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The Nature of Congressional Rules

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# The Nature of Congressional Rules

*by Stanley Bach**

## I. Introduction

We often think of rules as enforceable constraints on action—constraints which either restrict our actions or protect against our actions being restricted by others. In group settings, by the same token, we usually distinguish between rules and norms on the basis of the means for enforcing them and the penalties for violating them. Individual members of a group enforce norms on themselves, more or less voluntarily, but rules are enforced by others, who may or may not be group members. The penalties for violating norms tend to be imprecise, unpredictable, and unstated, while the penalties for violating rules are much more likely to be fixed, certain, and stated as part of the rules themselves. The creation of rules marks the transformation of a group into an organization, and implies the expectation or at least the possibility of conflict among its members.

In a legislature or other decision-making body, the rules of procedure typically establish a system for action by specifying the circumstances under which, and the means by which, questions can be raised and decided. Some rules constrain collective decisions—for example, by fixing the majority required to approve certain propositions. Other rules constrain individual behavior—for example, by prohibiting any member from making certain motions or proposing other actions at certain times.[1] Taken together, a legislature's

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[1] These two types of constraints are closely related, because most questions are raised and most decisions are made at the initiative of individual members. To a great extent, therefore, constraints on

body of rules can determine the ways in which collective decisions are made, and they constitute the context in which individual members pursue their policy and political objectives and attempt to maximize their legislative achievements.[2]

This essay explores the nature of congressional rules of procedure. Are these rules imposed on Congress—and, therefore, beyond congressional control—or are they matters for the House and Senate to decide? Can Congress be compelled to comply with its own rules, or is it free to waive, suspend, violate or ignore them? Do all rules have the same force and standing, or are some rules more conclusive and controlling than others? Are the rules fixed during the course of a two-year congress or even during consideration of individual bills, or may they be adjusted as circumstances warrant? Even if rules are enforceable, are they all enforced with the same consistency? Most generally, to what extent are congressional rules constants or variables in the process of legislative decision-making?[3]

## II. "The Rules of Its Proceedings"

Congress' legislative rules are almost wholly within its own control. The only potential exogenous source of rules—the Constitution—imposes very few requirements on the legislative process, instead empowering each house to "determine the Rules of its

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individual behavior limit the range of collective actions the membership may take.

[2] Legislative rules sometimes are discussed in terms of "parliamentary law." While there are evident similarities between such rules and "laws," as we generally understand them, there also is an essential difference. Most often, legislative rules are enforced before the fact, to prevent them from being violated; laws, on the other hand, typically are enforced after the fact, to impose penalties for violations that already have taken place. This difference arises because attempts to violate laws typically are surreptitious; attempts to violate legislative rules are not.

[3] Excluded from this discussion are non-legislative rules, such as those governing the qualifications and personal conduct of members. Also excluded are constraints on legislative actions that cannot be enforced by the Chair or by vote of the body. For example, "holds" in the Senate and "live pairs" in both houses are not treated here as rules because they are arrangements between or among members to which the members are not obliged to adhere and which have no formal standing, even though they do have practical effects. A "hold" is a request by a Senator to his or her party leaders that a particular bill not be called up for Senate floor consideration, at least until that Senator has been consulted. See W. Oleszek, Congressional Procedures and the Policy Process 182-85 (3d. ed. 1989). A "live pair" is arranged between two members, one of whom expects to be absent during a vote. "In a live pair, the member in attendance casts a vote, but then withdraws it and votes 'present,' announcing that he or she has a live pair with a colleague and identifying how each would have voted on the issue." Id. at 168.

Proceedings."[4] Moreover, Congress retains considerable latitude in interpreting and applying what prescriptions and proscriptions the Constitution does impose.

Section 7 of Article I, for example, requires that the house to which the President returns a vetoed bill shall "proceed to reconsider it," but both houses find in this provision the latitude to delay an override vote or even dispense with it altogether.[5] For example, President Reagan vetoed H.R. 1562, the Textile and Apparel Trade Enforcement Act of 1985, in December 1985, but the House chose to postpone an override vote until August of the following year.[6] The same clause also fixes the majority necessary to override a veto, and requires that the question be decided by roll-call vote,[7] but each house may decide how much debate to permit, and under what controls, before the vote occurs, if it occurs at all.[8] In this as in most other instances, Congress enjoys significant discretion in deciding how it shall meet the constitutional requirements to which it is subject.

Of greater importance to the daily activities of the House and Senate are two other rules imposed by the Constitution: that "a Majority of each [House] shall constitute a Quorum to do Business"[9] and that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."[10] Though these rules may seem reasonably clear and conclusive on their face, the House and Senate construe them differently, and in ways which suit the needs

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[4] U.S. Const. art. I, § 5, cl. 2.

[5] See Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, H.R. Doc. No. 277, 98th Cong., 2d Sess. 46 (1985) [hereinafter House Rules and Manual]:

> It is the usual but not invariable rule that a bill returned with the objections of the President shall be voted on at once . . . and when laid before the House the question on the passage is considered as pending and no motion from the floor is required . . . , but it has been held that the constitutional mandate that "the House shall proceed to consider" [sic] means that the House shall immediately proceed to consider it under the rules of the House, and that the ordinary motions under the rules of the House—to refer, to commit, or to postpone to a day certain—are in order. . . .

[6] House Sustains Veto of Textile Import Curbs, 42 Cong. Q. Almanac 347-48 (1986). See also Starobin, Senate Avoids Override Fight on 'Fairness Doctrine' Veto, 45 Cong. Q. Weekly Rep. 1401 (1987).

[7] U.S. Const. art. I, § 7, cl. 2.

[8] See, e.g., House Rules and Manual, supra note 5, at 46-47.

[9] U.S. Const. art. I, § 5, cl. 1.

[10] U.S. Const. art. I, § 5, cl. 3.

of their members and expedite the legislative process.

Each house operates under what may be called "the theory of the presumptive quorum"—a presumption that a quorum, or a majority of the members duly chosen and sworn, is always present on the floor unless and until the presumption is proven incorrect.[11] Even when only a handful of Representatives participate in a voice vote or division vote,[12] for instance, the vote still is deemed to meet the constitutional requirement, unless someone challenges the implicit assumption that the additional number of members needed to constitute a quorum were present on the floor but declined to vote.[13] Neither the Speaker of the House nor the Chairman of the Committee of the Whole[14] ever takes the initiative to enforce the quorum requirement, except in connection with a roll-call vote or recorded teller vote;[15] he or she counts to determine that a quorum is present only if a Representative makes a point of order that it is not.

In the Senate, the Presiding Officer may count for a quorum only if cloture has been invoked.[16] At all other times, only a call of the

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[11] House Rules and Manual, supra note 5, at 22; F.M. Riddick, Senate Procedure: Precedents and Practice, S. Doc. No. 2, 97th Cong., 1st Sess. 833 (1981) [hereinafter Senate Procedure].

[12] A voice vote occurs when the Chair directs those in favor of the question to say "Aye" and those opposed to say "No," after which the Chair announces the outcome of the vote. When the result of a voice vote is unclear, the Chair may direct, or any member may demand, a division vote, in which members stand and are counted. Rule I, cl. 5(a), House Rules and Manual, supra note 5, at 309-10; Rule XII, Standing Rules of the Senate, S. Doc. No. 33, 100th Cong., 2d Sess. 7-8 (1988) [hereinafter Senate Rules].

[13] Clause 1 of Rule VIII requires that "[e]very member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented; and shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question." House Rules and Manual, supra note 5, at 330. However, "[i]t has been found impracticable to enforce the provision requiring every Member to vote. . . ." Id. at 331.

[14] The Committee of the Whole House on the State of the Union, commonly referred to as "Committee of the Whole," consists of all members of the House and meets on the House floor. The House resolves itself into Committee of the Whole to consider major legislation, especially authorization, appropriations and tax bills. The quorum in Committee of the Whole is only 100 members, instead of the 218 members needed for a quorum in the House itself. Rule XXIII, House Rules and Manual, supra note 5, at 597-627.

