BICAMERAL CONFLICT AND ACCOMMODATION IN CONGRESSIONAL PROCEDURE

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ABSTRACT

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To the extent possible, the House of Representatives and the Senate prefer to act independently of each other. On internal administrative and organizational matters, each chamber generally is autonomous. Each chamber seeks to protect its constitutional prerogatives, and bicameral coordination of legislative planning tends to be informal and unsystematic.

The legislative procedures of the House and Senate also differ in a number of fundamental respects. Consequently, procedural conflicts may arise in the process of resolving policy differences. The rules of the House are intended to preserve the authorization-appropriation sequence and to restrict the policy decisions that may be incorporated in general appropriation bills; the Senate allows its members considerably greater latitude in amending spending measures. House rules also require that all amendments be germane; Senate rules impose no such requirement under most circumstances.

As a result, conference agreements may include provisions that violate important principles of House procedure. During the 1920s and 1970s, the House amended its rules to respond to this problem. In both instances, the House sought accommodation rather than confrontation, as it attempted to isolate the conflicts resulting from differences between House and Senate procedures and to cope with these conflicts by means that protect the basic integrity of House proceedings.

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INTRODUCTION

It is generally characteristic of the relations between the House of Representatives and the Senate that the members of one chamber frequently denote the other chamber as the "other body." This indirect form of reference during debate indicates something more than a sense of institutional distance. It suggests also the potential for conflict and the problems of coordination and accommodation that mark bicameral relations in Congress. The precedents of both chambers record instances in which a member has been called to order for referring directly and critically to a member or action of the "other body." 1/ It is considered inappropriate to acknowledge in debate that the decisions of the Senate may be influenced by what has or has not occurred in the House, and conversely. Comity is promoted, and the likelihood of conflict is diminished, by modes of address that are formal, impersonal, and often oblique. 2/

1/ U.S. Congress. House of Representatives. Cannon's Procedure in the House of Representatives. 87th Congress, 2d session. House Document No. 610, 1963, pp. 158-159; U.S. Congress. House of Representatives. Deschler's Procedure in the House of Representatives. (Washington, D.C.: U.S. Government Printing Office, 1979), pp. 646-648; U.S. Congress. Senate. Senate Procedure: Precedents and Practices. 97th Congress, 1st session. Senate Document No. 97-2, pp. 595-597. The indirect form of reference is not enforced strictly; members are most likely to be called to order when their direct references are particularly disparaging.

2/ In the manual of parliamentary practice he prepared while Vice President, Jefferson stated that "(i)t is a breach of order in debate to notice what has been said on the same subject in the other House, or the particular votes or majorities on it there; because the opinion of each House should be left to its own independency, not to be influenced by the proceedings of the other; and the quoting them might beget reflections leading to a misunderstanding between the two Houses." Quoted in George B. Galloway, History of the House of Representatives (New York: Thomas Y. Crowell Company, 1961), pp. 225-226.

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Although linked inextricably by their shared legislative powers, the House and Senate are, in many respects, quite different and separate institutions. Their relations combine the same elements of cooperation, competition, and conflict that characterize relations between the legislative and executive branches. 3/ Cooperation between the House and Senate ultimately is mandated by the constitutional requirement that both chambers must pass the same measure in precisely the same form before it can become law. The potential for competition and conflict, on the other hand, is inherent in the differences in their composition and in the absence of any central coordinating authority. 4/ Institutional differences between the House and Senate are real and important in and of themselves, whether or not exacerbated by differences in policy approaches or partisan control. 5/

At the heart of the matter is the relative autonomy of each chamber. Representatives and Senators are accountable to different constituencies at different intervals. The House and Senate each may "determine the rules of its proceedings" and resolve questions concerning its organization and membership without the concurrence of the other. 6/ No single person or institution has either the formal authority or informal power to organize and direct their actions, however much presidents might wish it were otherwise. Only the electorate has the means to do so, and the electorate usually speaks with many voices, if it speaks at all. The president and the public may attempt to set policy directions and goals for the Congress, but the institutional problems of bicameralism remain for the House and Senate themselves to resolve.

3/ On bicameral relations generally, see, for example, the following: George B. Galloway, The Legislative Process in Congress (New York: Thomas Y. Crowell Company, 1953), pp. 249-259; George H. Haynes, The Senate of the United States (Boston: Houghton Mifflin Company, 1938), vol. 2, pp. 997-1034; Robert Luce, Legislative Procedure (Boston: Houghton Mifflin Company, 1922), pp. 396-415; Neil MacNeil, Forge of Democracy (New York: David McKay Company, Inc., 1963), pp. 370-409; Walter J. Oleszek, "House-Senate Relationships: Comity and Conflict," The Annals of the American Academy of Political and Social Science, vol. 411, January 1974, pp. 75-86; and Warren Weaver, Both Your Houses (New York: Praeger Publishers, 1972), pp. 25-35.

4/ The interest of each chamber in preserving or enhancing its relative position dates to the 1st Congress and the debate over whether Representatives and Senators should receive equal compensation for their service. William Maclay, Sketches of Debate in the First Senate of the United States, in 1789-90-91 (George W. Harris, editor) (Harrisburg: Lane S. Hart Printer and Binder, 1880), pp. 133-138; Louis Fisher, "History of Pay Adjustments for Members of Congress," in Robert W. Hartman and Arnold R. Weber (editors), The Rewards of Public Service (Washington: The Brookings Institution, 1980), pp. 27-29.

5/ Divided party control of the Congress is more the exception than the norm. Since 1881, there have been only seven Congresses in which party control of the House and Senate was divided. Galloway, History of the House of Representatives, op. cit., p. 239.

6/ Article I, Section 5 of the Constitution.

DIMENSIONS OF BICAMERAL RELATIONS

As a general matter, the two chambers have approached their bicameral relations by adopting a policy of non-interference whenever possible and by defending their individual prerogatives and procedures whenever necessary. If an issue can be resolved solely within one chamber, the other chamber normally does not become involved. Bicameral action becomes likely only when actions contemplated or taken by either the House or Senate would have a direct and serious effect on the other.

In most respects, for example, the House and Senate act independently of each other on administrative matters affecting internal congressional management and services. The two chambers maintain separate administrative structures; each selects its own officers, who may or may not coordinate their activities on a case by case basis. The House and Senate each has developed its own disbursing and accounting systems, and there are separate House and Senate Document Rooms within the Capitol building itself. Each chamber has its own stationery store and barber shop and maintains its wing of the Capitol, in addition to its own office buildings. Certain shared functions are mediated; the Architect of the Capitol, for instance, is a presidential appointee, although he is accountable to both chambers. 7/

During the 1970s, each chamber created a body to examine its administration, management, and service functions--the Commission on the Operation of the Senate and the House Commission on Administrative Review. Each of these bodies proposed a wide range of internal changes in chamber operations, including the appointment of a single administrator to coordinate and supervise activities now dispersed among several officers. However, neither commission had the temerity even to suggest that additional economy and efficiency could be achieved by appointing one congressional administrator with bicameral powers and responsibilities. In fact, the prospects for bicameral coordination or consolidation were at best a minor theme in the commissions' reports and recommendations. 8/

7/ U.S. Congress. Senate. Commission on the Operation of the Senate. Senate Administration. (Committee print.) 94th Congress, 2d session; U.S. Congress. House of Representatives. Commission on Administrative Review. Background Information on Administrative Units, Members' Offices, and Committees and Leadership Offices. 95th Congress, 1st session, House Document No. 95-178, June 30, 1977.

8/ U.S. Congress. Senate. Commission on the Operation of the Senate. Toward a Modern Senate. 94th Congress, 2d session, Senate Document No. 94-278; U.S. Congress. House of Representatives. Commission on Administrative Review. Administrative Reorganization and Legislative Management. 95th Congress, 1st session, House Document No. 95-232.

The administrative autonomy of the House and Senate is amply demonstrated by the way in which the annual legislative branch appropriation bill is developed. 9/ Each chamber submits estimates of its own expenses for inclusion in the president's budget. When the appropriation bill is considered first in the House, funds for House operations are included but no funds are provided for the Senate. In turn, the Senate adds appropriations for its activities, but generally does not reconsider any item affecting only the House. Any attempt by one chamber to intervene in funding decisions for the other is almost bound to inspire controversy and contentions that the harmony of bicameral relations is threatened. For instance, the refusal of the House in 1978 to approve funds for constructing a new Senate office building was criticized by some members of the House, as well as by members of the Senate, as a potentially serious disruption of comity. 10/

The House and Senate also act independently of each other in determining their legislative organization. The number and jurisdiction of committees and subcommittees are matters that each chamber decides for itself. The House and Senate standing committee systems are quite similar, but the extent to which they parallel each other does not reflect a deliberate and consistent bicameral policy or effort. 11/ Instead, both chambers have reacted in similar ways to identical pressures—for example, the pressure of events that led to the creation of the Senate Committee on Aeronautical and Space Sciences (later abolished) and the House Committee on Science and Technology after the Sputnik launching, and the pressure of constituency interests that led to the establishment of the House Select Committee on Aging and the Senate Special Committee on Aging.

The creation of these committees, as well as the House and Senate committees on intelligence and small business, may have reflected a belief among some members that parallelism would enhance bicameral coordination. But to the extent that one chamber has reacted to the initiative of the other, it seems more likely that other motivations were dominant: the desire to appear equally responsive to the interest at issue, and the fear that a failure to act would leave the other chamber in a

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9/ For a discussion of the development and content of the legislative branch appropriation bill, see Robert A. Keith, "A Brief Guide to Understanding the Legislative Branch Budget," in U.S. Congress. House of Representatives. Committee on House Administration. Studies Dealing with Budgetary, Staffing and Administrative Activities of the U.S. House of Representatives 1946-1978. 95th Congress, 2d session. (Committee print.) November, 1978, pp. 1-14.

10/ Congressional Quarterly Almanac, vol. 34, 1978 (Washington, D.C.: Congressional Quarterly, Inc., 1979), pp. 70-77.

11/ Parallelism at the subcommittee level is considerably weaker, except in the cases of the House and Senate Committees on Appropriations. Because appropriation bills originate in the House, the Senate has found it convenient, if not necessary, to conform its appropriations subcommittee organization to the division of labor among House appropriations subcommittees. See the discussion in the next section on House and Senate actions with regard to appropriations jurisdictions.

dominant position with respect to that issue. The only committees established in both chambers by joint action since 1946 were the House and Senate Budget Committees, on which the Congress agreed after rejecting proposals for a single joint committee or exclusive reliance on a joint support agency.

The 1965-1966 Joint Committee on the Organization of Congress did make some recommendations to change the House and Senate committee systems and certain modifications ultimately were made by the Legislative Reorganization Act of 1970. But subsequent examinations of committee organization--including memberships and assignments as well as jurisdictions--were conducted independently by one select committee of the Senate and two select committees of the House. The Committee Reform Amendments of 1974, which were stimulated by the work of the 1973-1974 House Select Committee on Committees, directed the House members of the Joint Committee on Congressional Operations to work with their Senate counterparts in an effort to "rationalize the committee jurisdiction between the Houses." 12/ Little or nothing was done, however, to respond to this directive in any systematic way.

The Joint Committee on Congressional Operations was abolished three years later, as were several other joint committees, in response to recommendations by the Senate's Temporary Select Committee to Study the Senate Committee System and its standing Committee on Rules and Administration. In recent decades, both chambers have been leery of joint committees, despite their potential for improving coordination and minimizing duplication of effort. Only one recent joint committee has enjoyed any significant legislative responsibility, and that was the Joint Committee on Atomic Energy which was among those terminated. Of the four joint committees of the 97th Congress, none may report legislation and only the Joint Economic Committee has the potential for affecting policy development in its own right. 13/ Although House and Senate committees or subcommittees do hold joint hearings from time to time, proposals for joint legislative committees (such as a joint committee on energy) have not been well received. Arrangements for reviewing legislation are a matter that each chamber prefers to reserve to itself.

