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Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses

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SUMMARY

The Constitution requires that the House and Senate approve the same bill or joint resolution in precisely the same form before it is presented to the President for his approval or veto. To this end, both houses must pass the same measure and then attempt to reach agreement about its provisions.

The two houses may be able to reach agreement by an exchange of amendments between the houses. Each house has one opportunity to amend the amendments from the other house, so there can be Senate amendments to House amendments to Senate amendments to a House bill. House amendments to Senate bills or amendments are privileged for consideration on the Senate floor; Senate amendments to House bills or amendments generally are not privileged for consideration on the House floor. In either case, the House and Senate usually dispose of amendments between the houses by unanimous consent.

Alternatively, the House and Senate can disagree to each other's positions on a bill and agree to create a conference committee to propose a package settlement of all their disagreements. Most conferees are drawn from the standing committees that had considered the bill initially. The House or Senate may vote to instruct its conferees before they are appointed, but such instructions are not binding.

Conferees generally are free to negotiate in whatever ways they choose, but eventually their agreement must be approved by a majority of the House conferees and a majority of the Senate conferees. The conferees are expected to address only the matters on which the House and Senate have disagreed and to resolve each disagreement within the scope of the differences between the House and Senate positions. If the conferees cannot reach agreement on an amendment, or if their agreement exceeds their authority, they may report that amendment as an amendment in true or technical disagreement.

On the House and Senate floors, conference reports are privileged and debatable, but they are not amendable. After agreeing to a conference report, the House and Senate in turn dispose of any amendments in disagreement. The House also has a special procedure for voting to reject conference report provisions that would not have been germane to the bill in the House. Only when the House and Senate have reached agreement on all provisions of the bill can it be enrolled for presentation to the President.

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INTRODUCTION

The process of resolving the legislative differences that arise between the House of Representatives and the Senate is one of the most critical stages of enacting legislation. It is also potentially one of the most complicated. Each chamber continues to be governed by its own rules, precedents, and practices; but at this stage each house also must take into account the preferences and to some extent, the procedures of the other.

This report summarizes the procedures the two houses of Congress use most frequently to resolve their legislative differences. It is based upon the author's interpretation of the rules and published precedents of the House and Senate and his analysis of the application of these rules and precedents in recent practice. It bears emphasizing that this report is not exhaustive nor is it in any way an official statement of House or Senate procedures. It may serve as a useful introduction or general guide, but it should not be considered an adequate substitute for a study of House and Senate rules and precedents themselves, or for consultations with the Parliamentarians of the House and Senate on the meaning and possible application of the rules and precedents.

Readers may wish to study the provisions of the rules--especially House Rules XX and XXVIII and Senate Rules VII and XXVIII--and examine the applicable precedents, especially in Chapters 32 and 33 of *Procedure in the U.S. House of Representatives* (4th edition 97th Congress) and the 1985 and 1987 supplements, and the sections on "Amendments Between Houses" and "Conferences and Conference Reports" in *Senate Procedure* (Senate Document No. 97-2).

Some of the procedures discussed in this report are illustrated in a companion report: *Procedures for Reaching Legislative Agreement: A Case Study of H.R. 3128, the Consolidated Omnibus Budget Reconciliation Act of 1985*, Report No. 86-705, April 15, 1986.

This report should not be cited as authority in congressional proceedings.

THE NEED FOR RESOLUTION

Before Congress can submit a bill or joint resolution to the President for his approval or disapproval, the Senate and the House of Representatives must agree on each and every provision of that measure.[1]

It is not enough for both chambers to pass versions of the same bill that are comparable in purpose but that differ in certain technical or even trivial details; the House and Senate must agree on identical legislative language. Nor is it enough for the two chambers to agree to separate measures with exactly the same text; the House and Senate both must pass the same measure. In sum, both chambers of Congress must pass precisely the same bill in precisely the same form before it can become law.[2]

Each of these requirements--agreement on the identity of the measure (e.g., H.R. 1 or S. 1) and agreement on the text of that measure--is considered in turn in the following sections of this report.

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[1] Each chamber may interpret the same legislative language differently; these differences sometimes emerge from a comparison of House and Senate committee reports and floor debates. Deliberate ambiguity in the terms of legislation can be used to promote agreement between the two chambers.

[2] This requirement also applies to joint resolutions proposing constitutional amendments and to concurrent resolutions, even though neither are sent to the White House for the President's signature or veto. House and Senate resolutions, on the other hand, do not require action by "the other body." Throughout this report, the terms "bill" and "measure" are used interchangeably to refer to all measures on which House and Senate differences are to be resolved.

SELECTION OF THE MEASURE

Because both chambers must pass the same measure before it can become law, at some point during the legislative process the House must act on a Senate bill or the Senate must act on a House bill. Congress usually meets this requirement without difficulty or controversy. In some cases, however, selecting the measure may require some parliamentary ingenuity and can have policy and political consequences.

After either house debates and passes its measure on a subject it sends (or "messages") that bill to the other chamber. If the second house passes the first chamber's bill without any amendments the legislative process is completed: both houses have passed the same measure in the same form.[3] If the second house passes the bill with one or more amendments, both chambers have acted on the same measure; now they must resolve the differences between their respective versions of the text if the measure is to become law.

In most cases, either the House or the Senate can be the first chamber to act. However, the Constitution requires that all revenue measures originate in the House, and the House traditionally has insisted that this prerogative extends to appropriations as well as tax measures.[4] Thus, the House normally acts first on such a measure, and, consequently, it is a House bill or joint resolution that Congress ultimately presents to the President.

In some cases, the proponents of a measure may decide that one house or the other should act first. For example, a bill's supporters may first press for floor action in the chamber where they think the measure enjoys greater support. They may hope that success in one house may generate political momentum that will help the measure overcome the greater opposition they expect in the second chamber. Alternatively, one house may defer floor action on a bill unless and until it is passed by the other, where the measure is expected to encounter stiff opposition. The House leadership, for example, may decide that it is pointless for the House to invest considerable time, and for Representatives to cast possibly unnecessary and politically dangerous votes, on a controversial bill until after an expected Senate filibuster on a comparable Senate measure has been avoided or overcome.

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[3] In this report, terms such as "first chamber" and "second house" are used to refer only to the order in which the House and Senate complete initial floor action on a measure.

[4] From time to time, Senate committees and even the Senate as a whole may take some action on a Senate appropriations or tax measure, However, on the infrequent occasions when the Senate has passed and sent such a bill to the House, the House often has returned it to the Senate on the ground that the bill infringes on the House's constitutional prerogatives, as interpreted by the House.

As these considerations imply, major legislative proposals frequently are introduced in both houses--either identical companion bills or bills that address the same subject in rather different ways. If so, the appropriate subcommittees and committees of the House and Senate may consider and report their own measures on a subject at roughly the same time. Thus, when one house passes and sends a bill to the other, the second chamber may have its own bill on the same subject that has been (or is soon to be) reported from committee and available for floor consideration. In such cases, the second chamber often acts initially on its own bill, rather than the bill received from the other house. [5]

This is particularly likely to happen when the committee of the second house reports a bill that differs significantly in approach from the measure passed by the first chamber. The text selected for floor consideration generally sets the frame of reference within which debate occurs and amendments are proposed. In most cases, the House or Senate modifies, but does not wholly replace, the legislative approach embodied in the bill it considers. It is usually advantageous, therefore, for a committee to press for floor consideration of its approach, rather than the approach proposed by the other chamber.

In large part for this reason, the House (or the Senate) often acts on its own bill even though it has already received the other chamber's bill on the same subject. Under these circumstances, however, it would not be constructive for the House to pass its bill and then send it to the Senate. If it were to do so, then each chamber would have in its possession a bill passed by the other, but both chambers would not yet have acted on the same measure. To avoid this potential problem, the second house often acts initially on its own bill, and then it also acts on the other chamber's bill on the same subject. The usual procedures of the House and Senate for doing so differ slightly.

The House customarily debates, amends, and passes the House bill and, immediately thereafter, takes up the counterpart Senate bill. The floor manager then moves to strike out all after the enacting clause of the Senate bill (the opening lines of every bill--"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled") and replace the stricken text with the full text of the House bill as just passed. The House often agrees by unanimous consent to consider the Senate bill and approves the House substitute routinely. The Senate bill, as amended, then is passed by voice vote or without objection, and the House lays its own bill on the table. In some cases, the special rule under which a House bill is considered includes provisions for such action on the Senate bill. For instance, a special rule may state:

> After the passage of H.R. 1, it shall be in order to take from the Speaker's table the bill S. 1 and to move to strike out all after the enacting clause of

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[5] This may occur for strategic or institutional as well as procedural reasons, as when the House refuses to consider a Senate bill which the House finds to be in violation of its constitutional prerogative to originate revenue measures.

the said Senate bill and insert in lieu thereof the provisions contained in H.R. 1 as passed by the House.

In this way, the House actually passes two bills on the same subject and with identical provisions, but it is the Senate bill (which both chambers now have passed) that is the subject of further action.[6]

The Senate acts in a comparable fashion, although it usually does not pass its own bill. Instead, the Senate debates and amends its bill, and agrees to third reading and engrossment of the bill, as amended.[7] The Senate then takes up the House bill by unanimous consent, strikes out all after the enacting clause, inserts the amended text of the Senate bill, and passes the House bill, as amended by the Senate's amendment in the nature of a substitute. The Senate bill that was debated and amended is never actually passed; after passing the House bill, the Senate indefinitely postpones further proceedings on its own bill.

To facilitate this process of amendments between the houses, the Speaker often leaves a Senate bill on "the Speaker's table," instead of referring it to the appropriate House committee, if there is reason to expect that the House will soon act on a companion House bill. Similarly, under Senate precedents, a House bill may be taken up on the Senate floor without first being referred to committee when a companion Senate bill has been reported from committee and is on the Senate's legislative calendar.

By these devices, the House and Senate arrange to act on the same measure, even if they have passed that measure with fundamentally different texts. In most cases, these arrangements are non-controversial and routine. Under some circumstances, however, complications and difficulties can arise.

