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Germaneness Rules And Bicameral Relations In the U.S. Congress

The legislative procedures of the U.S. House and Senate differ in a number of fundamental respects, and procedural conflicts may arise in the process of resolving policy differences. One important difference between the two chambers concerns the germaneness of amendments. House rules require that all floor amendments be germane; Senate rules impose no such requirement under most circumstances. Consequently, conference agreements may include provisions that violate a basic principle of House procedure. The House changed its rules during the 1970s to address this problem and sought accommodation rather than confrontation, attempting to isolate conflicts with the Senate and cope with them by means that protected the integrity of House proceedings.

It is generally characteristic of the relations between the U.S. House of Representatives and the Senate that the members of one chamber 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. 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 vice versa. Comity is promoted, and the likelihood of conflict is diminished, by modes of address that are formal, impersonal, and often oblique (Galloway, 1961, pp. 225-226).

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 (Galloway, 1953, pp. 249-259; Haynes, 1938, pp. 997-1034). Cooperation between the House and Senate is ultimately mandated by the constitutional requirement that both chambers must pass the same measure in precisely the same form before it becomes law. The potential for competition

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and conflict, on the other hand, is inherent in the differences in their composition and in the absence of any central coordinating authority.[1] Institutional differences between the House and Senate are real and important in and of themselves, whether or not they are exacerbated by differences in policy approaches or partisan control.[2]

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, without the concurrence of the other, "determine the rules of its proceedings" under the Constitution and resolve questions concerning its organization and membership. No single person or institution has either the formal authority or the informal power to organize and direct the actions of the two chambers, 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.

In managing their bicameral relations, the House and Senate must cope with the fundamental differences between the two chambers in their approaches to the legislative process. Perhaps the most vivid manifestation of these differences is the contrast between House and Senate rules governing debate, which in turn reflects the very different ways in which the chambers have responded to the problem of balancing the prerogatives of voting majorities against the rights of voting minorities. In the House, debate is limited—sometimes severely—either by rule or by majority vote so that the majority may prevail with reasonable dispatch. In the Senate, on the other hand, there are no effective limitations on debate, either by rule or majority vote, so that individual senators and minorities within the Senate can attempt to protect their positions against precipitate majority action.

The five-minute rule in the House and the filibuster in the Senate affect when and even whether legislation is passed, but rules on debate do not directly affect the content of legislation. Consequently, these rules are not often the source of direct, institutional conflict, however important they may be to the operations of each chamber. The potential for conflict arises when policy differences must be resolved if legislation is to be enacted. Moreover, when the rules of one chamber permit legislation to include provisions that are prohibited in the other, problems of policy and procedure become intertwined, as each chamber seeks to protect the integrity of its procedures and the autonomy of its decisions. The most basic, long-standing, and important difference between House and Senate rules affecting the possible content of legislation concerns the germaneness of amendments.

Germane and Nongermane Amendments

Since the House of Representatives of the First Congress adopted its rules in April 1789, the rules of the House have included a prohibition against nongermane amendments.[3] 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." 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, or 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 that has been ruled nongermane.

Unlike representatives, 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 to a measure on which cloture has been invoked. In practice, bills and resolutions are frequently considered on the Senate floor under the terms of complex unanimous consent agreements that, in addition to limiting time for debate, impose a germaneness requirement on amendments offered to a specific measure (Keith, 1977). But senators relinquish their right to offer nongermane amendments only by unanimous consent, and such agreements often provide for consideration of one or more nongermane amendments excepted from the general germaneness requirement that senators impose on themselves, voluntarily and consensually.

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 from 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 have rarely 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 2 were enacted into law (Lehmann, 1976; Beth, 1981). On occasion, the Rules Committee has extracted a bill from the control of another committee or permitted the text of one bill to be offered as a nongermane floor amendment to another measure, but House committees generally retain conclusive control over the measures referred to them (Bach, 1981).

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 nongermane floor amendment to another measure, which may or may not touch related subjects. Although this strategy may inspire opposition from the committee that is bypassed, it has been successful either in obtaining passage of the proposal or in securing assurance of prompt committee action. Thus, while committees may be important 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 nongermane amendments whenever necessary to promote their political and policy objectives.[4]

From time to time, the absence of a general germaneness requirement in the Senate can offer opportunities for a representative whose legislation appears doomed in committee. The text of a bill that cannot reach the House floor by one means or another can be offered as a nongermane amendment in the Senate instead. If the proposal then returns to the House as a provision of a conference report, it may be accepted by the House without ever having been reported from the House committee to which it was originally referred.