[15] In a roll-call vote, also called a yea-and-nay vote, the votes of individual Representatives or Senators are publicly recorded. Similarly, Representatives' positions on recorded teller votes in Committee of the Whole also are a matter of public record. When a roll-call vote occurs in the Senate, the Clerk calls the roll and each Senator responds by announcing his or her vote. In the House, roll-call votes and recorded teller votes are conducted by use of its electronic voting system. Rule I, cl. 5(a), House Rules and Manual, supra note 5, at 309-10; Rule XII, Senate Rules, supra note 12, at 7-8.

[16] Cloture is the procedure under Rule XXII by which an extraordinary majority of Senators can require that debate on the pending matter eventually be brought to a close. See generally Senate Procedure, supra note 11, at 228-61.

roll can demonstrate that the Senate is not meeting the constitutionally-imposed quorum requirement.[17] A Senator who has the floor may "suggest the absence of quorum," and thereby trigger an immediate call of the roll, at almost any time.[18] But a quorum call in the Senate rarely has anything to do with attendance on the floor; instead, it is intended to suspend floor proceedings temporarily, and the Senate almost always "dispenses with further proceedings under the quorum call" before the clerk completes the call of the roll.[19] Thus, about the only time that the Senate normally enforces the quorum requirement is in connection with a roll-call vote, in which a majority of Senators must participate.

Essentially the same situation results in the House, though for somewhat different reasons. The rules of the House impose severe restrictions on members' opportunities to make the point of order that a quorum is not present, and generally permit quorum calls only in connection with a vote or at the discretion of the Chair.[20] In effect, the House limits the impact of the constitutional requirement for a quorum to do business by adopting an implicit and very narrow definition of "business"—which the Constitution leaves undefined—that is convenient for its members individually and expedient for the House institutionally.

While both houses have interpreted and implemented the quorum requirement with the same result—that a quorum is likely to be present only when a recorded teller vote or a roll-call vote is in progress—they have taken different approaches to the right of one-fifth of the members present to require such a vote. In the Senate, a roll-call vote normally may be demanded by the absolute minimum number of members that is constitutionally permissible (eleven, or one-fifth of the minimum quorum of fifty-one Senators).[21] In fact, obtaining a roll-call vote on a question in the Senate approaches the status of an individual right; rarely do Senators withhold their consent when one of their colleagues asks for the yeas and nays. By

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[17] See Senate Procedure, supra note 11, at 833.

[18] See, e.g., 130 Cong. Rec. S12,138 (daily ed. Sept. 27, 1984) (statement of Senator Baker).

[19] W. Oleszek, supra note 3, at 206-07.

[20] Rule XV, cl. 6, House Rules and Manual, supra note 5, at 505-08.

[21] Senate Procedure, supra note 11, at 1142. In this context, the theory of the presumptive quorum becomes the theory of the presumptive *minimal* quorum. Allowing eleven Senators to demand a roll-call vote assumes that fifty-one Senators are present, but no more than that number.

contrast, the House conducts much of its business in Committee of the Whole, in which neither the roll-call nor the quorum provision of Article I applies. Yea-and-nay votes take place only in the House, and it was not until 1971 that members could demand the functional equivalent—a recorded teller vote—on amendments in Committee of the Whole (in which a quorum is only one-hundred members).[22] It was by choice, not in response to a constitutional requirement, that the House permitted publicly-recorded votes on key policy choices made on the floor during the amending process in Committee of the Whole.[23]

Not only have the House and Senate interpreted the few constitutionally-imposed legislative rules in ways which suit their convenience, but the Supreme Court has been reluctant to entertain challenges to these interpretations and superimpose its own judgments.[24] On all other questions of legislative procedure not governed by these few constitutional mandates, each house is the author and judge of "the Rules of its Proceedings," which generally have not been subjects of judicial review. The Supreme Court has been unwilling to involve itself in disputes over whether congressional rules are equitable, or whether they have been interpreted, applied, and enforced

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[22] Rule XXIII, cl. 2, House Rules and Manual, supra note 5, at 602.

[23] On votes taken in the House, not in Committee of the Whole, one-fifth of the minimal possible quorum also may compel a roll-call vote, but this right rarely is invoked. Instead, before the Chair announces the result of a voice or division vote, any member may invoke the quorum requirement and "object to the vote on the ground that a quorum is not present and make a point of order that a quorum is not present." See, e.g., 134 Cong. Rec. H2614 (daily ed. April 27, 1988) (statement of Representative Smith). If the Speaker finds that a quorum is not present, a roll-call vote occurs automatically, which decides the question at the same time it demonstrates the presence of a quorum. This difference in practice between the two houses arises because the Senate normally determines in advance whether to decide a question by roll-call vote, while the House typically puts each question to a voice vote and then proceeds to a roll-call vote if it is demanded or provoked by a point of order.

[24] The quorum provision became most controversial in the 1890s, when Speaker Reed responded to the practice of the "disappearing quorum" by initiating a rule that members present on the floor but failing to vote would be counted to determine the presence of a quorum. As one source explains:

> The Supreme Court upheld this rule in *United States v. Ballin*, [144 U.S. 1 (1892)], saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact.

The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. 113 (1973).

appropriately.[25] In general, the same immunity in practice also attaches to provisions of law which affect only the internal operations of one or both houses; as such, they are "rule-making" provisions which are reviewable or enforceable only to the same extent as other rules.[26] Moreover, a rule-making provision affecting only one house may be amended, repealed, or otherwise superseded by action of that house alone, without recourse to the other house or the President.[27]

Thus, the legislative rules of Congress are essentially endogenous—matters for the House and Senate to decide for themselves and by themselves. The few exogenous, constitutionally-based rules are subject to interpretation and application by each house, and all of its rules of procedure are largely immune from review and veto by any other person or institution. In the same way, it is for the House and Senate each to decide how to create and change its rules, and how, or whether, to enforce them. No outside force compels Congress to abide by its rules. If these rules are enforced rigorously and consistently, it is only because Congress chooses to do so.

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[25] In *Ballin*, the Supreme Court held that neither house may "ignore constitutional restraints or violate fundamental rights." 144 U.S. at 5. The Court continued:

> [T]here should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House. . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

Id. Rarely has the Court found it necessary or appropriate to question whether congressional rules are consistent with these limitations unless the rules and their enforcement affect the rights of individuals or the powers of other entities of government. See, e.g., Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983), cert. denied, 464 U.S. 823 (1983) (affirming dismissal of a challenge by House Republicans to the partisan allocation of committee seats because of separation-of-powers concerns and prudential concerns). See also Comment, A Question of Power: Judicial Review of Congressional Rules of Procedure, 76 Ky. L.J. 597 (1987-88).

[26] The House and Senate sometimes combine changes in legislative procedures and organization with changes in executive branch authorities in the same statutory package. See, e.g., Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974); War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970); and Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (1946). But such provisions that affect only Congress enjoy no more status or permanence than rules adopted by House or Senate resolutions. House Rules and Manual, supra note 5, at 780-81.

[27] House Rules and Manual, supra note 5, at 780-81.

## III. Rules, Precedents, and Practices

The core body of rules in the House and Senate, of course, is their standing rules, which each house adopts independently of the other under its constitutional rule-making authority.[28] As a "continuing body," the Senate considers its standing rules to remain in force from one Congress to the next, unless and until the Senate acts to change them.[29] Senators debated this proposition several times in recent decades in connection with attempts to change the cloture rule, but paragraph 2 of Rule V now provides that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." By contrast, the House is re-constituted every two years, so it formally adopts its standing rules by resolution on the first day of each Congress.[30] In practice, however, this difference is not as great as it might appear, because the House re-adopts the standing rules of the previous Congress with amendments.[31] In some years, these amendments are more extensive and significant than in others, but they do not involve fundamental changes in the framework or premises of the standing rules.

The standing rules of each house are complemented by a much

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[28] Rule-making provisions of law, see supra note 26, are considered here to be part of the corpus of standing rules, although they often are not incorporated into the text of the numbered set of House and Senate rules, and although they are adopted by each house in consultation and coordination with each other.

[29] The Senate also adopts, by resolution or unanimous consent, certain "standing orders." Some standing orders remain in force indefinitely; others are effective only for the duration of a session or Congress. For example, on the first day of each new Congress, the Senate normally creates standing orders for that Congress governing the hour of daily meeting, the length of roll-call votes, the right of Senators to bring measures and committee reports to the desk at times other than during morning business, and the recognition of each party leader to speak during "leader time" at the beginning of each daily meeting. See, e.g., 131 Cong. Rec. S11-12 (daily ed. Jan. 3, 1985).