The House operates under a rule which requires that all amendments must be germane to the measure being considered; the Senate does not.[8] Unless the Senate imposes a germaneness requirement on itself by unanimous consent (which it often does), most measures are subject to whatever non-germane floor amendments Senators wish to offer. Consequently, the Senate may

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[6] If the first house's bill has been referred to committee in the second chamber and is still there, it is first necessary to discharge the committee from further consideration of the bill. This also is normally accomplished routinely, either by unanimous consent or, in the House, pursuant to the provisions of a special rule.

[7] Third reading and engrossment is a technical and non-controversial stage in both chambers that marks the conclusion of the amending process and precedes the vote on final passage.

[8] Senate rules require floor amendments to be germane only when offered to general appropriations bills or budget measures, or after the Senate has invoked cloture.

select a House bill on one subject as a convenient "vehicle" and amend it to include provisions on other, unrelated subjects. Sometimes the use of unrelated vehicles is accepted by both the House and the Senate as a useful, or even necessary, device to cope with different political and parliamentary conditions prevailing in the two chambers. Although such situations are relatively unusual, problems sometimes arise that make neutral vehicles useful for resolving them.

During the 95th Congress, President Carter submitted a massive proposal for major new national energy legislation.[9] The Democratic leadership of the House chose to consider the President's entire program in a single bill, and eventually the House passed H.R. 8444. In the Senate, on the other hand, the Democratic majority leadership concluded that an omnibus bill would inspire a filibuster that probably could not be broken; consequently, the Senate debated and amended five separate bills which collectively dealt with the same subjects as H.R. 8444.

A dilemma now arose. If the Senate passed its five bills and sent them to the House, the House would face different bills on different aspects of the President's program--precisely the situation the House had sought to avoid by consolidating the various proposals in H.R. 8444. Yet if the Senate attempted to pass the House bill, the feared filibuster was likely to develop. To resolve the dilemma, the Senate selected four neutral vehicles: minor House bills that had been awaiting Senate action. To each of these bills the Senate added the texts of one or more of its energy bills as well as provisions of the single House bill (H.R. 8444). It was on these bills that the House and Senate eventually resolved their differences over national energy legislation, even though the four bills originally had been for the relief of Jack R. Misner and Joe Cortina and to suspend import duties on competition bobsleds and luges and certain doxorubicin hydrochloride antibiotics. In this instance, then, selecting the measure was complicated by the differing situations in each house and was arranged through the use of four unrelated vehicles.[10]

Resorting to such convoluted procedures is unusual. Normally, the selection of the measure is arranged routinely, as the House and Senate proceed toward the more difficult task of resolving their differences over the substance, not the form, of legislation.

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[9] For a discussion of the procedures by which this legislation was considered, see: Stanley Bach, *Complexities of the Legislative Process: A Case Study of Congressional Consideration of National Energy Legislation During the 95th Congress.* CRS Report No. 79-68, March 7, 1979.

[10] Once the conferees completed their work, the House agreed to an unusual special rule under which it cast one vote to approve all four conference reports.

TWO METHODS OF RESOLUTION

Once the House and Senate have passed different versions of the same measure, there are basically two methods they can use to resolve the differences between their versions.

One method involves a conference committee--a panel of members representing each house which attempts to negotiate a version acceptable to both chambers. Most major bills are sent to conference committees.

The other method makes a conference committee unnecessary by relying instead on amendments between the houses--Senate amendments to the House position or House amendments to the Senate position or both. The two houses shuttle the measure back and forth between them, each chamber proposing an alternative to the position of the other or insisting on its own position, in the hope that both houses eventually will agree on the same position.

The essential nature of each method can be described relatively simply. However, potential complications abound. Occasionally, some combination of the two methods may be used. For example, the House and Senate may begin the process of resolving their differences by amending each other's amendments and then decide to go to conference if the first method is not totally, or even partially, successful. Alternatively, the two houses may decide immediately to create a conference committee which is able to resolve some, but not all, of the differences between their two versions. If so, the two chambers may accept whatever agreements the conferees have reached, and then attempt to deal with the remaining disagreements through amendments between the houses.

Under some circumstances, the process can become even more complicated. Certain patterns of action are most common, but the possible variations make the procedures at this stage of the legislative process the most difficult to predict with any assurance. Moreover, either house may refuse to act at any time and at any stage of this process, and if that chamber remains adamant in its refusal to act, the measure dies.

In general, the House or Senate cannot take any action by either method unless it is in formal possession of the "papers"--the official copies of the measure and whatever amendments, motions and accompanying messages have been approved by the House and Senate. In attempting to resolve their differences, the two chambers act sequentially, not simultaneously.

Although most major legislation is considered by a conference committee, amendments between the chambers are best discussed first.

AMENDMENTS BETWEEN THE HOUSES

The need to resolve differences arises when one house passes a measure which the second chamber subsequently passes with one or more amendments.[11] The differences may be resolved by one chamber accepting the amendments of the other or by proposing new amendments which the other house then accepts.

Within limits to be discussed, the measure may be sent back and forth between the House and Senate, each house amending the amendments of the other, in the hope that one chamber will agree to the proposals from the other. When the amending opportunities are exhausted, one chamber must accept the position of the other or the bill can die for lack of agreement. Alternatively, at any stage during this process, either house can propose to use the other method for resolving their differences by requesting a conference. (Then, if the conference is not totally successful, it may be necessary to return once again to amendments between the houses.)

The second chamber's amendments to the bill are the text that is subject to amendments between the houses, and that text may be amended in two degrees.[12] Assume that the House has passed H.R. 1 and the Senate has passed it with an amendment. When the Senate sends the bill back to the House, the House may amend the Senate amendment--technically, the House concurs in the Senate amendment with a House amendment. This House amendment to the Senate amendment is a first degree amendment.

When the Senate receives from the House the bill with the House amendment to the Senate amendment, the Senate may concur in the House amendment to the Senate amendment. If the Senate does so, the differences

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[11] Note that, at this point, both houses have agreed to everything in the text except the portion amended by the second chamber. Thereafter, neither chamber may propose changes in portions of the text to which both have agreed.

[12] A measure normally can be amended in two degrees on the House or Senate floor. An amendment offered to the text of the measure itself is an amendment in the first degree. While a first degree amendment is pending (that is, after it has been offered but before it has been voted on), an amendment may be offered to the amendment. Such an amendment to a pending amendment is an amendment in the second degree. Although more complicated situations may arise, both chambers generally prohibit third degree amendments. (In the House, however, a substitute for a first degree amendment is amendable.) Roughly the same principles apply to amendments between the houses. For more detailed descriptions of these procedures, see Stanley Bach, *The Amending Process in the Senate*. Report No. 83-230, December 7, 1983; and Stanley Bach, *The Amending Process in the House of Representatives*. Report No. 87-778, September 22, 1987.

between the chambers have been resolved. Alternatively, the Senate may amend the House amendment--technically, the Senate concurs in the House amendment to the Senate amendment with a further Senate amendment. This last amendment is a second degree amendment.

When the bill and the accompanying papers (that is, the various House and Senate amendments and messages) are now returned to the House, that chamber may not propose a further amendment. That would be a prohibited amendment in the third degree.[13] The House may concur in the final Senate amendment, in which case the differences are resolved, or it may disagree to the Senate amendment. (Note that this is the first point at which disagreement has been expressed; a later section of this report discusses the importance of the stage of disagreement.) If the House disagrees to the final Senate amendment (or to any Senate amendment at some earlier stage), the Senate may recede from its amendment and concur in the last position offered by the House (thereby achieving agreement), or the Senate may insist on its amendment. In turn, if both chambers are adamant, the House may insist on its disagreement, the Senate may adhere to its amendment, and the House finally may adhere to its disagreement.[14] If this stage is reached, the bill is almost certain to die unless one house or the other recedes from its adherence. (This same sequence of events can begin in the Senate, with the subsequent actions of the chambers reversed.)

The two houses may reach agreement at any stage of this process if one chamber concurs in the amendment of the other or recedes from its own amendment. Or stalemate could be reached more quickly--for instance, if the chambers refuse to alter their original positions and proceed directly through the stages of disagreement, insistence and adherence, bypassing the intermediate stages at which they could offer new proposals in the form of first and second degree amendments between the houses.

Fortunately, the House and Senate rarely reach the point of insistence and then adherence. It is even rather unusual for there to be second degree amendments between the houses (for instance, for the House to concur in the Senate amendment to the House amendment to a Senate bill with a further House amendment). Most often, the House and Senate either reach agreement at an earlier stage or they choose instead to submit their differences to a conference committee.

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[13] The House or Senate may consider a third degree amendment by unanimous consent. In the House, it also may be considered under suspension of the rules or pursuant to a special rule.

[14] The terms "recede," "insist," and "adhere" have technical meanings in the legislative process. When the House or Senate recedes, it withdraws from a previous position or action. To insist and to adhere have essentially the same meaning but represent different stages of the process.

CONSIDERATION OF SENATE AMENDMENTS BY THE HOUSE

The House may consider on the floor a measure with Senate amendments under several circumstances: (1) instead of sending the bill to a conference committee, (2) in the process of sending it to conference, or (3) after the measure has been considered by a conference. This section discusses House action on Senate amendments either instead of or before consideration in conference. House actions on Senate amendments after conference are discussed in later sections of this report on amendments in true and technical disagreement.

A bill with Senate amendments usually remains at "the Speaker's table" until it is taken up on the floor. It may be referred to a House committee at the discretion of the Speaker, but referral to committee is not mandatory and rarely occurs. The Speaker is most likely to refer if the Senate amendments are major in scope and non-germane in character, and especially if the Senate amendments would fall within the jurisdiction of a House committee that had not considered the bill originally.[15]

At this stage of the legislative process, a measure with Senate amendments is not privileged for floor consideration by the House--i.e., it is not in order to move to consider the bill and the Senate amendments--unless the Senate amendments do not require consideration in Committee of the Whole. The measure becomes privileged for House floor consideration only after the House has reached the stage of disagreement.