The freedom to offer nongermane amendments in the Senate can also serve an important bicameral interest. At times, different parliamentary and political conditions may prevail in the two chambers which make it desireable 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 to 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. This convoluted but useful approach would not have been possible if the Senate had been bound by a germaneness requirement similar to that of the House (Bach, 1979).

Even so, nongermane Senate amendments are much more likely to be a source of bicameral conflict than to be a means of cooperation. If the Senate attaches a nongermane amendment to a House bill and the House and Senate versions of the bill are submitted to a conference committee, the nongermane Senate amendment is properly before the conference. The authority of conferees is limited to resolving the matters in disagreement between the two chambers; they may not delete matter on which the two chambers agree nor may they insert matter that was not submitted to conference by one chamber or the other. Moreover, in resolving each matter in disagreement, the

conferees' recommendation must fall within the scope of the differences, defined by the House position at one extreme and the Senate position at the other. A nongermane Senate amendment, however irrelevant to the original purpose of the House bill, becomes such a matter in disagreement and may be accepted or modified by the conferees without violating the constraints on their authority.

House conferees have tended to consider nongermane propositions an inappropriate, or even irresponsible, device for changing national policy, but they have not always been willing or able to resist accepting them. Senate conferees may be prepared to trade their nongermane provisions for House acceptance of the Senate's position on aspects of the primary subject of the bill. Alternatively, however, senators may insist on House acceptance of a nongermane 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.[5]

Until 1970, 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 chamber. Rejection of a conference report means either the death of the legislation (which both chambers have already 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. The choices confronting the House were all unpalatable: to insist on the principle embodied in its rules at the risk of losing the legislation, to return to conference at the cost of delay and the danger of stalemate, or to abandon at Senate insistence a cardinal element of House procedure, the requirement that amendments be germane.

Amendments to the Rules of the House

This situation prevailed for many years until, in 1970, the House began to amend its rules so that, in conference reports and under various other parliamentary circumstances, nongermane Senate proposals could be considered separately. These rules changes have not subjected all 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 nongermane provisions separately and individually. With the enactment of the Legislative Reorganization Act of 1970, the House made the basic policy decision that nongermane Senate amendments should receive independent consideration on the House floor. Further rules changes in 1972 and 1974 remedied unanticipated problems with the 1970 provisions and extended the newly established procedures to cover other parliamentary contingencies.[6]

The 1965-1966 Joint Committee on the Organization of the Congress was prohibited by its authorizing resolution from proposing any changes in rules, precedents, or practices affecting floor procedures in either the House or the Senate. However, the House Rules Committee was under no such restriction when it considered bills based on the Joint Committee's recommendations. 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. 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 (with or without modification), that would have been ruled nongermane if offered as a House floor amendment would henceforth require a two-thirds vote for approval, after 40 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 intrude on the prerogatives of the Senate. Instead, it argued that nongermane Senate language should be subject to the same two-thirds vote necessary to suspend House rules under other circumstances (H.Rept. 91-1215, pp. 9-10):

> There has been increasing concern over the growing practice of the other body of adding extraneous language to such [House] bills. This material, often broad in scope, may be good or bad. 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 . . . .
>
> 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 the bill was debated on the House floor three months later, Emanuel Celler, chairman of the Judiciary Committee, supported the proposed two-thirds vote requirement in terms that seemed to give vent to years of recurring frustration (116 Cong. Rec. 31843):

> 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.
>
> The other body, in a sort of alleged rarified 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 . . . .
>
> 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.

Nonetheless, the House heeded arguments that the Rules Committee's proposal would affect the Senate profoundly, even though the proposal would have changed only the rules of the House. While agreeing that the germaneness problem required remedy, members such as Sam Gibbons of Florida 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. In response, James O'Hara of Michigan offered an alternative approach to amending Rule XX that won general acceptance. For Senate amendments which were considered on the House floor without having gone to conference, and which would have been nongermane if offered in the House, O'Hara proposed that the House have an opportunity to debate and vote on them separately before voting on a motion to dispose of all the Senate amendments (other than by sending them to conference). For nongermane Senate provisions included in conference reports, O'Hara adopted the same approach used by the House to protect itself against Senate initiatives violating Rule XXI's prohibitions against legislation and unauthorized appropriations in general appropriation bills.

