senate runoff races in Georgia result in litigation over who won, then when the senate convenes on January 21 those two senate seats might still be vacant. If that is the case, then Vice President Kamala Harris will be presiding (at least for awhile) over a senate with a republican majority and the issue of priority recognition will have to be addressed.

The Constitution provides that the vice president is the president of the senate. This means that after Kamala Harris is sworn in she can preside over the senate whenever she decides to do so. Now picture Harris presiding over the senate and **assume** the republicans win one or both of the Georgia runoff races. Majority leader Mitch McConnell and minority leader Chuck Schumer both stand and ask to be recognized to speak. Here are the two key questions.

1. Does presiding officer Harris have the **discretion** to recognize Schumer as being allowed to **speak first** instead of McConnell?
2. Can a decision by presiding officer Harris on which senator to recognize be **appealed** to the full senate?

The senator that gets to **'speak first'** on any issue has great power to shape the course of events in the senate. If minority leader Schumer is recognized first by presiding officer Harris, then more of President Biden's agenda will reach the senate floor for debate and a vote. Of course that does not mean that Biden's policy ideas will pass in a senate where republicans are the majority. But at a minimum it means that senators will have to run for reelection based on their voting record on policies that enjoy broad bi-partisan support among the voters.

The importance of being recognized by the presiding officer to **'speak first' is absolutely critical**. Below are some excerpts and a link to a fascinating article by James Wallner who is an expert on all this stuff.

Bio: <https://www.legislativeprocedure.com/who-we-are>

“The **majority leader’s power** is derived from the fact that his colleagues defer to him to order the chamber’s deliberations. But the leader’s ability to do that job depends on his being **recognized first** by the President pro tempore (or the Vice President depending on who is presiding).

Since any member can technically make a motion to consider legislation or a nomination under the Senate’s rules, being the **first** to do so enables the majority leader to set the schedule and control the agenda to a limited degree.

Priority of recognition also allows the leader to block votes on undesirable amendments. The ability to be **recognized first** before other members enables the majority leader to “fill the amendment tree,” or offer the maximum allowable number of amendments to legislation, and file cloture on a bill before other senators have a chance to debate the measure and offer amendments.

The right of recognition is thus the foundation on which leadership power is based in the contemporary Senate.”

<https://www.legislativeprocedure.com/blog/2018/8/10/how-the-vice-president-limits-the-power-of-senate-majorities>

The **answer to the two questions stated on p.1** of this report is found in the congressional record for January 29, 1915. I was pleasantly surprised to discover that this material is online. Here is how to download your own copy.

1. Open this link
<https://www.govinfo.gov/app/details/GPO-CRECB-1915-pt3-v52/GPO-CRECB-1915-pt3-v52-3-1/context>
2. Scroll down to the senate PDF file for January 29 and download that file.
3. Open the PDF and scroll down to original page numbers 2577-2578.

The 1915 congressional record shows the following discussion took place.

The PRESIDING OFFICER. The Chair will state that when he has not made up his mind as to a question and desires to receive debate to enlighten him, he will permit debate; but where it is proper and just, as in this case, the Chair will exercise his right and recognize the Senator from Missouri. The Senator from Missouri has been recognized, and has moved to lay on the table the motion of the Senator from Michigan [Mr. TOWNSEND].

.....

The PRESIDING OFFICER. **The Chair has control of recognition,** and the Chair has recognized the Senator from Kentucky.

Mr. LIPPITT. I have made a point of order, and the Chair recognized me.

The PRESIDING OFFICER. **There is no appeal from the decision of the Chair as to recognition.**

Mr. LIPPITT. Does the Chair refuse to have the record read?

The PRESIDING OFFICER. If the Senator will permit the Chair, the pending question is the appeal from the decision of the Chair, which the Senator from Kentucky [Mr. JAMES] has moved to lay on the table.

.....

The PRESIDING OFFICER. It was the ruling of the Chair that he had recognized the Senator from Kentucky.

Mr. ROOT. I **appeal** from that decision.

Mr. JAMES. I make the **point of order** that that is not in order.

Mr. SMITH of Georgia. A second appeal can not be added to a pending appeal.

The PRESIDING OFFICER. **An appeal from the decision of the Chair as to recognition is not permissible. The Chair desires to be shown any authority holding that such an appeal is permissible by the rules. If that can be done, the Chair will recognize the admissibility of the appeal.**

....

Mr. ROOT. Now, I appeal from the decision of the Chair overruling that **point of order**.