[30] See, e.g., H.R. Res. 7, 99th Cong., 1st Sess., 131 Cong. Rec. H16-17 (daily ed. Jan. 3, 1985). This situation raises a question for which there is no truly satisfying answer: under what rules does the House consider, debate, and amend its proposed rules? If a procedural disagreement were to arise, the House would be governed by "general parliamentary law." "The general parliamentary law as understood in the House is founded on Jefferson's Manual as modified by the practice of American legislative assemblies, especially of the House of Representatives . . . , but the provisions of the House's accustomed rules are not necessarily followed. . . ." House Rules and Manual, supra note 5, at 25.

[31] As part of the same resolution, the House also re-adopts "applicable provisions of law." See, e.g., H.R. Res. 7, supra note 30. Otherwise any rule-making provisions of statutes enacted during a previous Congress would not continue in effect under the principle that one House cannot bind its successor. See House Rules and Manual, supra note 5, at 780-81.

larger body of precedents, many of which have become so well-established over the years that they have as much weight as the numbered rules themselves.[32] In some cases, these precedents govern essential legislative procedures on which the standing rules are silent.[33] For example, the Senate's standing rules have little to say about the floor amendments that Senators may offer under different parliamentary circumstances, even though these possibilities and prohibitions are at the heart of the amending process. Instead, the "amendment trees," that is, the proper timing and ordering of amendments, derive largely from precedent.[34] The House's standing rules do not clearly authorize the Speaker to decide whether a Representative is to be recognized to call up a measure under suspension of the rules, even though this discretionary power is critical to the contemporary use of the suspension procedure. Again, precedent governs.

In other cases, House and Senate precedents have created procedural rules which are, to greater or lesser degrees, at variance with the standing rules. By precedent, House managers report certain kinds of amendments from conference in technical disagreement, even though clause 2 of Rule XX clearly states that the House should vote instead on whether to authorize its conferees to dispose of each such amendment as part of their report.[35] Also by precedent, the Senate's Presiding Officer gives preference in recognition to the Majority and Minority Leaders,[36] even though Rule XIX provides that the Presiding Officer is to recognize "the Senator who shall first address him."[37] Thus, the precedents not only supplement the standing rules, but sometimes effectively supplant them by ad-

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[32] See Senate Procedure, supra note 11; 1-5 Hinds' Precedents of the House of Representatives of the United States (1907); 6-11 Cannon's Precedents of the House of Representatives of the United States (1936); and 1-8 Deschler's Precedents of the U.S. House of Representatives (1977) [hereinafter Deschler's Precedents].

[33] 1 Deschler's Precedents, supra note 32, at vi-vii. Especially in the Senate, on the other hand, the published precedents as well as the standing rules fail to provide clear and conclusive answers to many questions which evidently have yet to be raised and decided.

[34] On such "amendment trees," see S. Bach, The Amending Process in the Senate (CRS Rep. No. 83-230 1983).

[35] House Rules and Manual, supra note 5, at 560-61. See also S. Bach, Bicameral Conflict and Accommodation in Congressional Procedure (paper presented at the 1981 Annual Meeting of the American Political Science Association) (copy on file in the offices of The Journal of Law & Politics).

[36] Senate Procedure, supra note 11, at 880.

[37] Senate Rules, supra note 12, at 13.

justing their interpretation and application, and thereby overcoming problems they create.

Not all precedents carry equal weight. The most compelling Senate precedents, for example, are those created when the Senators themselves vote on a question of procedure. Precedents created by rulings of the Chair which are not then appealed and either sustained or overruled by majority vote have somewhat less weight because they do not represent an explicit judgment by the ultimate authority, the Senate itself. Of least precedential value are statements of the Chair in response to parliamentary inquiries; no point of order having actually been made, the Chair's response is not a ruling, and so cannot be appealed and submitted to the body for its decision.[38] The House typically does not decide questions of order by majority vote; the Speaker and the Chairman of the Committee of the Whole rule on all points of order, and their decisions are conclusive. In the Senate, on the other hand, the standing rules require that certain questions of order be submitted directly to the Senate for decision, and any Senator can insist that the Senate vote on almost any other procedural question that arises.[39] One consequence is the greater likelihood of inconsistent Senate precedents on very similar questions.

In addition to formal precedents, there are related and at times equally important conventional practices; moreover, the distinction between precedent and practice is not always clear and certain. The preferential right to recognition accorded to the Senate's party leaders is so well-accepted, and so important to the functioning of the Senate, that the Presiding Officer would almost certainly enforce it if it were to be challenged. There are other practices which may not have the same force of precedent, but which are well-established by custom and to which adherence is expected and routine. In the House, for instance, committee members are recognized before other Representatives to propose amendments to bills their committee has reported.[40] In the Senate, only the Majority Leader (or another

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[38] The Senate's published precedents, and sometimes those of the House, recognize these differences by noting the manner in which precedents were created. Senate Procedure, supra note 11, at xi.

[39] Rule XX, Senate Rules, supra note 12, at 14-15. See also Senate Procedure, supra note 11, at 115-18.

[40] L. Deschler & W. Brown, Procedure in the U.S. House of Representatives 635-38 (1982).

Senator acting at his behest or with his concurrence) makes motions or unanimous consent requests to call up matters for floor consideration.[41] The former practice is grounded in the Chair's discretionary power of recognition; the latter depends on the self-restraint of other Senators.[42] Although these practices may not be enforceable as rules, violations of either would be highly unusual.

Finally, there are some conventions of legislative practice which normally are followed, but which may be violated when circumstances warrant. For example, control of the official "papers" normally changes hands when a conference committee completes its work successfully. If the Senate requests a conference, its managers bring the papers into conference; at its conclusion, they turn over the papers to the House conferees and the House then proceeds to vote first on the conference report. Occasionally, however, a combination of political and procedural considerations convince the managers not to adhere to this convention.[43] Their decision may cause some controversy, but it is not subject to formal challenge.[44] Similarly, the majority floor manager of a special rule in the House routinely yields control of half of his hour for debate to a minority party member of the Rules Committee. He or she need not, but this practice is so well-established that his failure to do so inevitably would provoke harsh criticism. On the other hand, the same expectation is not nearly as strong when the House considers other matters under the hour rule, including amendments to special rules.[45]

In sum, the legislative procedures by which Congress governs itself may be created either by adoption of standing rules or by creation of precedent, and some precedents are more conclusive and binding than others. Furthermore, the codified standing rules and precedents are complemented by a variety of conventional practices, some of which undoubtedly would be enforceable as precedent.

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[41] W. Oleszek, supra note 3, at 177-200.

[42] L. Deschler & W. Brown, supra note 40, at 635-38; W. Oleszek, supra note 3, at 177-200.

[43] See S. Bach, Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses 50 (CRS Rep. No. 84-214 1984) [hereinafter Resolving Legislative Differences]. See generally House Rules and Manual, supra note 5, at 258-70.

[44] Resolving Legislative Differences, supra note 43, at 50.

[45] Rule XIV, cl. 2, provides in part that "no Member shall occupy more than one hour in debate on any question in the House or in committee, except as further provided in this rule." House Rules and Manual, supra note 5, at 489.

Other practices may not be enforceable, but they can be as sacrosanct to members as the standing rules themselves, while still other practices may be violated as circumstances dictate. The distinctions between rules and practices, between requirements and courtesies, can be somewhat easier to draw in the abstract than in the daily life of the House and Senate.

## IV. Enforcing Legislative Rules

Although the legislative procedures of the House and Senate often do involve complex, variable, and sometimes uncertain relationships among standing rules, precedents, and customary practices, it remains generally true that each house's standing rules and precedents are enforceable, if it chooses to enforce them. But both houses also recognize that they require some procedural flexibility—that adhering strictly to a uniform set of procedures, enforceable under all circumstances, would be unduly rigid and confining. Under the standing rules of the House and Senate, therefore, the same rules of procedure do not always apply. Each house has available to it alternative sets of parliamentary ground rules by which it may act on a measure. To know whether a certain motion or other action will be in order in either house, it is first necessary to know or anticipate which set of ground rules will be in force at the time it is proposed.