Fifty years earlier, the House had confronted the fact that Senate rules on the content of general appropriation bills are not nearly as strict as those of the House. As part of a 1920 resolution reconsolidating jurisdiction over appropriations in the Committee on Appropriations, the House also amended Rule XX. According to the amended rule, House conferees could not accept Senate amendments that would have violated Rule XXI if offered in the House, unless the conferees first received explicit authority from the House in the form of separate floor votes on each such amendment. In practice, however, the House soon devised a different procedure to accomplish the same purpose. Instead of seeking House votes before reaching agreement in conference, House appropriations conferees report offending Senate amendments separately—as amendments in technical disagreement that accompany a partial conference report. First the House votes to accept the partial conference report, and then it acts on motions to dispose of each amendment in technical disagreement. By this means, the House may vote separately to accept, modify, or reject each conference proposal in violation of Rule XXI.

It was this procedure that the Legislative Reorganization Act of 1970 ultimately applied to nongermane provisions of conference reports. Each nongermane Senate amendment to which conferees agreed, in either original or modified form, was to be reported back as an amendment in technical disagreement. The House could then decide, by simple majority vote, to accept the conferees' recommendation or to reject it and perhaps send it back to conference for further negotiation.

By these amendments to Rule XX, the House agreed that it could continue to accept nongermane Senate proposals by majority vote, but only through separate votes on each, not through a single vote on a conference report that included nongermane provisions. The basic policy decision was made. However, it soon became evident that the 1970 rules changes would have to be modified if the goals of the Reorganization Act were to be achieved. The most serious problem arose from the common practice of one chamber amending the other's bill by striking everything after the enacting clause and inserting its own entire version of the bill. When conferees consider a bill that the Senate has amended in this way, they are confronted with only one amendment—the Senate's amendment in the nature of a substitute—even though that amendment may embody an entirely different approach to the subject and include one or more nongermane provisions. In this situation, the conferees normally exercise their authority by reporting a third version of the bill—their own conference substitute—which may include the Senate's nongermane provisions, with or without modification.

The 1970 amendments to Rule XX had provided for separate votes on nongermane Senate amendments, but not on nongermane provisions of larger amendments, such as these conference substitutes. As a result, there was no way for the House to vote on such nongermane provisions separately and individually.[7] In response, the Rules Committee reported H. Res. 1138 on September 26, 1972, amending the House rules governing conference reports and Senate amendments (in addition to making several other rules changes). The loophole this resolution proposed to close was described succinctly in the Committee's report (H. Rept. 92-1451, p. 2):

> The difficulty arises because the precedents of the House apply a doctrine of indivisibility 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 non-germane provisions in such amendments or conference reports; it must accept or reject the whole. (Emphasis in original.)

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 (118 Cong. Rec. 36013-36023). This resolution dealt with the problem confronting the House in two ways. First, it extended the coverage of Clause 1 of Rule XX, dealing with Senate amendments to House 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 nongermane if offered to the bill in the

House. The resolution made the same procedures applicable to any nongermane part of a Senate amendment in the nature of a substitute.

Second, and more important, H. Res. 1153 eliminated Clause 3 of Rule XX, adopted two years earlier, which had required prior authorization by vote of the House for conferees to accept any nongermane Senate amendment. In its place, the resolution added a new clause to Rule XXVIII, dealing with conference reports, which offered a somewhat different means for voting separately on any nongermane conference proposal.

Any member may make a point of order against any nongermane part of a conference report, regardless of whether the nongermane proposal was originally 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 sustains the point of order, thereby establishing the nongermane character of that part of the conference report, a motion can then be made and debated to reject the nongermane language in the report. Additional such points of order and motions may be made concerning other nongermane parts of the same report. If any and all such motions are defeated, the House has voted, in effect, to accept the provisions at issue—notwithstanding their nongermane character—and the House proceeds to vote on accepting or rejecting the conference report as a whole. On the other hand, if the House adopts one or more such motions, it proceeds to vote on accepting the remaining parts of the conference agreement (as a House amendment to the original Senate amendments). It then falls to the Senate to accept the conference agreement without the nongermane provisions or to request a further conference with the House.

Thus, in 1972, the House improved the implementation of its earlier decision by revising and extending the coverage of its 1970 rules changes, especially to take into account the frequent instances in which the Senate agrees to an amendment in the nature of a substitute—technically, only a single amendment, but an amendment that can make any number of germane or nongermane changes in the House version. Although a common procedural device, this is merely one that may be used in the attempt to resolve House-Senate differences on a pending bill or resolution. During this process, many 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, in whole or in part, in reaching agreement, regardless of the stage at which the measure is sent to conference. Even after the adoption of H. Res. 1153, there remained possible situations in which the House would be presented with nongermane Senate provisions and lack effective recourse.

