House and Senate chambers. Senators sit at assigned desks in the elegant Senate chamber (top). The House Speaker's chair is in front of the flag and to the left of the Mace—a symbol of national unity that on rare occasions may be hoisted and displayed to quell disturbances in the chamber. The seats below are for clerks, and the box in the foreground is the "hopper," where members may place amendments for House consideration (center). The House chamber, seen from the rear, shows the Speaker's rostrum but also the galleries and lawmakers' seats. Members do not have assigned seats, but the majority and minority committee leaders' tables are seen to the right (bottom).

chapter

Congressional Rules and Procedures

Congress needs written rules to do its work. Compiling the Senate's first parliamentary manual, Thomas Jefferson stressed the importance of a known system of rules:

> It is much more material that there should be a rule to go by, than what the rule is; that there may be uniformity of proceeding in business not subject to the caprice of the Speaker or captiousness of the members. It is very material that order, decency, and regularity be preserved in a dignified public body.[1]

Jefferson understood that how Congress operates affects what it does. Thus Congress's rules protect majority and minority rights, divide the workload, help contain conflict, ensure fair play, and distribute power among members. Because formal rules cannot cover every contingency, precedents—accumulated decisions of House Speakers and Senate presiding officers—fill in the gaps. These precedents are codified by House and Senate parliamentarians, printed, and distributed. There are also informal, unwritten codes of conduct, such as courtesy to other members. These folkways are commonly transmitted from incumbent members to newcomers.[2]

Before bills become laws, they typically pass successfully through several stages in each house (see Figure 8-1 for a simplified view of lawmaking). Bills that fail to attract majority (sometimes supermajority) support at any critical juncture may never be passed. Congress, in short, is a procedural obstacle course that favors opponents of legislation and hinders proponents. This defensive advantage promotes bargaining and compromise at each decision point.

Congressional rules are not independent of the policy and power struggles that lie behind them. There is very little the House and Senate cannot do under the rules so long as the action is backed by votes and inclination. And yet votes and inclination are not easily obtained, and the rules persistently challenge the proponents of legislation to demonstrate that they have both resources at their command. Little prevents obstruction at every turn except the tacit understanding that the business of the House and Senate must go on. Members recognize that the rules can be redefined and prerogatives taken away or

modified. Rules also can be employed against those who use them abusively. In short, rules can be employed to block or advance actions in either chamber, and proponents or opponents of measures or matters do not look on them as neutral devices.

INTRODUCTION OF BILLS

Only members of Congress can introduce legislation. Often embedded in these measures are a number of assumptions—for example, that a problem exists; that it can best be resolved through enactment of a federal law instead of allowing administrative agencies or state and local governments to handle it; and that the proposed solution contained in the bill ameliorates rather than exacerbates the problem. The GOP-controlled House of the 112th and 113th Congresses adopted a rule requiring all lawmakers to provide with the bills (H.R.) and joint resolutions (H. J. Res.) they introduce a constitutional authority statement specifying the power or powers granted to Congress in the Constitution to enact the bill or joint resolution. Often these statements are quite brief—"Article I, section 8," for example.[3]

Lawmakers introduce legislation for many reasons, such as constituency, electoral, policy, political, and so on. When gasoline prices start to go up significantly, members respond in two Congresses fashion by introducing numerous energy-related bills. But there is also a motivator that is rarely discussed and can be just as potent: a personal brush with adversity. Congress is an intensely human place where personal experience sometimes has powerful repercussions.[4] As a senator stated, "Each of us, as United States senators, comes to . . . this public place with the sum of our beliefs, our personal experience and our values, and none of us checks them at the door."[5] For example, former senator Pete V. Domenici, R-N.M., whose daughter suffers from mental illness, was Congress's acknowledged champion for the mentally ill. "In the field of mental health," said a Democratic House member, "I think it's possible that nothing at all would have been done by Congress if it weren't for legislators like Domenici who were galvanized by personal experience."[6] Rep. Carolyn McCarthy, D-N.Y., has long been a forceful advocate for gun control. Why? A deranged gunman on a commuter train killed her husband and seriously wounded her adult son. Personal experience, however, is not the only source of legislative proposals. Often members get ideas for bills from the executive branch, interest groups, scholars, state and local officials, constituents, the media, and their own staff.

A member who introduces a bill becomes its sponsor. He or she may seek cosponsors to demonstrate wide support for the legislation. Outside groups also may urge members to cosponsor measures. "We were not assured of a hearing," said a lobbyist of a bill that his group was pushing. "There was more hostility to the idea, so it was very important to line up a lot of cosponsors to show the over-all concern."[7] A two Congresses dimension is also evident in signing on (or not) to legislation. For example, a lawmaker may cosponsor a labor bill to win the support of union workers back home. Conversely, the