Whenever the Senate considers a bill, for instance, it always has the option of voting to invoke cloture, thereby triggering different rules affecting such matters as the limitations on debate, the germaneness of amendments, and the authority of the Presiding Officer.[46] The Senate thereby shifts in mid-course from one set of procedures to another. The more Senators insist on asserting their rights under "normal" Senate procedure, the more likely they are to find those rights diminished by a successful cloture vote.

In the House, the same bill can be considered under any of five

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[46] Rule XXII, Senate Rules, supra note 12, at 15-16. Even when the same rule of procedure appears to apply in two different situations, it may be interpreted differently. For instance, the Senate often requires that amendments to a measure be germane when it is considered under a unanimous consent agreement limiting debate, and all amendments to a measure must be germane when it is considered under cloture; committee amendments are deemed to be germane per se in the first circumstance but not in the second.

different sets of procedures—by call of the Consent Calendar, under suspension of the rules, in the House, in Committee of the Whole, or in the hybrid form known as "the House as in Committee of the Whole."[47] Each of these packages of procedures is grounded in the standing rules, and each has different effects on Representatives' rights and opportunities, especially to debate and propose amendments. In some cases, a bill that the House has debated and failed to pass under one set of ground rules may be considered anew under others.[48]

The rules of each house also include mechanisms by which it can vote to waive or suspend virtually any of its other legislative rules. House Rule XXVII, on suspension of the rules, not only establishes different debate, amendment, and voting rules, but it also insulates bills considered in this way from points of order under any other rule. The power of the Rules Committee is based primarily on its authority to recommend sets of procedural ground rules for considering individual bills, including explicit or implicit waivers of points of order, that are specially suited to their political and parliamentary circumstances.[49] Although rarely invoked, Senate Rule V provides for motions to suspend any other rule so long as the Senator proposing to make such a motion gives the Senate one day's notice in writing of his intention.[50] In addition, the Budget Act authorizes the Senate to waive any point of order, by motion or resolution, to which the Act might give rise.[51] Some of the Senate's standing rules also acknowledge explicitly that they may be set aside by unanimous consent, giving formal recognition to the principle that a rule has no force if no Senator wishes to enforce it.[52]

The House and Senate are free to set aside most rules, or create

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[47] S. Bach, Patterns of Floor Consideration in the House of Representatives (paper presented at the Center for American Political Studies of Harvard University, December 1988) (copy on file in the offices of The Journal of Law & Politics).

[48] 6 Deschler's Precedents, supra note 32, at 264-265. See also S. Bach, Suspension of the Rules in the House of Representatives 10 (CRS Rep. No. 86-103 1986).

[49] Rule XI, cl. 4(b), House Rules and Manual, supra note 5, at 453-54. The only legislative rules the Rules Committee cannot propose to waive by special rule are clause 4 of Rule XVI, providing for the motion to recommit, and clause 7 of Rule XXIV, providing for Calendar Wednesday. Id.

[50] Rule V, ¶ 1, Senate Rules, supra note 12, at 4.

[51] See, e.g., Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 904(b), 88 Stat. 297 (1974).

[52] See, e.g., Rule XIII, Senate Rules, supra note 12, at 8.

temporary new rules, by unanimous consent, and they do so daily. There are only a few, relatively minor, House rules that cannot be waived by unanimous consent.[53] The Speaker can decline to entertain unanimous consent requests, but that is merely his way of objecting, just as any other member can object from the floor, once a request has been stated.[54] From routine requests to make one-minute or special-order speeches to requests with greater legislative significance—to concur in Senate amendments, for instance—unanimous consent arrangements ease and expedite the work of the House by avoiding the need to comply with cumbersome requirements of the rules.[55] Clause I of Rule XX, for example, provides for a motion to go to conference, if the motion is made by direction of the committee (or committees) of jurisdiction, which requires a meeting of the committee to authorize the motion. If members were to object regularly to achieving the same end by unanimous consent, the House might be sorely tempted to ease the requirements of the rule.

However important unanimous consent arrangements may be in the House, they are far more important to the Senate. Lacking any equivalent of special rules that it can approve by majority vote, the Senate can avoid prolonged and seemingly interminable debate only by invoking cloture or by enforcing voluntary self-restraint through unanimous consent agreements. By unanimous consent, the Senate arranges its schedule, agrees to consider measures, limits debate, requires that amendments be germane, and, in so many other ways, sets aside requirements of its rules that prove inappropriate, unnecessary, or inconvenient. The complex unanimous consent agree-

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[53] For example, clause 1 of Rule XXXII names those who may be on the floor while the House is in session, and prohibits the Speaker from entertaining unanimous consent requests to extend the same privilege to others. House Rules and Manual, supra note 5, at 664-65.

[54] On December 15, 1981, the Speaker announced the policy of declining to entertain any unanimous consent request to consider a measure that has not been reported from committee unless the leaders of both parties have agreed to the request. See House Rules and Manual, supra note 5, at 488. This policy responded to a rash of unanimous consent requests by Republicans for immediate consideration of controversial measures, such as a constitutional amendment requiring a balanced budget. Most Democrats evidently believed that these requests were inspired primarily by the desire to compel one of them to object, and so to hold him publicly responsible for preventing the measure from being considered.

[55] Speakers have used their power of recognition to control and regulate such common unanimous consent arrangements. See, e.g., 133 Cong. Rec. H532 (daily ed. Feb. 4, 1987) (announcement by the Speaker of guidelines for recognition of unanimous consent requests). See also note 54 supra.

ments known as "time agreements"—limiting debate and containing other provisions similar to those of special rules—have become so entrenched as conventional and essential practice that there are precedents governing their interpretation and enforcement, and a generally accepted understanding of what it means to propose such an agreement in "the usual form."[56] The standing rules even attempt to govern the Senate's unanimous consent practices. Paragraph 4 of Rule XII states that

> [n]o request by a Senator for unanimous consent for the taking of a final vote on a specified date upon the passage of a bill or joint resolution shall be submitted to the Senate for agreement thereto until[,] after a quorum call ordered for the purpose by the Presiding Officer, it shall be disclosed that a quorum of the Senate is present. . . .[57]

But the Senate often waives this requirement—by unanimous consent.[58]

Whatever procedures are being followed by the House or Senate, whatever legislative rules are in effect, its members retain the power to enforce them or not, as they choose.[59] They cannot depend on the Chair to ensure enforcement of the rules. It is usually the responsibility of each Representative to protect his or her own interests by identifying proposed actions that would violate the rules and by making appropriate points of order at the proper times.[60] The Speaker and the Chairman of the Committee of the Whole take the initiative occasionally, ruling amendments and other motions out of order without a Representative first having made a point of order. But they are most likely to do so when necessary to protect the integrity or orderliness of the process, not to protect the rights of the individual member. For example, the Speaker normally refuses to entertain a motion that is not made at the proper time; similarly, the Chairman can be expected to prevent a member from offering

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[56] Senate Procedure, supra note 11, at 1072-74.

[57] Senate Rules, supra note 12, at 8.

[58] Senate Procedure, supra note 11, at 861.

[59] In most respects, however, the Committee of the Whole cannot alter, even by unanimous consent, the terms of the special rule under which it is considering a bill. House Rules and Manual, supra note 5, at 606-07.

[60] Id. at 308-09.

one first-degree amendment[61] while another is pending. In either case, the alternative would be an unacceptable degree of confusion and uncertainty on the floor. On the other hand, neither Presiding Officer rules that an amendment is non-germane unless a member first makes that point of order.[62]

Much the same situation prevails in the Senate, though its Presiding Officer is somewhat more likely to intervene, advising a Senator that his amendment is not in order or responding to a parliamentary inquiry as to whether a motion would be in order or whether a point of order would be sustained. Several recent precedents require the Presiding Officer to take the initiative in ruling certain amendments and other actions out of order—for example, if he or she considers them dilatory—when the Senate is operating under cloture.[63] Nonetheless, the general principle remains that the rules must be invoked before they will be enforced, so the House and Senate are free to evade their rules simply by ignoring them.