The House and Senate have been quick to react to any indication that one chamber might be intruding on the unique constitutional prerogatives of the other. As early as the 1st Congress, for example, the House asserted its interpretation of the origination clause--that "all bills for raising revenue shall originate in the House of Representatives"--by insisting that this

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12/ U.S. Congress. House of Representatives. Select Committee on Committees. Committee Reform Amendments of 1974. 93rd Congress, 2d session. (Committee print.) pp. 188-189.

13/ The other joint committees are the Joint Committees on Printing and the Library and the Joint Committee on Taxation, the latter providing an expert tax staff for the House Ways and Means Committee and the Senate Finance Committee.

authority extends to spending as well as taxing measures. 14/ This has been the consistent position of the House and one to which the Senate usually accedes in practice, however grudgingly. Senate rules clearly imply, for instance, that the Senate normally acts on amendments to general appropriation bills originating in the House. 15/ Yet as recently as 1962, the Senate adopted a resolution asserting that both chambers may originate appropriations. 16/ And on occasion, the Senate has acted first on a spending or taxing proposal, only to have it returned peremptorily by the House as an infringement on the latter's constitutional prerogative. 17/

14/ Article I, Section 7 of the Constitution. On the debates of the 1st Congress, see Robert P. Williams (editor), The First Congress (New York: Exposition Press, Inc., 1970), pp. 148-172. On interpretations of the origination clause, see Thomas J. Nicola, Parliamentary Law and Procedure Regarding Origination of Revenue Legislation. Report 79-222A of the Congressional Research Service, Library of Congress, Washington, D.C., October 31, 1979; Robert Luce, Legislative Problems (Boston: Houghton Mifflin Company, 1935), pp. 390-432; U.S. Congress. Senate. Precedents Relating to the Privileges of the Senate of the United States. 52nd Congress, 2d session. Senate Mis. Document No. 68, 1893, pp. 282-310; U.S. Congress. Senate. The Supply Bills. 62nd Congress, 2d session. Senate Document No. 872, July 15, 1912; and U.S. Congress. Senate. Committee on Government Operations. The Authority of the Senate to Originate Appropriation Bills. 88th Congress, 1st session. Senate Document No. 17, April 30, 1963.

15/ Senate Rule XVI, on appropriations and amendments to general appropriation bills, consistently refers only to amendments to general appropriation bills, implying that these bills originate in the House and then are subject to amendment by the Senate. On occasion, special appropriation bills have originated in the Senate. However, the right of the House, whether constitutional or traditional, to originate general appropriation as well as revenue measures does not necessarily guarantee the dominance of the House in such matters. The Senate retains the right to amend either type of bill at will, to the point of substituting an entirely different version for the text of a House-passed bill. On occasion, the Senate even has acted first on a revenue bill, but has held its bill at the desk pending receipt of the counterpart House measure, which the Senate then has amended with its own text. In such cases, the right of origination becomes little more than a formality.

16/ Congressional Record, vol. 108, part 17, October 13, 1962, p. 23470; see also Congressional Record, vol. 108, part 10, July 9, 1962, pp. 12898-12918. For a general discussion of the Senate's role in taxing and spending legislation, see Haynes, op. cit., vol. 2, pp. 431-470; and Clara H. Kerr, The Origin and Development of the United States Senate (Ithaca, N.Y.: Andrus & Church, 1895), pp. 68-80.

17/ Deschler's Procedure in the House of Representatives, op. cit., pp. 132-134; Senate Procedure: Precedents and Practices, op. cit., pp. 122-123.

The Senate has been equally vigilant over its constitutional role in giving advice and consent to proposed treaties. From time to time, Senators have expressed dismay that the House might intrude on the Senate's exclusive domain through its action or inaction on legislation necessary to implement treaties to which the Senate had consented. In 1979, some Senators were concerned that the House would pass and then insist on implementing legislation that would either nullify or abrogate provisions of the Panama Canal treaties. 18/ Later that the same year, there were hints that President Carter might submit the SALT II agreement to Congress as an executive agreement, to be approved by majority vote of both chambers, rather than as a treaty. In response, Senate Majority Leader Byrd publicly characterized such a gambit as an "end run around the Senate" that would do violence to the Senate's constitutional prerogative. 19/

In arranging their respective legislative agendas, coordination between the House and Senate tends to be informal and unsystematic, and is influenced by such factors as the relations among the party leaders of the two chambers, the importance of the legislation to be considered, and the pressures of time and impending deadlines. 20/ There is no formal mechanism for bicameral coordination on legislative matters; instead, there are fairly regular consultations among party leaders and their staffs, supplemented by a wider range of irregular contacts among committee leaders and staff on individual issues.

18/ Congressional Quarterly Almanac, vol. 35, 1979(Washington, D.C.: Congressional Quarterly, Inc., 1980), pp. 142-156. See Louis Fisher, The Constitution Between Friends (New York: St. Martin's Press, 1978), pp. 197-204.

19/ Congressional Record (daily edition), August 25, 1978, pp. S14406-S14407. On joint resolutions as alternatives to treaties, see Haynes, op. cit., vol. 2, pp. 633-636. A matter of recent controversy is whether the termination of a treaty may require congressional approval, and whether such approval should take the form of a two-thirds vote of the Senate only or a majority vote of both chambers. With regard to nominations, Representatives may play a part in selecting prospective nominees for federal district judgeships, but not in confirming their nominations. A Department of Justice memorandum on judicial selection procedures, released on March 6, 1981, states that "(w)ith respect to States with no Senators from the majority party, the Attorney General will solicit suggestions and recommendations from the Republican members of the Congressional delegation, who will act in such instances as a group, in lieu of Senate members from their respective States. It is presumed that Congressional members in such cases would consult with the Democratic Senators from their respective States."

20/ See Walter Kravitz, "Relations Between the Senate and the House of Representatives," in U.S. Congress. Senate. Commission on the Operation of the Senate. Policymaking Role of Leadership in the Senate. 94th Congress, 2d session. (Committee print.) pp. 121-138.

Much of the coordination that does seem to occur is attributable largely to the fact that a significant part of the annual legislative agenda is recurring and predictable. General appropriation bills, concurrent budget resolutions, and legislation to re-authorize expiring programs all require action by both chambers annually, and, collectively, these measures consume a considerable share of the time available for floor action each year. Moreover, the Congressional Budget Act and House rules establish a sequence and schedule for action on these measures that impose rather severe constraints on legislative scheduling in the House and Senate if the measures are to be enacted on time. One consequence is that appropriation bills normally should be the dominant concern of the House during June and early July of each year and then should consume most of the Senate's time and attention during the following weeks.

With respect to the more discretionary component of the legislative agenda, coordination becomes most important as adjournment nears and House and Senate leaders must select from among the measures remaining for floor action. Frequent consultations during the closing days of each Congress minimize the danger that increasingly precious floor time will be devoted to measures on which the other chamber is unlikely to act. Especially when the same party controls both chambers, consultation occasionally can promote legislative strategy as well--for example, when it matters which chamber acts first on a pending measure. But like the mandatory agenda, the discretionary agendas of the House and Senate are shaped, in considerable part, by external factors that tend to push both chambers in the same directions without extensive and deliberate internal coordination. Events such as economic fluctuations, international developments, and media investigations all can and do encourage the House and Senate to give priority to the same issues. In addition, of course, the president usually can secure a prominent place on the congressional agenda for his major legislative initiatives and, beyond that, influence the terms of debate by offering proposals to which the Congress reacts.

Along all four of these dimensions, therefore, formal bicameral cooperation and coordination is limited at best. On internal administrative and organizational matters, the House and Senate usually act independently of each other. On constitutional matters, each chamber seeks to protect its unique constitutional powers from intrusion by the other. And in setting their legislative schedules and agendas, the two chambers probably are influenced more by internal constraints and external pressures than by bicameral negotiations.

All this does not necessarily imply, however, that greater and more deliberate bicameral cooperation would be productive in every respect. Administrative centralization might achieve greater economy and efficiency, but each chamber has the ultimate constitutional responsibility for its own operations. Consequently, centralization might result only in the addition of a new layer of congressional bureaucracy. The House and Senate have made similar changes in their committee systems, even though they have not acted jointly. And there is merit to the contention that legislation can benefit from separate consideration by House and Senate committees which examine the same proposal from somewhat different jurisdictional perspectives. Constitutional powers should be protected, even though there may be differences over their meaning and exercise. And substantial legislative coordination

occurs naturally and informally, even in the absence of mechanisms such as a joint leadership council.

For purposes of this analysis, therefore, the point to be emphasized is the considerable autonomy of the House and Senate from each other, and the preference of each chamber to conduct its business without interference by the other.

THE PROCEDURAL DIMENSION

There is a fifth, procedural, dimension of bicameral relations in terms of which the House and Senate must reach a state of conflict or accommodation. 21/ Each chamber may act initially on a measure according to its own rules, precedents, and practices but, eventually, both must reach agreement if legislation is to be enacted. Full chamber autonomy is impossible; bicameralism requires that legislative differences between the chambers be resolved. Out of the process of resolution is to emerge legislation that is acceptable to both chambers.

Reconciling House-Senate differences necessarily is a ticklish business, if only because each chamber, cherishing its autonomy, must accept the co-equal status of the other. 22/ Each chamber must sacrifice preferred positions

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21/ From 1794 to 1876, a series of joint rules were in force, dealing with such matters as the transmittal of papers between the chambers and to the President. Since these rules were allowed to lapse, there have been no joint rules, despite occasional proposals for joint rules governing conference committee procedures. (Ada C. McCown, The Congressional Conference Committee (New York: Columbia University Press, 1927), pp. 100-101.)