If consideration is not privileged, the only motion that can be made on the House floor at this stage is the motion to disagree to the Senate amendments and request or agree to a conference. However, this motion is entertained at the Speaker's discretion, and may be made only at the direction of the committee (or committees) with jurisdiction over the subject of the measure.[16] The same result is achieved far more often by unanimous consent.

If the Senate amendments require consideration in Committee of the Whole, it is not in order to move to concur (thereby reaching agreement), or to move to concur in the Senate amendments with House amendments (thereby proposing a new House position to the Senate). But such actions frequently are taken by unanimous consent. The House floor manager may ask unanimous consent, for instance, to take the bill H.R. 1 with Senate amendments thereto

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[15] The same applies to a Senate bill with Senate amendments to House amendments, and to a House bill with Senate amendments to House amendments to Senate amendments.

[16] If the Senate has disagreed to House amendments to a Senate bill and returned the bill to the House, it is also in order, subject to the same requirements, to move to insist on the House amendments and request or agree to a conference.

from the Speaker's table and concur in the Senate amendments. Another Member, generally a minority party member of the committee of jurisdiction, often reserves the right to object, usually only for the purpose of asking the floor manager to explain the purpose of the request and the content of the Senate amendments. Their discussion usually establishes that the Senate amendments are either desirable or minor and, in any case, are acceptable to the Representatives who know and care the most about the measure. The reservation of objection then is withdrawn; the unanimous consent request is accepted, and the differences between the House and Senate are thereby resolved. In similar fashion, the House may--again, by unanimous consent--concur in some or all of the Senate amendments with House amendments.

It bears repeating that, if there is objection to a unanimous consent request to concur in Senate amendments (with or without House amendments), no motion to that effect can be made if the amendments require consideration in Committee of the Whole. However, at least two alternatives are available. First, the Speaker may recognize the floor manager on a Monday or Tuesday (or at the very end of a session) to move to suspend the rules and concur in the Senate amendments (again, with or without House amendments). Such a motion is debatable for forty minutes, it is not amendable, and it requires support from two-thirds of the Members present and voting. Second, the Rules Committee may report, and the House may agree to, a special rule making in order a motion to concur (with or without amendments). In fact, the special rule even may be drafted in such a way that the vote to agree to the rule is also the vote to concur in the Senate amendments. For example, in 1977 the House agreed to the following resolution (H. Res. 930):

> Resolved, That immediately upon the adoption of this resolution the bill (H.R. 9378) to amend title IV of the Employee Retirement Income Security Act of 1974 to postpone, for two years, the date on which the corporation first begins paying benefits under terminated multiemployer plans, together with the Senate amendments thereto, is taken from the Speaker's table to the end that the Senate amendments be, and the same are hereby, agreed to.

There are additional rules and precedents concerning the consideration of certain Senate amendments in Committee of the Whole, the germaneness of House amendments to Senate amendments, and the relative precedence of the motion to concur and the motion to concur with amendments. However, these rules and precedents are not often invoked at this stage of House proceedings because the measure and the Senate amendments are either sent directly to conference or they are disposed of by a means that waives these rules and precedents--unanimous consent, suspension of the rules, or special rules. Some of these possibilities are far more likely to arise during House floor action on Senate amendments in true or technical disagreement, and they are discussed in later sections on those subjects.

CONSIDERATION OF HOUSE AMENDMENTS BY THE SENATE

When the Senate receives a bill with House amendments, it normally is held at the desk. The motion to proceed to consideration of the amendments is privileged and, therefore, not debatable (the motion to proceed normally is debatable). Moreover, the consideration of these amendments suspends, but does not displace, the pending or unfinished business. Paragraph 3 of Rule VII provides:

> The Presiding Officer may at any time lay, and it shall be in order for a Senator to move to lay, before the Senate, any bill or other matter sent to the Senate by the President or the House of Representatives for appropriate action allowed under the rules and any question pending at that time shall be suspended for this purpose. Any motion so made shall be determined without debate.

Normally, the Majority Leader asks the Presiding Officer to lay before the Senate the House message on a bill; such a message may state that the House has passed a certain Senate bill with amendments that are stated in the message. The message also may inform the Senate that the House has requested a conference. Once the Senate has agreed to consider House amendments, the House amendments themselves are debatable.

After some explanation of the Senate bill and the House amendments, the Majority Leader or the majority floor manager of the bill usually makes a debatable motion, or asks unanimous consent, (1) that the Senate concur in the House amendments, or (2) that the Senate concur in the House amendments with Senate amendments, or (3) that the Senate disagree to some or all of the House amendments and either request or agree to a conference with the House. Whatever the proposal, it is likely to be accepted by the Senate without serious opposition.

Thus, the Senate may act on House amendments at virtually any time, even if a major bill is under consideration, both because the House amendments are privileged business and also because they normally are disposed of quickly (so that the Senate's consideration of the pending bill is not interrupted for long). It usually is not necessary to call up the House amendments by use of a non-debatable motion; they are considered by unanimous consent. But unanimous consent probably is made easier to obtain by the knowledge that the non-debatable motion is in order (and, therefore, that extended debate is not possible).

These Senate practices effectively obviate a variety of parliamentary options that are available for acting on House amendments. For example, a motion to agree to a House amendment has precedence over (and may be offered while there is pending) a motion to disagree and go to conference. But a motion to agree to the House amendment with an amendment has precedence over the

motion to agree, and a motion to refer the House amendments to a committee of the Senate has precedence over both the motion to agree and the motion to disagree.

Fortunately, the complexities that these options can create arise very infrequently because House amendments normally are not called up on the Senate floor until after a process of consultations and negotiations that is so characteristic of the Senate. The majority and minority floor managers can be expected to consult with each other and to decide if the House amendments are acceptable or if the two Senators can agree on amendments to those House amendments. Whatever agreement the floor managers reach also is discussed with other interested Senators in the hope of achieving general concurrence. If such concurrence is reached, it is reflected in an expeditious floor decision to agree to the House amendments, with or without amendments. If concurrence cannot be reached, the Senators involved normally decide to resolve the disagreements among themselves (as well as with the House) in conference, rather than through a complicated series of motions and amendments offered on the Senate floor.

THE INFORMAL ALTERNATIVE TO CONFERENCE

If the House and Senate versions of a measure are submitted to conference, the conference committee must meet formally and, if it resolves some or all of the differences, prepare both a conference report and a joint explanatory statement. To avoid these and other requirements, the two chambers may use amendments between the houses as an informal alternative that achieves much the same purpose and result.

The purpose of a conference committee is to negotiate a settlement of the legislative differences between the two chambers. But these negotiations can take place not only in the official setting of a conference committee meeting, but also through informal discussions among the most interested Representatives and Senators and their staffs. If such informal discussions are successful, their results can be embodied in an amendment between the houses.

As the second chamber nears or reaches completion of floor action on a measure, the staffs of the respective House and Senate committees are likely to be comparing the two versions of the bill and seeking grounds for settling what ever differences exist. After initial staff discussions, the House and Senate committee leaders themselves may become involved. If these informal and unofficial conversations appear productive, they may continue until a tentative agreement is reached, even though no conference committee has yet been created. If the tentative agreement proves acceptable to other interested Representatives and Senators, a conference committee may be unnecessary.

Instead, when the bill with the second house's amendments has been returned to the first chamber, the majority floor manager may, under the appropriate rules or practices of that house, call up the bill and propose that the House or Senate (as the case may be) concur in the second chamber amendments with some amendments. He or she then describes the differences between the House and Senate versions of the measure and explains that the proposed amendments represent a compromise that is agreeable to the interested members of both houses. The floor managers may express their confidence that, if the first house accepts the amendments, the other chamber also will accept them.

If the first house does agree to the amendments, the second chamber then considers and agrees to them as well, under its procedures for considering amendments of the "other body." In this way, the differences between the House and Senate are resolved through the kind of negotiations for which conference committees are created, but without resort to a formal conference committee.

This informal alternative to conference is useful when the bill at issue is not particularly controversial, when the differences between the House and Senate versions are relatively minor, or when the end of a session approaches. It is far less likely to be successful, or even attempted, when there are

significant differences between House and Senate approaches to major issues, and when there is time to discuss them at length.

THE STAGE OF DISAGREEMENT

Since the purpose of conference committees is to resolve legislative disagreements between the House and Senate, it follows that there can be no conference committee until there is disagreement--until the House and Senate formally state their disagreement to each other's positions. A chamber reaches this stage either by formally insisting on its own position or by disagreeing to the position of the other house, and so informing the other house. Once the House or Senate reaches the stage of disagreement, it cannot then agree to (concur in) a position of the other chamber, or agree with an amendment, without first receding from its disagreement.

The stage of disagreement is an important threshold. Before this threshold is reached, the two chambers presumably are still in the process of reaching agreement. Thus, amendments between the houses, as an alternative to conference, are couched in terms of one chamber concurring in the other's amendments, or concurring in the other's amendments with amendments. For example, when the House concurs in Senate amendments with House amendments, the House does so because it does not accept the Senate amendments--in fact, it disagrees with them. But the House does not state its disagreement explicitly and formally at this stage because crossing the threshold of disagreement has significant procedural consequences, especially in the House.

Whereas House amendments are always privileged in the Senate, most Senate amendments are not privileged in the House before the House has reached the stage of disagreement. Moreover, the order of precedence among certain motions is reversed in the House (but not in the Senate) after the stage of disagreement has been reached. Before the stage of disagreement, the order of precedence among motions in both chambers favors motions that tend to perfect the measure further; after the stage of disagreement in the House, the order of precedence is reversed, with precedence being given to motions that tend to promote agreement between the chambers. Before the stage of disagreement, for example, a motion to concur with an amendment has precedence over a motion to concur; after the stage of disagreement in the House, a motion to recede and concur has precedence over a motion to recede and concur with an amendment.

This reversal of motions can become important during the process of amendments between the houses; but, as noted earlier, it is unusual for this process to extend beyond the point at which one chamber reaches the stage of disagreement. At that point, the usual recourse is to a conference committee. The precedence among motions before and after the stage of disagreement is more likely to become important after a conference committee has reported and the House and Senate are considering amendments in true or technical disagreement. For this reason, a more detailed discussion of the subject is reserved to the sections on such amendments.