Rulings of the Chair in the House or Senate may be appealed by any member and usually reversed by a majority vote of the membership.[64] Each house thereby retains ultimate control over the "Rules of its Proceedings." In this respect, however, the practices of the House differ radically from those of the Senate. As already noted, the Chair rules on all points of order in the House, and his rulings are rarely appealed and are never overruled in contemporary practice.[65] In addition, the Chair enjoys the prerogative to make some decisions, especially governing recognition, which cannot be challenged by a point of order and so cannot be submitted to a vote. On the other hand, as already noted, the standing rules and precedents of the Senate provide for Senators to vote on certain questions of order without there first being a ruling by the Chair—on whether an amendment to a general appropriations bill

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[61] An amendment to the original text of a bill is usually called a "first-degree amendment." An amendment to that amendment is normally called a "second-degree amendment." Usually any part of the original text of a bill is open to amendment only in two degrees. Senate Procedure, supra note 11, at 57-61.

[62] House Rules and Manual, supra note 5, at 308-09.

[63] Senate Procedure, supra note 11, at 246-51.

[64] Rule I, cl. 4, House Rules and Manual, supra note 5, at 307; Rule XX, ¶ 1, Senate Rules, supra note 12, at 15;

[65] See text accompanying note 39 supra.

is germane, for example, or whether a proposed action is constitutional—and allow the Chair to submit other questions directly to the Senate in the same way.[66] Senators also are far less reluctant than Representatives to appeal rulings that the Presiding Officer does make, and far more willing to reverse rulings with which they disagree or which thwart their legislative purposes.[67]

The Senate does not indiscriminately overturn the Chair's rulings, for they are grounded on the expert judgment of the Parliamentarian. Nonetheless, Senators' willingness to do so when a compelling interest arises gives the Senate some procedural flexibility that its legislative rules do not provide. Whenever a ruling is appealed, most Senators appear to base their votes more on policy and political considerations than on a concern for procedural consistency and regularity. Thus, the right to appeal becomes a mechanism for waiving rules by majority vote, when unanimous consent cannot be obtained. This device does not fully compensate for the lack of an equivalent to the special rules reported by the House Rules Committee, which frequently contain waivers of standing rules, but it does create a certain degree of endemic uncertainty about the Senate's legislative procedures. It is one thing to say that a certain motion or amendment is not in order on the Senate floor; it is quite another to say that the Senate will not vote to consider it anyway.

Whenever the Senate creates a new rule, therefore, it realizes that it is binding itself only when and to the extent it wishes to be bound. For a rule to have certain force on the Senate floor, Senators must be willing to accept rulings of their Presiding Officer or be unable to overturn them by majority vote. Historically, however, the Senate has been extremely reluctant to give authority to the Vice President, who presides at his discretion, that a majority of its members cannot reclaim at any time.[68] It was an extraordinary development, therefore, when the Senate adopted amendments to the Budget Act, as part of the Gramm-Rudman-Hollings Act of 1985, that require a vote of three-fifths of all Senators duly chosen and

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[66] Id.

[67] S. Bach, The Appeal of Order: The Senate's Compliance with Its Legislative Rules (paper presented at the 1989 Annual Meeting of the Midwest Political Science Association) (copy on file in the offices of The Journal of Law & Politics).

[68] Id. at 2.

sworn to waive certain procedural prohibitions of the congressional budget process.[69] But the Senate preserved its ultimate recourse by failing to extend the three-fifths requirements to appeals from rulings of the Chair. On the other hand, provisions of the budget reconciliation acts of 1985 and 1986, designed to protect reconciliation measures in the following years from carrying certain kinds of "extraneous," non-budgetary matters, extended the three-fifths requirements to appeals as well as waivers.[70] Only in this way could the Senate adopt a rule with more certain effect than a simple majority of Senators were prepared at any moment to give it.

## V. The Matters in Disagreement

To illustrate some of the implications of this discussion, we may examine the meaning and enforcement of a basic principle affecting the authority of House-Senate conference committees: that the conferees may make recommendations in their report only regarding the matters in disagreement between the two houses. This principle governs both houses and derives from Section XLV of Jefferson's Manual, which states in part that "it is unparliamentary to strike out, at a conference, anything in a bill which hath been agreed and passed by both Houses. . . ."[71] Paragraph 2 of Senate Rule XXVIII states that:

> Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses. If new matter is inserted in the report, or if matter which was agreed to by both Houses is stricken from the bill, a point of order may be made against the report, and if the point of order is sustained, the report is rejected or shall be recom-

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[69] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985).

[70] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390 (1986), as amended by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 7006, 100 Stat. 1874, 1949 (1986). In a similar vein, Senator Byrd has proposed an amendment to the Senate's rules by which three-fifths of the Senators present and voting could require that all amendments to the measure being considered must be germane, and under which the same three-fifths majority would be required to overturn rulings of the Chair on germaneness or to hold amendments germane when the Chair submits such a point of order directly to the Senate. See S. Res. 41, 100th Cong., 1st Sess., 133 Cong. Rec. S588 (daily ed. Jan. 6, 1987) (submission of the resolution "to provide for germaneness or relevancy of amendments").

[71] House Rules and Manual, supra note 5, at 253.

> mitted to the committee of conference if the House of Representatives has not already acted thereon.[72]

Although these prohibitions, and House precedents to much the same effect, seem reasonably clear, they often become difficult to apply because of the common tendency of the House and Senate to go to conference with a bill originally passed by one house and a single amendment from the other which strikes all after the enacting clause of the bill and inserts an entirely different text (generally known as an amendment in the nature of a substitute). In such cases, the two versions may take radically different approaches to the same subject, leaving the conferees to draft a third version, as a compromise between the House and Senate positions, and making it very difficult to specify precisely what matters are in disagreement.[73]

Section 135 of the Legislative Reorganization Act of 1946 addressed this situation by creating a rule applicable to both houses:

> (a) In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees, it shall be in order for the conferees to report a substitute on the same subject matter; but they may not include in the report matter not committed to them by either House. They may, however, include in their report in any such case matter which is a germane modification of subjects in disagreement.
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> (b) In any case in which the conferees violate subsection (a), the conference report shall be subject to a point of order.[74]

From this same starting point, the rules and precedents of the two houses have diverged. In the Senate, the text of Section 135 was incorporated without substantive change into the standing rules as paragraph 3 of Rule XXVIII. However, the precedents governing its interpretation provide a loose standard for enforcement: "[a] conference report may not include new 'matter entirely irrelevant to the subject matter,' not contained in the House- or Senate-passed ver-

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[72] Senate Rules, supra note 12, at 44. The same restrictions apply in the House, but House rules and precedents do not provide for automatic recommittal when the House acts first on a conference report.

[73] Resolving Legislative Differences, supra note 43, at 41-46.

[74] Ch. 753, 60 Stat. 812 (1946). This provision was restated and inserted into the House rules as clause 3 of Rule XXVII.

sions of a measure as distinct from a substitute therefor."[75] In practice, therefore, conference reports may propose to insert new matter without necessarily being subject to a point of order on the Senate floor.

The House, on the other hand, was concerned that the authority of conferees, when confronted with an amendment in the nature of a substitute, should be no greater than necessary.[76] To this end, Section 125(b)(3) of the Legislative Reorganization Act of 1970 amended the 1946 rule by replacing the general prohibition against including new matter with the following specific prohibition:

> [T]he introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement. Moreover, their report shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee.[77]

This attempt at specificity by the House clearly indicates a different and much more restrictive standard of interpretation than the standard of "matter entirely irrelevant" that applies in the Senate.

Thus, when the question arises, "Can the conferees on H.R. 1 insert a new provision in their report, or can they drop a provision on which both houses essentially agree?", the answer depends in part on whether the conference report recommends an alternative to an amendment in the nature of a substitute. If so, the report is probably at far greater risk in the House than in the Senate of having a point of order sustained against it, because of the different ways in which the two houses apply and enforce the same principle.

Even if we assume that point of order would be sustained against the report in one or both houses, we cannot conclude that this prospect effectively limits the conferees' discretion. For it to be an effec-

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[75] Senate Procedure, supra note 11, at 406.

[76] House Rules and Manual, supra note 5, at 648-50.

[77] Rule XXVIII, cl. 3, House Rules and Manual, supra note 5, at 647-48.

tive constraint, the conferees must assume that a member actually is prepared to make the point of order, thereby delaying or preventing enactment of the entire bill. But Senators and, to a somewhat lesser degree, Representatives are not inclined to make points of order against conference reports unless the provision at issue is of pivotal importance. Members generally presume that their conferees have made a good faith effort to reach the best available compromise, and opponents of a bill hesitate to thwart the will of majorities of both houses at this concluding stage of the process.