The PRESIDING OFFICER. The Chair will state to the Senator from New York that **recognition in the Senate**, as the Chair understands, **is left entirely within the province of the Chair, and an appeal from the recognition by the Chair** of a Senator making a motion or rising to speak is not in order and **can not be entertained**.

The above discussion shows (1) there was an actual controversy regarding the presiding officer's power of recognition, (2) there was a point of order, (3) there was an appeal and (4) there was a decision by the presiding officer. Thus, this is a **strong precedent** for the idea that a decision by the presiding officer to recognize a senator is not subject to appeal.

Based on this precedent, when multiple senators are seeking to be recognized at the same time, including the majority leader, presiding officer Harris has complete discretion to recognize any senator and that decision **cannot be appealed**.

The issue of whether a decision by the presiding office on recognition can be appealed came up again on February 11, 1915. To download the congressional record use this link:

<https://www.govinfo.gov/app/details/GPO-CRECB-1915-pt4-v52/context>

Scroll down to February 11, download the senate PDF and scroll to original p.3578.

The record states:

The VICE PRESIDENT. We might just as well know "where we are at " right now. The Chair has been in the habit of treating Senators on each side of the Chamber courteously. They have been in the habit of doing things which were not provided for by rules, but have grown out of custom. It has been done as much by one side as by the other. All this day Senators have been coming up and serving notice that they desired to be recognized, and the Chair has recognized them in regular order. The Chair promised to recognize the Senator from Tennessee, and the Chair does not recognize the Senator from New York for the purpose of making a motion.

.....

The VICE PRESIDENT. The Chair had not recognized the Senator from New York for the purpose of making a motion.

Mr. O'GORMAN. With great deference, I **appeal** from the decision of the Chair.

The VICE PRESIDENT. **There is no appeal from recognition by the Chair.**

So once again we see that there was an actual controversy regarding recognition, there was an appeal and the presiding officer made a ruling that a decision by the presiding officer regarding recognition cannot be appealed.

Now fast forward from 1915 to August 13, 1937. Below is a link to a couple of pages from the congressional record for this date. Note that the **senator from Kentucky was majority leader**.
<https://static1.squarespace.com/static/5b2ee0125ffd20346354605a/t/5c7d5d6771c10be69b7eb6c2/1551719786035/Priority+of+Recognition+Precedent+%281937%29.pdf>

This 1937 record states:

“The Chair thinks it is his duty to recognize the Senator from Kentucky when he is on his feet, or to recognize the Senator from Vermont [Mr. Austin], who is acting as leader of the minority at the present time, if he should be on his feet.”

The above statement and the discussion surrounding it **says nothing at all** about the precedents from 1915 that (1) the presiding officer has complete discretion when deciding which senator to recognize and (2) decisions on recognition cannot be appealed. Instead, the 1937 presiding officer made a comment on how they would exercise their discretion regarding recognition.

Now fast forward again from 1937 to July 19, 1983. Below is a link to the congressional record. The relevant discussion is on original p. 19761 in column 3.
<https://www.congress.gov/bound-congressional-record/1983/07/19/senate-section?s=2&r=69>

The record shows that the senate’s 1983 discussion **says nothing at all** about the precedents from 1915 that (1) the presiding officer has complete discretion when deciding which senator to recognize and (2) decisions on recognition cannot be appealed. Instead, the 1983 presiding officer made a comment on how they would exercise their discretion regarding recognition.

Note that in 1937 and in 1983 the record shows that (1) there was no actual controversy regarding the presiding officer’s discretion to grant recognition and (2) there was no vote of any kind regarding recognition.

In **1937** both the vice president and majority leader belonged to the **same party** (democrat). In **1983** both the vice president and majority leader belonged to the **same party** (republican). None of the 1937 or 1983 senate proceedings described above addressed the situation where the presiding officer and majority leader belong to **different parties**. Thus, if the republicans retain their senate majority after the Georgia runoff elections, there is **no senate precedent** that limits VP Harris’ discretion to recognize a democrat senator when the republican majority leader is seeking recognition at the same time.

Over the years the term **“priority recognition”** has been used as shorthand for the mistaken notion that in 1937 a precedent was set that requires the presiding officer to always recognize the

majority leader first when the majority leader and other senator(s) are seeking to be recognized at the same time. **Apparently those who have promoted and written about this notion failed to look back further and apprehend the importance of the 1915 precedents described above.** And more specifically, no precedent at all has been set to address the circumstance where the vice president and majority leader belong to **different parties.**

If VP Harris recognizes Schumer as being able to speak first on an issue, then more ideas from the minority democrat party will be debated. This is exactly what Mitch McConnell asked for when the republicans were the minority party. Below are two sections quoting McConnell speaking on the senate floor on January 8, 2014.