22/ That conference committees can become a sensitive focal point of bicameral relations was amply demonstrated in 1962, when conference negotiations on general appropriation bills were delayed for months because of a dispute involving both institutional protocol and constitutional interpretation. House conferees adopted the position that, contrary to the usual practice of the time, half of the conferences on general appropriation bills should take place on the House side of the Capitol and should be chaired by Representatives. In turn, Senate conferees contended that half of the same bills should originate in the Senate; the House, however, insisted on its exclusive prerogative to originate general appropriation bills. Before the close of the 1962 session, the Senate originated an appropriation measure that the House returned with a resolution contending that the Senate action was an infringement on the privileges of the House. The Senate responded by adopting a resolution reasserting its claim to the right to originate appropriations. Congressional Record, vol. 108, part 10, July 9, 1962, pp. 12898-12918; Congressional Record, vol. 108, part 17, October 10, 1962, pp. 22980-22981, 23014-23015, October 13, 1962, p. 23470. See also, Richard F. Fenno, Jr., The Power of the Purse (Boston: Little, Brown, and Company, 1966), pp. 635-641; Stephen Horn, Unused Power (Washington: The Brookings Institution, 1970), pp. 165-173; Jeffrey L. Pressman, House vs. Senate: Conflict in the Appropriations Process (New Haven: Yale University Press, 1966), pp. 1-11; James C. Kirby, Jr., "The House-Senate Appropriations Dispute in the 87th Congress," reprinted in Congressional Record, vol. 109, part 1, January 28, 1963, pp. 1212-1213; Congressional Quarterly Almanac, 87th Congress, 2d session (Washington: Congressional Quarterly, Inc., 1962), pp. 144-146.

or face the prospect of stalemate. 23/ The conference committee is a device well-suited to the purpose because it permits free discussion and negotiation in a relatively informal setting, in comparison with formal floor action by one chamber on the amendments of the other. Positions can be explored, options can be presented, and tradeoffs can be proposed without foreclosing other possible compromises until full agreement is reached or the conferees become deadlocked. If the conference is successful, a single all-encompassing agreement then can be presented to both chambers with the support of a majority of both the House conferees and the Senate conferees. 24/

Although there are few constraints on how conferees may go about reaching agreement, both chambers do impose some limitations on what the conferees may decide. The authority of the conference committee is limited to the matters in disagreement between the two chambers. Consequently, the conferees may not eliminate a provision that was included in both versions of the bill that was sent to conference, nor may they include matter that was not submitted to the conference by either chamber. Moreover, in resolving each matter in disagreement, the conferees' discretion is limited by the scope of the disagreement. The conference resolution of each matter must fall within the

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23/ The 1962 conflict, mentioned in the preceding note, may have had its roots, in part, in a 1961 dispute over a supplemental appropriation bill. As the end of the session approached, the House acted on the partial conference report and various amendments in disagreement, and proceeded to adjourn sine die. (See the discussion of procedures in the next section.) This left the Senate with the choice between accepting the House position on several controversial items or adjourning without enacting the necessary appropriations. The bill was enacted, but the bitterness that remained in the Senate probably contributed to the rigidity of the positions taken in the following year. Congressional Record, vol. 107, part 16, September 26, 1961, pp. 21387-21397, 21518-21528.

24/ Among the general discussions of conference committees and the process of resolving House-Senate differences are the following: Lewis A. Froman, Jr., The Congressional Process (Boston: Little, Brown and Company, 1967), pp. 141-168; Galloway, The Legislative Process in Congress, op. cit., pp. 316-325; Bertram M. Gross, The Legislative Struggle (New York: McGraw-Hill Book Company, Inc., 1953), pp. 317-327; McCown, op. cit.; Walter J. Oleszek, "Conference Committee Procedure and Reform" in U.S. Congress. Senate. Temporary Select Committee to Study the Senate Committee System. Appendix to the Second Report, with Recommendations. (Washington: U.S. Government Printing Office, 1977), pp. 35-48; Walter J. Oleszek, Congressional Procedures and the Policy Process (Washington: Congressional Quarterly Press, 1978), pp. 181-193; Gilbert Steiner, The Congressional Conference Committee (Urbana, Illinois: The University of Illinois Press, 1951); David J. Vogler, The Third House (Evanston, Illinois: Northwestern University Press, 1971); and W.F. Willoughby, Principles of Legislative Organization and Administrat (Washington: The Brookings Institution, 1934), pp. 417-427. On appropriations conferences specifically, see Fenno, op. cit., pp. 616-678; and Pressman, op. cit.

bounds of the House position at one extreme and the Senate position at the other. 25/ These constraints on the substance of conference agreements help to ensure that the conferees will produce a true compromise of outstanding disagreements between the House and Senate. 26/ Moreover, bicameral harmony is promoted by the fact that both House conferees and Senate conferees are subject to these constraints in more or less equal measure.

For most purposes, each chamber is not affected by the rules and precedents under which the other reaches the position that it submits to conference. What is important is the substance of the two policy positions and how the conferees propose to reconcile them. The fundamental differences in the legislative processes of the House and the Senate normally do not matter so long as both chambers pass the same measure in one form or another. There are at least two circumstances, however, in which the procedural differences between the chambers become important. Under either of these circumstances, House and Senate conferees may reach agreements that fall within the scope of the matters submitted to them for resolution, but that nevertheless conflict with basic principles of legislative procedure in the House. When this occurs, the results of the process of policy accommodation can become the subject of institutional conflict.

25/ Conferees enjoy the greatest latitude when presented with two entirely different versions of a bill (i.e., when one chamber agrees to an amendment in the nature of a substitute for the text of the other chamber). In such cases, conferees may agree to a germane third version of the bill--a conference substitute--because the text of the bill as a whole is technically a single matter in disagreement. The Legislative Reorganization Acts of 1946 and 1970 included provisions to control the content of conference substitutes and restrict them to the issues presented to the conference by one chamber or the other.

26/ Attempts to measure the relative influence of each chamber in conference ultimately must be inconclusive. For example, a comparison of the conference report on a bill with the House and Senate versions of the bill may reveal the number of instances in which each chamber acceded to the position of the other (if the differences are discrete), but it cannot reveal the relative importance of each matter in disagreement, nor the number of items taken to conference either in order to expedite initial floor action and increase support for initial passage of the bill or to offer greater latitude in conference negotiations. A Senate floor manager, for instance, may accept another Senator's floor amendment, whether germane or not, to avoid prolonged debate and to attact the latter's support for the bill, but without any intention of insisting on the amendment in conference. The floor manager also may accept one or more amendments for the purpose of increasing the Senate's bargaining opportunities and leverage in conference.

Restrictions on General Appropriations

Through their respective rules, both the House and the Senate have attempted to segregate spending decisions from other legislative actions. 27/ In one respect, this separation takes the form of a two-stage funding sequence: first, the enactment of an authorization statute that establishes or continues a federal agency, program, or policy, and second, enactment of an appropriation bill that permits funds to be spent or obligated to carry out the purposes of the authorization. 28/ In another respect, the separation is manifested in rules that generally prohibit the inclusion in most appropriation bills of provisions that change existing law--i.e., that change the agency, program, or policy for which an appropriation is made--and that prohibit the inclusion by the House of appropriations in bills not primarily for that purpose. 29/

These restrictions began to develop even before the House and Senate each created its separate Committee on Appropriations in the 1860s. 30/ In 1837,

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27/ The House and Senate rules discussed in this section apply to general appropriation bills--primarily the thirteen annual appropriation bills for funding most federal agencies and activities. Under House precedents, appropriation bills for single purposes and continuing resolutions are not general appropriation bills. In the Senate, a continuing resolution has been held to be a general appropriation measure. (Senate Procedure: Precedents and Practices, op. cit., pp. 127-128.) The applicable House and Senate procedures and their consequences are discussed in Louis Fisher, The Authorization-Appropriations Process: Formal Rules and Informal Practices. Report No. 79-161G of the Congressional Research Service, Library of Congress, Washington, D.C., August 1, 1979.

28/ This separation is limited by exceptions in House and Senate rules (to be discussed later in this section), by waivers of House rules recommended by the Rules Committee or by suspension of the rules, and by devices such as entitlements that may effectively bypass the appropriation process. In addition, the innovative use of reconciliation procedures in 1980 and 1981 ultimately may have a profound effect on the entire funding sequence.

29/ There is no prohibition in Senate rules against including appropriations in legislative measures. However, the likelihood of this occurring is limited by the House interpretation of the origination clause.

30/ The issue of legislating on appropriation bills arose as early as 1806. Senator William Plumer included the following entry for April 22, 1806, in his journal: "Appropriations for an Indian treaty is lost. The House annexed two paragraphs rendering it penal for any person to settle on the lands purchased of the Indians, unless the settlers had title under the United States—and authorized the President to raise the militia against them. This was designed by John Randolph to prevent the Yazou claimants from entering. 'Tis abominable to tack such provisions to an appropriation law . . . . Tis a good provision in the constitution of Maryland that prohibits their Legislature from adding any thing to an appropriation law." Everett Somerville Brown (editor), William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807 (New York: The Macmillan Company, 1923), p. 490.

the House adopted a new rule stating that "(n)o appropriation shall be reported in such general appropriation bills, or be in order as an amendment thereto, for any expenditure not previously authorized by law." 31/ This rule was modified during the following year to include an exception for "such public works and objects as are already in progress and for the contingencies for carrying on the several departments of the government," 32/ and remained in force in this form until 1876. During debate in that year on a further change in the rule, Speaker Kerr noted that it had been construed to prohibit "an amendment to a general appropriation bill which changes an existing law," in addition to prohibiting most unauthorized appropriations. 33/

To clarify and modify the effect of the rule, Representative William Holman of Indiana proposed, and the House adopted, a revision that struck the exception for "contingencies" and added the following clause: 34/

> Nor shall any provision in any such bill or amendment thereto, changing existing law, be in order except such as, being germane to the subject-matter of the bill, shall retrench expenditures.

This clause, which became known as the "Holman rule," established in House rules the principle that "changes in existing law" (or "legislation," as such changes usually are denoted) should not be made in general appropriation bills, but also permitted an exception: that changes in existing law may be proposed and included if they are certain to retrench or reduce federal expenditures. During the general rules revision of 1880, the Holman Rule was revised to limit the means by which retrenchments might be made, unless proposed by the committee with jurisdiction over the existing law to be changed. 35/ Thereafter, the rule was dropped, re-adopted, and dropped again before being adopted in 1911 in its present form. 36/ In the rules of the House for the 97th Congress, clause 2 of Rule XXI reads as follows:

31/ Asher Hinds and Clarence M. Cannon, Hinds' and Cannon's Precedents of the House of Representatives (Washington: U.S. Government Printing Office, 1907 and 1936), vol. 4, sec. 3578, p. 383; Congressional Globe, vol. 5, September 14, 1837, p. 31.

32/ Hinds' and Cannon's Precedents, op. cit., vol. 4, sec. 3578, p. 383.

33/ Congressional Record, vol. 4, part 1, January 17, 1876, p. 445.

34/ Ibid., pp. 445-557.

35/ Congressional Record, vol. 10, parts 1 and 2, February 12, 1880, pp. 851-862, February 17, 1880, pp. 954-958, February 19, 1880, pp. 1015-1021.

36/ Hinds' and Cannon's Precedents, op. cit., vol. 7, sec. 1125, pp. 198-199.

> No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, or by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill: Provided, That it shall be in order further to amend such bill upon the report of the committee or any joint commission authorized by law or the House Members of any such commission having jurisdiction of the subject matter of such amendment, which amendment being germane to the subject matter of the bill shall retrench expenditures.

Thus, the prohibition in House rules against making changes in existing law as part of general appropriation bills was modified to permit certain forms of retrenchment provisions and amendments. In addition, the operation of the rule has been modified through a long series of precedents which permit legislative propositions in such bills in the form of "limitations," frequently described as "legislative riders." This second exception, which has never been stated in House rules themselves, derives from the premise that the House is not obligated to appropriate for every authorized agency, program, or purpose. Consequently, the House may choose not to appropriate for some part or aspect of a federal entity or activity, by means of a provision that limits the purposes for which an appropriation may be used. Such a limitation technically does not change existing law; instead, it limits the uses of money appropriated to implement existing law. 37/

Many rulings have been made in the House that attempt to distinguish between limitations and legislation (changes in existing law). 38/ For example, a limitation may restrict executive discretion, but the restriction may not impose new duties or affirmative directions upon the official charged with enforcing the restriction. Imposing a new responsibility constitutes a change in existing law; limiting the exercise of an existing responsibility does not. By the same token, the limitation must apply only to the funds appropriated by the act in which the limitation appears; it may not apply to the use of funds made available by other appropriation acts for the same fiscal year or for

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37/ Obviously, this technical distinction can be empty in practice. If no funds are appropriated to implement some provision of existing law, the provision may lack effective force.