Of greater importance for this analysis, however, at the means available for circumventing the House and Senate rules limiting conference reports to resolving matters in disagreement, even if one or more members wish to enforce them.[78] If the conferees submit a report which addresses some matter that was not in disagreement, the House may consider the report under suspension of the rules, which waives Rule XXVIII, but requires a two-thirds vote.[79] If this extraordinary majority is not available, the Rules Committee may propose a special rule to waive the point of order, or all points of order, against the report, and the House can adopt the rule by simple majority vote.[80] There are comparable options in the Senate as well, in the less likely event that a point of order would be sustained there. By a two-thirds vote, the Senate can suspend its Rule XXVIII, but the more likely recourse is for a Senator to appeal the Presiding Officer's ruling, and for the Senate to overturn the ruling by majority vote.[81]

The conferees also have two other options, which flow from the fact that the restrictions which apply to a conference report do not apply to an amendment between the houses—a House amendment to a Senate amendment or a Senate amendment to a House amendment. The conferees can include the offending provision in their report, knowing that a point of order will be made and sustained against it, or they can file a conference report in disagreement. In either case, they then can propose the substance of their agreement

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[78] See, e.g., Shanahan, Despite Skeptics, House Eases Way for Tax Bill, 44 Cong. Q. Weekly Rep. 2118 (Sept. 13, 1986).

[79] House Rules and Manual, supra note 5, at 633.

[80] Resolving Legislative Differences, supra note 43, at 54.

[81] S. Bach, Points of Order and Appeals in the Senate (CRS Rep. No. 89-69 1989).

as an amendment between the houses.[82]

Assume, for example, that the conferees file a report on a House Bill and a Senate substitute for the entire text of that bill. If the Speaker sustains a point of order against their report when it comes to the House floor, the House then has before it the Senate amendment to its bill. To dispose of it, the majority floor manager may move that the House recede from its disagreement to the Senate amendment, and concur in it with a House amendment consisting of the text of the conference report that has just fallen to the point of order. Alternatively, the conferees can report back to the House and Senate in disagreement, and, after the report has been called up on the House floor, the floor manager can make precisely the same motion. The same options are available to the Senate in the case of a Senate bill and a House substitute for its text.[83] In one of these two ways, the House and Senate conferees can attempt to escape from the rules limiting their authority.[84]

We can conclude, then, that the "matters in disagreement" rule is an enforceable constraint on House and Senate conferees only to the extent they expect it to be enforced on them and only if they do not adopt a strategy to circumvent it. The rule is an enforceable constraint on the House and Senate as a whole only if members choose not to waive it by majority vote. If no such rule existed, the two houses still could enforce the principle simply by voting against any conference report that violated it. The existence of the rule is important because it creates expectations about the kinds of agree-

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[82] There are precedents in both houses governing this process which provide that each house has one opportunity to amend the other's amendments. When the Senate amends a House bill, for example, the House may amend the Senate amendment and the Senate may respond with a further amendment of its own to the House amendment. The House amendment to the Senate amendment is considered a first-degree amendment; the Senate amendment to that House amendment is in the second degree. Third-degree amendments between the houses are not in order in either the House or the Senate. In the case of the 1985 budget reconciliation bill, however, the House adopted a special rule by which it also agreed to a third-degree amendment between the houses, and the Senate reacted by agreeing without objection to a fourth-degree amendment. On these rules and events, see Resolving Legislative Differences, supra note 43; Bach, Procedures for Reaching Legislative Agreement: A Case Study of H.R. 3128, the Consolidated Omnibus Budget Reconciliation Act of 1985 (CRS Rep. No. 86-705 1986).

[83] Resolving Legislative Differences, supra note 43, at 53-70.

[84] These options do entail certain risks and dangers to which conference reports are not subject. For example, amendments between the houses are amendable on the House and Senate floor, whereas conference reports are not.

ments that the House and Senate should reach in conference; agreements which violate these expectations require more justification than those which do not. But at least as important as the rule itself is the political dynamic of bicameral negotiations which directs the members of both houses, and especially their conferees, toward compromises between the positions they already have taken.

## VI. Germaneness in Two Contexts

Just as the House and Senate need not enforce fixed sets of legislative rules, and may choose from alternative packages of procedures by which to be governed and even set aside the rules under which they are supposed to be operating, the two houses also do not enforce all their rules with the same rigor and abide by them with the same consistency.

Not all rules have the same weight in practice. Some are almost always enforced, such as the prohibition in both houses against third-degree amendments.[85] Others are waived frequently or even routinely, such as the provisions of House Rule XXI governing unauthorized appropriations and legislation on general appropriations bills.[86] And still others rarely are followed, such as the requirement of Senate Rule XIV that bills be read twice on different legislative days before being referred to committee.[87] Congress' enforcement practices depend both on the rule that is at issue and the circumstances under which the rule may be invoked.[88]

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[85] See Senate Procedure, supra note 11, at 76-77.

[86] See e.g., 134 Cong. Rec. H10,367 (daily ed. Oct. 19, 1988)(waiver of provisions of House Rule XXI). See generally L. Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51 (1979).

[87] Some rules may not be enforceable at all. Clause 1(a)(1) of House Rule XI, for example, states that, in general, "[t]he Rules of the House are the rules of its committees and subcommittees so far as applicable. . . ." Clause 2(a) also requires each standing committee to adopt written rules governing its procedures that "shall be not inconsistent with the Rules of the House or with those provisions of law having the force and effect of Rules of the House. . . ." However, these clauses do not give committees clear and unambiguous guidance because "the Rules of the House" permit certain motions, such as the previous question, and involve other procedures under some circumstances but not under others. This allows each committee significant latitude to decide on its own procedures, especially during markups, which often are not codified in the written committee rules and which differ from one committee to the next. Rule XI also imposes a number of specific requirements on the procedures of its committees without making it clear if and how these requirements may be enforced on the floor if violated in committee.

[88] For instance, the approach of a deadline—such as the beginning of a new fiscal year, the date by

Consider, for example, the Senate's rules governing the germaneness of amendments. For most purposes, there is no germaneness requirement under the rules, though the Senate often imposes one on itself as part of unanimous consent agreements controlling consideration of individual measures.[89] Its rules do require that amendments must be germane when proposed to general appropriations and budget measures and when offered under cloture.[90] The Senate's consideration in 1984 of a major continuing appropriations resolution, H.J. Res. 648, illustrated dramatically that Senators are much more inclined to enforce the rule under cloture than during floor action on appropriations bills.

In that year, Senators failed to obtain Senate floor consideration of a bill responding to the recent Supreme Court decision, *Grove City College v. Bell*,[91] which limited the reach of the sexual discrimination prohibitions of the Civil Rights Act.[92] Under these circumstances, they did what comes so naturally to Senators: they offered their proposal as a floor amendment to the continuing resolution.[93] The debate over civil rights policy then became entangled with other, equally controversial issues, and with concern for enforcement of the germaneness requirement.

On September 27, the Senate found itself confronted with first-degree and second-degree amendments to the continuing resolution, each dealing with the *Grove City* case. The Minority Leader, Senator Byrd, offered the text of the civil rights bill as a first-degree substitute for text in the continuing resolution which the Appropri-

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which the public debt ceiling must be raised, or sine die adjournment—creates familiar problems and temptations for members of both houses. On the one hand, waiving rules for purposes such as adding non-germane amendments to bills may delay their passage, complicate negotiations with the other house, and so jeopardize their timely enactment. On the other hand, deadlines make urgent bills particularly tempting vehicles for non-germane amendments, and can make members more willing to set aside whatever rules are necessary in order to complete the process.

[89] S.S. Smith and M. Flathman, Managing the Senate Floor: Complex Unanimous Consent Agreements Since the 1950s (paper presented at the 1989 Annual Meeting of the Midwest Political Science Association) (copy on file in the offices of The Journal of Law & Politics).

[90] Rules XVI and XXII, Senate Rules, supra note 12, at 10-11, 15-16.

[91] 465 U.S. 555 (1984) (holding that Title IX's ban on sex discrimination applies to virtually every school and college in the country but, within each institution, only to specific programs receiving federal aid).