ARRANGING FOR A CONFERENCE

If the differences between the House and Senate cannot be resolved through the exchange of amendments between the houses, two possibilities remain. First, stalemate can lead to the death of the legislation if both chambers remain adamant. Or second, the two houses can agree to create a conference committee to discuss their differences and seek a mutually satisfactory resolution. In fact, major bills usually are sent to a conference committee, either after a formal or informal attempt to resolve the differences through amendments between the houses has proven unsuccessful, or without such an attempt having even being made.

The process of arranging for a conference can begin as soon as the second house passes the bill at issue, either with one or more amendments to parts of the measure or with a single amendment in the nature of a substitute that replaces the entire text approved by the first chamber. The second house then may simply return the bill, with its amendments, to the first chamber if there is reason to believe that the first house might accept the amendments, or that amendments between the houses can be used successfully as an informal alternative to conference. It also may do so if the second house wishes eventually to act first on an eventual conference report, because the chamber that asks for a conference normally acts last on the conference report.

Alternatively, and more commonly, the second house may pass the bill and immediately insist on its amendments and request a conference with the first chamber. By insisting on its amendments, the second chamber reaches the stage of disagreement. The bill, the second house's amendments, and the message requesting a conference, then are returned to the first house. The first house is not obliged to disagree to the second chamber's amendments and agree to the requested conference--for example, it also has the options of refusing to act at all or concurring in the second chamber amendments, with or without amendments--but it almost always does so.

If the second chamber just returns the bill and its amendments to the first house without insisting on its amendments, the first house may disagree to the amendments and request a conference. The bill, the amendments, and the message requesting the conference, then are returned to the second chamber which usually insists on its amendments (thereby reaching the stage of disagreement) and agrees to the conference.

Thus, there are essentially two direct routes to conference (there are more indirect routes, of course, if an attempt is first made to resolve the differences through an exchange of amendments). The second house may begin the process by insisting on its amendments and requesting the conference; if this does not occur, the first house then may begin the process by disagreeing to the second chamber's amendments and requesting the conference itself. The first route is likely to be followed when the need for a conference is a foregone conclusion.

However, strategic considerations also may influence how the Senate and House agree to go to conference, especially in view of the convention that the chamber which asks for the conference normally acts last on the conference report. With this in mind, proponents of the legislation may prefer one route to the other. For example, House or Senate conferees can avoid the possibility of facing a motion in one house to recommit the conference report (with or without instructions) if they have arranged for the other house to act first on the report. By the same token, if Senate opponents are expected to filibuster the conference report, proponents may prefer for the Senate to agree to a House request for a conference, so that the Senate will act first on the report. This arrangement avoids compelling Representatives to cast difficult votes for or against a conference report that may not reach a vote in the Senate. On the other hand, a bill's supporters could prefer that the House agree to the conference and then vote first on the report, with the hope that a successful House vote might improve the prospects for later success on the Senate floor.

SELECTION OF CONFEREES

After a chamber requests or agrees to a conference, it usually proceeds immediately to select conferees, or managers as they are also called. The selection of conferees can be critically important, because it is this group--generally a small group--of Representatives and Senators who usually determine the final form and content of major legislation.

In the House, clause 6(f) of Rule X authorizes the Speaker to appoint all members of conference committees, and gives him certain guidelines to follow:

> The Speaker shall appoint all select and conference committees which shall be ordered by the House from time to time. In appointing members to conference committees the Speaker shall appoint no less than a majority of members who generally supported the House position as determined by the Speaker. The Speaker shall name Members who are primarily responsible for the legislation and shall, to the fullest extent feasible, include the principal proponents of the major provisions of the bill as it passed the House.

These guidelines carry weight as admonitions but they necessarily give the Speaker considerable discretion, and his exercise of this discretion cannot be challenged on the floor through a point of order.

In the Senate, the Presiding Officer is almost always authorized to appoint "the managers on the part of the Senate." However, Senate conferees may be elected, and a motion to elect certain Senators as conferees is both debatable and amendable.

Before the formal announcement of conferees in each chamber, a process of consultation takes place that vests great influence with the chairman and the ranking minority member of the committee (and sometimes the subcommittee) that had considered the bill originally. These Representatives and Senators almost always serve as conferees. Furthermore, they usually play an influential, and often a controlling, role in deciding the number of conferees from their respective chambers, the party ratio among these conferees, and which of their committee colleagues shall be appointed to the conference committee. In the House, the Speaker often accepts without change the list developed by the House committee leaders; the Presiding Officer in the Senate always does so.

If the bill at issue had been considered by more than one committee in either house, as frequently occurs, all the involved chairmen and ranking minority members from that chamber normally participate in the selection of its conferees, and the conferees usually are drawn from both or all of those committees. In such cases, the party leaders in each house are more likely to become involved in the selection process--in determining the total number of House or Senate conferees and the division of conferees between or among the

committees of jurisdiction, as well as in choosing individual members to serve. From time to time, the Speaker also exercises his authority to appoint a Representative who offered a key successful floor amendment, even if he or she is not on the committee(s) that reported the legislation.

In some cases--and especially in cases of multiple committee jurisdiction--House or Senate conferees may be appointed for limited purposes: for example, only for the consideration of Title I of the House version, or only for the consideration of a particular (and possibly non-germane) Senate amendment. Such conferees are expected to limit their participation in the conference to consideration of the matters for which they are appointed. This practice protects the preponderant influence in conference of the appropriate House and Senate standing committees. But conferees appointed for limited purposes are in a somewhat anomalous position; they retain the right to sign or not sign the conference report and, therefore, to affect the prospects for a successful agreement.

Each house determines for itself the size of its delegation to the conference committee. The House and Senate need not select equal numbers of conferees, and they frequently do not. But unequal numbers of House and Senate managers do not affect the formal power of either house in conference decisions. The conference report requires approval by a majority of the House conferees and a majority of the Senate conferees, rather than a majority of all conferees.

Two notable developments concerning the selection of conferees have occurred in recent years. First, conference committees have generally increased in size. Second, seniority on committee has become a somewhat less controlling factor in the selection of conferees. More members, and more junior members, have been appointed to conference committees during recent Congresses. In addition to giving more members an opportunity to participate in this stage of the legislative process, increasing the number of conferees also increases the likelihood that a house's conference delegation will more accurately reflect the distribution of policy positions within the chamber as a whole (which can make it more difficult for the conferees to reach agreement).

Also contributing to these trends has been the comparatively high rate of turnover among Representatives and Senators in recent years, and the institutional changes that have distributed positions of influence more widely among members and somewhat reduced the importance of seniority. Another contributing factor has been the number of omnibus bills, such as the energy bill mentioned in a previous section and the various budget reconciliation bills of recent years, that have touched on the jurisdictions of numerous House and Senate committees. All the affected standing committees have a natural interest in being represented on the conference committees on such bills. The result has been some large conferences; the conference committee on the Omnibus Budget Reconciliation Act of 1981 included a total of more than 250 Senators and Representatives.

INSTRUCTING CONFEREES

After the House or Senate decides to go to conference (either by requesting the con-ference or agreeing to a request from the other house), its managers usually are appointed immediately. Between these two steps, however, there is an opportunity in both houses (although usually only a momentary opportunity) to move to instruct the conferees.[17] For example, the managers may be instructed to insist on the position of their house on a certain matter, or even to recede to the position of the other house.

Instructions are proposed infrequently in the House; they are rare in the Senate. In large part, this stems from the fact that instructions are not binding. They are only admonitions, or advisory expressions of position or preference. No point of order lies in either the House or the Senate against a conference report on the ground that conferees did not adhere to the instructions they received.

In the Senate, a motion to instruct is debatable and amendable. In the House, such a motion is debated under the one-hour rule, and a germane amendment to the instructions is in order only if the House does not order the previous question during or at the end of the first hour of debate. In neither house can conferees be instructed to take some action which exceeds their authority. In the House, only one valid motion to instruct is in order before conferees are named, whether or not the motion is agreed to; but if a motion to instruct is ruled out of order, another motion to instruct may be made.

Under the precedents of the House, a member of the minority party is entitled to recognition to move to instruct. Moreover, the Speaker normally looks first to senior minority members of the committee that reported the measure at issue. These recognition practices can be used to try to control the instructions that are proposed; for example, instructions on one subject may be precluded if the ranking minority member seeks recognition to offer a motion to instruct on another subject.[18]

Successful motions to instruct are relatively uncommon for essentially the same reason they are never binding. Conferences are negotiating sessions in which the managers appointed by each house meet to discuss their differences and arrange a suitable compromise. To impose binding instructions on them

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[17] Because the motion to instruct may be made only before the conferees are named, it is less likely to be viewed as a challenge to the intentions of the members appointed as managers.

[18] However, the House may amend the instructions (if it has not already ordered the previous question on the motion). Such an amendment must be germane to the House or Senate versions of the bill, but not necessarily to the the instructions to which the amendment is proposed.

would be to limit their discretion and flexibility, and possibly to reduce the likelihood of a successful conference. Members can view even non-binding instructions as restricting conferees' latitude, politically if not procedurally. For these reasons, prospective conferees generally oppose being instructed, and some members are inclined to vote against motions to instruct even though they may agree with the content of the instructions.

Why then does the House occasionally vote to instruct its conferees? In some cases, Representatives may question whether their conferees are likely to give sufficient priority to upholding the House position on a certain matter in disagreement. This concern may arise, for example, if the matter in question was included in the House version of the bill by a floor amendment which had been opposed by many of the prospective conferees. In other cases, instructions may be welcomed by House managers as evidence of strong House support for a position the conferees wish to maintain in conference.

In either case, a successful motion to instruct is a form of advance notice to House and Senate conferees that a conference report inconsistent with the instructions may not receive majority support on the House floor. Depending on the circumstances, this notice may be directed to House conferees, or it may be used by them to convince Senate managers that the House delegation must stand firm on the subject of the instructions if the conference report is to be approved by the House.