38/ For example, see Deschler's Procedure in the House of Representatives, op. cit., pp. 404-420; and Hinds' and Cannon's Precedents, op. cit., vol. 4, pp. 617-689, and vol. 7, pp. 597-711.

later fiscal years. A limitation does not change existing law because its effect is not permanent. The effect of the limitation is temporary--i.e., for the duration of the fiscal year for which the appropriation is provided. 39/ Such distinctions as these, established as House precedents, indicate that limitations can be a useful, though a rather uncertain and inflexible, device for the House to affect the administration of national policy. 40/

Before 1920, therefore, it had become established in the House that (1) a general appropriation bill may not be considered until all the appropriations in the bill have been authorized by law, (2) that provisions of and amendments to a general appropriation bill may not change existing law, but (3) that certain changes in existing law may be made (under the Holman rule) if they are certain to reduce Federal expenditures, and (4) that temporary controls on the implementation of existing law may be made under the precedents permitting limitations. 41/

A similar evolution has occurred in the development of Senate rules and precedents. 42/ In 1850, thirteen years after the comparable House action, the Senate imposed some constraints on appropriations for unauthorized purposes by adopting a new rule that read in part: 43/

> No amendment proposing an additional appropriation shall be received to any general appropriation bill unless it be made to carry out the provisions of some existing law, or some act or resolution previously passed by the Senate during that session, or in pursuance of an estimate from the head of some of the Departments . . . .

39/ U.S. Congress. House of Representatives. Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, 96th Congress. 95th Congress, 2d session. House Document No. 95-403, pp. 531-536 (hereinafter cited as House Manual).

40/ Walter Kravitz, "Legislation in Appropriation Bills: Procedural Problems in the House of Representatives and Some Options." Report of the Congressional Research Service, Library of Congress, Washington, D.C., July 28, 1977.

41/ House Manual, 65th Congress, 3rd session, pp. 363-377.

42/ On the evolution of the appropriation process in the Senate, see U.S. Congress. Senate. Committee on Appropriations: 100th Anniversary, 1867-1967. 90th Congress, 1st session, Senate Document No. 21, 1967.

43/ Congressional Globe, vol. 23, December 19, 1850, p. 94. Note that this Senate rule dealt only with appropriation amendments. Notwithstanding its position on the constitutional question, the Senate acknowledged in its rule that general appropriation bills would continue to originate in the House and then be subject to amendment by the Senate.

In contrast to the House prohibition against unauthorized appropriations, which made an exception only for public works in progress and, briefly, for other contingencies, this Senate rule permitted amendments to appropriate for unauthorized purposes if the authorization had been approved by the Senate during the same session or if the appropriation had been requested by the appropriate executive branch official. Consequently, House appropriation bills could be amended in the Senate to include provisions that would not have been in order in the House.

Two years later, the rule of 1850 was amended to permit an unauthorized appropriation to be considered if "moved by direction of a standing committee of the Senate." 44/ In explaining this proposal, Senator Badger of North Carolina argued that this addition would give Senators the same discretion enjoyed by their colleagues in the House: 45/

> (W)here is the Senate in regard to these appropriation bills? They originate in the House of Representatives. The committees of the House put what amendments they please upon them. They come here to the Senate, and, though every standing committee of ours may concur in the propriety of making an amendment, and though every member of this body may concur in its propriety, you cannot move an amendment making an additional appropriation. Now, if the Senator from Indiana [Senator Bright, who had spoken against the proposal] is willing to sit here as a mere register of the decrees of the House of Representatives, I am not.

On June 13, 1854, the rule was modified once more to allow unauthorized appropriations to be proposed by select, as well as standing, committees. 46/

Although the stated purpose of the 1850 rule was to protect the prerogatives of Senators in cases of appropriation bills originating in the House, the developments of 1850-1854 actually gave Senators far greater latitude than Representatives. Whereas the rules of the House bound Representatives rather strictly to the sequence of the authorization-appropriation process, the Senate allowed its members to propose new or increased appropriations even if the House had not voted on the authorization or merely if the appropriation were recommended by any one of the Senate's committees, including its Committee on Appropriations. In effect, Senate rules did not (and do not) constrain the Appropriations Committee at all; it might recommend appropriation amendments at will, whether authorized or not.

44/ Congressional Globe, vol. 24, part 2, May 7, 1852, pp. 1285-1287.

45/ Ibid., p. 1286.

46/ Congressional Globe, vol. 28, part 2, June 13, 1854, pp. 1380-1381.

In 1877, a year after the House adopted the first version of the Holman rule, the Senate debated a general revision of its rules, including those governing action on appropriation bills. In addition to re-adopting a slightly changed version of the rule of 1850-1854, the Senate adopted a new rule prohibiting legislation on general appropriation bills but omitting the Holman exception for retrenchments: 47/

> No amendment which proposes general legislation shall be received to any general appropriation bill; nor shall any amendment not germane or relevant to the subject-matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto . . . .

During the brief debate, no one challenged the desirability of separating legislation from appropriations, but several Senators asked if adopting the proposed rule would not put the Senate at a disadvantage vis-a-vis the House. 48/ However, John Sherman of Ohio and William Allison of Iowa both noted that, with the adoption of the Holman rule, the House could include most legislation in its appropriation bills only by suspending its rules, which requires a two-thirds vote. Moreover, Senator Ferry of Michigan argued that the new Senate rule might encourage the House to abide by its rules as well: 49/

> The Senator from Ohio has stated that the House is more restricted than the Senate. If so, then we have not traveled as far as the House; but if they should overleap the barrier and send us legislation on appropriation bills we shall by our rule be inhibited from doing that

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47/ Congressional Record, vol. 5, January 15, 1877, pp. 627-628. Note that this rule also imposed a germaneness requirement on amendments to general appropriation bills. The differences between the two chambers regarding germaneness are discussed in the next section.

48/ "Prior to 1855, there had been no instance of important general legislation being attached to appropriation bills, though for the preceding ten years unimportant legislation had been passed in that way. In that year the tariff bill was added to an appropriation bill, and from that time on such a course of procedure became very common. Mr. Sherman, speaking of the practice in the Fortieth Congress, said: 'Almost every legislative act changes an existing law, and the House rule forbids that being done on the appropriation bills; but in the Senate we have never practiced upon that. On the contrary, we seek the appropriation bills, sometimes, not only to carry convenient amendments, but to assert great principles; and I might go to many instances in the history of the government where the Senate has attached important legislative provisions to appropriation bills, and has presented them in that way forcibly to the country.'" Kerr, op. cit., p. 78.

49/ Congressional Record, vol. 5, January 15, 1877, p. 628. Senator Ferry evidently expected that the Senate would vote to strike from a House general appropriation bill any legislative provision that would not have been in order as a Senate amendment.

> and send it back to the House stricken out, and the House will appreciate the force of the rule of the Senate and yield to it doubtless.

During the next revision of Senate rules in 1884, the rules of 1850-1854 and 1877 regarding appropriation amendments were combined into a new Rule XVI which remained in force when the 66th Congress convened in 1919. 50/

Although the Senate did not provide for changes in existing law in the form of retrenchments, it did accept the same logic as the House with respect to limitations. Like the House, the Senate did not provide explicitly for limitations in its rules at this time. 51/ However, Senate precedents include an "open door" policy that has the effect of giving Senators greater discretion than Representatives in affecting the application of existing law. Limitations originating in the Senate are subject to restrictions generally comparable to those applicable in the House. But the Senate concluded that a limitation included in a general appropriation bill by the House opened the door to full consideration by the Senate of the policy question at issue. Therefore, Senate precedents permit Senators to offer any germane amendment to a House-initiated limitation (or retrenchment), including amendments that constitute legislation under Senate precedents governing limitations proposed in the Senate. 52/

This was essentially the situation that prevailed under House and Senate rules and precedents when the Congress began consideration of what became the Budget and Accounting Act of 1921. Both chambers restricted proposals to make unauthorized appropriations. House rules included a strict prohibition that could be waived only by unanimous consent, a two-thirds vote to suspend the rules, or adoption of a special rule proposed by the Rules Committee. Senate rules, on the other hand, permitted amendments for unauthorized appropriations if the amendment met one of several conditions--for example, if it was to carry out an authorization passed by the Senate during that session or if it

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50/ Kerr contends that the House rule of 1876 and the Senate rule of 1877 were not effective in ending the practice of attaching legislation to the general appropriation bills. She quotes James Blaine as commenting in 1879 that there had been more legislation on appropriation bills since the adoption of the Senate rule than in the twenty previous years. Kerr, op. cit., pp. 79-80.

51/ See note 64, infra.

52/ Senate Procedure: Precedents and Practices, op. cit., pp. 129-134. Riddick quotes Vice President Thomas Marshall as having ruled that: "notwithstanding the rule of the Senate to the effect that general legislation may not be attached to an appropriation bill, still when the House of Representatives opens the door and proceeds to enter upon a field of general legislation which has to do with a subject of this character, the Chair is going to rule . . . that the House having opened the door the Senate of the United States can walk through the door and pursue the field." Floyd M. Riddick, The United States Congress: Organization and Procedure (Manassas, Virginia: National Capitol Publishers, Inc., 1949), p. 367. See also Congressional Record, vol. 90, part 3, March 24, 1944, pp. 3037-3051.

was recommended by any Senate committee, incuding the Appropriations Committee. In effect, the permissive exceptions in the Senate rule were as important as the prohibition to which the exceptions applied. With respect to the inclusion of legislation in general appropriation bills, both chambers prohibited amendments to change existing law, but both made exceptions for limitation amendments. The House also included in its rules an additional exception for retrenchments under the Holman rule. The Senate did not allow this exception, but it did offer the freedom to propose all germane amendments to legislative provisions originating in the House, whether retrenchments or limitations.

The combined effect of these two sets of rules and precedents was to permit Senators to propose significant amendments that would have been ruled out of order if offered in the House. If such amendments were accepted by the Senate and submitted to conference, each then constituted a matter in disagreement between the chambers that the House and Senate conferees could include in their conference report without violating the restrictions on their discretion. Because House rules governing unauthorized appropriations and legislation in general appropriation bills only applied during initial House floor action, no point of order would lie against a Senate amendment or conference report provision that violated either provision of House Rule XXI.

This situation posed a dilemma for the House. Conference reports are package settlements of outstanding differences. As such, they are subject to acceptance or rejection, but they may not be amended by either the House or the Senate. Rejection of a conference report means either the death of the legislation (which both chambers already have voted to pass in one form or another) or another effort to reach a different and more acceptable agreement. Consequently, the pressures were great to accept conference reports even if the House, in doing so, had to accept Senate provisions that were inconsistent with House rules. These pressures were (and remain) particularly strong in the case of conference reports on general appropriation bills that must be passed, preferably before the beginning of the new fiscal year, if the federal government is to continue to function.

The choices confronting the House, therefore, were all unpalatable: to insist on the principles embodied in its rules at the risk of losing the legislation, to return to conference at the risk of damaging delays and uncertainties for government funding, or to abandon at Senate insistence a cardinal principle of House procedure--the separation of spending and policy decisions.

This discussion has carried the development of House and Senate procedures to the end of the second decade of this century, because the years 1919-1921 marked a watershed in federal budgeting and spending practices. In 1920, the Congress passed a bill to establish a national budget system, only to have it vetoed by President Wilson who held that his constitutional powers were violated by the bill's provisions for a General Accounting Office whose head was not to be subject to removal by the President. During the following year, a revised bill was signed into law by President Harding. This Budget and Accounting Act created the Bureau of the Budget as well as the GAO, and, most

importantly, directed the President to prepare and submit to Congress a consolidated, annual budget proposal in lieu of the separate and independent requests for funds that previously had been submitted by agency and department heads.