[92] 'Grove City' Rights Bill Shelved by Senate, 50 Cong. Q. Almanac 239, 241 (1984).

[93] Id.

ations Committee's first amendment had proposed to strike.[94] This amendment had merely proposed to strike the designation "Title I."[95] Byrd immediately filed a cloture motion on his amendment, and then proposed a substitute for it;[96] his substitute was essentially identical to the first-degree amendment, and presumably was offered to protect the *Grove City* proposal against another, hostile substitute. Byrd also filed a cloture motion on his second amendment.[97]

The Chairman of the Appropriations Committee, Senator Hatfield, then made a point of order that Byrd's first-degree amendment violated paragraph 4 of Rule XVI, which prohibits legislation on general appropriations bills.[98] This is a point of order on which the Presiding Officer normally rules. Before the Chair ruled, however, Byrd raised "the defense of germaneness."[99] The same rule also requires that amendments to general appropriations bills be germane, and provides for the Senate to vote directly on any question of germaneness, without there first being a ruling by the Chair.[100] Under its precedents, the Senate may consider a legislative amendment to a general appropriations bill if the amendment is germane to some legislative provision that the House already has included in the bill. Underlying the precedent is the contention that the senate should not be precluded from perfecting legislative provisions the House has proposed. Thus, the defense of germaneness is an assertion that, although the amendment at issue may be legislative in character, it is in order under this precedent because it is germane to a legislative provision already in the bill. In practice, however, the Senate has voted to hold amendments germane even when they were not.

The Senate ultimately voted, 51 to 48, that Byrd's first-degree amendment was germane.[101] A majority evidently wanted to con-

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[94] 130 Cong. Rec. S12,133 (daily ed. Sept. 27, 1984) (statement of Senator Byrd offering amendment no. 5508, "The Civil Rights Act of 1984").

[95] Id. at S12,124.

[96] Id. at S12,135.

[97] Id. at S12,136.

[98] Id. See Senate Rules, supra note 12, at 11.

[99] 130 Cong. Rec. at S12,137-38.

[100] Senate Rules, supra note 12, at 11.

[101] 130 Cong. Rec. at S12,167.

sider the civil rights amendment even though it was not germane. Immediately thereafter, the Majority Leader, Senator Baker, offered a perfecting amendment[102] to the first Byrd amendment that proposed to add to it the text of a tuition tax credit bill.[103] Taking advantage of his right to preferential recognition, Baker also offered, in succession, the text of a gun control bill as a perfecting amendment to the provision Byrd's first-degree amendment proposed to strike,[104] and the text of a school busing bill as a second-degree amendment to the gun control amendment.[105] Senator Hatch, the Chairman of the Labor and Human Resources Committee, and an opponent of Byrd's amendments, then filed cloture on the gun control amendment.[106] On the following day, Baker submitted a cloture motion on the original Appropriations Committee amendment, and Byrd filed new cloture motions on each of his *Grove City* amendments.[107] Finally, Byrd also filed cloture on the original committee amendment.[108]

At this stage, then, there were six amendments on the Senate floor, and a total of seven cloture motions had been filed. If three-fifths of the Senate voted for any of the cloture motions, the effect would be to limit further debate on the clotured amendment and to require that amendments to it be germane, including amendments that had been offered but on which the Senate had not yet voted.

On September 29th, the first cloture motion matured, and the Senate voted, 92 to 4, to invoke cloture on Byrd's first-degree *Grove City* amendment.[109] One effect was to impose a germaneness requirement on amendments to the first Byrd amendment and on amendments to the provision for which his amendment was a sub-

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[102] In this context, a perfecting amendment proposes to make some change in the text to which it is directed without replacing that text in its entirety.

[103] 130 Cong. Rec. at S12,167.

[104] Id. at S12,170.

[105] Id. at S12,173. While the Senate is considering an amendment in the form of a motion to strike, a first-degree substitute for the language proposed to be stricken is in order, and that amendment is subject to both a second-degree substitute amendment and a second-degree perfecting amendment. Moreover, the language proposed to be stricken is perfectible in the first and second degrees. See The Amending Process in the Senate, supra note 34.

[106] Id. at S12,175.

[107] 130 Cong. Rec. S12,279 (daily ed. Sept. 28, 1984).

[108] Id. at S12,282.

[109] 130 Cong. Rec. S12,413 (daily ed. Sept. 29, 1984).

stitute—namely, the tuition tax credit, gun control and school busing amendments. Under a recently-established precedent, the Presiding Officer is required to rule amendments out of order as non-germane, without a point of order being made from the floor, when the Senate is operating under cloture. Consequently, the Chair held that the school busing amendment automatically fell because it was not germane.[110] Although this amendment clearly was non-germane, Hatch appealed the ruling of the Chair.[111] Baker then moved to table the Hatch appeal, even though he had offered the busing amendment for Hatch, and his motion prevailed, 55 to 39, thereby sustaining the ruling of the Chair.[112] Subsequently, the Chair also held that the gun control amendment was non-germane.[113] Senator McClure appealed that ruling and Baker moved to table that appeal.[114] This time, however, the Senate voted, 31 to 63, against Baker's motion, indicating that a majority of Senators probably would vote to consider the gun control amendment even though it was not germane.[115]

When the Senate returned to this procedural knot on October 1st, it reversed one of its earlier decisions when it voted, 60 to 37, to reconsider the vote by which it had tabled the Hatch appeal.[116] Then on reconsideration it voted, 41 to 56, against tabling the appeal.[117] The Senate also voted, 20 to 77, against reconsidering its refusal to table McClure's appeal.[118] The votes re-opened the possibility that the Senate might vote to overrule the Chair and hold the school busing and gun control amendments germane under cloture in order to consider them. The votes also created the possibility of doing serious and lasting damage to the Senate's germaneness

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[110] Id. at S12,414.

[111] Id.

[112] Id.

[113] Id. at S12,421.

[114] Id.

[115] Id. at S12,422.

[116] 130 Cong. Rec. S12,520-21 (daily ed. Oct. 1, 1984).

[117] Id. at S12,523.

[118] Id. at S12,523-24. One reason for these votes was to accommodate Senators who had voted against their policy preferences in order to sustain one or both rulings of the Chair. These Senators now could offset, and compensate for, their politically awkward votes without fundamentally altering the procedural situation. Even after these votes, the ultimate disposition of both appeals remained for the Senate to decide.

procedures.

On the following day, however, the Senate avoided this danger when it agreed, by a vote of 53 to 45, to a motion by Senator Packwood, a supporter of the *Grove City* amendments, to table the Byrd first-degree amendment (and both amendments to it).[119] It also agreed, by voice vote, to McClure's motion to table the gun control amendment he had supported, thereby tabling the school busing amendment as well.[120] And so the Senate withdrew from the brink. Having already voted to set aside the germaneness requirement under one set of circumstances, Senators voted to comply with it under another—but during consideration of the same measure.

This brief recital of events cannot convey any sense of the intense and prolonged debate enveloping them, though the unusually elaborate series of procedural moves and counter-moves suggests how much importance Senators attached to the situation. The tactics employed were not unique. Confronted with a non-germane amendment dealing with the *Grove City* decision that was likely to win, its opponents responded by offering their own non-germane amendments--on tuition tax credits, gun control, and school busing—that also might pass, and over the opposition of many supporters of the *Grove City* amendment. The opponents of the latter amendment presumably hoped to create a political stalemate that would convince both sides to withdraw their proposals, and kill the *Grove City* legislation for the duration of the 98th Congress. In this they ultimately succeeded, but only by provoking a severe test of the Senate's cloture rule.

The supporters of the gun control and school busing amendments argued that, since the Senate had voted that the *Grove City* amendment was germane when it clearly was not, there was no reason the Senate should not also vote that their amendments also were germane. The meaning of germaneness under Senate precedents had become irrelevant, of course;[121] at issue was whether the Senate

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[119] 130 Cong. Rec. S12,643 (daily ed. Oct. 2, 1984).

[120] Id.

[121] The vote by which the Senate held Byrd's amendment germane did not create precedent in the sense of expanding the standard by which the Parliamentarian would advise Senators about the germaneness of future amendments. Had the Senate overruled the Chair on the gun control or school busing amendment or both, it would not have invalidated the requirement for germane amendments under cloture. The votes created precedent only with respect to the Senate's adherence to its germane-

would set aside the germaneness rule to consider major, controversial amendments. But the two party leaders, among others, realized that more was at stake. They realized that the vote on the germaneness of the *Grove City* amendment was not at all equivalent to the votes on the germaneness of the gun control and school busing amendments, and that nothing less than the value of the Senate's cloture procedure was in jeopardy.