In the House, but not in the Senate, motions to instruct also are in order after House conferees have been appointed but have failed to report an agreement. Clause 1(b) of House Rule XXVIII provides:

> After House conferees on any bill or resolution in conference between the House and Senate shall have been appointed for twenty calendar days and shall have failed to make a report, it is hereby declared to be a motion of the highest privilege to move to discharge said House conferees and to appoint new conferees, or to instruct said House conferees; and, further, during the last six days of any sessions of Congress, it shall be a privileged motion to move to discharge, appoint, or instruct, House conferees after House conferees shall have been appointed thirty-six hours without having made a report.

By precedent, more than one proper motion to instruct is in order when made pursuant to this clause. In 1989, the clause was amended to provide that such a motion is in order "only on the day after the calendar day on which the Member making the motion announces to the House his intention to do so and the form of the motion." (It is possible for Senate conferees to be instructed by resolution while a bill is in conference.)

Although used infrequently, the right to instruct under Rule XXVIII can be invoked to break logjams in conference. Under these circumstances, instructions may be welcomed, or even sought, by House conferees to test the

sentiment of the House or, more likely, to demonstrate the strength of House opinion to the Senate.

RESTRICTIONS ON THE AUTHORITY OF CONFEREES

Because conference committees are created to resolve disagreements between the House and Senate, the authority of conferees is limited solely to the matters in disagreement between the two houses. Conferees have no authority to change matter that is not in disagreement--i.e., either matter that appears in House and Senate versions of the measure in identical form, or matter that was not submitted to the conference in either the House or Senate version.

Moreover, as conferees consider each matter in disagreement, their authority is limited by the scope of the differences between the House and Senate positions on that matter. The managers may agree on the House position, the Senate position, or some middle ground. But they may not include a provision in a conference report that does not fall within the range of options defined by the House position at one extreme and the Senate position at the other. If, for example, the House proposes to appropriate $1 billion for a certain purpose and the Senate proposes $2 billion instead, the conferees may agree on $1 billion or $2 billion or any intermediate figure. But they may not agree on a figure that is less than $1 billion or more than $2 billion. To do so would exceed the scope of the differences between the House and Senate positions on that matter in disagreement.

The concept of "scope" relates to specific differences between the House and Senate versions of the same measure, not to the implications or consequences of these differences. Thus, conferees on a general appropriations bill may agree on the higher (or lower) of the House and Senate positions on each appropriation item, even though the sum of their agreements is higher (or lower) than the total sum proposed in either the House or the Senate version of the bill (unless the two versions explicitly state such a total). Also, if one house proposes to amend some existing law and the other chamber does not, the scope of the differences over this matter generally is bounded by the proposed amendments, on the one hand, and the pertinent provisions of existing law, on the other. Thus, the conferees may agree on the proposed amendments or on alternatives that are arguably closer to existing law.

Thus, there are significant restrictions on the authority of conferees: they only accept agreements that are within the scope of the differences between the House and Senate over matters in disagreement between them.[19] However, it is far easier to make this statement than to apply it in all cases. For example, it becomes much more difficult to define the scope of the differences when the differences are qualitative, not quantitative as in the example above. Moreover,

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[19] Clause 2 of House Rule XX also restricts the authority of House conferees to include certain kinds of Senate amendments in conference reports on general appropriations bills. These restrictions are discussed in the section on amendments in technical disagreement.

the difficulty of defining the scope of the differences also depends on how the second chamber to act on the measure has cast the matters in disagreement.

If one house takes up a measure from the other and passes the measure with a series of amendments to the first chamber's text, then the matters in disagreement in conference are cast in terms of a number of discrete second house amendments (which usually are numbered). The two versions of the measure can be compared side by side to identify the provisions that are identical in both versions and those that are the subject of disagreements. Therefore, it is possible to identify both the matters in disagreement and the House and Senate positions on each of them.

However, the second chamber to act on a measure frequently casts its version in the form of an amendment in the nature of a substitute for the entire text passed by the first house. In such cases, only one amendment is submitted to conference, even though that single amendment may encompass any number of specific differences between the House and Senate versions of the measure. In fact, the text of the bill as passed by one house and the text of the other house's amendment in the nature of a substitute may embody wholly different approaches to the subject of the measure. The two versions may be organized differently and may address the same subject in fundamentally different ways.

Second house substitutes make it much harder, if not impractical, to specifically identify each matter in disagreement and the scope of the disagreement over that matter. When a second chamber substitute is in conference, therefore, the managers must have somewhat greater room for maneuver. Technically, the House and Senate are in disagreement over the entire text of the measure; substantively, the policy disagreement may be almost as profound. In such cases, the conferees may resolve the differences between the House and Senate by creating a third version of the measure--a conference substitute for both the version originally passed by the first house and the amendment in the nature of a substitute approved by the second house.

This latitude may be necessary but it also means that the conference substitute could take the form of a third and new approach to the subject at hand--an approach that had not been considered on the floor of either house. To inhibit such a result, paragraph 3(a) of Senate Rule XXVIII states that:

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

The comparable House rule was amended in 1971 to include some criteria for determining when a conference substitute is not a "germane modification."

However, the text of clause 3 of House Rule XXVIII almost conveys a certain sense of frustration with the difficulty of the task:

> Whenever a disagreement to an amendment in the nature of a substitute has been committed to a conference committee it shall be in order for the Managers on the part of the House to propose a substitute which is a germane modification of the matter in disagreement, but the introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement. Moreover, their report shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee.

Notwithstanding this specificity, determining whether a conference substitute includes some new "topic, question, issue, or proposition" is far more difficult than determining whether the conferees' agreement on an appropriation for a program falls within the scope of the differences between the funding levels originally proposed by the House and Senate. Furthermore, under Senate precedents, when identical provisions appear in a bill and a second chamber substitute, the conferees may change them.

If the conferees have exceeded their authority in any one respect in agreeing to a conference report, that report as a whole is tainted and subject to a point of order on the House or Senate floor.[20] However, it is relatively unusual for a point of order to be made and sustained against a conference report. One reason is that conferees are aware of the limits within which they are to negotiate, and usually try not to exceed their authority. A second reason is the frequency of second chamber substitutes (except on general appropriations bills) and the somewhat greater discretion conferees have in developing conference substitutes.

If the managers realize that their conference settlement includes agreements that would make the entire conference report subject to a point of order, they can report the offending items back to their parent chambers as separate amendments in technical disagreement (unless the only amendment in conference is a second chamber substitute). Even if a conference report would be subject to a point of order on the House floor, the House can approve it by a two-thirds vote under suspension of the rules or the Rules Committee may propose that the House approve a special rule waiving the point of order. And

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[20] Conference reports also are subject to points of order if they violate certain provisions of the Budget Act.

in the case of a second chamber substitute, if the conference report is ruled out of order, it may then be possible to propose the text of that report as an amendment between the houses (if the amendment is not in the third degree and does not contain non-germane matter).

In the Senate, by contrast, there is no comparable device for waiving the rules governing the content of conference reports, but the Senate has interpreted these rules broadly. For example, Floyd Riddick states in *Senate Procedure* that a "conference report may not include new 'matter entirely irrelevant to the subject matter,' not contained in the House- or Senate-passed versions of a measure as distinct from a substitute therefor."[21] And referring to conference substitutes, he states that, "in such cases, they [the conferees] have the entire subject before them with little limitation placed on their discretion, except as to germaneness, and they may report any germane bill."[22]

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[21] Floyd M. Riddick, *Senate Procedure*. Washington, U.S. Govt. Print. Off., 1981. (97th Congress, 1st session. Senate. Document no. 97-2). p. 406.

[22] *Ibid.*, pp. 386-387.

CONFERENCE PROCEDURES AND REPORTS

Rules of procedure guide and constrain the legislative activities of both the House and Senate. So it is striking that there are virtually no rules governing procedure in conference. The members of each conference committee can decide for themselves whether they wish to adopt any formal rules governing such matters as the selection of a chairman, debate, quorums, proxy voting, or amendments. But usually they do not. The only rules imposed by the two houses governing conference committee meetings concern voting and open meetings.

In a conference committee, there are only two votes: a House vote and a Senate vote. A majority of the House managers and a majority of the Senate managers must approve and sign the conference report. Decisions are never made by a vote among all the conferees combined. This is why there is no requirement or necessity for the two houses to appoint the same number of conferees; five Senate conferees, for example, enjoy the same formal collective power in conference as twenty-five House conferees.

Until the mid-1970s, conference meetings were almost always closed to the public; now they generally are open unless a specific decision is made to close part or all of a meeting. Paragraph 6 of Senate Rule XXVIII states that:

> Each conference committee between the Senate and the House of Representatives shall be open to the public except when managers of either the Senate or the House of Representatives in open session determine by a rollcall vote of a majority of those managers present, that all or part of the remainder of the meeting on the day of the vote shall be closed to the public.

The comparable House rule is even more stringent. Clause 6(a) of House Rule XXVIII requires a majority vote on the House floor to close part or all of a conference meeting. In other words, House conferees cannot vote to close a conference committee meeting unless authorized to do so by specific rollcall vote of the House. If a point of order is made and sustained on the House floor that conferees met in violation of clause 6(a) (or that they never met at all), the conference report is rejected and the House is considered to have requested a further conference with the Senate.

This difference between House and Senate rules has not been a source of public contention because efforts to close conferences normally are made only when they must deal with national security matters. When House managers want the authority to close part or all of a formal conference meeting, they usually offer a motion to this effect at the time the House arranges to go to conference.

No other rules govern conference proceedings nor do conferences often vote to establish their own rules. Instead, they generally manage without them. This absence of rules reflects the basic nature of the conference committee as a negotiating forum in which the negotiators should be free to decide for themselves how to proceed most effectively.

In some cases, conferences are rather formal. One delegation puts a proposal on the table; the other delegation considers it and responds with a counter proposal. In other cases, conferences resemble free-form discussions in which the issues and the matters in disagreement are discussed without any apparent agenda or direction until the outlines of a compromise begin to emerge. In recent years, conferences on massive omnibus bills have even created "sub-conferences" to seek agreements which then can be combined into a single conference report.