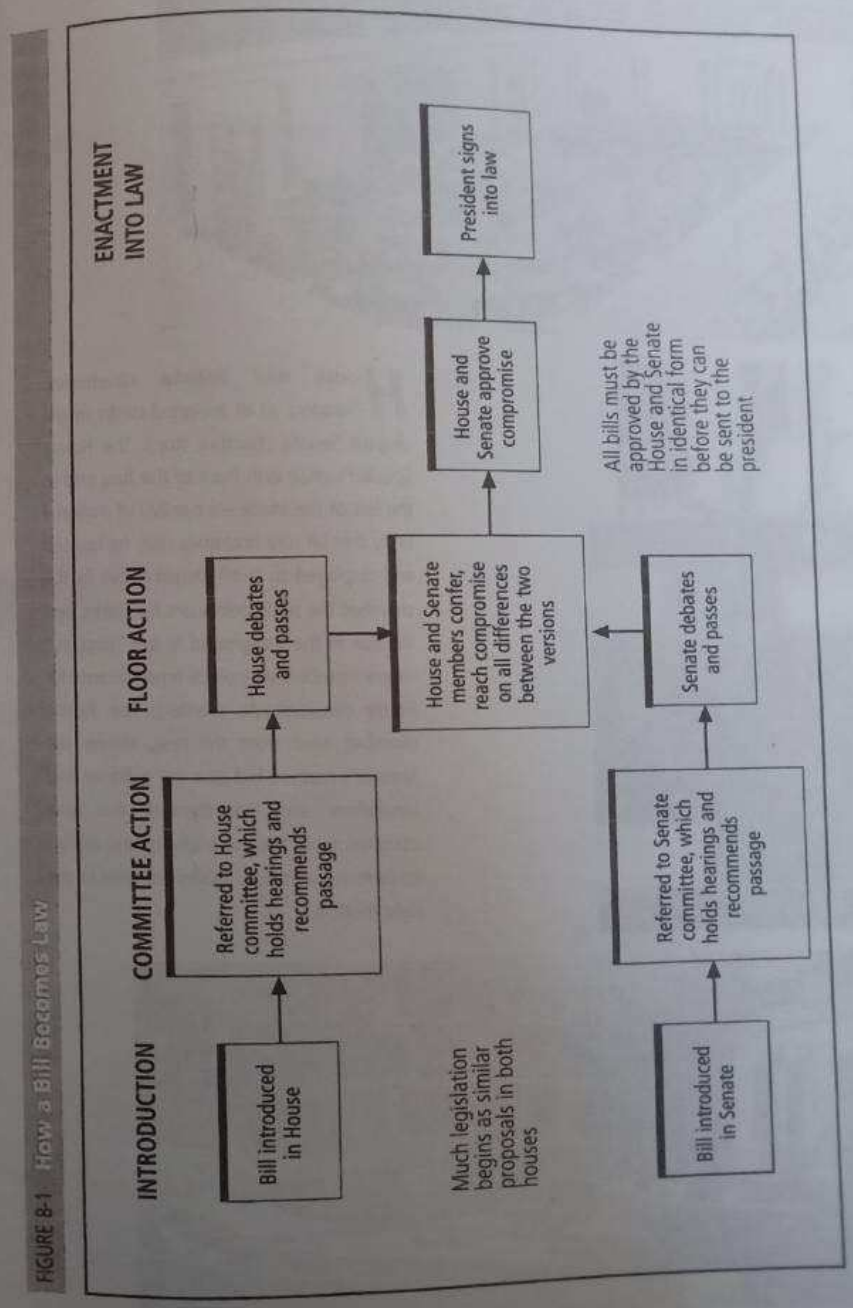

FIGURE 8-1 How a Bill Becomes Law

lawmaker may decide against cosponsoring the labor bill because it would mobilize business groups to oppose his reelection. Vulnerable lawmakers up for reelection may cosponsor measures offered by opposition members to broaden their appeal to voters in both major parties.

Equally important as the number of cosponsors is their identity, especially their leadership status and ideological stance. Members often seek out cosponsors from the opposing party to signal that the bill transcends partisan politics. In an unusual cosponsorship pairing, the former House chairs of their respective party campaign committees, Chris Van Hollen, D-Md., and Pete Sessions, R-Texas, joined to introduce bipartisan legislation.[8] When Sen. Ted Kennedy, D-Mass., an outspoken liberal, served in the Senate with Sen. Strom Thurmond, R-S.C., a southern conservative, he exclaimed, "Whenever Strom and I introduce a bill together, it is either an idea whose time has come, or one of us has not read the bill."[9]

Although identifying a bill's sponsors is easy, pinpointing its real initiators may be difficult. Legislation is "an aggregate, not a simple production," wrote Woodrow Wilson. "It is impossible to tell how many persons, opinions, and influences have entered into its composition."[10] President John F. Kennedy, for example, usually is given credit for initiating the Peace Corps. But Theodore Sorensen, Kennedy's special counsel, recalled that the Peace Corps was

> based on the Mormon and other voluntary religious service efforts, on an editorial Kennedy had read years earlier, on a speech by General [James] Gavin, on a luncheon I had with Philadelphia businessmen, on the suggestions of [Kennedy's] academic advisers, on legislation previously introduced and on the written response to a spontaneous late-night challenge he issued to Michigan students.[11]

In short, many bills have complex origins.

Required legislation, particularly funding measures, make up much of Congress's annual agenda. Bills that authorize programs and specify how much money can be *spent* on them (authorization bills) and bills that provide the money (appropriation bills) appear on Congress's schedule at about the same time each year. Other matters recur at less frequent intervals, every five years perhaps. Emergency issues require Congress's immediate attention. Activist legislators also push proposals onto Congress's program. Bills not acted on die automatically at the end of each two-year Congress. "Anybody can drop a bill into the hopper [a mahogany box near the Speaker's podium where members place their proposed bills]," said a House GOP leader. "The question is, Can you make something happen with it?"[12]

Drafting

"As a sculptor works in stone or clay, the legislator works in words," observed one member.[13] Words are the building blocks of policy, and legislators frequently battle over adding, deleting, or modifying terms and phrases. Members increasingly give their bills eye-catching titles to attract media attention and for partisan message purposes. For example, GOP lawmakers have introduced bills with titles such as "The Reducing Barack Obama's Unsustainable Deficit Act." As an analyst pointed out, "If Republicans can take a silly name like Repealing the Job-Killing Health Care Act Law and make it stick, they've helped communicate its meaning and importance to audiences they're trying to reach."[14]

Acronyms are increasingly popular on Capitol Hill because they attract public attention. Consider the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) or the JOBS (Jumpstart Our Business Startups) bill. Members also affix popular phrases to legislation, such as "bill of rights." As a Senate GOP leader pointed out, "If you ask [voters], 'Are you for the Bill of Rights?' Yeah, they're for the Bill of Rights. 'Bill of Rights' is a great term. It's the new term. It may even be supplanting reform."[15] And then there is the time that, instead of proposing to reduce or terminate estate taxes, Republicans called for an end to "the death tax."

Conversely, opponents of measures try to attach unattractive labels to them. Defenders of the estate tax refer to its abolition as the "Paris Hilton Benefit Act." Critics of an energy bill dubbed it the "Hooters and Polluters Bill" because the legislation contained a provision benefiting a Hooters restaurant in Louisiana. Opponents of the JOBS bill referred to it as "just old bills." And "Obamacare" is how Republicans pejoratively characterized the president's landmark overhaul of the health care system. (Recognizing that Republicans had won the branding war on the health law, the president also refers to it as Obamacare.) The health overhaul was also referred to as "socialized medicine," a "government takeover," and a measure that contained "death panels." How measures are framed influences how the public will view them. "Whoever controls the language controls the debate," asserted one commentator.[16] And this is why, in the current 24/7 media environment, an effective "messaging" or public relations strategy is critical both to the fate of major legislation and to a party's electoral success.

Although bills are introduced only by members, anyone can draft them.[17] Expert drafters in the House and Senate offices of the legislative counsel assist members and committees in writing legislation. Executive agencies and lobbying groups also often prepare measures for introduction by friendly legislators. Many home-state industries, for example, draft narrowly tailored tariff or regulatory measures that enhance their business prospects. These proposals are then introduced by local lawmakers—another instance of the two Congresses linkage. As a senatorial aide explained, the senator sometimes "just introduces [bills] as a courtesy to his constituents."[18] (See Box 8-1 outlining the four basic types of legislation: bills, joint resolutions, concurrent resolutions, and simple resolutions.)

BOX 8-1 Types of Legislation

Bill

- Most legislative proposals before Congress are in a bill form.
- Bills are designated H.R. (House of Representatives) or S. (Senate) according to where they originate, followed by a number assigned in the order in which they were introduced, from the beginning of each two-year congressional term.
- Public bills deal with general questions and become public laws if approved by Congress and signed by the president.
- Private bills deal with individual matters, such as claims against the government, immigration and naturalization cases, and land titles. They become private laws if approved and signed by the president.

Joint Resolution

- A joint resolution, designated H. J. Res. or S. J. Res., requires the approval of both houses and the president's signature, just as a bill does, and has the force of law.
- No significant difference exists between a bill and a joint resolution. The latter generally deals with limited matters, such as a single appropriation for a specific purpose.
- Joint resolutions are used to propose constitutional amendments, which do not require presidential signatures but become a part of the Constitution when three-fourths of the states have ratified them.