“Yesterday the majority leader rejected my offer for both sides to offer amendments to the unemployment insurance bill--the way things used to work around here; we had a bill called up, and we had amendments. This is, sadly, typical of the way things are these days in this institution. If the majority leader just accepted my offer, we could actually be debating and amending this bill instead of wasting time. **How does the majority leader expect to achieve consensus when one side doesn't have the chance to offer any input at all?** That is the way the Senate used to operate. Look. If the majority leader wants this bill to pass the Senate, then there is a very good likelihood he is going to have to find a way to pay for it. I will be offering one idea on that front; that is, paying for a longer extension by dropping the mandate that forces Americans to buy insurance they don't want. But if they don't like that idea, there are others. One is a bipartisan idea endorsed by the President that ensures individuals can't draw both Social Security disability benefits and unemployment benefits at the same time. Senators Coburn and Portman both have versions of that. There is another plan offered by Senator Ayotte that would cut down on fraud in refundable tax credits. There are plans for job creation that will be offered by Senators Paul, Thune, and Inhofe. These plans take a different approach than the government-led one we see from our Democratic friends. They rely on unlocking the potential of the private sector to actually increase employment. Why don't we have a vote on them in the Senate? I am sure there are many Democratic ideas out there as well, **but we won't get the chance to debate any of them as long as the majority leader keeps blocking us from offering amendments.**

This obstructionism by the Democratic majority is against the traditions of this body, and it needs to end because if Democrats truly want to get anything done this year, they are going to have to learn how to work with us.

I yield the floor.”

<https://www.congress.gov/congressional-record/2014/1/8/senate-section/article/s88-2?s=1&r=1>

“Hopefully, we can all agree that we have a problem. I realize both sides have their own favorite account of what caused it. We have our talking points, and they have their talking points. We all repeat them with great repetition, and we all congratulate each other for being on the right side of the debate. I understand that. People over there think Republicans abuse the rules, and we think they do. But, as I said, my goal here isn't to make converts on that front; my purpose is to suggest that the Senate can be better than it has been and that it must be if we are to remain great as a nation.

The crucial first step of any vision that gets us there is to recognize that vigorous debate about our differences isn't some sickness to be lamented. **Vigorous debate is not a problem. When did that become a problem? It is actually a sign of strength to have vigorous debates.**

....

Second, bills should come to the floor and be thoroughly debated. We have an example of that going on right now, and **that includes a robust amendment process.** In my view, there is far too much paranoia about the other side around here. What are we afraid of? Both sides have taken liberties and abused privileges. I will admit that. But the answer isn't to provoke even more. **The answer is to let folks debate.** This is the Senate. Let folks debate. Let the Senate work its will, and that means bringing bills to the floor. **It means having a free and open amendment process.** That is legislating.

That is what we used to do. That is exactly the way this place operated just a few years ago. The senior Senator from Illinois, the Democratic assistant majority leader, likes to say--or at least used to say--that if you don't want to fight fires, don't become a fireman, and **if you don't want to cast tough votes, don't come to the Senate.** I guess he hasn't said that lately.

When we used to be in the majority, I remember telling people: Look. The good news is we are in the majority. The bad news is, in order to get the bill across the floor, you have to cast a lot of votes you don't want to take--and we did it and people groaned about it, complained about it. Yet the Sun still came up the next day and everybody felt as though they were a part of the process.

Senator Durbin was right about that when he said it. **I think it is time to allow Senators on both sides to more fully participate in the legislative process, and that means having a more open amendment process around here.** As I said, obviously it requires us, from time to time, to cast votes we would rather not cast. But we are all grownups. We can take that. There is rarely ever a vote we cast around here that is fatal.

The irony of it all is that kind of process makes the place a lot less contentious. In fact, it is a lot less contentious when we vote on tough issues than when we don't, because when we are not allowed to do that, everybody is angry about being denied the opportunity to do what they were sent here to do, which is to represent the people who elected us and offer ideas we think are worth considering.

At a meeting we just came out of, Senator Cornyn was pointing out there were 13 amendments people on this side of the aisle would like to offer on this bill, all of them related to the subject and important to each Senator who seriously felt there was a better way to improve the bill that is on the floor right now. **But, alas, I expect that opportunity will not be allowed because one person who is allowed to get prior recognition can prevent us from getting any amendments or, even worse still, pick our amendments for us, decide which of our amendments are OK and which aren't.**

I remember the late Ted Stevens telling the story about when he first got here. Senator Mansfield was still the majority leader, and he tried to offer an amendment--Senator Stevens did--and the Member of the majority who was managing the bill prevented it, in effect. Senator Mansfield came over to Senator Stevens, took his amendment, went back to his desk and sent it to the floor for him. He sent it to the floor for him. That was the Senate not too long ago.