As this legislation was being developed and perfected, the House and Senate also recognized the need for changes in their own organization and procedure for the same purpose: to achieve a more unified and coordinated approach to budgetary decisions (with the expectation that consolidation would promote economy). The primary concern in both chambers was the development of the annual general appropriation bills and the desirability for vesting sole responsibility for these bills with the House and Senate Committees on Appropriations.

It was not until 1865 in the House and 1867 in the Senate that the House Ways and Means Committee and the Senate Finance Committee were divested of their responsibility for appropriations legislation, retaining only their jurisdiction over revenue measures. In 1865, the House established the Committee on Appropriations and gave it jurisdiction over most of the major spending bills; the Senate followed suit two years later. In 1879-1880 and 1885, however, the House decentralized its appropriation process by giving control of eight of the thirteen regular appropriation bills to other House committees, so that, for example, the Agriculture and Naval Affairs Committees were vested with the authority to develop the agricultural and naval appropriation bills respectively. 53/ In 1899, the Senate made comparable changes in the rules governing its committee system.

In 1920, at the same time the Congress was developing legislation to improve fiscal policy-making within the executive branch, the House sought the same goal in its own operations. 54/ For this purpose, the House voted on June 1, 1920, to adopt H. Res. 324, reconsolidating jurisdiction over most appropriation

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53/ Writing in 1879, James Garfield, a former chairman of the Appropriations Committee, anticipated this development and related it to the consequences of adoption of the Holman rule: "Perhaps the most reprehensible method connected with appropriation bills has resulted from a change of one of the rules of the House, made in 1876, by which any general legislation germane to a bill may be in order if it retrenches expenditures. The construction recently given to this amended rule has resulted in putting a great mass of general legislation upon the appropriation bills, and has so overloaded the committee in charge of them as to render it quite impossible for its members to devote sufficient attention to the details of the appropriations proper. If this rule be continued in force, it will be likely to break down the Committee on Appropriations, and disperse the annual bills to several committees, so that the legislation on that subject will not be managed by any one committee, nor in accordance with any general and comprehensive plan." James A. Garfield, "National Appropriations and Misappropriations," The North American Review, No. 271, June, 1879, p. 586.

54/ On these developments, see George Rothwell Brown, The Leadership of Congress (Indianapolis: The Bobbs-Merrill Company, 1922), pp. 225-240.

bills in the hands of the Appropriations Committee. 55/ In addition, this resolution made a significant change in House rules affecting conference reports on these bills. Specifically, H. Res. 324 added the following new clause 2 to House Rule XX: 56/

> No amendment of the Senate to a general appropriation bill which would be in violation of the provisions of clause 2 of Rule XXI, if said amendment had originated in the House, nor any amendment of the Senate providing for an appropriation upon any bill other than a general appropriation bill, shall be agreed to by the managers on the part of the House unless specific authority to agree to such amendment shall be first given by the House by a separate vote on every such amendment.

The provisions of clause 2 of Rule XXI, of course, were the rules barring proposals for unauthorized appropriations and for changes in existing law (other than limitations and retrenchments) during consideration of general appropriation bills.

This rules change was barely mentioned during the debate on H. Res. 324, 57/ nor was it discussed in any detail in the committee report accompanying the resolution. 58/ The question of jurisdictional reconsolidation monopolized the the interest of Representatives, both as it affected the coordination of House spending decisions and as it affected the relative influence of the Appropriations Committee and the various authorizing committees. Nonetheless, the reasons for changing Rule XX are clear from the discussion above of the evolution of applicable House and Senate procedures, and were summarized several years after adoption of the resolution by two leading scholars of the time: 59/

> The practice of executive departments desiring appropriations not authorized by existing law, and thus debarred in the House, had been to get such items inserted by the Senate. This method sometimes involved scant scrutiny of the purposes for which the money was to be used. Legislative "riders," too, had been attached to appropriation bills by the Senate. The House rules permit this practice only if such provisions reduce expenditures.

55/ Congressional Record, vol. 59, part 8, June 1, 1920, pp. 8102-8121.

56/ Ibid., p. 8109.

57/ Ibid., pp. 8102-8121.

58/ U.S. Congress. House of Representatives. National Budget System--Changes in the Rules of the House. 66th Congress, 1st session. House Report No. 373, October 11, 1919.

59/ Paul DeWitt Hasbrouck, Party Government in the House of Representatives (New York: The Macmillan Company, 1927), p. 16; Willoughby, op. cit., pp. 510-511.

> One of the most serious abuses of the old pre-budget system was the practice which prevailed in both Houses, but especially in the Senate, of attaching to general appropriation bills, not merely minor clauses but, at times, whole bills of a general legislative character. The motives inducing this action were twofold. As it is essential that the general appropriation bills be considered and passed if provision is to be made for the conduct of the government, and as these bills have high priority the attachment to them of other measures ensured their consideration. Secondly, the attachment of such measures to the general appropriation bills made it exceedingly difficult for the President to express his disapproval of them, since he could only do so by vetoing the entire bill, a step which might seriously interfere with due provision for the financial needs of the government and which consequently he would be exceedingly loath to take.

On its face, the new clause of Rule XX did not make the provisions of Rule XXI applicable to Senate amendments or conference reports, nor did it affect the indivisibility of conference reports which prevented the House from eliminating conference report provisions offensive to Rule XXI. Instead, the 1920 rule allowed a point of order to be made against a conference report that included a Senate amendment (or a modification of such an amendment) that would have violated Rule XXI if it had been proposed in the House, unless the House first voted to permit House conferees to accept the offending amendment. In this way, Representatives could vote on a Senate unauthorized appropriation or legislative provision and determine whether they were willing to allow House conferees to accept it.

Almost immediately, however, the practice of the House began to diverge from the letter of the new rule, although the practical consequences for the general appropriation bills remained essentially unchanged. Instead of seeking separate House votes before reaching agreement in conference, House conferees began to report offending Senate amendments separately--as amendments in technical disagreement--a practice that continues to this day. 60/

When confronted with a Senate amendment for legislative or unauthorized purposes which House conferees wish or are compelled to accept, they report back with a partial conference report and an amendment in technical disagreement. After the House votes to accept the partial conference report, the amendment in technical disagreement is presented to the House. When this occurs, the majority floor manager may move that the House accept the Senate amendment or a modification of it (by means of a motion to recede

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60/ McCown, op. cit., pp. 183-192; House Manual, 66th Congress, p. 356; House Manual, 96th Congress, pp. 522-523; Hinds' and Cannon's Precedents, op. cit., vol. 7, pp. 589-596. The same practice may be used to protect provisions of other conference reports that violate the general restrictions on conferees. However, the frequent use of second chamber substitutes (a device discussed in the next section) and the latitude this gives to conferees reduce the need for recourse to this practice.

and concur or a motion to recede and concur with an amendment). The House then may vote to accept or reject a conference proposal in violation of Rule XXI, but after the conferees have reached agreement, rather than before, as contemplated by clause 2 of Rule XX. 61/ If the House votes to reject the offending provision, then that single matter is to be resolved without re-opening the other differences reconciled in the partial conference report.

Both the rule of 1920 and this different practice for implementing it represent changes in House procedure to take account of the less constraining procedures of the Senate. The House could have adopted other alternatives--for example, a simple extension of the coverage of Rule XXI to Senate amendments and conference reports. This approach would have permitted a single Representative to make a point of order resulting in the rejection of any Senate amendment or any entire conference report that violated the strictures on general appropriation bills. The result almost certainly would have been open bicameral conflict, leading to immediate stalemate but possibly to an eventual change in Senate rules or practices. Instead, the House chose the path of accommodation, seeking and finding a means to protect its own procedures without challenging the Senate directly. The ultimate necessity for bicameral cooperation undoubtedly made the latter approach the more attractive solution to the problem.

Two years after the adoption of H. Res. 324, the Senate acted to amend its rules. As in the House, the basic issue in controversy during consideration of S. Res. 213 of the 67th Congress was whether jurisdiction over all general appropriation bills should be reconsolidated in the hands of the Committee on Appropriations. 62/ For purposes of this analysis, it is interesting to note that, in addition to arguing the merits of reconsolidation, several proponents of the Senate resolution argued that the 1920 House rules change more or less necessitated comparable action by the Senate. According to Senator Underwood, for example: 63/

> So it seems to me that the only thing which can be done, now that the House has changed its rules, if the Senate is not going into legislative war with the House, is for us to make our rules conform to the rules of the House and provide for these bills all being considered in one committee.

61/ This change in practice may have been intended to preserve the free character of conferences. If the House were to vote to deny its conferees the authority to accept a Senate amendment in violation of the rule, the conferees on the part of the House would be bound not to accept it. The freedom of conferees to exercise their discretion is considered so important that, although the House or Senate may vote to instruct its conferees, such instructions are never binding.

62/ Congressional Record, vol. 62, parts 3 and 4, March 1, 1922, pp. 3199-3207, March 2, 1922, pp. 3279-3291, March 3, 1922, pp. 3331-3344, March 4, 1922, pp. 3375-3392, and March 6, 1922, pp. 3418-3432.

63/ Ibid., p. 3419.

The general appropriation bills would continue to originate in the House. Consequently, the House would determine the scope and form of such measures, and the Senate would have to adjust its committee system to accommodate them.

During the course of their debate, Senators devoted less attention to bicameral relations than to the relations between the Senate Appropriations Committee and the various Senate authorizing committees. For example, S. Res. 213 amended Rule XVI to provide that several members of some authorizing committees would serve as ex officio members of the Appropriations Committee during consideration of the bills funding agencies within their jurisdictions, and that at least one member of the interested authorizing committee also should serve as a conferee on that general appropriation bill. These provisions were intended to ensure sufficient expertise among the Senators developing and then perfecting the general appropriation bills, but also to protect the interests of the authorizing committees and the programs that had been exclusively within their care. Remnants of this system survived until adoption of the Committee System Reorganization Amendments of 1977.

The Senate resolution also addressed the issue of legislation in general appropriation bills, extending the rules then in force. These rules already stated that a point of order could be made against a proposed legislative amendment, including a committee amendment, to a general appropriation bill. In 1922, the Senate increased the sanctions against legislation proposed in a committee amendment. S. Res. 213 added a new paragraph to Rule XVI which stated that, if a point of order is made and sustained against an Appropriations Committee amendment on the grounds that it proposes general legislation, the bill automatically is recommitted to the Committee. 64/ The debate clearly indicates that this provision was motivated less by an abstract interest in preserving the purity of the appropriation process than by the desire to ensure that the remaining legislative jurisdiction of the Senate's authorizing committees would not be subordinated to an all-powerful Appropriations Committee. Again, Senator Underwood clearly articulated the issue: 65/

> I know the temptation, under the stress of circumstances, to write legislation in appropriation bills, because it is the direct method of securing the enactment of law. More than that, I am free to confess that during the period of the war I was guilty myself of adopting such methods, because it was the most expeditious way that legislation should be considered.

64/ Since 1922, the Senate rules concerning appropriations and amendments to general appropriation bills have been modified. For example, a later rules change recognized explicitly that restrictions might be imposed on the expenditure of appropriated funds through limitation amendments, but also prohibited limitations tied to a contingency. However, the Senate rules on this subject, as they now appear in Rule XVI, have remained basically unchanged. U.S. Congress. Senate. Standing Rules of the Senate. 97th Congress, 1st session Senate Document No. 97-10, pp. 11-12.

65/ Congressional Record, vol. 62, part 4, March 6, 1922, p. 3419.