Sometimes customary practices develop among members of House and Senate committees who meet with each other regularly in conference. For example, they may alternate the chairmanship from one conference to the next between the committee or subcommittee chairmen from each house. Conference bargaining also can be facilitated by preliminary staff work. For instance, staff may prepare side-by-side comparisons of the House and Senate versions, so that the conferees can understand more easily how the two houses dealt with the same issues or problems. Furthermore, senior staff may engage in preliminary negotiations among themselves, seeking agreements acceptable to their principals, so that the members themselves can concentrate on the more intractable disagreements.

When the conferees reach full agreement, staff prepare a conference report which indicates how each amendment in disagreement has been resolved. For example, the report may state that the Senate recedes from certain of its amendments to the House bill, that the House recedes from its disagreement to certain other Senate amendments, and that the House recedes from its disagreement to the remaining Senate amendments and concurs in each with a House amendment (the text of which is made part of the report). Two copies of this report must be signed by a majority of House conferees and a majority of Senate conferees. No additional or minority views may be included in the report. From time to time, a manager's signature may be accompanied by an indication that he or she does not concur in the conference agreement on a certain numbered amendment. This does not make the report subject to a point of order in the House so long as a majority of House conferees have agreed on each numbered amendment.

The conference report itself is not the most informative document, because it does not describe the nature of the disagreements that confronted the conferees. Therefore, the rules of both houses require that a conference report be accompanied by a joint explanatory statement that is "sufficiently detailed and explicit to inform the House [Senate] as to the effect which the amendments or propositions contained in such report will have upon the measure to which

those amendments or propositions relate" (clause 1(c) of House Rule XXVIII and paragraph 4 of Senate Rule XXVIII). Normally, this joint explanatory statement summarizes the House, Senate, and conference positions on each amendment in disagreement (or each provision, in the case of second chamber and conference substitutes). The statement also is prepared in duplicate and signed by majorities of both House and Senate conferees.

The house that agreed to the conference normally acts first on the conference report. Because this is an established practice, not a requirement of either House or Senate rules, the order of consideration can be reversed, if that is strategically advantageous.[23] For example, the House may wish to delay acting on a report until after the Senate has voted on it because of the possibility that the report may fall victim to a filibuster. Alternatively, Senate conferees may agree that the House should act first if the report is likely to enjoy greater support in the House, in the belief (or hope) that the House vote will increase the prospects for approving the report in the Senate.[24] Whatever the case may be, the conferees must see to it that the house they want to act first takes the papers out of the conference.

If conferees cannot agree on any of the amendments before them, or if they cannot agree on all matters encompassed by one house's bill and the other's substitute, they may report back in disagreement. The House and Senate then can seek a resolution of the differences either through a second conference or through amendments between the houses. Conferees also may report in total disagreement if they have reached an agreement on a bill and a second chamber substitute which, in some respect, violates their authority. In such a case, their disagreement is technical, not substantive. After the House receives or the Senate agrees to the report in disagreement, the conferees' actual agreement is presented as a floor amendment to the amendment in disagreement, at which point considerations of the conferees' authority no longer apply.

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[23] This practice is stated in Section XLVI of Jefferson's Manual.

[24] Rather than violate the customary order for considering conference reports, the same end can be achieved by arranging for one house to request the conference instead of agreeing to a request by the other.

FLOOR CONSIDERATION OF CONFERENCE REPORTS

A conference report may be presented or filed at almost any time the House or Senate is in session, but not when the Senate is in executive session or when the House has resolved into Committee of the Whole. The Senate may consider the report immediately. The House is less likely to do so because of the layover and availability requirements that apply to conference reports under House rules.

In the House, conference reports are subject to a three day "layover" requirement. Clause 2(a) of Rule XXVIII prohibits consideration of a conference report until the third day (excluding weekends and legal holidays) after the report and joint explanatory statement have been filed in the House, and then only if the report and statement have been printed in the *Congressional Record* for the date on which they were filed. These requirements do not apply during the last six days of a session.[25] In addition, copies of the report and the statement must be available for at least two hours before consideration of the report begins; however, the House may waive this restriction by adopting a resolution reported from the Rules Committee for that purpose.[26] Clause 2(b) applies the same requirements and conditions to amendments reported from conference in disagreement.

A conference report that meets these availability requirements is considered as having been read when called up for consideration in the House. If a report does not meet one or more of the requirements but is called up by unanimous consent, it must be read. However, the House normally agrees by unanimous consent to have the joint explanatory statement read in lieu of the report and then to dispense with the reading of the statement.

Conference reports are highly privileged in the House, and may be called up at almost any time another matter is not pending. When called up, the report is considered in the House (not in Committee of the Whole), under the one-hour rule. Clause 2(a) of Rule XXVIII requires that this hour be equally divided between the majority and minority parties, not necessarily between proponents and opponents. The two floor managers normally explain the agreements reached in conference and then yield time to other Members who

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[25] In contemporary practice, adjournment resolutions usually are not approved until very shortly before the adjournment takes place. This often makes it impossible to know when the "last six days" begin. To achieve the same end, the House may adopt, as the end of the session approaches, a resolution reported from the Rules Committee which triggers certain provisions of House rules and waives others for the duration of the session.

[26] Such a resolution always is in order, notwithstanding the usual requirement that a two-thirds vote is necessary for the House to consider a resolution from the Rules Committee on the same day it is reported.

wish to speak on the report. If both floor managers support the report, a Member who opposes it is entitled to claim control of one-third of the time for debate. Before a second hour of debate can begin, the majority floor manager moves the previous question. If agreed to, as it invariably is, this motion shuts off further debate and the House immediately votes on agreeing to the conference report.

Any points of order against a conference report in the House must be made or reserved before debate on the report begins (or before the joint explanatory statement is read). A conference report can be protected against one or more points of order if the Rules Committee reports and the House adopts a resolution waiving the applicable rules, or if the report is considered under suspension of the rules.

The Senate has no layover rule governing consideration of conference reports. Moreover, the report and accompanying statement normally are not printed in the Senate section of the *Record* if they have been printed in the House section. A conference report does not have to be printed before the Senate may consider it. Conference reports are privileged in the Senate. The motion to consider a report on the Senate floor is in order at most times and it is not debatable, although such reports normally are called up by unanimous consent at times arranged among the floor and committee leaders.

When considered on the Senate floor, a conference report is debatable under normal Senate procedures; it is subject to extended debate unless the time for debate is limited by unanimous consent or cloture. Paragraph 5 of Senate Rule XXVIII states that, if time for debating a conference report is limited (presumably by unanimous consent), that time shall be equally divided between the majority and minority parties, not necessarily between proponents and opponents of the report. Consideration of a conference report by the Senate suspends, but does not displace, any pending or unfinished business; after disposition of the report, that business again is before the Senate.

A point of order may be made against a conference report at any time it is pending on the Senate floor (or after all time for debate has expired or has been yielded back, if the report is considered under a time agreement). The Senate has no procedures for waiving points of order comparable to waivers by special rule in the House. Senate rules do include a procedure for suspending the rules, but it is used very infrequently. However, points of order rarely are made against conference reports on the Senate floor, in part because of the Senate's generous interpretation of conferees' authority. If a point of order is sustained against a conference report in the Senate, Rule XXVIII provides that "the report shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon."

Conference reports may not be amended on the floor of either house. Conferees are appointed to negotiate over the differences between the houses; the delegations return to their respective chambers with identical recommendations

in the form of a report that proposes a package settlement of all the differences. The House and Senate may accept or reject the settlement but they may not amend it directly. If conference reports were amendable, the process of resolving bicameral differences would be far more tortuous and possibly interminable.

As noted in previous sections, the house that agrees to the request for a conference normally acts first on the report. The first chamber to act may vote to agree or not agree to the report, or it may agree to a preferential motion to recommit the report to conference, with or without non-binding instructions. Recommittal is quite unusual, in part because such an action implies that the conferees should and could have reached a more desirable compromise. If the first house agrees to the report, the second house only has the options of approving or disapproving the report. At this stage, the report cannot be recommitted. A vote by either house to agree to a conference report has the effect of automatically discharging its conferees and disbanding the conference committee; thus, there is no conference committee to which the second house could recommit the report.

The defeat of a conference report in either house may kill the legislation--but only if no further action is taken, such as requesting a second conference or proposing a new position through an amendment between the houses. For lack of time, however, a second conference may not be practical near the end of a Congress, when many conference reports are considered.

The vote to agree to a conference report normally completes that house's action on the measure, assuming the other body also approves the report. How ever, some conference reports, especially those on general appropriations bills, may be accompanied by one or more amendments in either true or technical disagreement. Furthermore, House rules include special procedures for coping with conference report provisions, originating in the Senate, that would not have been germane floor amendments to the bill in the House. These possibilities are discussed in separate sections that follow.

AMENDMENTS IN TRUE DISAGREEMENT

It is generally in the interests of both the House and Senate managers and their parent chambers for the conferees to reach full agreement. Each house already has passed a version of the legislation and has entrusted the responsibility for resolving its differences with the other body to members who probably were actively involved in developing and promoting the measure. Nonetheless, conferees sometimes cannot reach agreement on all the amendments in disagreement. In such a case, the conferees may return to the House and Senate with a partial conference report dealing with the amendments on which they have reached agreement, but excluding one or more amendments that remain in disagreement.

The house that agreed to the conference first debates and votes on the partial conference report. After the report is approved, the reading clerk reads or designates the first amendment in disagreement, and the floor manager offers a motion to dispose of the amendment. When this process begins in the House, the floor manager may move that the House insist on its disagreement to a Senate amendment. Agreeing to this motion implies that the House adamantly supports its original position and asks the Senate to recede from its amendment. Alternatively, the floor manager may move that the House either (1) recede from its disagreement to the Senate amendment and concur in that amendment, or (2) recede and concur with a House amendment. In the latter case, this House amendment (which must be germane to the Senate amendment) may be the position that the House managers had been advocating in conference or it may be a new compromise position they have developed. By agreeing to this motion, the House supports the negotiating position of its conferees and asks the Senate to concur in this new House amendment.