As a result, the Rules Committee and the House amended the rules on this subject for a third time in 1974, during consideration of H. Res. 998 of the 93rd Congress (120 Cong. Rec. 10184-10200). The resolution consolidated all related provisions in Rule XXVIII and extended the applicability of this rule to other contingencies, such as the possibility that a nongermane provision in a Senate bill could be rejected by the House during initial floor consideration but then accepted by House conferees. The result was a reasonably uniform set of procedures for dealing with nongermane Senate provisions, however they may come before the House. These perfecting changes were discussed only in passing on the House floor, and debate focused on more controversial matters, such as the requirement that recorded teller votes be obtained on amendments in Committee of the Whole.

Diplomacy, Libraries, and Silver

On three different occasions during the 1970s, the Rules Committee and the House as a whole attempted to devise, and then modify and perfect, a body of rules that would protect the integrity of House legislative procedures when the House was confronted with nongermane proposals adopted in accordance with the Senate's procedures. The House changed its rules, not by abandoning its own principles of procedure, but by developing 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; however, the House now has a remedy it did not enjoy before 1970. House action on three conference reports under Rule XXVIII illustrates how this recourse has been used.

Diplomacy

H. R. 7645 of the 93rd Congress, the Department of State authorization bill for fiscal year 1974, was passed by the House on June 7, 1973 and approved by the Senate one week later with an amendment in the nature of a substitute. When the House took up the conference report on the bill on September 11, Gerald Ford of Michigan made a point of order under Rule XXVIII against a section of the conference substitute. This section modified a Senate provision concerning access by congressional committees to information held by foreign affairs agencies of the executive branch. After the point of order was sustained, William Mailliard of California moved that the House reject the offending section—the first such motion made pursuant to the 1972 rules change. The House agreed to the motion by a vote of 213 to 185. Robert Sikes of Florida then made a comparable point of order against a

second section of the report, also originating in the Senate, that required congressional approval of military base agreements with foreign countries. This point of order was also sustained, and the House agreed by voice vote to Sikes's motion to reject the section. By a second voice vote, the House then amended the Senate amendment with an amendment consisting of the remainder of the conference report (119 Cong. Rec. 29235-29246).

Instead of accepting the conference agreement without the nongermane provisions, the Senate considered the bill again on September 26 and agreed to a Senate amendment to the House amendment to the Senate substitute. The Senate amendment reinserted the two sections in modified forms, in an evident attempt to avoid any further conflict with the House's germaneness rule. As modified, the two provisions affected only the Department of State and the funds authorized for its operations. The Senate then requested a further conference, to which the House agreed (119 Cong. Rec. 31560-31562).

On October 10, a second conference report was considered by both the House and the Senate. Both chambers agreed to this report by voice vote after learning that the two nongermane provisions, even in their modified forms, had been dropped by the conferees (119 Cong. Rec. 33577-33578, 33609). There was little discussion of the report on the House floor, but William Fulbright, chairman of the Senate Foreign Relations Committee, expressed dismay at the situation as it had developed (119 Cong. Rec. 33578):

> The rejection of these two provisions is serious enough of itself. But the significance of what took place goes far beyond the fate of these two sections: it amounts to a rejection of the traditional concept of comity between the branches. If the House can reject individual components of conference reports on grounds that they do not meet the requirements of the House rules, it is no less than an effort to make the Senate comply with the House rules on germaneness, an extraterritorial application of the House rules, if you will.

Confronted with the House rule, as it had been revised in 1972, and perhaps fearing that the germaneness of the two provisions was still in doubt, the Senate conferees had agreed to delete them from the second report. Despite the Senate's insistence on a second conference and despite Fulbright's expressions of dismay, the invocation of the revised House rule ultimately proved successful.