> I think the legislative committees of the Senate should be fully protected in their rights. An amendment of great import put in an appropriation bill would attract general attention, but a vast number of minor items creating new legislation might be inserted in appropriation bills without attracting any attention and at the same time wipe out the viewpoint and the desire and the intent of the legislative committees of the Senate.
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> So I believe it worth while to put a supreme penalty on the Committee on Appropriations reporting new legislation. It is done in this amendment [the pending committee amendment to S. Res. 213]. Under the old rule if they reported new general legislation a point of order could be made on the floor and that item would go out of the bill, but if this rule is adopted and the general appropriations committee [sic] puts new legislation in the bill, they then endanger the passage of the whole bill and no committee will take a chance of that kind.

Interestingly enough, Senators discussed the changes in House rules made two years earlier only in the context of reconsolidating appropriations jurisdiction. The impact on the Senate of the new clause 2 of House Rule XX was not examined. There was some uncertainty and disagreement, however, as to the effect of the new Senate rules on legislative provisions originating in the House. Within a matter of hours after adopting S. Res. 213, the Senate began consideration of the District of Columbia appropriation bill for FY 1923. One of the first amendments to be considered proposed to amend legislative language included in the bill by the House. When a point of order was made against the amendment, there ensued a discussion as to whether sustaining the point of order would result in the rejection of the amendment only or in recommittal of the bill as a whole under the terms of the new Senate rule. Instead, the Presiding Officer overruled the point of order on the ground that S. Res. 213 had not affected the "open door" precedent under which the proscription of Senate legislative amendments does not apply when the amendments are directed to legislative provisions in general appropriation bills as passed by the House. 66/

66/ Ibid., pp. 3434-3439. If a point of order is made on the Senate floor against a proposed amendment on the ground that it would add legislation to a general appropriation bill, the question of germaneness may be raised before the point of order is decided. If the Senate votes that the amendment is germane, it may be considered, notwithstanding the point of order, because the effect of the vote on germaneness is to determine whether or not the amendment falls within the open door policy. In recent years, the Senate occasionally has voted that an amendment was germane even though it did not propose to amend legislative language previously included in the bill by the House. In 1979, however, the Senate supported a ruling by the Presiding Officer that the question of germaneness cannot be raised in defense of a Senate legislative amendment when that amendment is not directed to legislative language in the House version of the bill. If this ruling becomes accepted Senate practice, the open door policy will be limited to its original purpose. Senate Procedure: Precedents and Practices, op. cit., p. 130.

The Germaneness of Amendments

Fifty years later, in 1970, the House again amended its rules to cope with parliamentary problems made possible by Senate procedures.

Since the House of Representatives of the 1st Congress adopted its initial rules on April 7, 1789, the rules of the House have included a prohibition against non-germane amendments. 67/ Clause 7 of Rule XVI currently provides that "no motion or proposition on a subject different from that under consideration shall be admitted under color of amendment." 68/ Although the apparent simplicity of this statement does not reflect the voluminous precedents and interpretive difficulties that are involved in determinations of germaneness, the principle underlying the rule is clear and reasonable. While considering a measure on one subject, the House should not be distracted by amendments on unrelated subjects that may not have received adequate, if any, committee consideration. It is commonplace for the germaneness of amendments to be challenged on the House floor and virtually unprecedented for the membership to overrule its presiding officer in order to consider a proposition ruled non-germane.

It is indicative of the procedural differences between the two chambers that Senators are not subject to any such general germaneness requirement. Under Senate rules, an amendment must be germane only if offered to a general appropriation bill or budget measure or if offered to a measure on which cloture has been invoked. 69/ In practice, bills and resolutions frequently are considered on the Senate floor under the terms of complex unanimous consent agreements that, in addition to limiting time for debate, also impose a germaneness requirement on amendments offered to a specific measure. 70/ But Senators relinquish their right to offer non-germane amendments only by unanimous consent, and such agreements often provide for consideration of one or more non-germane amendments as exceptions to the general germaneness requirement that Senators impose on themselves, voluntarily and consensually.

67/ The rule of 1789 required that an amendment be germane only if offered as a substitute for the motion or proposition under debate. The requirement was extended to all amendments in March of 1822, bringing the rule to its present form. See Hinds' and Cannon's Precedents, op. cit., vol. 5, sec. 5825, pp. 422-424.

68/ House Manual, 96th Congress, pp. 490-506.

69/ Standing Rules of the Senate, op. cit., pp. 11 (paragraph 4 of Rule XVI) and 16 (paragraph 2 of Rule XXII); Section 305(b)(2) of Public Law 93-344 (88 Stat. 311), the Congressional Budget and Impoundment Control Act of 1974.

70/ Robert Keith, "The Use of Unanimous Consent in the Senate," in U.S. Congress, Senate, Commission on the Operation of the Senate. Committees and Senate Procedures. (Committee print.) 94th Congress, 2d session, pp. 140-168.

This difference in House and Senate rules gives individual Senators considerably greater leverage over the floor agenda than is enjoyed by their colleagues in the House. A Representative whose bill is not reported by the committee of jurisdiction has relatively little recourse within the House. A procedure for discharging a House committee from further consideration of a measure referred to it has been a part of House rules, in one form or another, since 1910. However, these procedures rarely have been used successfully. Between 1910 and 1980, 900 discharge petitions were filed, but during the same period, only 25 measures were discharged from committee by this means, of which only two were enacted into law. 71/ On occasion, the Rules Committee has extracted a bill from the control of another committee or permitted the text of a bill to be offered as a non-germane floor amendment to another measure, but House committees generally retain conclusive control over the measures referred to them. 72/

By contrast, a Senator whose bill is not moving through the committee stage has a readily available recourse--to offer the text of the bill as a non-germane floor amendment to another measure that may or may not touch related subjects. Although the use of this strategy may inspire opposition from the committee that is being bypassed, it often has been successful, either in obtaining passage of the proposal or in securing assurances of prompt committee action. Thus, however important committees may be as screening and filtering devices in the Senate as well as in the House, the Senate has reserved to its members the right to circumvent the committee system through the use of non-germane amendments whenever necessary to promote their political and policy objectives. 73/

This procedural difference between the two chambers also has had important consequences for bicameral relations, especially in connection with conference reports. The Senate can, and frequently does, attach non-germane amendments to House-passed bills. If the House and Senate versions of the same bill then are submitted to a conference committee, the non-germane Senate amendments are properly before the conference. The lack of a general germaneness requirement

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71/ Mildred L. Lehmann, The Discharge Petition in the House of Representatives. Report 76-239G of the Congressional Research Service, Library of Congress, Washington, D.C., December 9, 1976; Richard S. Beth, "Statistics on Recent Discharge Petitions." Memorandum of the Congressional Research Service, Library of Congress, Washington, D.C., March 9, 1981.

72/ For a discussion of the role of the Rules Committee in permitting consideration of non-germane floor amendments, see Stanley Bach, "The Structure of Choice in the House of Representatives: The Impact of Complex Special Rules," Harvard Journal on Legislation, forthcoming.

73/ The Standing Rules of the Senate permit Senators to bypass committees in another respect as well; under the provisions of Rule XIV, a Senator may, as a matter of right, introduce a bill and have it placed directly on the Calendar of Business without first being referred to and reported from one or more of the Senate's standing committees.

in the Senate presented the House with the same problem it faced before 1920 over Senate amendments to general appropriation bills that included new legislative provisions or provisions that appropriated for unauthorized purposes. House conferees have tended to resist accepting non-germane provisions as an inappropriate, or even irresponsible, device for changing national policy, but they have not always been willing or able to do so. Senate conferees may be willing to trade off their non-germane provisions in return for House acceptance of the Senate's position on aspects of the primary subject of the bill. Alternatively, Senators may insist on House acceptance of a non-germane provision as the only opportunity for that provision to become law. In the latter case, acquiescence by the House may be a necessary price of agreement. 74/

Until recently, therefore, the differences between the two chambers regarding germaneness created a problem for the House comparable to the one it had attacked in 1920. By adopting and insisting on non-germane amendments to House bills, the Senate would force the House to choose between the likelihood of no legislation being enacted or the necessity to abandon another basic and historic principle of House rules--the requirement that amendments be germane.

Since 1970, the House has amended its rules on three occasions to provide for separate consideration of non-germane Senate amendments in conference reports and under various other parliamentary circumstances. These rules changes have not subjected such Senate amendments to consideration by the standing committees of the House, but they have enabled the House as a whole to debate and vote on these provisions separately and individually. With the passage of the Legislative Reorganization Act of 1970, the House made the basic policy decision that non-germane Senate amendments should receive independent consideration on the House floor. The subsequent actions taken by the House in 1972 and 1974 remedied unanticipated problems with the 1970 provisions and extended the newly established procedures to cover other parliamentary contingencies. 75/

74/ See, for example, Vogler, op. cit., pp. 101-102. Robert Luce described the problem in the following terms: "So when the House sends over other than a general appropriation bill, the Senate may by riders or otherwise amend as it sees fit. Indeed, it may replace with a wholly new measure everything except the title. . . . Still excepting the appropriation bills, when this is done the House gets no chance whatever to pass judgment separately on the Senate changes before the conference. Blindfolded the House puts its interests in the hands of its conferees. When their report comes in, praise or blame of any one feature of their judgment is useless except so far as it may contribute toward acceptance or rejection of their conclusion as a whole. The practical effect is that none but a few members of the House have ordinarily had any real part in shaping or making so much of the law as results from the Senate proposals in question." Luce, Legislative Procedure, op. cit., pp. 404-405.

75/ The following discussion is based in part on a report prepared for the Congressional Research Service: Stanley Bach, House Consideration of Nongermane Senate Amendments. Report 76-224G of the Congressional Research Service, Library of Congress, Washington, D.C., November 16, 1976.

Senate Concurrent Resolution 2 of the 89th Congress, which established the 1965-1966 Joint Committee on the Organization of the Congress, included a proviso that specifically prohibited the Joint Committee from making "any recommendations with respect to the rules, parliamentary procedure, practices, and/or precedents of either House, or the consideration of any matter on the floor of either House." 76/ Consequently, the Joint Committee's final report was silent on the touchy issue of non-germane Senate amendments and their impact on bicameral relations. 77/

When the House Committee on Rules considered bills based on the Joint Committee's recommendations, however, it was under no such restriction. Thus, the bill reported by the Committee on June 17, 1970, included an attempt to deal with the problems arising out of House-Senate differences regarding germaneness, and by a means that did as little violence as possible to the principles of House procedure. In effect, Section 120 of H.R. 17654 would have amended House Rule XX to provide that any Senate amendment, presented to the House or included in a conference report, that would have been ruled non-germane if offered as a House floor amendment henceforth would require a two-thirds vote for adoption, after forty minutes of debate to evaluate the merits of the proposition in question. In its report, the Rules Committee asserted that it was not proposing that the House should intrude on the prerogatives of the Senate. Instead, it argued that non-germane Senate language should be subject to the same two-thirds vote requirement that must be achieved in order to suspend House rules under other circumstances. 78/

> There has been increasing concern over the growing practice of the other body of adding extraneous language to such [House-passed] bills. This material, often broad in scope, may be bad or good. The merit of the language is not the issue. What concerns many Members is that this practice (1) by-passes the normal, orderly legislative process in the House and necessitates hasty decisions on the floor without adequate consideration, (2) deprives House committees of the right to consider matters pending before the House that fall within their jurisdiction, and (3) denies the House membership an opportunity to engage in meaningful debate on vital issues pending before it.

76/ Senate Concurrent Resolution 2, 89th Congress, 1st session, adopted on March 11, 1965.

77/ U.S. Congress. Senate. Organization of Congress: Final Report of the Joint Committee on the Organization of the Congress. 89th Congress, 2d session. Senate Report No. 1414, July 28, 1966.

