RULES, RULINGS, AND THE RULE OF LAW IN CONGRESS

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On May 23, 1900, the House of Representatives was completing action on a bill concerning the extradition of fugitives from Cuba. After Rep. Ray of New York moved the previous question on the bill, Rep. De Armond of Missouri proposed to recommit the bill back to committee. The Speaker pro tempore ruled, however, that De Armond's motion was not in order until after the stage of engrossment and third reading. De Armond was perplexed; he referred to a provision of House Rule XVII that seemed to make his motion in order without regard to whether or not engrossment and third reading had taken place. The Chair responded by citing a precedent from 1896 in support of his ruling, acknowledging that "[t]here is perhaps a discrepancy" between the text of the rule and the precedent he cited, "but the practice of the House, since the ruling of Speaker Reed, has been uniform." De Armond was provoked to reply, in apparent exasperation, that "[o]f course the rules will have to yield to the rulings...."[1]

This paper addresses the relationship between rules and rulings in Congress. It consists largely of four stories, two about the House and two about the Senate, that are variations on a single theme: that each house retains and occasionally exercises the authority to interpret its rules in ways that diverge significantly from the most plausible understanding of what those rules were expected to be implemented and what they were intended to accomplish. Within constitutional boundaries that are so broad as to be irrelevant for most practical purposes, the rules of the House and Senate mean only what either house chooses for them to mean, and that meaning can change with the passage of time and without any change in the text of the rules themselves.

In an important sense, this paper is an extension of the work that Elizabeth Rybicki and I are doing on the history of the amendment rule in the House of Representatives. In a 1995 paper, we traced the history of the House's standing rule that permits Members to offer as many as four amendments before any vote must take place.[2] We demonstrated, to our satisfaction at least, that what the House understood this rule to mean when adopting it in 1880 is quite different from what it later came to mean and what it means today, even though the text of the rule remains the same. The current accepted and authoritative

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[1]*Congressional Record*, May 23, 1900, pp, 5921-5922.

[2]Bach and Rybicki, "A Tree Grows in Washington: The Crystallization and Interpretation of Amendment Rules in the House of Representatives," a paper presented at the 1996 Annual Meeting of the American Political Science Association.

interpretation of the rule differs significantly from how its authors intended it to be interpreted. We still are in the process of trying to discover when, how, and why this change in interpretation took place.

In the stories told here, what happened, and when and how it happened, is reasonably clear, even if motive is not.

THE NUMBER OF HOURS IN A DAY

October 29, 1987, was one of the most tumultuous days of Jim Wright's Speakership.[3] As 8:00 p.m. approached, the House passed an omnibus reconciliation bill by a one-vote margin, 206 to 205. After Members had 15 minutes to vote on the bill, the tally stood at 205 to 206 against final passage, and so it remained for perhaps ten more minutes. House Rule XV provides at least 15 minutes for Members to reach the floor and be recorded on most electronically recorded votes, but the rules do not require that the vote be closed as soon as the 15 minutes expire. Normally, 15-minute votes are left open for at least a few more minutes as an accommodation to Members who are on their way to the Chamber. In this case, the Speaker waited for much longer until one of his fellow Democrats came to the floor and changed his vote from nay to yea, providing the Speaker and his allies with their razor-thin margin of victory.

Naturally, House Republicans were incensed, contending that the Speaker had abused his discretion in order to deny them a hard-fought victory on one of the most important bills of the year. This episode continued to rankle and undoubtedly contributed to the intensely partisan atmosphere in which charges of ethical lapses against Wright were pursued, ultimately leading to his resignation from the House. When veteran Representatives today think back to Speaker Wright's conduct in presiding over the House, this episode must provide many one of their most vivid memories.

What is less often remembered is how the House came to consider the bill, H.R. 3534, in the first place. Earlier in the day, the House had rejected a special rule for considering the bill. No Republicans joined 203 Democrats in supporting it, but there were 48 Democrats among the 217 who opposed it, one reason being the inclusion, by a self-executing provision, of a wide-ranging welfare reform package that some preferred to consider separately. Almost immediately thereafter, the Speaker and Rep. Derrick of the Rules Committee both announced that the Rules Committee would meet in an hour to consider another rule on the bill.

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[3]For all the events discussed in this section, see pp. 29905-30239 in the *Congressional Record* of that date. The discussion here largely tracks, and has benefitted from, a memorandum written by Don Wolfensberger, then Minority Counsel to the Subcommittee on the Legislative Process of the Rules Committee. His memorandum is reprinted in the *Congressional Record* of February 4, 1988, at pp. 992-994.

For the next two hours, the House indulged in one-minute and special order speeches until Rep. Frost of Texas filed the Rules Committee's report on its new proposed rule. Then Majority Leader Foley made two motions to which the House agreed. First Foley moved that "when the House adjourns today it adjourn to meet at 3:15 today;" then he moved that "the House do now adjourn." (If the House had adjourned without benefit of the first motion, it would have adjourned until its next regular meeting time on the following day.) So at 3:05 p.m., the House began the vote to adjourn, and reconvened ten minutes later.[4] After a vote on approving the Journal, Derrick immediately called up the new rule which no longer incorporated welfare reform in the reconciliation bill. This time there were only 13 Democratic defections so the rule was adopted and the House took up the bill itself, leading, two and a half hours later, to the Speaker's "slow gavel."

It had been necessary for the House to adjourn because of a constraint on the authority of the Rules Committee to call up the special rules it reports. A rule can be called up for floor consideration only after it has met a one-day layover requirement: a special rule "shall not be called up for consideration on the same day it is presented to the House, unless so determined by a vote of not less than two-thirds of the Members voting...." (Rule XI, clause 4(b)) It was to satisfy or circumvent this requirement, depending on one's point of view, that Foley arranged for the House to adjourn for ten minutes in the middle of the afternoon. When the House reconvened, it began a new legislative day, even though it remained the same calendar day.

In the process, Foley endorsed one of three possible interpretations of the one-day layover requirement. What does the rule mean when it refers to "the same day"? It could refer to the same calendar day, in which case a two-thirds vote would have been required to consider the new rule at any time before midnight on the 29th. Or it could refer to a twenty-four hour period, in which case the rule could not have been considered until 2:30 p.m. on October 30th. Or it could refer to the next legislative day.

In both the House and the Senate, a new legislative day begins whenever that house convenes after an adjournment and it continues until the next time that house adjourns. Consequently, a legislative day can extend far beyond the calendar day on which it begins, and this occurs routinely in the Senate. More often than not, the Senate recesses at the end of its daily sessions, so that when it reconvenes on the following calendar day, it remains in the same legislative day and the Senate will continue in that legislative day until it does adjourn, which may occur days or even weeks later. Alternatively, sometimes the Senate

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[4]According to Wolfensberger, Foley made his motion to adjourn at 3:05 p.m. "Because the adjournment vote would not end until after the new legislative day was to begin, the Chamber clock facing the chair was manually stopped just before 3:15. The vote was announced (236-171), the House adjourned, and then, almost immediately, was reconvened." Wolfensberger memorandum reprinted in the *Congressional Record*, February 4, 1988, p. 992.

has adjourned for only a minute when there has been some procedural need to create a new legislative day. In the House, on the other hand, calendar and legislative days almost always coincide because the House almost always adjourns at the end of each meeting. But not on October 29th, when the House began a second legislative day on the same calendar day.

In explaining to the House why he was about to offer an adjournment motion, Foley asserted by implication that "the same day" meant the same legislative day:[5]

> Because the Rules of the House require a two-thirds vote for it [the second special rule on the reconciliation bill] to be brought up on the same day, it was our intention to ask for unanimous consent so that this might occur. Since I have been advised, however, that will not be granted, we now intend to move that the House adjourn today, and, should that motion be adopted, we would reconvene at 3:15 p.m. this afternoon to consider the rule....

But was this the correct meaning of "day"? The answer, it appears, depends on whether we ask what the rule was originally intended to mean or what it now is interpreted to mean.

There is little doubt that "the same day" now is taken to mean the same legislative day. In 1987 (and today), the Parliamentarian's commentary on the rule makes this clear:[6]

> Pursuant to this clause, a privileged report from the Committee on Rules may be considered on the same *legislative* day only by a two-thirds vote...and if the House convenes for two *legislative* days on the same calendar day, any report filed on the first *legislative* day may be called up on the second without the question of consideration being raised. (Emphasis added.)