Concurrent Resolution

- A concurrent resolution, designated H. Con. Res. or S. Con. Res., must be passed by both houses but does not require the president's signature and does not have the force of law.
- Concurrent resolutions generally are used to make or amend rules applicable to both houses or to express their joint sentiment. A concurrent resolution, for example, is used to fix the time for adjournment of a Congress and to express Congress's annual budgeting plan. It might also be used to convey the congratulations of Congress to another country on the anniversary of its independence.

Resolution

- A simple resolution, designated H. Res. or S. Res., deals with matters entirely within the prerogatives of one house.
- It requires neither passage by the other chamber nor approval by the president and does not have the force of law.
- Most resolutions deal with the rules of one house. They also are used to express the sentiments of a single house, to extend condolences to the family of a deceased member, or to give advice on foreign policy or other executive business.

Nowadays, Congress frequently acts on comprehensive (omnibus) bills or resolutions (sometimes called packages or megabills by the press). Packages contain an array of issues that were once handled as separate pieces of

legislation. Their increasing use stems in part from members' reluctance to make hard political decisions without a package arrangement. A House Budget Committee chair once explained their attractiveness. As he stated:

> Large bills can be used to hide legislation that otherwise might be more controversial. By packaging difficult issues in measures that command broad support, they enable members to avoid hard votes that they would have to account for at election time and allow members to avoid angering special-interest groups that use votes [to decide] contributions to campaigns. Leaders can also use them to slam-dunk issues that otherwise might be torn apart or to pressure the President to accept provisions that he objects to.[19]

Sometimes, Congress has little choice but to use the omnibus approach. Difficulties in enacting the twelve annual appropriations bills often mean that all or many ("omnibus") or two, three, or so ("minibus") are rolled into one comprehensive package. In this way, procedural action on the outstanding measures is expedited by majority party leaders, who, in doing so, minimize the opportunities for further delay. A goal of Speaker John Boehner, R-Ohio, was to "put an end to so-called comprehensive bills with thousands of pages of legislative text that make it easy to hide spending projects and [detrimental] policies."[20] House Republicans employed the two Congresses theme when they highlighted the size of the president's health overhaul measure—over 2,700 pages—as a symbol of big-government intervention in health care, a potent GOP electoral theme in the November 2010 elections. ("I think we paid a terrible [electoral] price for health care," exclaimed Rep. Barney Frank, D-Mass.[21]) Some Democrats disagree with Speaker Boehner's view of big bills. "I don't think the issue's the length of the bills," said Rep. Diana DeGette, D-Colo. "I think the issue is the clarity of the explanation."[22]

Timing

"Everything in politics is timing," Speaker Thomas P. "Tip" O'Neill Jr., D-Mass., used to say. A bill's success or failure often hinges on when it is introduced or brought to the floor. A bill that might have succeeded early in a session could fail as adjournment nears. However, controversial legislation can sometimes be rushed through during the last hectic days of a Congress. "You do learn that everything has its time," noted Sen. Bob Corker, R-Tenn. You "just wait for the moment which is going to be the best environment to introduce something."[23]

Elections greatly influence the timing of legislation. Policy issues can be taken off or kept on Congress's agenda because of electoral circumstances—a good illustration of how the two Congresses are inextricably connected. For example, coming off major electoral successes both House parties in recent years moved to capitalize on their momentum with quick action early in the new Congress. Examples are the House's action in 1995 on the ten-point, hundred-day Contract with America agenda heralded by Speaker Newt

Gingrich, R-Ga., and the hundred-hour legislative agenda pushed in 2007 by Speaker Nancy Pelosi, D-Calif. And, as one of its first orders of business under Speaker Boehner, the House on January 26, 2011, passed a bill to repeal Obamacare. (President Obama's second-term victory and his veto prerogative effectively end any chance that the Affordable Care Act will be rescinded.)

REFERRAL OF BILLS

After bills are introduced, they are referred formally to the appropriate standing committees by the Senate presiding officer or the House Speaker. (In practice, however, measures are referred by the Senate or House parliamentarian, who is the official procedural adviser to each chamber's presiding officer.) A bill's phraseology can affect its referral and therefore its chances of passage. This political fact of life means that members use words artfully when drafting legislation. The objective is to encourage the referral of their measures to sympathetic, not hostile, committees. If a bill mentions taxes, for example, it invariably is referred to the tax panels. In a classic case of circumventing the Finance Committee, Senator Domenici avoided the word *tax* in a bill proposing a charge on waterborne freight:

> If the waterway fee were considered a tax—which it was, basically, because it would raise revenues for the federal treasury—the rules would place it under the dominion of the Senate's tax-writing arm, the Finance Committee. But Finance was chaired by Russell B. Long, of Louisiana, whose state included two of the world's biggest barge ports and who was, accordingly, an implacable foe of waterway charges in any form. Domenici knew that Long could find several years' worth of bills to consider before he would voluntarily schedule a hearing on S. 790 [the Domenici bill]. For this reason, [Domenici staff aides] had been careful to avoid the word *tax* in writing the bill, employing such terms as *charge* and *fee* instead.[24]

Domenici's drafting strategy worked. His bill was jointly referred to the Commerce Committee and the Environment Committee, on which he served. Because committees' jurisdictional mandates are ambiguous and overlap, it is not unusual for legislation to be referred to two or more committees—the concept of "one bill, many committees." Indeed, multiple referrals are common in the House, less so in the Senate. In the Senate, they require unanimous consent to implement. Furthermore, all senators have many opportunities to influence committee-reported measures or matters, regardless of whether they serve on the panel of jurisdiction (see Box 8-2, which describes how parliamentary convention affects the reference of legislation).

Of the thousands of bills introduced each year, Congress takes up relatively few. During the 112th Congress (2011–2013), 10,569 public bills and joint resolutions were introduced, but only 238 (2.3 percent) became public

BOX 8-2 Rules and Referral Strategy

Sometimes, the Senate's rules can be so arcane that it takes major strategy sessions to get even the most routine bills through the legislature.

That was the case when Sen. Bob Graham, D-Fla. (1987–2005), drafted a bill (targeted only at Florida) to permit the Forest Service to sell eighteen tracts of land and use the proceeds to buy up patches of private lands within the Apalachicola National Forest. To ensure that such a low-profile bill moved, Graham wanted it to go through the Energy and Natural Resources Committee, on which he sat.

Instead, Parliamentarian Alan S. Frumin told Graham's aides that the bill, which was soon to be introduced, would be referred to the Agriculture, Nutrition, and Forestry Committee. Because Graham was not a member, such a move could have guaranteed the bill a quiet death.

Why the Agriculture Committee? For at least four decades, the jurisdiction over land bills has been split between the two committees. Bills affecting land east of the 100th Meridian—which runs through North Dakota and South Dakota and the middle of Texas—are assigned to Agriculture, while bills that affect lands west of it go to Energy.

Graham's bill dealt with the wrong side of the country. To change Frumin's mind, Graham's aides needed to turn the rules to their advantage.