78/ U.S. Congress. House of Representatives. Legislative Reorganization Act of 1970. 91st Congress, 2d session. House Report No. 91-1215, June 17, 1970, pp. 9-10.

> The House operates on a strict rule of germaneness whereas the other body does not. The problem this creates was recognized as early as 1880 when Rule XX was first adopted. Nearly 100 years later, the rules and practices still do not protect the rights and privileges of the House as a co-equal partner in the legislative process.
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> The proposed third clause in Rule XX prescribes new procedures in the House to deal with language added to a House-passed measure which would have been nongermane in the House under clause 7 of Rule XVI. If a point of order is properly made and sustained, such nongermane language can be adopted only by a two-thirds vote under a suspension-of-the-rules type of debate of 40 minutes.
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> The proposal is a proper exercise of the rulemaking power of the House to regulate its own procedures. It does not in any way circumscribe the freedom of the other body. Nongermane matter can still be amended into a bill. The proposed rule change simply establishes the procedures to be followed in the House for consideration of such an amendment.

When Section 120 was read for amendment in Committee of the Whole on September 15, 1970, Representative Sam Gibbons of Florida moved to strike the proposal in its entirety. 79/ He and others supporting his position did not defend the Senate's practice of attaching non-germane provisions to House bills. Instead, they argued that Section 120 would affect the Senate profoundly even though it technically changed only the rules of the House. In effect, they contended, the proposal advocated by Chairman Colmer of the Rules Committee would require more than majority support in the House for many propositions originating in the Senate. In addition to questioning the constitutionality of the Colmer proposal, supporters of the Gibbons motion warned the House that retention of the two-thirds vote requirement in the bill would arouse sufficient Senate opposition to doom the entire reorganization effort. Recognizing that a problem existed, they proposed remedial action by means of a separate House resolution that would not require Senate concurrence.

In defense of the bill as reported, Colmer and Chairman Celler of the Judiciary Committee stressed the extent to which the Senate had been intruding regularly on the prerogatives and rules of the House through the use of non-germane amendments. Celler was particularly adamant, citing two instances that affected matters within the jurisdiction of his committee: attachment of the 18 year-old vote provision to the extension of the Voting Rights Act,

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79/ For the debate on this provision and amendments thereto, see Congressional Record, vol. 116, part 23, September 15, 1970, pp. 31840-31846.

and inclusion of an antitrust exemption for professional football in an "insignificant revenue bill." As a senior member of the House, Celler seemed to give vent to years of recurring frustration: 80/

> I will say to the Members of the House that it is high time that we assert ourselves and we say to the other body that it is time we insist upon our own rules.
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> The other body, in a sort of alleged rarefied atmosphere, shall no longer have the right to add on to our bills non-germane amendments. They look upon us from their Olympian heights as mere mundane characters and they do not give a tinker's dam about our own rules.
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> Now, we have rules. Those rules should be obeyed. We have to be either men or we are going to be mice. We have to stand up to this other body and say that if you want to amend, then amend according to the rules. If you want to according to the rules of your house, fine, but when it comes to this body, we have rules and we ought to abide by those rules. And you must abide by them.
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> Here we have situations where insignificant bills are sent to the other body and they add onto them highly important provisions and expect us to swallow willy nilly those highly important provisions. In a sense, they seek to ram them down our throats. We must put a stop to this unfair practice.

Confronted with compelling arguments on both sides of the question, the House rejected both the Colmer proposal and the Gibbons motion in favor of a substitute offered by Representative James O'Hara of Michigan. The O'Hara substitute amended Rule XX in two respects to deal with non-germane Senate amendments, whether presented to the House directly or included in conference reports. With regard to non-germane Senate amendments considered on the House floor without having gone to conference, O'Hara proposed that, during consideration of a motion to dispose of Senate amendments to a House-passed bill (other than by sending them to conference), there could be separate debate and a vote on any amendment that would have violated the House germaneness rule if it had been offered to the bill during initial consideration on the House floor. Unlike the Colmer proposal, O'Hara's approach permitted the House to accept a non-germane Senate amendment by simple majority vote.

80/ Ibid., p. 31843.

With respect to non-germane Senate amendments in conference reports, O'Hara adopted the same approach used by the House to protect itself against Senate initiatives that violate the House prohibitions in Rule XXI against legislation and unauthorized appropriations in general appropriation bills. The substitute provided that House conferees could not agree to a non-germane Senate amendment without prior and specific authorization in the form of a separate House vote on each such amendment. Again, the House would give or withhold this authority by simple majority vote. O'Hara explained that the practical effect of the second part of his proposal would be to require that House conferees bring back non-germane conference proposals as separate amendments in technical disagreement, and then move that the House recede and concur, with or without amendment, with each such Senate amendment. This majority-vote compromise was accepted by voice vote--with the support of Colmer, Celler, and Gibbons--as a reasonable way to address the problem without jeopardizing Senate passage of the reorganization bill.

The O'Hara substitute was included as Section 126 of the Legislative Reorganization Act of 1970, as enacted. 81/ It soon become apparent, however, that there were problems with the new provisions of Rule XX. On November 10, 1971, the House took up the conference report on H.R. 8687, the military procurement authorization bill for Fiscal Year 1972. Representative H. Allen Smith of California, the ranking Republican on the Rules Committee, noted that this would be the first attempt to implement the procedures for dealing separately with non-germane provisions accepted by House and Senate conferees. Yet because of a contingency not covered by the O'Hara substitute, it was necessary to bring the conference report to the House floor under an unusual special rule reported by the Rules Committee. 82/

The problem arose because the Senate had amended the House bill with an amendment in the nature of a substitute which struck the entire text of the House version and substituted a Senate version that differed from the House position in many respects. 83/ Among the differences between the House and Senate versions were a series of non-germane propositions that the Senate had included in its version of the bill. Technically, however, there was only one amendment before the conference committee. The three non-germane Senate provisions that the House conferees agreed to accept were not separate amendments to the House bill; instead, they were provisions of the single Senate substitute for the House text. In this situation, the conferees exercised their authority by reporting a third version of the bill--their own conference substitute. Rule XX provided for separate votes on non-

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81/ Section 126 of Public Law 91-510 (84 Stat. 1160), the Legislative Reorganization Act of 1970.

82/ For the debate on the resolution, H. Res. 696, and the conference report itself, see Congressional Record, vol. 117, part 31, November 10, 1971, pp. 40479-40490.

83/ Congressional Record, vol. 117, part 30, November 5, 1971, pp. 39551-39560.

germane Senate amendments, but not on non-germane provisions of larger amendments, such as this substitute. As a result, there was no way for the House to vote on the non-germane provisions separately and individually. The 1970 amendments to Rule XX had failed to deal with non-germane Senate provisions in the relatively common situation of a Senate substitute for the House version of a bill, leading in turn to a conference substitute for both chambers' versions.

To achieve the result intended by the O'Hara rule, the Rules Committee reported a special rule for considering the conference report that permitted separate debate and votes on each of the non-germane provisions. This sufficed as a stopgap remedy, but not as a permanent solution to the gaping loophole in Rule XX. First, this approach gave the Rules Committee discretion to decide whether it would permit the House to vote separately on non-germane provisions included in conference substitutes. Second, even with separate votes permitted on each such provision, a vote to reject any one of them would have resulted automatically in the rejection of the conference report as a whole. According to Speaker Albert, "(t)he House by its action in rejecting any one of the sections on which a separate vote may be demanded would nullify the agreement between the managers on the part of the House and the Senate, and the conference report would therefore fall." 84/

The same problem arose on July 27, 1972, during consideration of a special rule waiving points of order against the conference report on H.R. 12931, the Rural Development Act of 1972. 85/ As in the case of the defense procurement bill, the Senate had amended the House text of H.R. 12931 with a single amendment in the nature of a substitute. 86/ In turn, the conference substitute included as many as eight items, derived from the Senate version, that arguably would have been non-germane if offered as House floor amendments. In this case, however, the Rules Committee proposed and the House agreed to waive all points of order against the conference report. In the absence of such a waiver, the conference report as a whole would have been subject to a point of order on the grounds that the conferees violated clause 3 of Rule XX by accepting a non-germane proposition originating in the Senate without prior authorization by the House.

Both the proponents and opponents of the waiver to protect the rural development conference report agreed that a problem existed. Although they differed over how the problem should be resolved in this particular instance, there was no disagreement that additional changes were required in permanent House rules. In response, the Rules Committee reported H. Res. 1138 on

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84/ Congressional Record, vol. 117, part 31, November 10, 1971, p. 40482.

85/ For the debate on the resolution, H. Res. 1057, as well as the conference report, see Congressional Record, vol. 118, part 20, July 27, 1972, pp. 25822-25842.

86/ Congressional Record, vol. 118, part 16, June 14, 1972, pp. 20928-20938.

September 26, 1972, amending the House rules governing Senate amendments and conference reports (in addition to making several other rules changes). The loophole this resolution proposed to close was described succinctly in the Committee's report: 87/

> The difficulty arises because the precedents of the House apply a doctrine of indivisability to Senate amendments in the nature of a substitute and to conference reports that present substitutes for such amendments. Under these precedents, the House may vote only on the whole of an amendment in the nature of a substitute, or on the whole of a conference report dealing with such a substitute. The doctrine effectively prevents the House from considering and voting separately on any specific part or parts of such amendments or conference reports. Thus, at present the House has no method by which it can isolate the nongermane provisions in such amendments or conference reports; it must accept or reject the whole. (emphasis in the original)

As reported, H. Res. 1138 dealt with this problem in two ways. First, it extended the coverage of clause 1 of Rule XX, dealing with Senate amendments to House-passed bills that are taken up on the House floor without first being sent to conference. This clause had permitted separate debate and votes on each such amendment that would have been non-germane if offered to the bill in the House. The resolution made the same procedures applicable to any non-germane part of a Senate amendment in the nature of a substitute.

With regard to conference reports, H. Res. 1138 eliminated clause 3 of Rule XX, adopted two years earlier, that had required prior authorization by vote of the House for conferees to accept any non-germane Senate amendment. In its place, the Rules Committee proposed the addition of a new clause 4 to Rule XXVIII, dealing with conference reports, to permit any Member to make a point of order against any non-germane part of a conference report, regardless of whether the non-germane provision was submitted to conference as a separate amendment or as an element of a single Senate amendment in the nature of a substitute. If the Speaker sustained the point of order, thereby establishing the non-germane character of that part of the conference report, a motion then could be made and debated to strike the non-germane language from the report. Other such points of order and motions could be made concerning additional non-germane parts of the same report. If any and all such motions were to be rejected, the House would have voted, in effect, to accept the provisions at issue, notwithstanding their non-germane nature, and the House would proceed to vote on accepting or rejecting the conference report as a whole. On the other hand, if the House voted to adopt one or more such motions to strike

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87/ U.S. Congress. House of Representatives. Nongermane Senate Amendments and Other Matters. 92nd Congress, 2d session. House Report No. 92-1451, September 26, 1972, p. 2. This problem does not arise in connection with conference reports on appropriation bills because the Senate invariably amends such bills item by item.

but agreed to the remainder of the report, only the portions of the conference report thereby rejected would be recommitted to conference or returned to the Senate (depending on whether or not the Senate already had acted on the report). 88/

When the Rules Committee brought its proposals to the House floor on October 13, 1972, it called up a modified package of rules changes, embodied in H. Res. 1153. 89/ This new resolution made the same changes in Rule XX, but modified the provisions of the proposed addition to Rule XXVIII. The two resolutions contained the same procedures for making points of order and motions to strike against non-germane parts of conference reports, even if the non-germane language was included as part of a Senate or conference amendment in the nature of a substitute. However, the revised resolution, H. Res. 1153, stated that, if the House voted to strike one or more non-germane provisions, it would proceed to vote on accepting the remaining parts of the conference agreement (in the form of a motion to recede and concur in the Senate amendment with a House amendment consisting of the remainder of the conference report). It then would fall to the Senate to accept the conference agreement without the non-germane provisions or to request a further conference with the House.