It is clear, then, that Foley and the House were preceding under an unambiguous interpretation of the rule that already was in place; the rule was not being re-interpreted to suit the convenience of the moment.[7]

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[5]*Congressional Record*, October 29, 1987, p. 29934.

[6]U.S. Congress, House of Representatives. *House Rules and Manual*, 100th Congress. House Document No. 99-279, 99th Congress, 2d Session, p. 460. See the next note for the difference between the commentary in 1987 and 1995.

[7]In his memorandum, however, Wolfensberger later distinguished between the 1987 episode and the 1985 event that the *House Rules and Manual* cited to illustrate the statement just quoted. In 1985, Wolfensberger pointed out, the Rules Committee reported a rule after midnight, toward the end of a long daily session of the House. The House then adjourned and reconvened later on that

A different picture emerges, however, when we go back to the 1924 debate on adopting the "same day" requirement. The one-day layover rule was proposed by Rep. R. Walton Moore of Virginia on January 18, 1924, as a floor amendment to H.Res. 146, a resolution making various changes in the House's rules.[8] His complaint, not surprisingly, was that Members deserved more advance notice of what business the House was about to transact. In support of his proposal, Moore quoted Champ Clark as having argued four years earlier that:[9]

> The Rules Committee ought to be compelled to give 24 hours' notice every time it brings in a rule.
>
> They bring it on the House suddenly, and the House does not know a thing on the face of the earth about what is in the rule--no one except the Rules Committee, and several of that committee do not know it, for some of them do not attend the meetings.

According to Moore, Clark "supported the view which I presented then and which I am presenting now."[10] Here is evidence, then, that Moore intended his amendment to require a 24-hour layover period. During the debate on the amendment, Davis of Tennessee also referred to the benefits that would flow from giving Members' 24 hours notice before considering a special rule, and an opponent of the amendment, Sanders of Indiana, implicitly endorsed a calendar day, if not a 24 hour, interpretation when we complained that the majority

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calendar day to begin a new legislative day. In 1985, therefore, the House had not *convened* for two legislative days on the same calendar day, as it did in 1987. Instead, the House had concluded one legislative day (which had begun on the previous calendar day) and then had begun a second legislative day. In 1985, the House evidently did not adjourn and create a new legislative day, to begin immediately, in order to circumvent the two-thirds vote requirement. In 1987, of course, that is precisely what happened. In 1985, furthermore, the Speaker had not actually made a ruling; he only had replied to a parliamentary inquiry, which normally does not carry as much precedential weight as a ruling. *Congressional Record*, December 16, 1985, p. 36755. The Parliamentarian's commentary in the most recent *House Rules and Manual* (House Document No. 103-342) now cites both the 1985 and the 1987 cases in stating that "if the House continues in session into a second calendar day and then meets again that day, or convenes for two legislative days on the same calendar day, any report filed on the first legislative day may be called up on the second without the question of consideration being raised" (pp. 495-496). The first part of this statement reflects the 1985 situation, and the second part the 1987 ruling.

[8]Proceedings on the amendment appear in the *Congressional Record* of that date at pp. 1139-1141.

[9]*Congressional Record*, May 11, 1920, p. 6878.

[10]*Ibid.*

party leadership "may not have known on Monday that there would be an opportunity to take up a bill on the floor of the House on Tuesday." There were no references in any context during the debate to the concept of the legislative day.

Several months after the events of October 29th, Rep. Lott, then a member of the Rules Committee, addressed the interpretation of the rule in a brief special order speech in which he offered two reasons why the "legislative day" interpretation was illogical. First, he noted the anomaly of requiring a two-thirds vote to consider a rule, but then enabling the House to effectively waive this requirement by agreeing by simple majority vote to adjourn momentarily. "Why would the rule require a two-thirds vote for same-day consideration of a rule if the house could instead adjourn and reconvene immediately by simple majority vote?" And second,[11]

> The second part of the rule, suspending the two-thirds requirement during the last 3 days of a session, can only refer to calendar days since, allowing for multiple legislative days during that period, one could not calculate backward which would be the final 3 legislative days. And this calendar day interpretation is confirmed by a precedent in which the Chair held that the rule applied to the last 3 calendar days, except for Sundays. In short, the author of the rule could hardly have intended for the word "days" to mean legislative days in the first part of his parenthetical clause, and calendar days in the second.

Lott also observed that, under other House rules, each committee report on a bill and each conference report must be available (lay over) for three calendar days before the House may take up the bill or conference report. Lott implies, therefore, that all three layover requirements should be interpreted in the same way, and that the "same day" requirement for special rules also should be understood to mean a calendar day. On the other hand, each of the three-day layover rules specifically refers to calendar days, and each was first adopted as part of the Legislative Reorganization Act of 1970. Perhaps those drafting what became the 1970 Act simply had been more precise and careful than Rep. Moore had been. However, it might be just as reasonable to argue that, if the House wanted all availability periods to be counted in calendar days, it would have taken advantage of the opportunity in 1970 to clarify the rule it had adopted many years earlier, in 1924.

Further light was shed on the episode several weeks later when Lott inserted in the *Record* an exchange of letters with Speaker Wright.[12] In his letter, the Speaker elaborated on his position and the analysis he had received from the House's Parliamentarian. Wright observed that, notwithstanding Lott's argument about counting days at the end of a session, "the term 'day,'

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[11]*Congressional Record*, February 4, 1988, p. 991.

[12]*Congressional Record*, February 23, 1988, pp. 2431-2433.

unless otherwise clarified, is normally interpreted to be a 'legislative day' rather than a 'calendar day.'"[13] When the rule had been adopted in 1924, legislative and calendar days virtually always coincided; when the House adjourned, it adjourned until its next regularly scheduled meeting day and time. It was not until 1973, Wright pointed out, that the House adopted the provision of Rule XVI, clause 4, allowing the House to adjourn by motion "to a day and time certain."

Whether intended or not, the effect of the 1973 rule was to enable the House to de-link calendar and legislative days by creating the possibility of momentary adjournments. According to Wright, adjourning the House to create a new legislative day was not an innovation that he and Foley had concocted in 1987. He wrote to Lott that "the Parliamentarian has advised me that he has consistently advised Members and staff since that time [1973] that such a motion [to adjourn to a day and time certain] could technically be used to establish two legislative days during a single calendar day to facilitate the application of other rules wherein the counting of 'legislative days' would be relevant."[14]

Although Wright did not say so directly, his letter to Lott implied that even if the result was to affect how the layover rule could be implemented--read, circumvented--and allow the House to act contrary to the spirit of the 1924 rule, that did not change how the rule itself was to be construed. Wright also cited instances in which the Rules Committee had reported special rules after midnight but before the House adjourned, and then called them up without need for a two-thirds vote when the House began a new legislative day later on the same calendar day. What Wright failed to address, however, was Lott's question why, if "day" means "legislative day" unless a rule specifies otherwise, the reference in the rule to the last three days was accepted as meaning calendar days.

In summary, the best that can be said is that the arguments made in 1924 lend strongest support to the conclusion that the rule was intended to require a special rule to lay over for 24 hours so that Members would have ample time to prepare for the debate on it and the bill it made in order. This purpose is not achieved by Wright's interpretation, nor would it be achieved by the interpretation Lott proposed--that "day" should be understood to mean "calendar day"--because, under that interpretation, the Rules Committee could report a new rule at 11:59 p.m. and call it up moments later.

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[13]Note in this context the following statement from *Riddick's Senate Procedure*, Senate Document No. 101-28 (which, of course, is not binding on the House): "The word 'day,' as used in the rules, unless it is specified as a calendar day, is construed to mean a legislative day" (p. 713).

[14]*Congressional Record*, February 23, 1988, p. 2432.

For whatever reason, Rep. Moore had not specified in the text of his rule what he meant by "the same day," with the result that his evident intent was undermined, intentionally or not, by later rules and rulings on which the Parliamentarian based his advice, and the Speaker his ruling, in 1987. In his letter to Lott, Wright claimed "to appreciate the accuracy and depth of your [Lott's] research and your general conclusion regarding the original intent of the Member who authored the one-day layover rule in 1924." The Speaker was more concerned, however, with "the documented (and uncontested) construction" of the layover provision as a legislative day requirement. Original intent was interesting but inconclusive. The rule had to yield to the rulings.