Libraries

On November 20, 1973, the Senate considered and passed, without debate, S. J. Res. 40, authorizing and requesting the president to call a White House Conference on Library and Information Sciences (119 Cong. Rec. 37712-37713). On December 12 of the next year, the joint resolution was

also passed by the House, but with an amendment in the nature of a substitute (120 Cong. Rec. 39359-39365). Instead of concurring in the House amendment, the Senate amended the House amendment on the following day to include an amendment to clarify and modify the Family Educational Rights and Privacy Act of 1974 (the "Buckley amendment") concerning access to educational records (120 Cong. Rec. 39859-39866). Four days later, the Senate reconsidered the joint resolution and, by unanimous consent, added to it additional amendments to (1) exempt college fraternities and sororities and youth service organizations, such as the Boy Scouts and Girl Scouts, from the provisions of Title IX of the Education Amendments of 1972 that bar sex discrimination in admissions to federally assisted educational programs and (2) protect the medicare benefits of persons receiving care in nursing facilities operated by fraternal organizations (120 Cong. Rec. 39991-39994). The sponsors of both amendments suggested that the amendments were necessary to correct misinterpretations of congressional intent by executive agencies.

The conference report that was filed on December 17 resolved the minor differences between the two chambers concerning the White House conference and included modified versions of the Senate provisions affecting the Buckley amendment and Title IX; the final Senate provision, on medicare payments, was eliminated in conference (120 Cong. Rec. 40547-40550). Both chambers agreed to the report by voice votes on December 19, but not before an attempt was made on the House floor to delete the Title IX amendments. William Steiger of Wisconsin made the point of order that this section of the conference substitute was nongermane, and, after the point of order was sustained, moved that the House reject the provision. In this case, however, the motion was rejected, 37 to 102 (120 Cong. Rec. 41076-41078, 41389-41396).

By this vote, the House determined that it would consider the conference report even though it included provisions that were obviously nongermane under the rules of the House. Most of the representatives voting evidently concluded that the amendments had merit and that there was good cause for approving them in this fashion. The House accepted these nongermane provisions, but it did so as a matter of choice, not of necessity.

Silver

The House voted on April 3, 1979 to pass H. R. 595, a bill to authorize the General Services Administration to dispose of 35,000 long tons of tin from national and supplemental stockpiles (125 Cong. Rec., daily ed., H1895-H1902). Six months later, on October 16, the Senate passed the same bill with an amendment in the nature of a substitute that had been reported by the Senate Armed Services Committee. As passed by the Senate, the bill

authorized $237 million for acquisition of strategic and critical materials and provided for disposal of 15 million troy ounces of silver and 1.5 million carats of industrial diamonds as well as of the 35,000 long tons of tin (125 Cong. Rec., daily ed., S14651-S14654). Floor action in both chambers was brief and routine.

The conference report, which the House considered on December 12, proposed a third version of the bill, in lieu of the Senate substitute, that included the $237 million authorization and provided for disposal of 5 million troy ounces of silver, 3 million carats of industrial diamonds, and 35,000 long tons of tin (125 Cong. Rec., daily ed., H11479). Any representative who opposed any provision of the conference report could have made a point of order against the report as a whole on the grounds that the conferees had exceeded their authority in the industrial diamond provision. The scope of the differences between the chambers on this matter was defined by the Senate position of 1.5 million carats and the House position of zero. The conference position of 3 million carats exceeded the scope of the differences and made the entire agreement subject to a point of order.

Instead, Larry McDonald of Georgia made a point of order on the House floor that the provision of the conference report concerning silver would have been nongermane if it had been offered as a House floor amendment to H. R. 595, which originally dealt only with tin. After the Speaker sustained the point of order, McDonald moved that the House reject the silver provision of the report. The House voted, 272 to 122, to agree to the McDonald motion, and then approved the remainder of the conference report as a House amendment to the Senate amendment to the bill (125 Cong. Rec., daily ed., H11834-H11841). The Senate accepted the House amendment a week later (125 Cong. Rec., daily ed., S19140-S19142), and H. R. 595 became law without any provision for the disposal of silver. Had the rules changes of 1970-1974 not been in effect, there would have been no readily available means to delete the silver provision from the conference report. McDonald would have had three primary options, none of them satisfactory: to accept the conference report, including the silver provision, or to either make a point of order against the report or urge its defeat by majority vote, perhaps losing the tin provision which was the original purpose of the bill. Rule XXVIII gave him the fourth option: to attack the provision he opposed without doing fatal damage to the provisions he accepted.

As these three cases demonstrate, the 1970-1974 House rules changes have given representatives the opportunity to reject nongermane provisions of conference reports (and Senate amendments), but rejection is not automatic. After the nongermane character of a provision is established, it remains for the House to decide, by majority vote, whether or not to accept the provision as part of the report. By the same token, the Senate is not bound by whatever

decision the House makes. If the House votes to reject a nongermane provision and accept the remainder of the report, the Senate may concur and sacrifice the nongermane matter. However, the Senate retains the option of insisting on its original position (or some modification of it) and returning to conference, at which all the issues in the House and Senate versions of the measure may be reconsidered and renegotiated.