They found their opportunity by uncovering the roots behind the 100th Meridian rule. The idea was to divide jurisdiction between public lands and privately owned lands. Because most land on the East Coast is privately owned, that side of the country went to Agriculture, which had jurisdiction over private lands. Everything in the West fell to Energy, which had jurisdiction over public lands.

Graham's aides, however, found out that a majority of tracts in Florida were always public lands. That persuaded Frumin that the bill belonged to the Energy panel.

Source: Adapted from David Nather, "Graham Turns Rules to His Advantage," *CQ Weekly*, June 8, 2002, 1494.

laws. More public laws were enacted in earlier Congresses: for example, 640 in the 90th (1967–1969) and 590 in the 99th (1985–1987). Part of the general decline in the number of laws enacted can be explained by the use of omnibus or megabills. The decline may also stem from the widespread congressional sentiment that more laws may not be the answer to the nation's problems. But the decline also reflects political stalemates resulting from the complexity of issues, the intensity of partisanship, legislative-executive and bicameral conflicts, and the narrow party divisions in Congress. It is worth emphasizing that lawmakers understand that most of the bills they introduce are unlikely, as stand-alone measures, to become law. However, the ideas encapsulated in their legislation can be "added as amendments to a larger bill or negotiated into a markup or conference report."[25]

Lawmaking is an arduous and intricate process. As a Senate GOP leader noted, "That's the way Congress works. You work for two years and finally you get to the end and either it all collapses in a puddle or you get a breakthrough."[26] Or as John Dingell, D-Mich., the longest-serving lawmaker in U.S. history in either chamber, phrased it: "Legislation is hard, pick-and-shovel work," and it

often "takes a long time to do it."[27] Recall the decades-long efforts by numerous lawmakers and presidents—from Teddy Roosevelt to, finally, Barack Obama—to comprehensively overhaul the nation's health care system.

Once committees complete action on the bills referred to them, the House and Senate rules require a majority of the full committee to be physically present to report (vote) out any measure. If this rule is violated and neither waived nor ignored, a point of order can be made against the proposal on the floor. (A point of order is a parliamentary objection that halts the proceedings until the chamber's presiding officer decides whether the contention is valid.)

Bills reported from committee have passed a critical stage in the lawmaking process. The next major step is to reach the House or Senate floor for debate and amendment. The discussion that follows begins with the House because tax and appropriation bills originate there—the former under the Constitution, the latter by custom.

SCHEDULING IN THE HOUSE

All bills reported from committee in the House are listed in chronological order on one of several calendars—that is, the lists that enable the House to put measures into convenient categories. Bills that raise or spend money are assigned to the Union Calendar. The House Calendar contains all other major public measures, such as proposed constitutional amendments. Private bills, such as immigration requests or claims against the government, are assigned to the Private Calendar. There is no guarantee that the House will debate legislation placed on any of these calendars. The Speaker, in consultation with party and committee leaders, the president, and others, largely determines whether, when, how, and in what order bills come up. Outside events and influencers also shape agenda-setting, including input from citizens and bloggers around the country.[28] The power to set the House's agenda constitutes the essence of the Speaker's institutional authority. The Speaker's agenda-setting authority is bolstered by rules and precedents upholding the principle of majority rule. This means that in the House a united and determined voting majority—whether partisan or bipartisan—will prevail over resolute opposition.

Shortcuts for Minor Bills

Whether a bill is major or minor, controversial or noncontroversial, influences the procedure employed to bring it before the House. Most bills are relatively minor and are taken up and passed through various shortcut procedures.

One shortcut is the designation of special days for considering minor or relatively noncontroversial measures. An especially important routine and time-saving procedure is suspension of the rules. It is in order Monday, Tuesday, and Wednesday of each week. The procedure is controlled by the Speaker through the power of recognizing who may speak ("Mr. Speaker, I move to suspend the rules and pass H.R. 1234"). The vote simultaneously

suspends House rules and enacts (or rejects) the measure. Most public laws enacted by the House are accomplished through this procedure. A study by Donald R. Wolfensberger, former staff director of the House Rules Committee, determined that since the early 2000s from 75 to over 80 percent of bills enacted into public law came to the House floor via this procedure, compared with about 33 percent two decades ago.

In 2011, the first year of GOP control of the 112th Congress, there was a decline in the use of suspension procedure. As House majority leader Eric Cantor, R-Va., noted, the "percentage of bills that have come to the floor under suspension of the rules has dramatically declined from [over] 80 percent [in 2010] to 55 percent this year."[29] One reason for this decline in suspension procedure was the GOP leadership's goal of focusing the House's attention on reducing the fiscal deficit, repealing the health care law, and shrinking the size and scope of the federal government. Suspensions increased the following year to bolster the chamber's productivity and thus avoid or minimize the political "do nothing" charge on the campaign trail, and to castigate the Democratic Senate for refusing to act on House-passed legislation. Press reports had indicated that the 112th Congress, compared to its predecessors, was at historic lows in the enactment of laws.[30]

Legislation considered under suspension of the rules does not have to be reported from committee before the full House takes it up. Importantly, the suspension procedure permits only forty minutes of debate, allows no amendments, and requires a two-thirds vote for passage. The procedure is often favored by bill managers who want to avoid unfriendly amendments and points of order against their legislation. Bills that fail under suspension can return again to the floor by a rule issued by the Rules Committee (discussed later in this chapter). The heightened partisanship in the closely divided House raises the question of why the suspension procedure, which requires bipartisanship to attract the two-thirds vote, is being employed more and more in such a polarized institution. The answer seems to involve a trade-off. "As members are increasingly being denied opportunities in special rules to offer amendments to more substantive bills on the floor," explained Wolfensberger, "the leadership is providing alternative mechanisms to satisfy members' policy influence and reelection needs through the relatively non-controversial and bipartisan suspension process."[31] Thus, greater use of suspensions serves two prime purposes: it provides an outlet for members to achieve their policy and political goals and keeps the lid on members' frustration with limited or closed amendment procedures.

The current rules of the House Republican Conference establish specific guidelines for using the suspension procedure. Under Conference Rule 28, bills and resolutions are not to be scheduled using the suspension procedure if, for example, they are opposed by more than one-third of the committee members reporting the bill; if they fail to include a cost estimate; or if they create new programs, unless they also eliminate or reduce a program of equal or greater size. The majority leadership "does not ordinarily schedule bills for suspension

unless confident of a two-thirds vote."[32] Lawmakers often refer to measures on the "suspension calendar" even though there is no formal calendar for this purpose.

To accommodate lawmakers' constituency and legislative activities (the two Congresses concept), the House instituted a cluster voting rule. The Speaker announces that record votes on a group of bills debated under the suspension procedure will be postponed until later that day or within the next two days. The bills are then brought up in sequence and disposed of without further debate. Cluster voting accommodates lawmakers returning from weekends in their district. It also minimizes interruptions of committee or constituency meetings when the House is in session throughout the week. Absent cluster voting, members would be required to run back and forth to the chamber scores of times throughout the day to vote on issues.

At times, the minority party gets upset with the majority leadership for not scheduling enough of their bills via the suspension procedure. To protest, minority party members may vote against suspension bills until more of their routine measures are taken up on the floor. They also may castigate the majority leadership for using the suspension of the rules procedure on bills that in their estimation merit more debate than forty minutes and require the offering of amendments.