INSTRUCTIONS FROM THE HOUSE

One of the first things the Republicans did when they took control of the House in January 1995 was to adopt an amended set of House rules that dealt with many of their grievances against the former Democratic majority and how it had governed the House, especially since the early 1980s. One such amendment affected the form and use of the motion to recommit.[15]

For years the Republican minority had complained that the Democrats were misinterpreting the House rules governing one of the few motions that belongs to the minority party and one that allows the minority to force votes on its alternatives to the majority's bills. Just before the House votes on passing a bill, one motion to recommit may be made. The motion belongs to someone who opposes the bill (at least in its present form), and to any member of the minority party in preference to even the most senior member of the majority.

The motion can take two forms. A simple or "straight" motion simply proposes to recommit the bill to the committee that had reported it. If adopted by simple majority vote, that motion kills the bill. More common and more important, therefore, is a motion to recommit with instructions that proposes to return the bill to committee and to instruct the committee as to what further action it is to take. These instructions usually are "amendatory": they direct the committee to report the bill back to the House "forthwith" with a certain amendment. Because these instructions give the committee no discretion and no time to act, the bill never actually leaves the floor. If the House adopts such a motion, the committee chairman simply stands and, pursuant to the House's instructions, reports the bill back to the House with the proposed amendment. The House then acts on the amendment and then votes on passing the bill, as it may just have been amended.

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[15]This discussion is based on my statement on "Recommittal Motions, Special Rules, and Minority Rights in the House," presented to the Subcommittee on Rules of the House. U.S. Congress. House of Representatives. Subcommittee on Rules of the House of the Committee on Rules. *Roundtable Discussion on the Motion to Recommit* (Subcommittee Print; 102d Congress, 2d Session, 1992), pp. 8-31.

In this way, the recommittal motion provides one last opportunity for the House to amend a bill before deciding whether or not to pass it. Furthermore, by well-established precedent, it is an opportunity that the House, certainly a majority-rule institution, accords to the minority party if any of its members rises to claim it. The motion was particularly valuable before 1971 because, until then, there were no recorded votes on amendments in Committee of the Whole. Minority members might offer their amendments to the majority's bills, but without being able to put all Representatives on public record for or against them. Recommittal motions, on the other hand, are made in the House where there is a constitutional right to demand the yeas and nays. So the minority could use such a motion to force a rollcall vote in the House on an amendment of its choice.[16]

After the House authorized recorded votes in Committee of the Whole, the value of the motion declined, but the Republican minority remained sensitive to anything that undermined one of its few prerogatives under House rules. It was not surprising, therefore, that Republicans reacted angrily when the majority-dominated Rules Committee reported an increasing number of special rules that denied them the right to offer recommittal motions with instructions containing amendments. Under most circumstances, the Rules Committee can propose special rules that waive, explicitly or implicitly, almost any of the procedures and prohibitions of House rules. What especially infuriated the Republicans in this case, however, was that the House's standing rules seemed to prohibit the majority's Rules Committee from tampering with the minority's recommittal motion.

At issue were provisions of House Rules XI and XVI. In the same clause of Rule XI that imposes the one-day layover for special rules (discussed in the previous section of this paper), the Rules Committee is prohibited from reporting "any rule or order which would prevent the motion to recommit from being made as provided in clause 4 of rule XVI." If not for this prohibition, the majority could render minority recommittal motions a nullity simply by adopting special rules that prevented them from being offered. (By the same token, the only other rule that the Rules Committee cannot waive is the rarely-invoked Calendar Wednesday rule that was adopted to enable House committees to bring bills to the floor should the Rules Committee refuse to report rules for their consideration.)

In turn, clause 4 of Rule XVI states in part that:

> After the previous question shall have been ordered on the passage of a bill or joint resolution one motion to recommit shall be in order, and the Speaker shall give preference in recognition for such purpose to a

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[16]*Cannon's Precedents*, v. VIII, sec. 2698; Samuel McCall, *The Business of Congress* (New York: Columbia University Press, 1911), p. 119; and Champ Clark, *My Quarter Century of American Politics* (New York: Harper & Bros., 1920), v. 1, p. 205.

> Member who is opposed to the bill or joint resolution. However, with respect to any motion to recommit with instructions after the previous question shall have been ordered, it always shall be in order to debate such motion for ten minutes before the vote is taken on such motion, except that on demand of the floor manager for the majority it shall be in order to debate such motion for one hour. One half of any debate on such motions shall be given to debate by the mover of the motion and one half to debate in opposition to the motion.

Putting the two rules together, the minority Republicans could assert that the Rules Committee could not report a special rule providing that a motion to recommit would be in order but that it could not contain certain instructions or any instructions. They could argue that Rule XI prohibited the Committee from reporting a rule preventing "the motion to recommit from being made as provided in clause 4 of rule XVI," and that Rule XVI specifically provided for such a motion to include instructions. On the other hand, the majority Democrats could argue that Rule XVI only required that "one motion to recommit shall be in order," and that need not be a motion to recommit with instructions. If a motion to recommit with instructions happened to be in order and happened to be made, then it was debatable under the terms of the rule. But so long as the Rules Committee did not prohibit a recommittal motion in any form, the Democrats could assert, the Committee was complying with Rule XI.

By the time the dispute over this question came to a head in the early 1990s, precedent clearly supported the Democratic majority's position. According to the House Parliamentarian, in *Deschler's Precedents*:[17]

> The Committee on Rules is precluded under clause 4(b), Rule XI from reporting a special rule which would prevent the motion to recommit from being made as provided in clause 4, Rule XVI (in the second sentence), although it may report a special rule limiting to a straight motion, or precluding certain instructions in, the motion to recommit which may be offered on a bill or joint resolution pending final passage.

Without endorsing the line of argument offered above, the Parliamentarian endorsed the conclusion that the Rules Committee could prevent a recommittal motion from including some or all instructions without subjecting its resolution to a point of order under Rule XI. One reason the minority Republicans did not make points of order against special rules that did restrict or prohibit instructions was precisely because they were well aware how the rules were being interpreted and they did not want to fix this interpretation even more firmly in the House's precedents.

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[17]U.S. Congress, House of Representatives. *Deschler's Precedents of the United States House of Representatives* (House Document 94-661; 94th Congress, 2d Session), v. 7, ch. 23, sec. 25, at pp. 179-180.

But was this interpretation consistent with the legislative history of the two rules and what it tells us about legislative intent?

Notice that Rule XVI, clause 4, as quoted above, does not require the Speaker to favor the minority over the majority in recognizing Members to make recommittal motions. Instead, the rule directs the Speaker to "give preference in recognition for such purpose to a Member who is opposed to the bill or joint resolution." This requirement dates back to 1909. In his *Precedents*, Clarence Cannon argues that, although motions to commit and recommit with instructions had been offered as early as 1850,[18] the 1909 amendment was adopted in reaction to "the practice which had grown up under which the Speaker recognized the Member in charge of the bill to make the motion to recommit, in effect nullifying the purpose of the motion"--namely, to "afford the House a last opportunity to express its preference on the final form of the bill" by recognizing "a Member actually opposed to the measure."[19]

A year after the 1909 amendment, Speaker Cannon looked back on the House's earlier practice in similar terms:[20]

> The object of this provision [for a motion to recommit] was, as the Chair has always understood, that the motion should be made by one friendly to the bill, for the purpose of giving one more chance to perfect it, as perchance there might be some error that the House desired to correct. But since the adoption of the late rule upon this subject, the Chair is compelled, provided some one arises and moves to recommit the bill, to submit the question: "Is the gentleman opposed to the bill?"

The purpose and effect of the rules change, therefore, was to overcome the Speaker's customary and natural inclination to recognize the majority floor manager in preference to some other Member seeking recognition at the same time and for the same purpose. To the same end, the 1909 rules changes also prohibited the Rules Committee from proposing to set aside the motion to recommit. Otherwise, the majority party in the committee and on the floor could nullify the right of a bill's opponents to try to amend it by use of a recommittal motion simply by adopting a special rule that prevented any such motion from being made.