After the House disposes of the first amendment in disagreement, it acts in similar fashion on each of the other amendments that were not resolved in conference. The House then sends all the papers to the Senate with a message describing its actions. If the Senate agrees to the partial conference report and to the House position on all the amendments in disagreement on which Senate action is required, the legislative process is completed and the bill may be enrolled for Presidential action.

However, the Senate may agree to the partial conference report (which is rarely controversial), but not accept the House position on one or more of the amendments in disagreement. Instead, the Senate may vote to insist on its original position, support the negotiating position of its managers, or propose a new bargaining position to the House. If the House has insisted on its disagreement to a Senate amendment, the Senate may adhere to its amendment. If the House has receded from its disagreement to a Senate amendment and concurred in that amendment with a House amendment, the Senate may disagree to the House amendment or concur in the House amendment with a

further Senate amendment (if such a Senate amendment would not be in the third degree).

If one or more amendments remain in disagreement at the end of this process, either method of resolution may be pursued again. The amendments may be "messaged" back and forth between the houses until one chamber accepts the position of the other or until stalemate is reached. Alternatively, either house may request a further conference to consider the remaining amendments in disagreement. The same or new conferees may be appointed. Only the amendments in disagreement are submitted to the new conference. The managers may not re-open matters that had been resolved in the partial conference report approved by both chambers because these matters are no longer in disagreement. But the partial conference report cannot become law until all the remaining disagreements have been resolved. If the second conference is successful, the managers submit a second report for action on the House and Senate floor. If not, the legislation, including the partial conference report, is probably dead for that Congress.

Amendments in true disagreement usually do not arise when conferees are presented with a second chamber substitute. In such a situation, there is only one amendment before the conference. The conferees either reach agreement or they do not; they may not report only part of the substitute as an amendment in disagreement. However, they may report back in total disagreement, and the House and Senate then can vote to insist on their original positions or propose new versions of the legislation. This does not occur very often; but when it does, the bill may die for lack of further action or the two houses may agree to a new conference to consider the same issues once again.

Instead, amendments in true disagreement generally arise when the second chamber has passed a bill with a series of separate amendments. Since this happens most often to general appropriations bills that originate in the House (and on which the Senate requests conferences), the House usually acts first on partial conference reports and amendments in disagreement.

The possibility of amendments in disagreement can make it exceedingly difficult to anticipate what will happen to a measure that is sent to conference. It is not simply a question of whether or not the conferees will be able to resolve the differences over all the amendments in disagreement by reaching compromises that fall within the scope of the House and Senate versions. If a number of amendments are considered in conference, the managers may reach agreement on some, but not on others. And what then happens to the amendments reported in disagreement depends on the motions made and agreed to by the House and Senate.

Moreover, the recourse to amendments in disagreement creates new possibilities that were not available in conference. In conference, the managers' options are defined and limited by the scope of the differences between the House and Senate positions before them. However, when the House and Senate

act on an amendment in disagreement, they are not subject to this restriction. For example, the House may amend a Senate amendment in disagreement with a new House position (or technically, recede from its disagreement to the Senate amendment and concur in the Senate amendment with a House amendment) that goes beyond the scope of either chamber's original position. The concept of "the scope of the differences" is a restriction on the authority of managers in conference; it is not a restriction on amendments between the houses.[27]

Thus, it is possible, though not very likely in practice, that (1) the conferees could report an amendment in disagreement. (2) the first chamber to act could propose a new position in the form of an amendment to the amendment in disagreement (3) the second chamber could respond with a further amendment that constitutes a new position of its own, and (4) conferees could be appointed for a second time to attempt to resolve the differences between these two new positions on the same subject. In this second conference, the same general policy question would be at issue, but the scope of the differences between the House and Senate versions (and consequently the options open to the conferees) would not be the same.

To add to the uncertainties, several other complications can occur in the House as it acts on each amendment in disagreement. These options arise from the different order of precedence among certain motions in the House (but not in the Senate) that prevails before and after the stage of disagreement is reached, and the opportunities for crossing and re-crossing that threshold. These complications are most likely to arise during action on amendments in disagreement to general appropriations bills.

Before the House reaches the stage of disagreement, the order of precedence favors motions that tend to perfect the measure further; after the stage of disagreement, the order of precedence is reversed and favors motions that tend to promote agreement between the houses. Thus, if a motion to concur in a Senate amendment is made on the House floor before the stage of disagreement, a motion to concur with an amendment has precedence and may be offered and voted on while the motion to concur is pending. The motion to concur with an amendment has precedence because it tends to perfect the measure. If the House agrees to the motion to concur with an amendment, the straight motion to concur automatically falls without a vote, even though it had been offered first.[28]

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[27] However, floor amendments to amendments in disagreement still must meet normal requirements for floor amendments. For example, a House amendment to a Senate amendment in disagreement to a general appropriations bill still must be germane and may not propose a new unauthorized appropriation.

[28] Such motions are not likely to be made in practice, for reasons discussed in the section on House consideration of Senate amendments.

After the House has reached the stage of disagreement, however, a motion that the House recede from its disagreement and concur in a Senate amendment has precedence over a motion to recede and concur with an amendment. The motion to recede and concur tends to promote agreement more directly than the motion to recede and concur with an amendment. If a preferential motion to recede and concur is made and carries, no vote occurs on the motion to recede and concur with an amendment.

As if this were not complicated enough, the motion to recede and concur is divisible in the House, as is the motion to recede and concur with an amendment. Any Representative may demand that it be divided into two proposals: first, that the House recede from its disagreement to the Senate amendment; and second, that the House then concur in the Senate amendment (or concur in it with an amendment, depending on which motion has been made). Following a demand for the division of the motion, the House first considers whether it should recede from its disagreement. But if the House votes to recede it crosses back over the threshold of disagreement; consequently, the precedence of motions reverses so a motion to concur with an amendment takes precedence over a motion to concur.

As a result, the possibilities that may arise on the House floor as the House considers each amendment in disagreement depend: first, on which motion is made by the floor manager; second, on what motions have precedence over that motion; and third, on whether an attempt is made to change the order of precedence by demanding a division of the first motion.

Suppose that the clerk reads an amendment in disagreement and the floor manager moves that the House recede from its disagreement to that amendment and concur therein. The stage of disagreement having been reached before the House and Senate went to conference, a motion to recede and concur with a House amendment does not have precedence. However, if any Member demands a division of the motion to recede and concur, the House first debates and votes on whether to recede. Normally, the House does vote to recede because rejecting this motion would imply that the House is unwilling to consider either the Senate amendment or any compromise version. But when the House recedes from its disagreement, it crosses back over the threshold of disagreement and the order of precedence among motions is reversed. When the House then considers the second half of the divided motion--to concur in the Senate amendment--another Member may move instead that the House concur in the Senate amendment with an amendment, because the motion to concur with an amendment now has precedence over the motion to concur. Only if the House rejects the motion to concur with an amendment would it then vote on the original proposal to concur in the Senate amendment.

Suppose instead that, after an amendment in disagreement has been read, the floor manager moves that the House recede and concur with an amendment. The stage of disagreement having been reached, a simple motion to recede and concur has precedence and may be offered. But if this motion is divided, the

House votes first on whether to recede. And if the House does recede, the threshold of disagreement again is re-crossed and the motion to concur with an amendment has precedence over the second half of the divided motion--that the House concur. Thus, the amendment originally proposed in the motion to recede and concur with an amendment may be offered again as a motion to concur with an amendment--after a preferential motion to recede and concur has been offered after that motion has been divided, and after the House has voted to recede.[29]

The array of possible complications on the Senate floor is more limited. First, the order of precedence of motions in the Senate is not reversed after the stage of disagreement has been reached. Second, Senators may not demand the division of a motion to recede and concur or of a motion to recede and concur with an amendment.

Even in the House, Representatives seldom use the opportunities available to them. Amendments in true disagreement do not arise frequently and when they do, the House usually accepts the floor manager's motions to dispose of them. The sheer complexity of some of the parliamentary maneuvers described above probably discourages Members from attempting them, for fear that they are more likely to create confusion than achieve some strategic advantage. Nonetheless, the possibility of amendments in true disagreement and the various options for dealing with each of them on the floor make it dangerous to predict with confidence exactly what will happen to a measure once it has been submitted to conference.

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[29] Additional complications are possible. If a motion to concur with an amendment, or to recede and concur with an amendment, is made and rejected, another such motion could be made proposing a different germane amendment. Alternatively, if the previous question is not ordered on a motion to concur with an amendment (or a motion to recede and concur with an amendment), a germane second degree amendment could be offered to the amendment.

AMENDMENTS IN TECHNICAL DISAGREEMENT

As discussed in earlier sections of this report, there are important restrictions on the content of conference reports. Conferees may deal only with matters in disagreement between the House and Senate, and they must resolve each of these matters by reaching an agreement that is within the scope of the differences between the House and Senate versions. If a conference report violates these restrictions in any one respect, the entire report is subject to a point of order.[30]

Yet conferees sometimes find it desirable or necessary to exceed their authority. For example, changing circumstances may make it imperative for Congress to appropriate more money for some program than either the House or the Senate initially approved. Or the conferees may decide that the bill should include provisions on a subject that was not included in the version passed by either house. In such cases, the conferees may be able to achieve their purpose, without subjecting their report to a point of order, by using the device of amendments in disagreement. In doing so, they take advantage of the fact that the restrictions that apply to provisions of conference reports do not govern amendments between the houses.

If the conferees wish to exceed their authority in resolving one of the amendments in disagreement, they exclude this amendment from the conference report; instead, they present to the House and Senate a partial conference report and an amendment in disagreement. This is called an amendment in technical disagreement. There is no substantive disagreement between the House and Senate conferees; they report the amendment in disagreement only for technical reasons--to avoid the restrictions that apply to conference reports.