Although this difference between the two resolutions might seem to be a technical change only, it reflected the sensitivity of both the House and the Senate to the problem for their bicameral relations caused by their different positions regarding germaneness. During debate on H. Res. 1153, as well as during earlier consideration of the rural development conference report, House Members had reported Senate disgruntlement with the provisions of the 1970 Act affecting House consideration of non-germane Senate amendments. Evidently, some Senators became even more perturbed at the prospect that H. Res. 1138 would permit the House to reject non-germane parts of a conference report, accept the remainder of the report, and then return to conference only to resolve the disagreement over the unacceptable non-germane language. This approach would have seriously weakened the Senate's ability to secure acceptance of its non-germane amendments as part of any conference report, because the proposed addition to Rule XXVIII would have permitted the House to accept the conference agreement on the germane provisions of the bill, and then return to conference to resolve (or fail to resolve) the non-germane issues separately.

Instead, H. Res. 1153 stated that, if one or more non-germane conference report provisions were stricken, the House then would vote on accepting the remainder of the conference agreement. If the Senate did not concur, a new conference could be held at which all provisions of the two versions of the bill, including the non-germane Senate provisions, could be reconsidered together. Although the debate on the resolution does not state conclusively the reasons for this change, it seems likely that the Rules Committee was

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88/ Ibid., pp. 4-6, 12-14.

89/ For the text and debate, see Congressional Record, vol. 118, part 27, October 13, 1972, pp. 36013-36023.

anticipating adverse Senate reaction to the Committee's original proposal, and the possibility of Senate retaliation in one form or another. 90/

H. Res. 1153 was adopted by a vote of 281 to 57, with no opposition expressed to the new procedures for coping with the germaneness problem.

In 1972, therefore, the House revised and extended the coverage of its 1970 rules change to take account of the frequent instances in which the Senate agrees to an amendment in the nature of a substitute for a House passed bill--technically only a single amendment, but an amendment that may make any number of changes in the House version. Although a common procedural device, this is merely one of the many parliamentary situations that may arise in the process of attempting to resolve House-Senate differences on a pending bill or resolution. During this process, many different sequences of procedural developments are possible, depending on such considerations as (1) whether the measure originates in the House or the Senate, (2) whether an attempt is made to resolve the differences without recourse to conference (creating the possibility of Senate amendments to House amendments to Senate amendments to a House bill), and (3) whether a conference committee is successful or unsuccessful, in whole or in part, in reaching agreement, regardless of the stage at which the bill is sent to conference. Even after the adoption of H. Res. 1153, there remained possible situations in which the House would be presented with non-germane Senate provisions and lack effective recourse.

As a result, the Rules Committee and the House amended its rules on this subject for a third time in 1974, during consideration of H. Res. 998 of the 93rd Congress. 91/ This resolution changed House rules in a number of respects; the further changes made in Rules XX and XXVIII were discussed only in passing as debate focused on more controversial matters such as the requirement for obtaining recorded votes on amendments in Committee of the Whole. With respect to non-germane Senate actions, the resolution consolidated all related provisions in Rule XXVIII and extended the applicability of this rule to (1) non-germane provisions in Senate measures that were rejected by the House during initial floor consideration but then accepted by House conferees, and (2) amendments reported in disagreement by conferees with the intention of offering motions on the House floor to either accept the Senate amendment (recede and concur) or amend the Senate amendment (recede and concur with an amendment). The second of these additions to

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90/ This interpretation is certainly not contradicted by the fact that the report accompanying H. Res. 1153 stated only that "(t)he Committee on Rules, having had under consideration House Resolution 1153, by a nonrecord vote reports the same to the House with the recommendation that the resolution do pass." U.S. Congress. House of Representatives. Amending the Rules of the House of Representatives with Respect to House Consideration of Certain Senate Amendments, to Provide for the Delegates from Guam and the Virgin Islands, and for Other Purposes. 92nd Congress, 2d session. House Report 92-1573, October 11, 1972.

91/ For the text and debate, see Congressional Record, vol. 120, part 8, April 9, 1974, pp. 10184-10200.

Rule XXVIII dealt with situations that had been addressed by the O'Hara substitute in 1970. The 1972 repeal of part of the 1970 change had created an unintended loophole that was closed in 1974 by adopting reasonably uniform procedures for dealing with non-germane Senate provisions, however they may come before the House.

Thus, on three different occasions during the last decade, the Rules Committee and the House as a whole attempted to devise, and then modify and perfect, a body of rules for protecting the integrity of House legislative procedures when confronted with non-germane proposals adopted in accordance with the Senate's procedures. As in the case of legislation and unauthorized appropriations in general appropriation bills, it fell to the House to accommodate its rules to those of the Senate--not by abandoning its own principles of procedure, but by devising innovative (and rather complicated) methods to prevent these principles from being circumvented. The Senate has continued to take advantage of the latitude that comes from not being bound by a germaneness requirement. To cite only one example, in 1977, the Senate considered a House bill to refund duties paid by Smith College on the importation of bells needed to repair its carillon, and proceeded to add amendments concerning the food stamp and medicaid programs. 92/ In this case, the Senate additions were not controversial. But if they had been, the House could have rejected them, under the rules changes of 1970-1974, without necessarily jeopardizing the bill to which they were attached.

Although the House felt compelled to adjust its own procedures to take account of Senate rules (or the absence thereof), House actions with respect to non-germane Senate amendments may have had a reciprocal effect on Senate practices. During the 1970s and 1980s, an increasing number of major bills have been considered on the Senate floor under the terms of unanimous consent agreements which, as discussed at the beginning of this section, usually have included a requirement that amendments be germane. Since this is a practice rather than a rule, there is no authoritative legislative history to document the factors encouraging its development. It is certainly interesting, however, that this practice has become almost routine now that the House has devised means for protecting itself against non-germane Senate actions. This coincidence suggests that Senators may have concluded that it has become less profitable to offer non-germane amendments and, therefore, that they have become more willing to waive their right to do so. If so, then a process of mutual accommodation has resulted in a new (though tenuous) bicameral stability, at least with respect to this issue.

92/ Congressional Record, vol. 123, part 17, June 28, 1977, pp. 21271-21273.

CONCLUSION

In these two instances, bicameral differences created bicameral difficulties. The House and Senate could not adopt their preferred position of relative indifference to the internal operations of the other, because parliamentary rules and procedures affect the limits of legislative outcomes, and different House and Senate outcomes must be reconciled if the legislative process is to reach completion. The House-Senate differences regarding appropriations and germaneness had consequences, especially for the House, for many years before the House amended its rules in 1920 and again fifty years later. In fact, it is striking that the House permitted so many years to pass during which Senate intransigence could create situations in which the House faced the choice of having desired legislation die for lack of agreement or of accepting violations of its own fundamental procedures.

In both instances, it was the House that eventually acted, because it was the rules of the House that were challenged, and even undermined, by the permissive procedures of the Senate. And when the House did act in 1920 and then in 1970, it acted to mitigate conflict, not to heighten it. Instead of seeking confrontation with the Senate in the hope that an intractable House could compel the Senate to adopt stricter procedures, the House accepted rules changes designed to minimize the negative consequences of existing Senate practices. The House changed its rules to isolate offending Senate actions, so that they can be treated separately and with as little jeopardy as possible to the bills to which they are attached. Rather than seeking agreement on a shared set of parliamentary ground rules, the House was satisfied to minimize the consequences of disagreement.

It is noteworthy also that the approach adopted by the House in both instances preserved, although in diminished form, the benefits that Representatives could derive from the state of Senate rules. The preceding discussion of the differences between the two chambers concerning appropriations and germaneness has emphasized the potential for conflict, but the situations to which the House rules changes responded were not situations of pure conflict. On occasion, individual Representatives or a majority of Representatives could take advantage of Senate rules to accomplish ends foreclosed by House rules or political conditions.

The greater opportunities for proposing unauthorized appropriations in the Senate have made it possible for the House to accept, on occasion, appropriations greater than the level authorized by law, or to escape from the demanding timetable imposed by the Budget Act on the authorization-appropriation sequence. By the same token, the severe constraints imposed by precedent on limitation amendments in the House can be eased through the

"open door" policy prevailing in the Senate. 93/ The absence of a general germaneness requirement in the Senate also can offer opportunities for a Representative whose legislation appears doomed in committee. That same proposal can be offered as a non-germane amendment on the Senate floor in the hope that it will be presented to the House as part of a conference report. Although it is now subject to a separate vote, the issue can be brought to the floor in this manner without approval by the House committee of jurisdiction. Instead of extending the prohibitions of House rules to cover Senate and conference proposals as well, the effect of the House rules changes has been to allow the House, by majority vote, to decide if it wishes to set its rules aside for a particular purpose. 94/

The freedom to offer non-germane amendments in the Senate also can serve an important bicameral interest. At times, different parliamentary and political conditions may prevail in the two chambers that make it desirable to use neutral legislative "vehicles" to achieve a common purpose. For example, during the 95th Congress, the House passed a single national energy bill; however, the leadership of the Senate found this approach unacceptable, fearing that such a massive bill would stimulate a filibuster that could not be broken. Consequently, the Senate acted on five separate bills, and then inserted provisions of the House bill and one or more of the Senate bills in each of four other House bills that had nothing to do with energy policy: bills for the relief of Joe Cortina and Jack Misner, and bills to suspend the duty on certain doxorubicin hydrochloride antibiotics and permit the duty-free entry of competition bobsleds and luges. It was these four bills--not the original House or Senate bills--that ultimately became law. The Senate voted on the four conference reports individually; the House preserved its package approach by taking the unusual step of adopting all four reports with one vote. This convoluted but useful approach would not have been possible if the Senate had been bound by a germaneness requirement comparable to that of the House. 95/

93/ Alternatively, conflict may be exacerbated. The interplay of House and Senate precedents affecting limitations and the extent to which limitations can complicate the process of enacting necessary appropriations are well illustrated by the controversy surrounding limitations concerning funding for abortions. For a summary of the legislative history of this controversy, see Congressional Record (daily edition), May 21, 1981, pp. S5461-S5467.

94/ The alternative is to request a special rule from the Rules Committee that waives clause 2 of Rule XXI or clause 7 of Rule XVI during initial House floor consideration.

95/ For a discussion of this series of developments, see Stanley Bach, Complexities of the Legislative Process: A Case Study of Congressional Consideration of National Energy Legislation During the 95th Congress. Report No. 79-68G of the Congressional Research Service, Library of Congress, Washington, D.C., March 7, 1979.

Whatever the impact of such strategic considerations may have been on the approaches adopted by the House in 1920 and 1970-1974, the principal conclusion to be drawn from these events is that the House acted to resolve sensitive bicameral problems in ways that promoted comity, instead of exacerbating conflict by rigidly insisting on the principles of its rules. Evidently recognizing the inescapable necessity of bicameral cooperation, the House sought and found means to isolate the conflicts resulting from differences between House and Senate procedures and to cope with these conflicts by devices that protect the basic integrity of House proceedings. On such adjustments rests the management of the bicameral system.