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[18]U.S. Congress, House of Representatives. *Hinds' Precedents of the House of Representatives* (Washington: Government Printing Office, 1907), v. V, secs. 5301, 5529-5541, 5545-5547.

[19]U.S. Congress, House of Representatives. *Cannon's Precedents of the House of Representatives* (Washington: Government Printing Office, 1936), v. VIII, sec. 2757.

[20]Quoted in *Cannon's Precedents*, v. VIII, sec. 2762.

Within a few years after these rules changes, Champ Clark, Cannon's successor as Speaker, began to entrench the precedent that, if two or more opponents of a bill sought recognition to recommit it, the Speaker gives preference to a member of the minority party--in other words, that the right to propose recommittal belongs to the minority in the House as well as to the minority on the bill. As early as 1913, Clark stated that:[21]

> The present occupant of the Chair laid down a rule here about a year ago that in making this preferential motion for recommitment the Speaker would recognize the top man on the minority of the committee if he qualified--that is, if he says he is opposed to the bill--and so on down to the end of the minority list of the committee.

Although several of Clark's later statements on the same subject are more ambiguous,[22] two conclusions emerge from the few discussions of this question that were recorded in the *Precedents*: first, that the minority party's "property right" in the motion to recommit is based on precedent, not on the text of House rules; and second, that this right had become well-established by 1932, when Speaker Garner explained to John McCormack that:[23]

> Under the usages of the House on the motion to recommit, it has been customary for the Chair to recognize the opposition, which in the present case would be the Republican members of the Ways and Means Committee, to move to recommit provided they qualified as being opposed to the bill. If no Member on the minority side sought recognition and qualified for that purpose, the Chair would then recognize the majority side, according to their rank on the committee, provided they qualified for a motion to recommit.

Speaker Gingrich could repeat this statement today with equal fidelity to the rules and to the precedents governing their interpretation.

As early as 1912, Speaker Clark also sustained a point of order against a special rule that had the effect of preventing a motion to recommit the bill that the resolution made in order. Speaking to the Rules Committee and referring to the 1909 rules change, Clark held that:[24]

> You can report any rule which you see fit to put upon the books, but as long as that section stands there the Committee on Rules is

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[21]*Cannon's Precedents*, v. VIII, sec. 2767.

[22]*Cannon's Precedents*, v. VIII, secs. 2264, 2773; see also the 1919 discussion among Gillett, Crisp, and Garrett in sec. 2727 of the same volume.

[23]*Cannon's Precedents*, v. VIII, sec. 2697.

[24]*Cannon's Precedents*, v. VIII, sec. 2263.

> precluded from bringing in such a resolution as this one. If you bring in a resolution amending the rules, that is a proposition which, of course, the Chair would entertain; but you are not bringing in a resolution to amend the rules, you are bringing in a resolution which violates a rule of the House.

However, Clark did not speak to whether a special rule might permit a recommittal motion but prohibit it, directly or indirectly, from containing any instructions. The first time that question appears to have been addressed was in a 1934 ruling made by Henry T. Rainey of Illinois during his only term as Speaker.

The special rule at issue made no mention of a recommittal motion, but it did prohibit any floor amendments to or conflicting with Title II of the bill. Reserving a point of order against the resolution, the Republican Minority Leader, Snell of New York, asked whether this rule would preclude "the usual motion to recommit." Clearly, Snell had in mind a recommittal motion with instructions that included an amendment:[25]

> I mean the usual motion that is made to recommit a bill, where the minority have a right to put their position on pending legislation before the House for a vote....

He anticipated that the special rule's prohibition against floor amendments changing or affecting Title II would apply to such an amendment that might be offered in a motion to recommit with instructions.

On behalf of the Rules Committee, William Bankhead of Alabama acknowledged candidly that the committee intended its resolution to be interpreted in precisely the way Snell feared, that the rule was drafted to prevent a recommittal motion with instructions from touching Title II:

> The purpose of this rule, if we have the votes to adopt it, is to protect, as I stated to the gentleman, the integrity of title II of the pending bill in toto. Under this rule, if adopted, a motion could be made to recommit to the Appropriations Committee. A motion could be made, and would be in order, to recommit with instructions as to any other item or items in the bill not covered by title II. But it is my opinion, and I think the Chair would so hold, that a motion to recommit with instructions affecting matters under title II would not be in order.

And in fact, the Chair did so hold. Rainey overruled Snell's point of order and, on appeal, the House sustained his ruling by a vote of 260-112, firmly establishing his decision as the judgment of the Chair.

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[25]These proceedings are found in the *Congressional Record* for January 11, 1934, at pp. 480-483.

In overruling Snell's point of order, Rainey observed, rightly enough, that the special rule did not prohibit the motion to recommit; it only limited the form the motion could take:

> The special rule, House Resolution 217, now before the House does not mention the motion to recommit. Therefore, any motion to recommit would be made under the general rules of the House. The contention of the gentleman from New York that this special rule deprives the minority of the right to make a motion to recommit is, therefore, obviously not well taken. The right to offer a motion to recommit is provided for in the general rules of the House, and since no mention is made in the special rule now before the House it naturally follows that the motion would be in order.

When Snell asked if, under the Speaker's ruling, "the minority will be offered to offer the usual motion to recommit," Rainey replied: "The usual *simple* motion to recommit provided by the rules" (emphasis added). In other words, so long as the special rule did not prohibit every motion to recommit, it could prohibit the motion from including certain instructions--and by extension, any instructions. Implicitly Rainey ruled that Rule XI did not protect what Snell characterized as "the usual and regular motion to recommit," which, as he had explained, was a motion containing amendatory instructions by which "the minority have a right to put their position on pending legislation before the House for a vote...." So long as a special rule left some motion to recommit in order, Rainey ruled, it did not violate Rule XI: "the motion to recommit, as provided in clause 4, rule XVI, has been reserved to the minority and...insofar as such rule is concerned the special rule before the House does not deprive the minority of the right to make a simple motion to recommit."[26]

In defense of Rainey and his ruling, in 1934 Rule XVI made no mention of motions to recommit with instructions; that reference was added to the rule years later, as a result of the Legislative Reorganization Act of 1970, in order to permit ten minutes of debate on a recommittal motion offered in this form.[27]

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[26]Rainey went on to offer what was in effect an advisory opinion: that if the House adopted the rule, a recommittal motion proposing to amend Title II would not be in order because "a motion to recommit with instructions may not propose as instructions anything that might not be proposed directly as an amendment." And that is precisely how he ruled when, on the following day, a Member proposed to recommit the bill to the Appropriations Committee with instructions to report it back with an amendment striking out a portion of Title II. Once the House adopted the special rule, it had the same force and effect as the House's standing rules, and Rainey was right to enforce it.

[27]Nothing was said during the 1970 debate, or during the 1985 debate on allowing the majority floor manager to extend the time for debate to an hour, to indicate that either amendment to the House's rules was intended or expected to have any effect on whether or how special rules might affect the form or

On the other hand, it is difficult to reconcile Rainey's 1934 ruling with what the 1909 debate reveals about why the House decided to restrict the Rules Committee's discretion with regard to recommittal motions. Rainey found that the Rules Committee could preclude instructions on certain matters, and he very clearly implied that he would not sustain a point of order against a special rule prohibiting any and all instructions. To Rainey, it was sufficient for the Rules Committee to leave open the opportunity for a simple motion to recommit--one without any instructions--that proposed to kill, not amend, the bill.

Yet clearly the purpose of the 1909 rules changes was to ensure the minority's opportunity to have the House consider and, just as important, cast a rollcall vote on the minority's position on the bill. The change in Rule XI required the Speaker to recognize a Member opposed to the bill (and, by precedent established soon thereafter, a member of the minority party). The change in Rule XVI was intended to ensure that the first rules amendment was something more than an empty promise that the majority on the Rules Committee and in the House could set aside whenever it served their purposes. In short, it is hard to avoid concluding that Rainey's ruling was directly in conflict with the purpose and intent of the 1909 amendment to Rule XI, and that it confirmed the worst fears of those who devised the corresponding amendment to Rule XVI.