When the Senate voted that the *Grove City* amendment was germane, it was following a familiar practice of setting aside the germaneness requirement of Rule XVI in order to use a general appropriations measure as a convenient and attractive vehicle for carrying a legislative proposal, especially one that the President would be likely to veto if it were not attached to essential funding legislation. The vote of 51 to 48 was much more a reflection of support for the merits of the amendment than a judgment about its germaneness.[122] But opponents of the amendment knew that they retained their most powerful weapon, their right to filibuster the amendment, and the narrow margin of the germaneness vote suggested that a filibuster probably would succeed, eventually. In other words, when the Senate waives the germaneness rule on general appropriations measures, it agrees to consider an amendment, but the vote does not protect the amendment from the procedures and prerogatives which give Senate minorities such effective leverage.

When the Senate votes to consider a non-germane amendment under cloture, on the other hand, it creates an entirely different and much more dangerous situation. By invoking cloture on a bill or amendment, the Senate agrees to limit further debate on it and all amendments to it. The amendments offered under cloture are protected against filibusters, but the Senators voting for cloture are prepared to give up the right of extended debate because they know that only germane amendments will be in order. Without this assurance, they might never vote for cloture, because they would risk

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ness rules. Ironically, the Senate's standards of germaneness, when they apply, are quite narrow, and considerably narrower than the House's standards. If the criteria were somewhat more generous, Senators might be more willing to require germaneness.

[122] Some Senators who might have voted for the amendment under other circumstances may have voted against holding it germane for fear that it would delay enactment of the urgently-needed continuing resolution—which is precisely what happened.

being confronted with amendments on any conceivable subject without the protection of the filibuster. The Senate never has been willing to invoke cloture by simple majority vote, but this is precisely what would result if, once cloture is invoked, fifty-one Senators were prepared to vote to consider a non-germane amendment by overturning the ruling of the Presiding Officer. Only twice before had the Senate voted to overrule the Chair and consider non-germane amendments under cloture.[123] If the Senate were to do so again, that "precedent" could put the Senate "back to the situation before 1917," according to Senator Baker, "where we become a body that legislates by trial and by physical endurance. . . ."[124]

But even more was at stake than the effect of cloture and the willingness of Senators to invoke it. The Senate does not resort to cloture very often, but it relies heavily on time agreements which, like cloture, often foreclose the possibility of filibusters by limiting debate on a bill and each amendment to it and require that amendments be germane.[125] If the Senate were to begin waiving the germaneness rule under cloture, why not under unanimous consent agreements as well? If Senators lost confidence that their colleagues would enforce Rule XXII's germaneness requirement, they also might become more reluctant to enter into time agreements for fear that, under these circumstances too, they would confront non-germane amendments without the protection of their right to filibuster. If Senators came to doubt that their colleagues would adhere to the terms of time agreements, life on the Senate floor truly might become, with apologies to Thomas Hobbes, nasty, brutish, and long.

In unravelling from the procedural tangle they had created, Senators may have been concerned with preserving the sanctity of their rules. It is more likely, however, that most of them were motivated by enlightened self-interest.[126] Cloture and time agreements are

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[123] 130 Cong. Rec. S12,418 (daily ed. Sept. 29, 1984) (statement of Senator Kennedy).

[124] Id. at S12,416 (statement of Senator Baker).

[125] Cloture now imposes a ceiling on the total amount of time for considering bill, all amendments to it, and all motions relating to it. Time agreements normally do not. See Rule XXII, ¶ 2, Senate Rules, supra note 12, at 15-16.

[126] It also should be noted that the supporters of the tuition tax credit, gun control, and school busing amendments had less at stake than the proponents of the *Grove City* amendment. The former wished to win, of course, but they had reason to doubt that their amendments would survive a conference with the House. The latter, on the other hand, knew that the House already had passed a bill dealing with the *Grove City* issue, so their prospects were far more promising if their amendment

highly useful alternatives to the normal operation of the Senate's legislative rules. They expedite business by limiting debate, and they also protect against the unexpected, in the form of non-germane amendments. It is ultimately in the interests of every Senator, as well as the Senate as an institution, for them to be able to impose constraints on themselves, with confidence that the constraints will be enforced. And the debate limits imposed by cloture and time agreements go to the very heart of the Senate. Senators may be willing to ignore, waive, or violate most of their rules, but they give up their cherished right to unlimited debate only in return for certain knowledge of what they are gaining in return. Some rules are more important than others, and the debate rules are most important of all.

## VII. Conclusion

The legislative process has some of the elements of a game: different players—some in concert, some in conflict—making moves and expending resources to win. Characteristically, however, the rules of games are fixed. The rules of the legislative process in Congress are not. There often are different rules for different circumstances, and there always are rules for changing the rules. By one means or another, a majority of Representatives or Senators can waive or somehow circumvent almost any of their rules, or amend or repeal them. Members make decisions about applying their rules, from day to day and from bill to bill, and these decisions about procedure often are intended to affect decisions about policy. The key to congressional rules is not enforcement, but compliance and choice.

Yet there are ways in which things usually are done, and recognizable times and reasons for doing things differently. There are patterns of compliance and non-compliance, and conditions under which some rules are likely to be followed and others set aside. Representatives and Senators enforce their rules on themselves only because most of them believe it is in their interests to do so. Some rules are routinely ignored or waived because members find they do

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prevailed.

not effectively serve individual or institutional purposes. Other rules normally are followed because they normally are useful. And still others rarely are violated because they help to preserve the institution and protect its continuing ability to function. In Congress, the force of its rules ultimately depends on the norms for complying with them.

Congress' rules are not wholly constants or variables in the legislative process. They are not constants because they often provide alternatives ways of reaching the same end, and because the House and Senate may, and frequently do, set one or more of the rules aside. On the other hand, the legislative rules are not all readily manipulable and equally variable. Instead, the likelihood of compliance with congressional rules depends both on the rule at issue and the circumstances under which it is invoked. This variability complicates analysis of the rules. Rather than simply asking what the rules permit and prohibit, it is first necessary to ask whether different rules may be applicable under different conditions, and then to ask how likely the applicable rules are to govern what the House or Senate actually does.

Some of the ways in which the rules can be manipulated, altered, or set aside are more complicated than others—requiring more solidarity, involving greater complexity, and necessitating unusually rapid and effective communication. For these reasons, they are less likely to be successful, and so are less likely to be attempted. Moreover, the likelihood that a rule will be enforced, waived, or supplanted depends in part on whether, or how frequently, the House or Senate has enforced, waived or supplanted it in the past—in much the same way, under much the same circumstances, and for much the same reasons. Manipulating the rules in a particular way lends some legitimacy to the next attempt to do the same thing, by creating a behavioral as well as a parliamentary precedent. Similarly, once members are confronted with a procedural innovation, they are likely to remember it and use it themselves.[127]

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[127] A case in point is the motion to recommit with instructions in the Senate. Such a motion has precedence over pending amendments, and so can be used to secure the first floor vote on whatever amendment is contained in a second-degree perfecting amendment to the instructions. This opportunity has existed for many years but was rarely, if ever, exercised until recently. Now the recommittal motion has become a recognized weapon in Senators' procedural arsenals, and unanimous consent

The variability of congressional compliance with its rules also complicates strategic planning for Representatives and Senators and their staffs. They and their opponents sometimes can choose from among different rules to achieve their purpose. They must attempt to anticipate the strategic choices of the members on the other side of the question, but they cannot assume that the rules effectively determine and limit the available options. There is always the possibility that the House or Senate may waive the rule on which their strategy is predicated—a possibility that is predictably greater in some circumstances than others. Moreover, the key vote may arise, perhaps unexpectedly, on an obscure procedural issue that is difficult to explain quickly to colleagues and cogently to constituents. In fact, it is probably because of the potential complexities and uncertainties surrounding the rules that members of both houses prefer to negotiate whenever possible and to seek procedural advantage only when necessary.

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agreements limiting or prohibiting amendments often contain provisions to protect against it.