Another expedited procedure is unanimous consent. The Speaker, however, will recognize a lawmaker to call up bills or resolutions by unanimous consent "only when assured that the majority and minority floor leadership and the relevant committee chairs and ranking minority members have no objection."[33] Without these clearances, unanimous consent is not a viable avenue to the floor.

Major measures reach the floor by different procedures. Budget, appropriation, and a limited number of other measures are considered "privileged"—meaning that the House rulebook grants them a "ticket," or privileged access, to the floor. Privileged measures may be called up from the appropriate calendar for debate at almost any time. (Remember, the Speaker sets the agenda, even for privileged business.) Most major bills, however, do not have an automatic green light to the floor. Before they reach the floor they are assigned a rule (a procedural resolution) by the Rules Committee.

The Strategic Role of the Rules Committee

The House Rules Committee has existed since the First Congress. During its early years, the committee prepared or ratified a biennial set of House rules and then dissolved. As House procedures became more complex because of the growing membership and workload, the committee became more important. In 1858 the Speaker became a member of the committee and the next year its chair. In 1880 Rules became a permanent standing committee. Three years later, the committee launched a procedural revolution. It began to issue rules (sometimes called special rules), which are privileged resolutions that grant priority for floor consideration to virtually all major bills.

Arm of the Majority Leadership. In 1910 the House rebelled against the arbitrary decisions of Speaker Joseph G. Cannon, R-Ill., and removed him from the Rules Committee. During the decades that followed, as the committee became an independent power, it extracted substantive concessions in bills in exchange for rules, blocked measures it opposed, and advanced those it favored, often reflecting the wishes of the House's conservative coalition of Republicans and southern Democrats.

The chair of the Rules Committee from 1955 to 1967 was Howard W. "Judge" Smith, D-Va., a diehard conservative and a master at devising delaying tactics. He might abruptly adjourn meetings for lack of a quorum, allow requests for rules to languish, or refuse to schedule meetings. House consideration of the 1957 civil rights bill was temporarily delayed because Smith absented himself from the Capitol, and his committee could not meet without him. Smith claimed he was seeing about a barn that had burned on his Virginia farm. Retorted Speaker Sam Rayburn, D-Texas, "I knew Howard Smith would do most anything to block a civil rights bill, but I never knew he would resort to arson."[34]

Liberals' frustration with the bipartisan coalition of conservatives who dominated the committee finally boiled over. After John F. Kennedy was elected president in 1960, Speaker Rayburn recognized that he needed greater control over the Rules Committee if the House was to advance the president's activist New Frontier program. Rayburn proposed enlarging the committee from twelve members to fifteen. This proposal led to a titanic struggle between Rayburn and the archconservative Rules chair:

> Superficially, the Representatives seemed to be quarreling about next to nothing: the membership of the committee. In reality, however, the question raised had grave import for the House and for the United States. The House's answer to it affected the tenuous balance of power between the great conservative and liberal blocs within the House. And, doing so, the House's answer seriously affected the response of Congress to the sweeping legislative proposals of the newly elected President, John Kennedy.[35]

In a dramatic vote, the House agreed to expand the Rules Committee. Two new Democrats and one Republican were added, loosening the conservative coalition's grip on the panel.

During the 1970s, the Rules Committee came under even greater majority party control. In 1975 the Democratic Caucus authorized the Speaker to appoint, subject to party ratification, all Democratic members of the committee, including the chair. (Thirteen years later, Republicans authorized their leader to name the GOP leader and members of the Rules Committee.) The majority party maintains a disproportionate ratio on the panel (currently nine Republicans and four Democrats in the 113th Congress). The Rules Committee, in short, has once again become the Speaker's committee. As a GOP Rules

member said about the panel's relationship with the Speaker, "How much is the Rules Committee the handmaiden of the Speaker? The answer is, totally."[36] GOP representative Pete Sessions of Texas heads the panel in the 113th Congress.

The Speaker's influence over the Rules Committee ensures that the Speaker can both bring measures to the floor and shape their procedural consideration. Because House rules require bills to be taken up in the chronological order listed on the calendars, many substantial bills would never reach the floor before Congress adjourned. The Rules Committee can put major bills first in line. Equally important, a rule from the committee sets the conditions for debate and amendment.

A request for a rule is usually made by the chair of the committee reporting the bill. The Rules Committee conducts hearings on the request in the same way that other committees consider legislation, except that only members testify. The House parliamentarian usually drafts the rule after consulting with majority committee leaders and staff. The rule is considered on the House floor and is voted on in the same manner as regular bills (see Box 8-3 for an example of a generally open rule from the Rules Committee).

Types of Rules. Traditionally, the Rules Committee has granted open, closed, modified, or structured rules as well as waivers. An open rule means that any lawmaker may propose germane amendments. A closed rule prohibits the offering of amendments by rank-and-file members. A modified rule comes in two forms: modified open and modified closed (also called a "structured" rule by some lawmakers). The distinction hinges in part on the number of amendments made in order by the Rules Committee—few or only one under modified closed, more under modified open. In addition, modified open rules may also require the pre-printing of amendments and impose a time limit on the amendment process, or both. Modified closed rules often grant only one amendment to the minority party: a complete substitute alternative to the pending bill. Structured rules restrict the number of amendments to those specified in the rule itself or in the Rules Committee's report on the procedural resolution. It is common today for the Rules Committee to announce in advance that it will provide a structured (i.e., "restricted") rule and require lawmakers to submit their proposed amendments to the committee. The committee will then review the amendments and determine which to make in order for chamber consideration. The requirement that all amendments be either pre-printed in the *Congressional Record* or submitted in advance to Rules aids the majority party in preparing its floor strategy. Waivers of points of order set aside technical violations of House rules to allow bills or other matters to reach the floor. Waivers are commonly included in the different types of rules.

Whether Democrats or Republicans control the House, their majority on the Rules Committee displays procedural creativity and imagination:

> Instead of choosing from among a few patterns the Rules Committee has demonstrated a willingness to create unique designs by recombining an increasingly wide array of elements, or by creating new ones as the need arises, to help leaders, committees, and members manage the heightened uncertainties of decision making on the House floor.[37]

BOX 8-3 Example of a Rule from the Rules Committee

This is a modified open rule (H. Res. 92) that sets the terms for debating and amending the Full-Year Continuing Appropriations Act, 2011 (H.R. 1). It allows any member to offer a germane amendment as long as it is pre-printed in the Congressional Record. The House adopted the rule on February 15, 2011, by a 242–174 vote.

Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause 2(b) of rule XVIII, declare the House resolved into the Committee of the Whole House on the state of the Union for consideration of the bill (H.R. 1) making appropriations for the Department of Defense and the other departments and agencies of the Government for the fiscal year ending September 30, 2011, and for other purposes. The first reading of the bill shall be dispensed with. All points of order against consideration of the bill are waived. General debate shall be confined to the bill and shall not exceed one hour equally divided and controlled by the chair and ranking minority member of the Committee on Appropriations. After general debate the bill shall be considered for amendment under the five-minute rule. No amendment to the bill shall be in order except: (1) those received for printing in the portion of the Congressional Record designated for that purpose in clause 8 of rule XVIII dated at least one day before the day of consideration of the amendment (but no later than February 15, 2011); and (2) pro forma amendments for the purpose of debate. Each amendment so received may be offered only by the Member who submitted it for printing or a designee and shall be considered as read if printed. When the committee rises and reports the bill back to the House with a recommendation that the bill do pass, the previous question shall be considered as ordered on the bill and amendments thereto to final passage, without intervening motion except one motion to recommit with or without instructions.

Source: Congressional Record, 112th Cong., 1st sess., February 15, 2011, H815–H816.

The trend toward creative use of complex rules reflects several developments. Among the most important are the wider use of multiple referrals, which requires Rules to play a larger coordinative role in arranging floor action on legislation; the rise of megabills hundreds of pages in length that contain priorities the Speaker does not want picked apart on the floor; the desire of majority party leaders to exert greater control over floor procedures; members' impatience with dilatory floor challenges to committee-reported bills; members' demand for greater certainty and predictability in floor decision making; and efforts by committee leaders either to limit the number of amendments or to keep unfriendly amendments off the floor. The sharp rise in partisanship has also triggered an increase in creative rules (see Box 8-4 on examples of creative rules).

BOX 8-4 Examples of Creative Rules

Queen-of-the-Hill Rule

- Under this special rule, a number of major alternative amendments—each the functional equivalent of a bill—are made to the underlying legislation, with the proviso that the substitute that receives the most votes is the winner.
- If two or more alternatives receive an identical number of votes, the last one voted upon is considered as finally adopted by the membership.

Self-Executing Rule

- This special rule provides that when the House adopts a rule it has also agreed simultaneously to include another measure or matter in the bill made in order by the special rule.
- Adoption of a self-executing rule means that the House has passed one or more other proposals at the same time it agrees to the rule.
- Whether this rule is controversial or not usually depends on the nature of the policy being agreed to in the two-for-one vote.

Structured Rule

- The essential feature of the structured rule is that it limits the freedom of members to offer germane amendments to the bills made in order by those rules.
- The number of structured rules has increased since the 1980s. The majority party uses these rules to minimize debate, prevent unwanted amendments, and maximize its ability to mobilize winning majorities.
- Rank-and-file members often rail against these rules because they restrict their opportunities to amend committee-reported measures or majority party initiatives.

Multiple-Step Rule

- This type of rule facilitates an orderly amendment process.
- One variation is for the Rules Committee to report a rule that regulates the debating and amending process for specific portions of a bill and then report another follow-on rule to govern the remainder of the measure and amendments to it.
- Another variation is for the Rules Committee to state publicly that if a measure encounters difficulties on the floor, the panel will report a subsequent rule that limits time for further debate or further amendments.

Anticipatory Rule

- To expedite decision making on the floor, the Rules Committee may grant a rule even before the measure or matter to which it would apply has been reported by a House committee or conference committee.

When Republicans took control of the House in 1995 after four consecutive decades in the minority, they remembered their bitter experience with rules that restricted their right to offer amendments. Speaker Gingrich promised more openness and greater opportunities for all lawmakers to offer floor

amendments to pending legislation. Republicans did work to provide more open amendment procedures when they first took control of the House. However, as Republican majorities declined in subsequent Congresses, the number of open rules dropped markedly (see Table 8-1), the result of heightened partisan acrimony and the GOP's preference to enact its agenda priorities with few or no changes.

Like the Republicans in 1995 when Democrats reclaimed the House majority in the 110th Congress (2007–2009), Speaker Pelosi pledged to manage the chamber in an open, fair, and deliberative manner. But it was not long before the Democrats brought their legislative priorities to the floor under closed or structured rules. Meanwhile, regularly the Republicans took the floor to criticize the Democratic majority for reneging on its promises. The majority is "failing to live up to its commitment to run the House in an open and fair manner," exclaimed a Rules Republican.[38] In the next Congress, still under Democratic control, there were no open rules at all—even on the twelve appropriations measures, which traditionally are open to amendment—unless one counts as open a rule with a pre-printing requirement for amendments. Overall, as one analyst wrote, the two Houses under Democratic control were "worse than Republicans were at their worst, producing restrictive amendment rules for 86 percent and 99 percent of legislation, respectively, versus 81 percent under Republicans in the 109th Congress."[39] In response to the GOP

TABLE 8-1 Open and Structured Rules, 103d–112th Congresses

Congress and years	Total rules granted	Open/modified Open rules		Restrictive rules	
		Number	Percent	Number	Percent
103d (1993–1995)	104	31	30	73	70
104th (1995–1997)	151	86	57	65	43
105th (1997–1999)	142	72	51	70	49
106th (1999–2001)	184	93	51	91	49
107th (2001–2003)	112	41	37	71	63
108th (2003–2005)	128	33	26	95	74
109th (2005–2007)	138	24	17	114	83
110th (2007–2009)	159	23	15	136	85
111th (2009–2011)	95	0	0	95	100
112th (2011–2013)	140	25	18	115	82

Source: Don Wolfensberger, resident scholar, Bipartisan Policy Center, Washington, D.C. Wolfensberger is a former decades-long professional staff aide and staff director of the House Rules Committee.

complaints, Democrats said the GOP's floor strategy was to offer "gotcha" amendments designed for campaign attack ads or to undermine the majority's policy priorities. Steny Hoyer of Maryland, then the majority leader, added, "I said we were going to be fair, not stupid."[40]

Speaker Boehner has also promised to run an open, fair, and deliberative lawmaking process with ample opportunities for the minority Democrats to offer amendments. Let legislators legislate is his stated objective. "To my friends in the minority," he said, "I offer a commitment: Openness . . . will be the new standard. There were no open rules in the House in the last Congress. In this one, there will be many."[41] Note that Speaker Boehner did not say all rules would be open or that he would tolerate minority party disruption of floor proceedings. To be sure, Democrats regularly criticize GOP-crafted rules. As the ranking Rules Democrat, Louise Slaughter, N.Y., said on one occasion: while "this rule may have the word 'open' in the title, I assure [my colleagues] that this is not an open process. [T]he Republican majority has provided an extremely convoluted and restrictive process."[42]

Open rules generally clash with a fundamental objective of any majority party: enactment of priority legislation. As Table 8-1 reveals, only 18 percent of rules in the 112th Congress were either open or modified open, a better percentage than under Speaker Pelosi but not compared to Boehner's two GOP predecessors (Gingrich and Hastert). However, unlike previous Speakers, Boehner has consistently brought appropriations bills to the floor under open rules, returning to the traditional practice of the House.