We cannot know why Rainey ruled as he did (though it certainly is easy to understand why a majority of the House sustained his ruling on appeal). What we do know is that is ruling stood unchallenged as precedent for more than 50 years. Between 1977 and 1990, 74 special rules, providing for initial floor action on bills and joint resolutions, either limited or denied the minority's right to include amendments in recommittal motions; 35 restricted recommittal amendments while 39 prohibited them altogether. Although these resolutions constituted only seven percent of the special rules granted during the same period, they made in order bills on such matters as campaign reform, civil rights, Contra aid, crime control, immigration, drugs, tax reform, and welfare reform, and they governed floor consideration of several reconciliation bills and 17 appropriations measures. Interestingly, many of these rules enjoyed substantial bipartisan support--only a bare majority of them (38 of 74) were opposed, successfully or unsuccessfully, by 100 or more Members--and in only one instance did a Member make a point of order against a rule for restricting or prohibiting amendatory instructions.

In 1990, Minority Leader Michel challenged the rule on a reconciliation bill because it stated that a motion to recommit the bill "may not include instructions." The Speaker pro tempore, Rep. Murtha of PA, overruled the point of order, citing Rainey's 1934 ruling; he found that "the Committee on Rules has the authority to recommend special rules to the House which may limit but not totally prohibit, the type of motion to recommit which may be offered," and that "Rule XVI does not guarantee that a motion to recommit a bill may always

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content of recommittal motions.

contain instructions."[28] Thus, when Rep. Gerald Solomon challenged three rules in 1991 for similar reasons, the Speaker had two precedents to cite in overruling Solomon's points of order. In January 1995, however, the new Republican majority trumped precedent by amending clause 4(b) Rule XI to state that a special rule may not prevent a recommittal motion from being made under Rule XVI, "including a motion to recommit with instructions to report back an amendment otherwise in order (if offered by the Minority Leader or a designee)...."[29]

INADVERTENCE AND DESPERATION IN THE SENATE

Twice during the 104th Congress, the Senate voted to make potentially significant changes in its floor procedures.[30] In neither instance, however, did it vote to change its rules. The rules remained the same; their meaning--perhaps more accurately, their application--did not. It also is very possible, even likely though beyond proof, that many Senators had no intention of making these changes and were not aware of what their votes would mean.

Legislating on Appropriations Bills

In the first instance, the Senate effectively nullified, for the time being at least, the prohibition in its standing rules against including "legislation" in a general appropriations bill. Paragraph 4 of Rule XVI provides in part that, "[o]n a point of order made by any Senator, no amendment offered by any other Senator 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...." Paragraph 2 of the same rule imposes a corresponding restriction on committee amendments: "[t]he Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation...."

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[28]*Congressional Record* (daily edition), October 16, 1990, p. H9934.

[29]*Congressional Record* (daily edition), January 4, 1995, p. H29. An exception is made for "a Senate bill or resolution for which the text of a House-passed bill has been substituted." In other words, a recommittal motion need not be in order before final passage of a Senate measure that the House takes up after passing its own bill on the same subject and that the House considers only for the purpose of arranging for the two houses to reconcile their policy differences.

[30]This section relies heavily and draws verbatim in places from two memoranda, both dated October 16, 1996, that I wrote for the general information of Congress: "1995 Senate Decision Concerning Legislating on Appropriations Bills" and "Recent Senate Decision Concerning Conference Reports."

These provisions are intended to establish and preserve a separation between "legislation" and appropriations. In principle, the sole purpose of appropriations bills is to provide funding for programs and activities. Appropriations bills are not to establish those programs, authorize those activities, or affect the purposes and means by which they are to be implemented. Such "new or general legislation" is more properly the responsibility of the standing committees with legislative jurisdiction over the subject of the programs and activities involved. (House Rule XXI includes corresponding rules to the same effect.) Because of the Senate's recent decision, however, the two provisions quoted above are being construed as essentially unenforceable.

On March 16, 1995, the Senate was considering an emergency supplemental appropriations and rescissions bill (H.R. 889).[31] Sen. Hutchison (R, TX) offered an amendment to rescind $1.5 million previously appropriated to implement the Endangered Species Act. More to the point, her amendment also included additional language that the Senate's Parliamentarian held to be legislative in nature. After the Senate rejected a motion to table the amendment, Sen. Reid (D, NV) made a point of order against it under paragraph 4 of Rule XVI. When the Presiding Officer sustained the point of order, on advice of the Parliamentarian, Sen. Hutchison appealed the ruling. By a vote of 42-57, the Senate rejected the ruling as the judgment of the Senate, so the Hutchison amendment remained before the Senate. Immediately thereafter, the Senate agreed to the amendment by voice vote.

By its vote, the Senate held that the Hutchison amendment was not legislation within the meaning of Rule XVI. It is likely that at least some (maybe most) Senators voted to overturn the Chair on appeal only because they wanted to consider and adopt the amendment, not because they wanted to establish a new precedent. In fact, during the debate on the amendment, there was no discussion about whether or not it violated the Senate's rules;[32] there was no debate at all on the point of order or on the appeal. Nonetheless, the effect of the vote was to establish a precedent that future Presiding Officers can be expected to respect because it was created by vote of the Senate itself, which is the ultimate constitutional arbiter of its rules.

Unless and until the Senate acts to set it aside, this new precedent apparently will require Presiding Officers not to sustain--perhaps not even to entertain--points of order against allegedly legislative amendments. During the remainder of the 104th Congress, the Parliamentarian advised Senators and their staff that the prohibition against legislative floor amendments to

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[31]For these events, see pp. S4028-S4035 in the *Congressional Record* of that date.

[32]Some Senators did complain, however, that it was not timely for Hutchison to offer her amendment because the Environment and Public Works Committee was actively considering the proposal it embodied.

appropriations bills had been effectively nullified--that because of the Senate's decision concerning the Hutchison amendment, the prohibitions in Rule XVI against new or general legislation no longer had any practical force. The Senate's vote dealt only with the Hutchison amendment in particular, not with the interpretation and application of Rule XVI in general. However, the Parliamentarian explained that if, in the judgment of the Senate, the Hutchison amendment did not constitute legislation, there is no reasonable criterion by which any other amendment could be held to be legislative in character.

If Senators understood and intended this to be the effect of their vote, surely there would have been some discussion about the wisdom of establishing a precedent that may undermine, if not destroy, what remains of the wall between appropriation and authorization legislation, and that could complicate and delay passage of appropriations bills because of controversial amendments unrelated to levels of Federal spending. Yet there was no such discussion at the time or thereafter. The reason may well lie in the fact that Senators did not think that they were doing anything unusual or precedent-setting. The Senate has regularly legislated on appropriations bills, notwithstanding Rule XVI and without setting new precedent. The significance of the March 1995 incident was not so much in what the Senate did, but in how it did it.

For many years, the Senate has had a convenient way to circumvent the Rule XVI prohibition against legislating on appropriation bills. By long-standing precedent, the Senate has allowed itself to consider a legislative amendment to a House-passed appropriation bill if that amendment is germane to legislative language the House already included in the bill. Should the House fail to comply with its own rule against legislation on appropriation bills, the Senate should not be prevented by a strict application of Rule XVI from responding in kind on the same issue or issues. Once the House has opened the door, so to speak, the Senate has a right to walk through it.

When a Senator made a point of order against a pending amendment that it was legislative in nature, the amendment's sponsor could raise "the defense of germaneness" before the Presiding Officer ruled on the point of order. Under Rule XVI, all amendments to general appropriations bills must be germane, and the Senate itself, not the Presiding Officer, is to decide by majority vote if a particular amendment meets this requirement. So when a Senator has raised the defense of germaneness, the Senate has voted to decide the question of germaneness. If the amendment was held to be germane, it was in order even if it was legislation, under the Senate's "open door" policy. If it was not germane, it was not in order for that reason alone, regardless of whether or not it also constituted legislation. In either case, the Presiding Officer never had to rule on the original point of order under paragraph 2 or 4.

By raising the defense of germaneness, therefore, the Senate sponsor of an allegedly legislative amendment has been able to have the Senate vote whether or not to consider it, without regard to whether or not it actually was germane to legislative language in the House-passed bill. In this way, the Senate could

effectively vote to waive paragraph 2 or 4 by holding that a legislative amendment was germane even when it was not. And it did so with some frequency. Although the data are dated, my compilation of Senate rollcall votes on points of order and appeals during 1965-1986 included 44 such votes to dispose of questions of germaneness.[33] On 60 percent of those votes, the Senate decided to consider the amendments in question by supporting the defense of germaneness.