Conflict or Accommodation

As a general matter, the House and Senate have approached their bicameral relations by adopting a policy of noninterference 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 the 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. Arrangements for reviewing legislation are also matters that each chamber prefers to reserve to 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. Instead, both chambers have tended to respond in similar ways to identical pressures of events or constituency interests. On constitutional matters, each chamber seeks to protect its unique constitutional prerogatives from intrusion by the other: for example, the prerogative of the House to originate revenue measures and the prerogative of the Senate to give its advice and consent to proposed treaties. When each chamber arranges its legislative agendas, its coordination with the other chamber tends to be informal, unsystematic and influenced by such factors as party control, the relations among the party leaders of the House and Senate, the importance of the legislation to be considered, and the pressures of time and impending deadlines.

If legislation is to be enacted, however, full chamber autonomy is impossible. Each chamber may act initially on a measure according to its own rules, precedents, and practices, but the differences between their initial positions must be resolved eventually to the satisfaction of both. Reconciling House-Senate differences over policy is necessarily a ticklish business, if only because each chamber, cherishing its autonomy, must accept the coequal status of the other. Each chamber must sacrifice preferred positions or face the prospect of stalemate. The conference committee is a device well-suited to the purpose because it permits free discussion and negotiation

in a relatively informal setting, in which positions can be explored, options can be presented, and trade-offs can be proposed without foreclosing other possible compromises until full agreement or deadlock is reached.

If a conference committee is successful, a single package agreement is presented to both chambers with the support of a majority of both the House conferees and the Senate conferees. But the agreement depends on preserving the unity of the package. It is precisely because conference reports must remain indivisible that nongermane Senate propositions posed such a serious dilemma for the House. The House responded by developing a procedure by which rejection of any nongermane provision of a conference report constitutes rejection of the report as a whole. The differences between the chambers then may be resolved through amendments between the chambers or through renewed conference negotiations.

Confronted with the problem of nongermane Senate actions, the House had several options. First, the House could have done nothing. In fact, it is striking that the House permitted so many years to pass during which Senate intransigence could force the House to choose between allowing desired legislation to die for lack of agreement and accepting violations of one of its most fundamental rules of procedure. Alternatively, the House could simply have extended the applicability of its germaneness rule to both conference reports and Senate amendments, requiring that all provisions of a measure before the House be germane at every stage of the legislative process. This course of action would have permitted a single representative to block agreement to a conference report merely by making a point of order, but it almost certainly would have caused open conflict with the Senate as well.

In preference to either of these options, the House sought and found a means of accommodation. Instead of seeking confrontation with the Senate in the hope that an intractable House could compel the Senate to adopt stricter procedures, the House mitigated conflict by accepting 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 could 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 groundrules, the House was satisfied to minimize the consequences of disagreement.

In adopting and perfecting this approach, representatives may have been motivated in part by a recognition that attaching nongermane provisions to a measure in the Senate can occasionally be useful or necessary. But representatives must also have appreciated the inescapable necessity of bicameral cooperation and the desirability of resolving sensitive bicameral problems in ways that promote comity instead of exacerbating conflict. To this end, the House developed means to isolate the conflicts resulting from a

fundamental difference 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.

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NOTES

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1. The interest of each chamber in preserving or enhancing its relative position dates to the First Congress and the debate over whether representatives and senators should receive equal compensation for their services (Maclay, 1880, pp. 133-138; Fisher, 1980, pp. 27-29).

2. Divided party control of the Congress is more the exception than the rule. Since 1881, there have been only seven Congresses in which party control of the House and Senate was divided (Galloway, 1961, p. 239).

3. 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 1822, bringing the rule to its present form (5 Hinds and Cannon 5825, pp. 422-424).

4. 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 having it referred to and reported from one or more of the Senate's standing committees.

5. See for example, Vogler (1971), pp. 101-102. Luce (1922, pp. 404-405) 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."

6. The following discussion is based in part on Bach (1976), a report prepared for the Congress by the Congressional Research Service.

7. This situation is unlikely to arise during action on a general appropriation bill. Virtually all general appropriation bills originate in the House and are amended by

the Senate, item by item. Consequently, the Senate changes consist of a series of discrete amendments, rather than a single amendment in the nature of a substitute.

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