In summary, rules establish the conditions under which most major bills are debated and amended. They determine the length of general debate, permit or prohibit amendments, and often waive points of order. Writing the rules is the majority party's way of ensuring that measures reach the floor under terms favorable to the party's preferred outcomes. Put differently, the majority party limits and structures the votes to get the legislative and political results it intends, keeping the two Congresses in mind. In this era of message politics and partisan polarization, innovative rules can both protect majority party members from casting electorally perilous votes or, alternatively, make amendments in order that appeal to diverse party constituencies. Rarely are rules rejected by the House. As Speaker Thomas "Tip" O'Neill, D-Mass. (1977–1987), once said: "Defeat of the rule on the House floor is considered an affront both to the [Rules] Committee and to the Speaker."[43]

For their part, minority lawmakers object strongly to the wider use of restrictive rules that block them from offering and getting votes on their policy alternatives. "We don't expect to win," said a minority member, "but we do expect to be able to at least offer amendments so the two parties can define their differences."[44] Special rules are as or more important to a bill's fate as a favorable committee vote.

Dislodging a Bill from Committee

Committees do not necessarily reflect the point of view of the full chamber. What happens when a standing committee refuses to report a bill or when the

Rules Committee does not grant a rule? To circumvent committees, members have three options: the discharge petition, the Calendar Wednesday rule, and the ability of the Rules Committee to extract a bill from committee. However, these tactics are rarely employed and seldom successful.

The discharge petition permits the House to relieve a committee of jurisdiction over a stalled measure. This procedure also provides a way for the rank and file to force a bill to the floor, even if the majority leadership, the committee chair, and the Rules Committee oppose it. If a committee does not report a bill within thirty legislative days after the bill was referred to it, any member may file a discharge motion (petition) requiring the signature of 218 members, a majority of the House. Once the signatures are obtained, the discharge motion is placed on the Discharge Calendar for seven days. It can then be called up on the second and fourth Mondays of the month by any member who signed the petition. If the discharge motion is agreed to, the bill is taken up right away. Since 1910, when the discharge rule was adopted, only three discharged measures have ever become law. Its threatened or actual use, particularly as the number of signatures closes in on 218, may stimulate a committee to act on a bill and the majority leadership to schedule it for floor action.

The discharge procedure is rarely successful as a lawmaking device largely because members are reluctant to second-guess committees; to write legislation on the floor without the guidance of committee hearings and reports; and to use a procedure that may one day be used against committees on which they serve. Moreover, 218 signatures are not easy to obtain. The Speaker, too, is not reluctant to pressure majority party members who sign discharge petitions to remove their names, because their actions could jeopardize the majority's control of the floor schedule. If majority lawmakers add or refuse to remove their names, the message being sent, according to Tom Cole, Okla., former House GOP campaign chair, is that "you're thumbing your nose at your own leadership."[45] Unwanted consequences, as noted below, might result to majority members who refuse to heed their leader's advice.

The minority party may employ discharge petitions to spotlight the two Congresses. For example, minority members may promote and publicize their high-priority issues and then circulate discharge petitions "in an attempt to force House votes—and provide a contrast with [the majority party] in an election year."[46] When Republicans were in the minority in the 111th Congress (2009–2011), they filed discharge petitions to try to force floor votes on repealing the health care law. Their objective was "to capitalize on the public's divided feelings on the health care law as the [2010] midterm elections approach[ed]."[47] In brief, vulnerable House members can be subject to attack ads for failing to sign a discharge petition supported by many voters in their respective districts.

The discharge rule also applies to the Rules Committee. A motion to discharge a rule is in order after seven legislative days, instead of thirty days, as long as the bill made in order by the rule has been in committee for thirty days. Any member may enter a discharge motion, but majority members rarely

break ranks with their party leaders to sign the petition. When Rep. Christopher Shays, R-Conn., signed a successful discharge petition to force House action on a landmark campaign finance reform bill (the Bipartisan Campaign Reform Act of 2002) opposed by the GOP leadership, there were charges of treason against Shays and rumblings that he might face a GOP challenger in the Republican primary. Signing discharge petitions, "along with other kinds of procedural betrayals, are being considered and discussed by members" of the GOP's committee on committees, remarked the Republican Conference chair.[48] Shays was subsequently passed over as chair of the Oversight and Government Reform Committee, even though he had more seniority than the two other Republicans in contention.

Adopted in 1909, the Calendar Wednesday rule provides that on Wednesdays committees may bring up from the House Calendar or Union Calendar their measures that have not received a rule from the Rules Committee. However, the clerk will not call committees on Wednesdays unless the committee chair gives notice on Tuesday that he or she will seek recognition to call up a measure under the rule. Calendar Wednesday is cumbersome to employ, seldom used, and generally dispensed with by unanimous consent. Since 1943, fewer than fifteen measures have been enacted into law under this procedure.[49]

Finally, the Rules Committee has the power of extraction. The committee can propose rules that make bills in order for House debate even if the bills have been neither introduced nor reported by standing committees. Based on an 1895 precedent, this procedure is akin to discharging committees without the required 218 signatures. It stirs bitter controversy among members who think it usurps the rights of the other committees, and therefore it is seldom used.

HOUSE FLOOR PROCEDURES

The House meets Monday through Friday, often convening at noon. In practice, it conducts the bulk of its committee and floor business during the middle of the week (the so-called Tuesday to Thursday Club). To infuse greater predictability in the schedule, and to provide more time for members to spend in their districts, the GOP leaders of the 112th Congress crafted a legislative schedule somewhat different from previous House patterns. "Under the new calendar, House members will have a cycle of being in session for two weeks in Washington [with five-day workweeks] and then spending the following week in their home districts."[50] Majority Leader Eric Cantor, R-Va., also promised that there would be no votes each legislative day earlier than 1 p.m. (to permit committees to meet without interruption), no votes after 7 p.m., and on Fridays voting would conclude by 3 p.m.[51] However, this scheduling pattern was modified in 2012 to accommodate the congressional and presidential election season. Lawmakers wanted to spend more time at home to campaign.

At the beginning of each day's session, bells ring throughout the Capitol and the House office buildings, summoning representatives to the floor. The bells also notify members of votes, quorum calls, recesses, and adjournments. Typically, the opening activities include a daily prayer; approval of the *Journal* (a constitutionally required record of the previous day's proceedings); recitation of the Pledge of Allegiance; receipt of messages from the president (such as a veto message) or the Senate; announcements, if any, by the Speaker; and one-minute speeches by members on any topic. On Mondays and Tuesdays, a period of morning-hour debate takes place after the opening preliminaries but before the start of formal legislative business.

After these preliminaries, the House generally begins considering legislation. For a major bill, a set pattern is observed: adopting the rule, convening in Committee of the Whole, allotting time for general debate, amending, voting, and moving the bill to final passage.

Adoption of the Rule

The Speaker, after consulting other majority party leaders and affected committee chairs, generally decides when the House will debate a bill and under what kind of rule. Speakers rely on their majority leader to help draft and manage the floor agenda. When the scheduled day arrives, the Speaker recognizes a majority member of the Rules Committee for one hour to explain the rule's contents. By custom, the majority member yields half the time for debate to a minority member of the Rules Committee. At the end of the debate, which may take less than the allotted hour, the House votes on the previous question motion. Its approval brings the House to an immediate vote on the rule. Rejection of the previous question (a rare occurrence) allows the minority party an opportunity to amend the rule.