It would be impossible to discover in these decisions any criteria of germaneness because there is every reason to think that Senators were voting on the merits of the amendments, not on whether they satisfied some procedural requirement. But for purposes of Senate precedents, this never mattered because Rule XVI precluded the Presiding Officer from ever ruling on whether an amendment to an appropriation bill was germane.[34] Had Sen. Hutchison raised the defense of germaneness, the Senate presumably would have supported it, and Sen. Reid's point of order would have fallen without the Presiding Officer ever ruling on it. Once again, the Senate would have voted not to enforce paragraph 4, but its decision would have had no precedential effect or, to put it more precisely, no more precedential effect than the Senate chose to give it in voting on questions of germaneness in the future.

By failing to raise the defense of germaneness, however, or by choosing not to do so, Sen. Hutchison left it to the Presiding Officer to rule on Sen. Reid's point of order, and for the Senate to overturn that ruling on appeal. The result, intended or not, was a precedent that future Presiding Officers will be obligated to follow in similar cases, unless the Senate somehow nullifies its effect. In fact, there is reason to expect that the Senate soon will reverse the precedent. On the opening day of the 105th Congress, the Majority and Minority Leaders both

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[33]Bach, *Points of Order and Appeals in the Senate,* CRS Report for Congress 89-69 (January 27, 1989); see also Bach, "The Senate's Compliance with Its Legislative Rules: The Appeal of Order," in *Congress & the Presidency,* v. 18, n. 1, Spring 1991, pp. 77-92.

[34]The Presiding Officer does rule whether amendments are germane under other circumstances, especially under cloture and unanimous consent agreements. In doing so, however, Presiding Officers never have felt obligated to apply a standard, or absence thereof, derived from the Senate's majority votes on germaneness under Rule XVI. Were any Presiding Officer to do so, he or she would have to find that virtually any amendment is germane, compared to those which the Senate has held germane in the past. The result would be to undermine, and quite possibly destroy, the utility of both cloture and unanimous consent agreements.

expressed interest in doing so by rollcall vote, perhaps during consideration of the first FY 1998 appropriations bill to reach the Senate floor.[35]

Scope of the Differences in Conference

In somewhat similar fashion, the Senate ended the 104th Congress with a vote that, the Senate Parliamentarian later concluded, will give future Senate conferees "carte blanche to include basically anything they wish in a conference report."[36] If the Senate may have acted by inadvertence in 1995, it may have acted in desperation in 1996.

At issue was the conference report on H.R. 3539, to reauthorize Federal Aviation Administration programs, that was one of the very last major items of legislative business that the Senate considered before adjourning *sine die* in October 1996. Included in this report was a provision that had been inserted in conference to amend the Railway Labor Act in a way that affected the Federal Express corporation. That provision generated intense controversy, inspired considerable debate on the conference report, and delayed the Senate's adjournment *sine die.*

The Federal Express provision made the entire conference report subject to a point of order under paragraphs 2 and 3 of Rule XXVIII. Paragraph 2 states in part that "[c]onferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses." Implicit in this rule is the requirement that Senate conferees resolve the differences committed to them and their House counterparts by reaching agreements within "the scope of the differences" between the House and Senate versions of the bill. The conferees may agree to the House position, the Senate position, or a position that is a compromise between them. Any position that is not within this range of options exceeds the scope of the differences between the two houses. The conferees may not accept it because it constitutes "matter not committed to them by either House, and makes their conference report subject to a point of order on the Senate floor.

Conferees must and do enjoy greater latitude when they confront a bill from one house and a complete substitute for its text from the other. In such cases, it usually would not be practical or even possible to identify the scope of the differences between the two houses on each matter that is in disagreement between them. So Senate "conferees have a wider latitude or wider scope for compromise in dealing with the matters in dispute...than in the case of

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[35]*Congressional Record*, January 7, 1997, p. S10. On July 28, 1995, the Majority Leader, Sen. Dole, had asked unanimous consent that the Presiding Officer not be bound by the March precedent. Sen. Ford objected. Neither Senator explained his reasons. *Congressional Record*, July 28, 1995, p. S10859.

[36]Ed Henry, "FedEx Battle Delivers Parliamentary Controversy in Senate's Closing Days," *Roll Call*, October 7, 1996, p. 3.

amendments made to various sections;...they have the entire subject before them with little limitation placed on their discretion, except as to germaneness, and they may report any germane bill."[37]

Such discretion enhances the power of conferees, of course, because their reports cannot be amended. Having already passed their own versions of the bill, the House and Senate ultimately vote on whatever new version the conferees write in conference, and they usually must take it or leave it. It has been important, therefore, that the Senate impose some constraints on its conferees. "In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees," paragraph 3 of Rule XXVIII empowers Senate conferees "to report a substitute on the same subject matter" and to include in it anything "which is a germane modification of subjects in disagreement." However, the conferees "*may not include in the report matter not committed to them by either House.*" (Emphasis added.) By enforcing this germaneness requirement, the Senate has protected itself against having to vote either to accept or reject a conference report addressing subjects that it may not have considered, either in committee or on the floor.[38]

The supporters and opponents of the Federal Express provision agreed that it could not be defended as "a germane modification of subjects in disagreement" in the FAA reauthorization bill. After the Senate invoked cloture on the conference report on October 3, the new Majority Leader, Sen. Lott, stated his understanding "that if a point of order were raised that the pending FAA conference report exceeds the scope of the conference committee, that the Chair would rule that the conferees did exceed the scope with respect to the so-called Federal Express provision. If the point of order is raised and sustained, the conference report would then fall."[39] But if the conference report fell to a point of order so close to *sine die* adjournment, the bill almost certainly would die.

Sen. Lott went on to argue that "the Senate should not let this vital piece of legislation be killed on this point of order." But how to save it? When the same problem had arisen in the House, it had solved it simply by adopting a special rule waiving all points of order against the conference report and its consideration. For all its flexibility, the Senate has no such waiver procedure. So knowing that a point of order was certain to be made, the only plausible option available to Senate supporters of the conference report was to plan to

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[37]U.S. Senate. *Riddick's Senate Procedure.* Sen. Doc. 101-28; 101st Congress, 2d Session, 1992; p. 463.

[38]In striking contrast to the Senate's record under Rule XVI, there were only four rollcall votes during 1965-1986 on points of order or appeals relating to the authority of Senate conferees.

[39]All quotations from the Senate debate are from the *Congressional Record* of October 3, 1996, pp. S12229-S12232.

appeal and reverse the unfavorable ruling that they expected the Presiding Officer to make.[40]

But if the only way to save the bill was to successfully appeal the ruling of the Chair, the long-term costs could be high. In overturning the ruling of the Chair, the Senate would be voting that its conferees had not exceeded their authority by including the Federal Express provision in the FAA conference report even though neither house had included a related provision in the version of the bill that it had committed to conference. By voting in effect that the Federal Express provision did not exceed the scope of the differences, that it was "a germane modification of subjects in disagreement," the Senate would nullify the "scope" restrictions of Rule XXVIII as surely as its 1995 vote had undermined enforcement of the Rule XVI prohibitions against legislating on an appropriation bill.

In this instance, the Senate was fully aware that what it was doing could have lasting procedural consequences. During debate on the point of order that Sen. Lott himself made "[i]n order to facilitate the vote," Sen. Kennedy, perhaps the most vociferous opponent of the Federal Express provision, tried to convince his colleagues to sustain the Chair's expected ruling by stressing the dangerous procedural consequences that would follow if they did not:[41]

> if conference committees are permitted to add completely extraneous matters in conference, that is, if the point of order against such conduct becomes a dead letter, conferees will acquire unprecedented power. They will acquire the power to legislate in a privileged, unreviewable fashion on virtually any subject. They will be able to completely bypass the deliberative process of the Senate.
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> ....Today the narrow issue is the status of one corporation under the labor laws. But tomorrow the issue might be civil rights, States' rights, health care, education, or anything else. It might be a matter much more sweeping than the labor law issue that is before us today.