The first house considers the partial conference report and then the amendment in technical disagreement.[31] When that amendment is presented, the floor manager moves that the House recede from its disagreement to the Senate amendment and concur therein with an amendment that is the decision made in conference. Because this conference recommendation is considered outside of the conference report--as part of a motion to dispose of an amendment in technical disagreement--no point of order lies against the motion on the grounds that the proposed amendment exceeds the scope of the differences or

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[30] However, the Senate interprets its rules in a way that gives its conferees considerable latitude, and points of order can be waived by special rule in the House.

[31] The House usually acts first on partial conference reports and amendments in technical disagreement because they arise most often on general appropriations bills which originate in the House (and on which the Senate usually requests conferences).

proposes a subject not committed to conference by either house. However, the proposed amendment still must be germane in the House.

If the first house votes for the motion, the second chamber acts on the partial conference report and then on the first house's amendment to the amendment in technical disagreement. When the amendment is presented, the floor manager moves that the Senate concur in the House amendment. If the Senate agrees to this motion, the process of resolution is completed.

Conferees use this device regularly, although for a somewhat different purpose, to complete congressional action on general appropriations bills. The rules of the House generally prohibit such bills from carrying unauthorized appropriations and changes in existing law ("legislation"). The procedures of the Senate, however, are not as strict. Under a number of conditions, the Senate may consider floor amendments to general appropriations bills that would not have been in order in the House. If approved by the Senate, these amendments are sent to conference and constitute amendments in disagreement with the House. They are properly before the conference and may be accepted by the conferees without violating the restrictions on their authority that have been mentioned so far.

This situation could create a significant problem for the House. On a general appropriations bill, conferees could present the House with a report that is not amendable but that includes matter that could not even have been considered, much less approved, by the House when it first acted on the bill on the floor. The remedy for the House lies in the use of amendments in technical disagreement.

Clause 2 of House Rule XX states that House conferees may not agree to a Senate amendment to a general appropriations bill if the amendment would violate the prohibitions against unauthorized appropriations and legislation on such bills (in clause 2 of Rule XXI), "unless specific authority to agree to such amendment shall be first given by the House by a separate vote on every such amendment."

The text of this rule requires a separate House floor vote before House conferees can act. In practice, however, the rule operates differently. The conferees reach their agreement and then report any amendments that would be subject to clause 2 of Rule XX as amendments in technical disagreement. After the House agrees to the partial conference report, it considers these amendments. As each of the Senate amendments is presented to the House, the floor manager offers a motion that the House recede from its disagreement and either concur in the Senate amendment or concur in it with a House amendment. In either case, the floor manager's motion incorporates the agreement reached in conference. After the House agrees to these motions, the Senate approves the partial report and then agrees to corresponding motions to dispose of the amendments that require Senate action. Whereas the House deals with most or all of the amendments separately, the Senate usually disposes of most

or all of them en bloc by unanimous consent. (The House may dispose of a number of such amendments en bloc, also by unanimous consent, when they are non-controversial and when the floor manager proposes that the House recede and concur in each of them.)

By this means, the House can respond, on a case-by-case basis, to Senate amendments to general appropriations bills that would not have been in order in the House. The House protects itself against having simply to vote for or against a conference report containing such Senate amendments (or modifications of them), and, therefore, having to choose between rejecting the report (and jeopardizing the bill) or violating the principles of its own rules. By voting on the motions made by the House floor manager, the House decides in each instance whether to accept the judgment of its conferees that wisdom or necessity dictates an exception to a strict separation of appropriations from both authorizations and changes in existing law. Moreover, the House and Senate have the same options for dealing with amendments in technical disagreement that are available for disposing of amendments in true disagreement.

Thus, amendments in technical disagreement have become a useful device to cope with the differences between House and Senate rules governing matters that may be included in general appropriations bills.

HOUSE CONSIDERATION OF NON-GERMANE SENATE AMENDMENTS

The contrast between House and Senate rules and procedures governing general appropriations bills poses one problem for bicameral relations that arises during the process of resolving legislative differences. The remedy is the use of amendments in technical disagreement. Another and similar problem results from the contrast between House and Senate rules concerning the germaneness of amendments--a problem for which the House has devised a somewhat different remedy.

House rules require amendments to be germane (unless this requirement is waived by a special rule). By contrast, Senate rules require that amendments be germane only when offered to general appropriations measures or budget measures (both budget resolutions and reconciliation bills) or when offered after cloture has been invoked. In addition, the Senate frequently imposes a germaneness requirement on itself as part of unanimous consent agreements governing consideration of individual measures, although such agreements may include exceptions that make specific non-germane amendments in order.

Consider the potential consequences of this difference for the House. The Senate may pass a House bill with one or more non-germane amendments. Each of these amendments is "conferenceable" (an unofficial term that is used from time to time by participants in the legislative process) as an amendment in disagreement between the House and Senate. The conferees may include it (or a modification of it) in their conference report without violating their authority. However, this situation could force the House into an up or down vote on a conference report including non-germane matters that were not debated on the House floor, that would have been subject to points of order if offered as floor amendments, and that might not even have been considered by the appropriate House committee.

The remedy for the House appears in clauses 4 and 5 of House Rule XXVIII. These clauses create an opportunity for the House to identify non-germane matter originating in the Senate and to consider it separately.

Clause 4 states that when a conference report is called up on the House floor and before the joint explanatory statement is read or debate begins, a Member can make a point of order that certain matter in the report would not have been germane if it had been offered as a House floor amendment to the measure (in the form the measure passed the House).[32] This matter in the conference report may be a Senate amendment (or a modification of it), a provision in a Senate bill that was not included in the House-passed version, or

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[32] The Speaker first entertains any points of order against the report as a whole (on grounds of scope, for example) before entertaining points of order concerning germaneness.

a provision of a Senate substitute or a conference substitute to which the conferees agreed. If the Speaker sustains the point of order (thereby establishing that the matter in question is non-germane), the Member then may move that the House reject the non-germane matter. This motion is debatable for forty minutes, to be equally divided between and controlled by proponents and opponents. After the House votes on the motion, another such point of order may be made against different non-germane matter; and if it is sustained, another motion to reject is in order.

If any and all motions to reject are defeated, the House has decided to retain the non-germane matter as part of the conference report, and the House then debates and votes on the entire report. The House may vote not to reject non-germane language for at least two reasons. First, a majority of Representatives may decide that the non-germane matter should be enacted as part of the conference report, even at the cost of violating a principle of House procedure. Or second, the House may conclude that the Senate is so insistent on its non-germane language that rejecting it could seriously jeopardize enactment of the entire bill.

If the House does vote to reject any non-germane matter, the conference report is considered as having been rejected. This is consistent with the principle that conference reports are indivisible. Clause 4(d) states that the House then proceeds automatically to decide "whether to recede and concur in the Senate amendment with an amendment which shall consist of that portion of the conference report not rejected." In other words, the House votes on a House amendment to the Senate amendment and asks the Senate to accept the remainder of the conference agreement without the non-germane matter.[83]

If the Senate accepts the new House amendment, resolution is reached. If not, the Senate may disagree to the House amendment and request a new conference with the House. In this way, the House can isolate non-germane Senate matter for separate consideration, but neither chamber can impose its will on the other.

Clause 5 applies similar procedures to a Senate amendment considered on the House floor after the stage of disagreement has been reached and to a Senate amendment reported in disagreement from conference. A Representative may make a point of order that such an amendment contains non-germane matter, doing so immediately after a motion is offered to recede and concur in the Senate amendment or to recede and concur in the Senate amendment with

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[83] If the House rejects non-germane matter in a conference report that originally appeared in a Senate bill, the House then votes on insisting further on the House amendment to the Senate bill. Several case studies of these procedures in use are presented in Stanley Bach, "Germaneness Rules and Bicameral Relations in the U.S. Congress." *Legislative Studies Quarterly*. v. VII, n. 3. August 1982. pp. 341-357.

a House amendment. In the latter case, the point of order lies against the Senate amendment as it would be amended by the House amendment.

SOME CONCLUDING OBSERVATIONS

Describing conference committees as bargaining forums implies an element of competition between the House and Senate. Each house passes its own version of a bill and expects its managers to defend it in conference. The conferees wish to return to their parent chamber and assert that their report preserves the essential features of their house's version of the bill--that the other body gave more ground in conference.

Which house most often wins in conference? Observers and students of Congress have attempted to answer this question from time to time, using methods ranging from case studies to statistical analyses. Perhaps it is not surprising that the results have not been consistent or conclusive. The answer to "Who wins in conference?" depends on the answer to another question: "What do the various participants want to win in conference?" And answering the latter question requires an understanding of members' motives and intentions which cannot always be discerned accurately from the public record.

If a conference committee accepts the Senate's positions (or relatively minor modifications of them) on three out of every four of the matters in disagreement, has the Senate "won"? There are at least three reasons to be skeptical. First, not all matters in disagreement are of equal significance. The matters on which the House prevailed, though fewer in number, may define and shape the essential character of the legislation; whereas the greater number of matters on which the Senate prevailed may be less important, individually and even collectively, in determining the scope and effect of the legislation.

Second, the conferees from each house almost certainly are not equally committed to defending every element of their chamber's version of the legislation. One or both houses may include provisions that are bargaining positions, rather than fixed legislative objectives. If one house, for instance, has passed a "weak" version of a bill, the other house may pass a version that is "stronger" than it really wishes or expects to be enacted, in anticipation of conference negotiations that will reach some middle ground.

It also can be tempting for the floor manager of a bill to express no opposition to colleagues' amendments when they are offered on the floor if accepting the amendments will induce their sponsors to vote for the bill without costing the votes of other members. This is a particularly attractive option in the Senate where Senators may offer non-germane amendments on unrelated subjects about which they feel strongly. As a result, the managers can take into conference a number of amendments which they are prepared to trade in return for more substantively important concessions from the other body.

Third, it is a considerable oversimplification to think of each house's delegation to a conference as a single unit or even as a group of individuals with the same goals. It is often said that conferees are to defend the positions

of their chamber. However, all Representatives and Senators have individual legislative goals; each conferee can be expected to be more concerned about certain provisions in his or her house's version of the bill than about others. And at least some of the conferees usually prefer some of the provisions of the other chamber's version. In short, as each decision is made in conference, some managers from each house win, and others lose.

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