If someone isn't allowed to get a vote on something they believe in, of course they are going to retaliate. **Of course they are going to retaliate.** But if they get a vote every once in a while, they do not feel the need to. Voting on amendments is good for the Senate and it is good for the country. Our constituents should have a greater voice in the process.

Since July of last year, there have been four Republican rollcall votes. In the whole second half of 2013, Members on this side of the aisle have gotten four rollcall votes--stunning. That is today's Senate.

So let me say this: **If Republicans are fortunate enough to be in the majority next year, amendments will be allowed,** Senators will be respected, and we will not make an attempt to wring controversy out of an institution which expects, demands, and approves of great debates about the problems confronting the country.

<https://www.congress.gov/congressional-record/2014/1/8/senate-section/article/s88-4?s=1&r=2>

Now think about 'filling the amendment' tree, which I think is an abusive practice that both parties are guilty of doing. If the presiding officer recognizes someone from the minority party to speak first about a proposed bill, the minority party is unlikely to fill the amendment tree. Any such bill would be highly unlikely to pass the senate since the majority party would rightly feel shut out of the process. Instead, even though speaking first the minority party would have to leave room in the tree for amendments by the majority party. Guess what! This approach allows bills the administration is promoting to at least reach the senate floor for debate. It also forces the parties to at least try to compromise. And when the debate is over the senators will have to vote on issues and run for re-election on their voting record. **This sure sounds to me like the way the senate is supposed to work.**

One counter argument I keep hearing is that the republican majority (assuming there is one after the Georgia runoff elections) can force VP Harris to give majority leader McConnell "priority recognition" by amending the senate rules to make this into a formal rule. Here is a link to an article on the procedure for amending the senate rules. If you read this you will learn that amending the senate rules is not as easy as a simple majority vote.

<https://fas.org/sgp/crs/misc/R42929.pdf>

Below are insightful comments by user "noble experiment" from a thread on the DailyKOS website

I would summarize the naysayers argument as that Harris is beholden to Senate rules which can be changed on a McConnell whim. I found that argument unconvincing, mostly because:

1) The Constitution says Harris is the President of the Senate. I think it is at least an open issue as to whether the interpretation of "preside" includes the ability to choose who to recognize for discussion. If it does include that, then I find it hard to believe that a Senate rule can eliminate a power granted to the VP in the Constitution.

2) Some argued that SCOTUS would refuse to engage on this. I think they initially would, but what would happen when Democrats chose to proceed on a motion after Harris recognized Schumer in priority over McConnell and then declared a vote? Someone has to decide whether the ensuing vote is legitimate or not. I think ultimately SCOTUS could be engaged on this. And the originalists will have a hard time siding with McConnell if they are true to their “supposed” ideology.

3) There is literally no downside to this. If Harris loses, she is right where she started (with only the right to be a tiebreaker). So why not try it. Some argued she would be weakened by losing. I question whether she would be weakened with anyone other than those who already hate her. I think she would be seen as legitimately fighting for our agenda. And the upside if it works is great.

4) I’m adding this which just occurred to me. If it works that would be awesome, *if it fails, it will stop a future Republican VP from trying this*. Because you know they will. Republicans don’t care about whether something can work, they just do it and fight about it later — even when their arguments are absurd. Let’s have the fight on our terms.

Here is a question that always comes up. If this whole idea is legit and VP Harris really does have the power when she presides over the senate to bypass majority leader McConnell and allow democrat senators to ‘speak first’, then why didn’t Biden do this when he was vice president and there was a republican majority in the senate? Great question! My reply is to point out that sometimes the simple answer is correct. **Maybe no one at that time was aware of the 1915 senate precedent and the critically important role it can play when the vice president and senate majority leader belong to different parties.** After all, if relying on the 1915 precedent had been considered when Biden was VP, then you would think that diligent online searching could find something more than nothing about it. I searched extensively and found no mention of the 1915 precedent.

Other people are also thinking about priority recognition. Here are links to some of the articles I found.

<https://blog.usejournal.com/mitch-mcconnell-an-emperor-without-clothes-c0096ac51e36>

By: Nicolas Carteron, @ncarteron

<https://newsflector.com/how-vp-harris-can-sideline-moscow-mitch>

By: @newsflector

<https://gregolear.substack.com/p/whos-afraid-of-mitch-mcconnell>

By: @ThatShockratees and published by @gregolear