In response, supporters of the conference report observed that it was not unprecedented or even particularly unusual for Senate conferees to insert such new, non-germane provisions in conference reports without those provisions provoking points of order. According to Sen. Pressler, for example:

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[40]Opponents of the Federal Express provision argued that both houses could act quickly to pass a new bill consisting of the conference agreement without that provision. We cannot know, however, if anyone actually thought this to be a realistic possibility.

[41]For these events and quotations see, pp. S12229-S12232 in the *Congressional Record* of October 3, 1996.

> Mr. President, those on the opposite side of the issue know full well that this is done with some frequency when a particular situation necessitates such action. Those Members also know that as a result, sections in many, if not most of the conference reports considered in this body would be subject to this same point of order. Do we raise such points of order? No, Mr. President, we do not. Why? Because all Members know full well that this is how we conduct our business and have done so throughout our history.

Senators also pointed out that the same point of order could have been made against the conference report because of various other provisions that had been inserted in conference. They contended that a Senate vote to overturn the ruling of the Chair should constitute a narrow precedent or no precedent at all.

After listening to this debate, the Presiding Officer sustained the point of order. By a vote of 39 to 56, the Senate then rejected that ruling as the judgment of the Senate and, after some further debate, agreed to the conference report itself.

There is little doubt that a majority of the Senate wanted to salvage the FAA conference report before leaving town for the closing weeks of the election campaign. We cannot know how much difference, if any, the procedural arguments such as those quoted above made to the outcome. We do know, however, that by overturning the ruling of the Chair on appeal, the Senate held that its conferees had not exceeded their authority by including the Federal Express provision in the FAA conference report. And we also know that, according to the Senate's Parliamentarian, future Senate conferees will have "carte blanche" to write whatever they wish into their reports unless the Senate somehow abrogates its new precedent.

If the Senate's decision on October 3 stands as precedent, then in the judgment of the Senate, the Federal Express provision did not constitute non-germane matter that had not been committed to conference by either house. And if the Federal Express provision satisfies the requirements of Rule XXVIII, then so too would "basically anything," the Parliamentarian is quoted as having said.[42] As in the case of Rule XVI after the Senate's 1995 decision, the Senate Parliamentarian may well conclude, and so advise the Chair, that it is essentially impossible to discern a plausible criterion by which any Presiding Officer could distinguish between provisions in future conference reports that do or do not conform with the rule. If so, the Chair would be constrained not to sustain any future point of order that conferees had exceeded the scope of their authority (although, of course, the Senate would be free to overturn that ruling on appeal as well).

In other words, the Senate and House rules that have restricted conferees to reaching agreements within the scope of the differences presented to them

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[42]*Roll Call*, October 7, 1996, *op. cit.*

now may be enforceable only if the House decides not to waive its rule by simple majority vote. For the time being at least, the relevant provisions of the Senate's rule remain in force but without any practical effect. Perhaps it is for such reasons that the same *Roll Call* article cited above quoted the Majority Leader as saying that this is something "we want to go back and address."[43]

RULES AND RULINGS

The two stories that I have related about the House are very similar in theme, as are the two stories about the Senate. In the case of the House, it adopted two procedural rules amendments in 1909 concerning recommittal motions, and another amendment in 1924 affecting floor consideration of special rules. In each instance, the reason for the House's action was clear. Whether or not there was disagreement about the wisdom of adopting the rules changes, there was no disagreement about why they were being proposed and what they were intended to achieve. In each instance also, the language of the rules changes could be interpreted in more than one way--whether the right to recommit with instructions was or was not protected and whether special rules had to lie over for a calendar day or a legislative day. However, in each case, the debate on adopting the new rules makes it fairly obvious which of these interpretations the House intended.

In both cases, however, Speakers later made rulings that adopted different and, in my judgment, probably incorrect interpretations of what these rules meant. By themselves, these events are not particularly noteworthy; even Speakers can make mistakes. What is noteworthy, though, is that these rulings took on lives of their own as precedents, especially Rainey's 1934 decision that the House voted overwhelmingly to uphold.

Judges at all levels, including the Supreme Court, give great weight to following precedent, to the doctrine of *stare decisis* holding that established precedent should be followed unless there is some compelling reason to diverge from it. So too do Speakers of the House, and Chairmen in Committee of the Whole, follow established precedent in making rulings upon advice of the House's Parliamentarian. The result, if the arguments made earlier in this paper are sound, can be a line of precedent that is predicated on an initial reading of a rule that did not accurately reflect its purpose and intended meaning. We can view this as the perpetuation of error and ask that Speakers exercise more independent judgment in interpreting and applying the rules.

On the other hand, we should not minimize the institutional value of consistency in procedure and procedural rulings. As William O. Douglas said of *stare decisis* in the judicial context, that doctrine "provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.

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[43] *Ibid.*

It is a strong tie which the future has to the past."[44] How reminiscent is this argument to Jefferson's emphasis on the importance of known rules consistently applied in the legislative context. Referring to the forms of legislative rules, he argued in an often-quoted passage that "whether these forms be in all cases the most rational or not, is really not of so great importance. It is much more material that there should be a rule to go by, than what that rule is; that there may be an uniformity of proceeding in business, not subject to the caprice of the Speaker, or captiousness of the members."[45]

To illustrate the deference that modern Speakers have given to precedent, consider how Speaker Longworth responded to an awkward situation that arose while he was presiding over the House in 1931. Longworth found that the House's precedents required him to overrule a point of order even though he believed that line of precedent to be illogical and unreasonable. Notwithstanding his own strongly-held opinion about how the rule in question properly should be interpreted, he considered himself bound by existing precedent to overrule the point of order. Before doing so, however, he said that "such action as the House might see fit to take, the Chair would abide by with equanimity."[46] In other words, in none too subtle fashion, he invited the House to overrule his decision on appeal, which is precisely what the House proceeded to do. Longworth evidently believed that if a clear precedent was to be reversed, it should be done by vote of the House, not by decision of the Speaker. As arbiter and neutral referee of the House's proceedings, the Speaker was obligated to follow precedent; as the ultimate authority over its procedures, the House itself was not.

Consider the level of partisan contentiousness in the contemporary House, and the contributions made by recent Speakers such as O'Neill, Wright, and Gingrich. Then consider how much more contention there would be if procedural decisions were made according "to the caprice of the Speaker," not according to established rules and rulings applied in a neutral manner. In fact, one of the more remarkable aspects of the House is that it can be governed by the elected leader of the majority party who almost always manages to leave behind his policy preferences and the interests of his party when he mounts the

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[44]William O. Douglas, "Stare Decisis." *Record of the Association of the Bar of the City of New York*, v. 4, 1949, p. 153.

[45]Thomas Jefferson, *A Manual of Parliamentary Practice.* (Washington: Government Printing Office, 1993 reprint of first edition of 1801), p. 2. Obviously, the ability of the House to comply with Jefferson's admonition by consistently applying its rules and following its precedents was enhanced dramatically when those precedents were compiled--first by Hinds, then by Cannon, and most recently by Deschler and Brown--and made generally available to Members.

[46]On this incident, see the *Congressional Record* for February 21, 1931, at pp. 5644-5649.

rostrum to preside. If we were reinventing the House today, we might very well consider this too implausible to propose.

So it would be impractical as well as disruptive for each procedural question that arises to be treated as one to be decided *ab initio*, without regard to how comparable questions had been answered in the past. On the other hand, as I have tried to demonstrate, relying strictly on precedent can deny the majority, the minority, or the individual Member some prerogatives or protections that the House intended them to enjoy.

The two stories about the Senate tell quite a different tale. In both cases, the Presiding Officers made rulings that were correct on their face--Senators did not question the essential soundness of either ruling even though voting to overturn it on appeal--and that dealt with situations and questions that are in no sense unsettled or unusual. Assertions that appropriations amendments are legislative in nature and that conferees have exceeded their authority are among the more familiar procedural questions on which Presiding Officers rule with the advice of the Senate Parliamentarian. In short, the Senate's Presiding Officer applied well-established principles in familiar situations and made rulings that were consistent with both the letter and the intent of the rules in question. The two events were significant not because of the rulings, but because the Senate voted to make its own rulings by exercising its constitutional right to appeal and reverse those rulings.

The procedural issues involved in the two House cases were relatively subtle, involving relatively fine distinctions. Was a day a calendar day or a legislative day? Was any motion to recommit protected or every motion to recommit? The rules themselves were ambiguous; the positions of Rainey in 1934 and Wright in 1987 were not obviously inconsistent with them. Their positions were among the possible interpretations of the rules in question, even though we may conclude in retrospect that they were not the interpretations most consistent with the original intent and purpose of the rules.

In the Senate, on the other hand, although Senators technically were voting on how to interpret their rules, they actually were voting on whether or not to enforce them. Common sense and experience strongly suggests that the Senate was not making procedural rulings at all; it was making policy decisions in the guise of procedural ones. As a result, the Senate's votes in 1995 and 1996 did not create discrepancies between rules and rulings so much as they established precedents that are fundamentally incompatible with the rules, leaving the rules in question as empty shells.

The differences between these cases point to the differences between the Speaker of the House and the Presiding Officer of the Senate, and how much deference each enjoys. In the House, appeals are rare and successful appeals are

rarer still. When Lewis Deschler retired in 1974 as House Parliamentarian, he wrote in his letter of resignation:[47]

> [F]rom the beginning of the 70th Congress, in 1927, there have been only eight appeals from decisions of the Speaker, and in seven of these eight cases the decision of the Speaker was sustained by the House of Representatives. On the one occasion when the Speaker was overruled [in the incident described above], the House was actually following the wishes of Speaker Longworth, for he in effect appealed to the House to overrule him in order to correct what he regarded as an erroneous precedent.

Since then, the number of appeals has increased--one reflection among many of the House as a more combative place--but without exception, they have continued to fail. By contrast, appeals in the Senate are even more common and, more important, far more likely to succeed.[48] The Senate is less likely than the House to be governed by its standing rules, not only in the familiar sense that the Senate relies on unanimous consent agreements to foreclose the possibility of filibustering, but also in the sense that the Senate is demonstrably willing to take the enforcement of its rules out of the hands of its Presiding Officer and to decide for itself if and when it wants to be bound by them and when it prefers to shrug off one of its rules as an unwelcome obstacle blocking its ability to do what it wants to do. It is in recognition of this tendency that the Senate recently has taken the unprecedented step of requiring a vote of three-fifths of its entire membership to waive certain budget rules or to overturn rulings of the Chair to enforce those rules. Otherwise, the Senate could have little confidence that the rules it adopted (as part of the Budget Enforcement Act of 1990, for example) actually would be enforced.

In this context, the two Senate stories also point to the importance of self-restraint among Senators in resisting the temptation to overturn rulings of the Chair on appeal more often and less discriminately.

One notable, if unusual, example was the sequence of events that began on March 13, 1996, when the Senate agreed by unanimous consent to limit the amendments that Senators could offer to a major continuing resolution. The agreement identified some of the amendments by sponsor and subject, and others only by sponsor but with the notation in each case that the amendment would be relevant to the bill.[49] Five days later, Sen. Hatfield offered an amendment on behalf of Sen. Burns, and Burns then proposed a second-degree

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[47]*Congressional Record*, June 27, 1974, p. 21590

[48]See Bach, "The Senate's Compliance with Its Legislative Rules: The Appeal of Order," in *Congress & the Presidency*, v. 18, n. 1, Spring 1991, pp. 77-92.

[49]*Congressional Record* (daily edition), March 13, 1996, pp. S1966-S1967. Under the agreement, second-degree amendments also were to be relevant.

amendment, ensuring that the first vote would take place on his proposal. Both amendments dealt with restructuring US courts of appeals, especially affecting western states, including Burns' Idaho as well as Nevada and California. When the Chair sustained a point of order made by Sen. Reid of Nevada that the Hatfield/Burns first degree amendment was not relevant, as the unanimous consent agreement required, Burns appealed the ruling.[50]

During the debate that followed, Reid buttressed his arguments against the amendment on its merits by emphasizing the long-term procedural problems that might ensue if the Burns appeal was successful. Reid argued that the effect of Burns' appeal, if successful, would be to create an exception to the relevancy requirement imposed by the unanimous consent agreement. But if the Senate could effectively waive by simple majority vote an essential provision of a unanimous consent agreement, the whole structure of unanimous consent in the Senate would be jeopardized for the foreseeable future. If the Senate did not uphold the ruling of the Chair, Reid contended,[51]

> it is going to be a long time before there is another unanimous-consent agreement adopted because we could not enter into one. How could we? It would mean that no matter what we agreed to, it could be changed by a simple majority. That is not the way it should be. We lose our rights under the Senate to protect ourselves with a filibuster, where it would take 60 votes, or in a number of other parliamentary points that we reserve to ourselves when there is not a unanimous-consent agreement that is pending.

The same argument has been made, and with equally good cause, on those rare instances when a Senator has appealed a ruling made under cloture that an amendment was not germane. If the Senate were to use appeals as a way to decide by simple majority vote to consider certain non-germane amendments under cloture, the use and value of the cloture procedure would be put at risk. Both cloture and unanimous consent agreements involve a kind of implicit treaty by which Senators relinquish their right to filibuster in exchange for solid assurance that they will not confront unexpected amendments they would want or need to filibuster. The Burns appeal put this treaty in jeopardy for future unanimous consent agreements. On the following day, therefore, Burns withdrew his appeal and, on the day after that, the Senate took up and quickly passed a free-standing bill that resembled the two Burns amendments.[52]

This denouement was typical of the Senate. The institution withdrew from the brink of what could have been a dangerous procedural development. An

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[50]*Congressional Record* (daily edition), March 18, 1996, pp. S2235-S2237.

[51]*Ibid.*, pp. S2237-S2238.

[52]*Congressional Record* (daily editions), March 19, 1996, p. S2284, and March 20, 1996, pp. S2544-S2545.

unexpected delay (a possible filibuster) in enacting a needed continuing resolution was avoided. Sen. Burns and his allies secured passage of a bill that had been awaiting Senate floor action for three months after having been reported from committee. Yet as they may very well have anticipated, the bill ultimately died after languishing in the House committee of jurisdiction. And most important from our perspective here, the Senate refrained from voting on an appeal that could have done as much damage to unanimous consent agreements (and, by extension, to cloture) as its other votes did to its procedures on appropriations amendments and conference reports. Self-restraint prevailed, perhaps because the procedural stakes were greater and better appreciated as the situation unfolded.

What importance does all this have for the study of Congress? We know too little about how and why the House and Senate adopted many of its formal rules. There is an enormous amount of fertile ground to plow as we take the concepts by which we claim to understand the contemporary Congress and apply them to the Congress during earlier eras of its history. Just as more scholars are paying more attention to the influence of rules on the decisions the Congress makes today, knowing more about the history of those rules will help us understand how the House and Senate used to work and what policy outcomes it used to produce.

At the same time, however, it can be dangerous to assume that rules necessarily are constants in the legislative process--that once adopted, rules are a static contextual element of the game. While this assumption will prove true more often than not, especially in the short run, it should be treated with the skepticism that all such assumptions deserve. The developments chronicled in this paper were unusual but far from unique. Other examples might include, in the House, the transformation of suspension motions that followed Speaker Randall's decision to assert control over recognizing Members to offer them,[53] and, in the Senate, the new precedents that Majority Leader Byrd deliberately provoked to avoid a filibuster on taking up a treaty or nomination[54] and to endow the Presiding Officer with powers to expedite Senate action under cloture.[55]

The meaning of rules can change, deliberately or not, for good reason or bad, and without being amended. A right that the House or Senate bestows (or

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[53]Bach, "Suspension of the Rules, the Order of Business, and the Development of Congressional Procedure," in *Legislative Studies Quarterly*, v. 15, n. 1, February 1990, pp. 49-63.

[54]*Riddick's Senate Procedure*, pp. 941-942. U.S. Congress, Senate, Committee on Foreign Relations. *Treaties and Other International Agreements: The Role of the United States Senate.* 103d Congress, 1st Session; Committee Print, S. Prt. 103-53; p. 101.

[55]*Riddick's Senate Procedure*, pp. 286-287, 297-300, 311-319.

a restriction that it imposes) by rule can be strengthened or weakened, entrenched or uprooted, by subsequent precedent, and when rules and rulings clash, the practice and natural tendency of the Congress, with its ample supply of lawyer-legislators, is for precedent to prevail.