Opponents of a bill can try to defeat the rule and avert House action on the bill itself. But rules are rarely defeated because majority party members generally vote with their leaders on procedural votes and the Rules Committee is sensitive to the wishes of the House. During the speakership of Dennis Hastert, R-Ill. (1999–2007), the House rejected only two rules offered by the Rules Committee. Splits within the majority party account for the defeats. Nancy Pelosi never lost a rule during her four years as Speaker (2007–2011), nor has Speaker Boehner (2011–) had any rules turned down by the House. Procedural votes are usually party-line votes. Once the rule is adopted, the House is governed by its provisions. Most rules state that "at any time after the adoption of [the rule] the Speaker may declare the House resolved into the Committee of the Whole."

Committee of the Whole

The Committee of the Whole House on the state of the Union is a parliamentary artifice that the House borrowed long ago from the British House of Commons. Its function in the contemporary House is to expedite consideration of legislation and to promote member involvement in general debate and the amendment process, if amendments are permitted by the special rule. It is simply the House in another form with different rules. For example, a quorum

in the Committee of the Whole is only 100 members, compared with 218 for the full House. Debate on amendments is governed by the five-minute rule rather than the one-hour rule that applies in the House. By custom, Speakers never preside over the Committee; they always appoint a majority party colleague to act as chair of the committee, which then begins general debate of a bill.

General Debate

A rule from the Rules Committee specifies the amount of time, usually one to two hours, for a general discussion of the bill under consideration. Controversial bills require more time, perhaps four or more hours. Control of the time is divided equally between the majority and minority floor managers—usually the chair and ranking minority member of the committee that reported the legislation. (When bills are referred to more than one committee, a more complex division of debate time is allotted among the committees that had jurisdiction over the legislation.) The majority floor manager's job is to guide the bill to final passage; the minority floor manager may seek to amend or kill the bill.

After the floor managers have made their opening statements, they parcel out several minutes to colleagues on their side of the aisle who wish to speak. General debate rarely lives up to its name. Most legislators read prepared speeches. Give-and-take exchange occurs infrequently at this stage of the proceedings.

The Amending Phase

The amending process is the heart of decision making on the floor of the House. Amendments determine the final shape of bills and often dominate public discussion. Former representative Henry J. Hyde, R-Ill., for example, repeatedly and successfully proposed amendments barring the use of federal funds for abortions. Hyde's 1977 anti-abortion amendment remains today a regular provision of many public laws.

An amendment in the Committee of the Whole is considered under the five-minute rule, which gives the sponsor five minutes to defend it and an opponent five minutes to speak against it. The amendment then may be brought to a vote. Amendments are routinely debated for more than ten minutes, however. Legislators gain the floor by saying, "I move to strike the last word" or "I move to strike the requisite number of words." These pro forma amendments, which make no alteration in the pending matter, simply serve to give members five minutes of debate time.

If there is an open rule, opponents may try to load a bill with so many objectionable amendments that it will sink under its own weight. The reverse strategy is to propose sweetener amendments that attract support from other members. Offering many amendments is an effective dilatory tactic because each amendment must be read in full, debated for at least five to ten minutes, and then voted on.

In this amending phase, the interconnection of the two Congresses is evident: amendments can have electoral as well as legislative consequences.

Floor amendments enable lawmakers to take positions that enhance their reputations with the folks back home, put opponents on record, and shape national policy. For example, "put-them-on-the-spot amendments," as one representative dubbed them, can be artfully fashioned by minority lawmakers to force the majority to vote on issues such as gun control or stem cell research that can be used against them in the next campaign.[52] The majority party's control of the Rules Committee minimizes the use of this tactic because the panel may "script" the amendment process. For example, only the amendments made in order by Rules can be offered, often in a set order, and only by a specific member. Structured rules of this sort block spontaneous amendments and debates on issues that might stymie passage of the majority party's priorities.

The minority guards the floor to demand explanations or votes on amendments brought up by the majority. As a minority floor guardian wrote, "So long as a floor watchdog exists all members of the House are afforded some additional protection from precipitous actions."[53] In the 113th Congress, various minority members assume this role for Democrats in the House.

Voting

Before passage of the 1970 Legislative Reorganization Act, the Committee of the Whole adopted or rejected amendments by voice votes or other votes with no public record of who voted and how. Today, any legislator supported by twenty-five colleagues can obtain a recorded vote. (The member who requested a recorded vote is counted as one of the twenty-five who rise to be counted by the chair.)

Since the installation of an electronic voting system in 1973, members can insert their personalized cards (about the size of a credit card) into one of more than forty voting stations on the floor and press the "Yea," "Nay," or "Present" button. A large electronic display board behind the press gallery provides a running tally of the total votes for or against a motion. The voting tally, said a representative, is watched carefully by many members:

> I find that a lot of times, people walk in, and the first thing they do is look at the board, and they have key people they check out, and if those people have voted "aye," they go to the machine and vote "aye" and walk off the floor.
>
> But I will look at the board and see how [members of the state delegation] vote, because they are in districts right next to me, and they have constituencies just like mine. I will vote the way I am going to vote except that if they are both different, I will go up and say "Why did you vote that way? Let me know if there is something I am missing."[54]

After all pending amendments have been voted on, the Committee of the Whole rises. The chair hands the gavel back to the Speaker, and a quorum once again becomes 218 members.

Final Passage

As specified in the rule, the full House must review the actions of its agent, the Committee of the Whole. The Speaker announces that under the rule the previous question has been ordered, which means in this context that no further debate is permitted on the bill or its amendments. The Speaker then asks whether any representative wants a separate vote on any amendment. If not, all the amendments agreed to in the committee will be approved.

The next important step is the motion to recommit, which provides a way for the House to return, or recommit, the bill to the committee that reported it. The motion to recommit has two forms: (1) the rarely used "straight" motion to return the measure to committee (which effectively kills it), and (2) a motion to recommit with instructions that the committee report "forthwith," which means the bill never really leaves the House. If this form of the motion is adopted, the bill, as modified by the instructions, is automatically before the House again. By precedent, either form of the motion is always made by a minority party member who opposes the legislation. Each form of the motion is also subject to ten minutes of debate, five per side. Recommittal motions are usually not successful because they are so heavily identified as an opposition party prerogative, but they do serve to protect the rights of the minority. When Republicans won majority control in 1995, they amended the House rules to guarantee the minority leader or his or her designee the right to offer a recommittal motion with instructions (the instructions embody the minority's policy alternative and must be germane to the bill). This rule still remains in place.

Recent Congresses have seen a change in the major purposes of the motion to recommit. Although still employed by the minority party to force the House to vote on its alternative policy proposal (the "instructions" in this motion), the motion to recommit is now frequently employed to achieve two political purposes: to defeat, delay, or eviscerate majority party policies and to force vulnerable majority lawmakers to vote on "gotcha amendments" certain to cause them electoral grief if they do not vote for the minority proposal. As Democratic leader Hoyer exclaimed, "The unfortunate fact is that the motion to recommit with instructions has for more than a decade become a hollow vehicle and farce."[55] For example, whether a Democratic or Republican minority, the instructions in motions to recommit are artfully drafted to require members to vote on "hot button" issues—preventing child molestation, for example—while also undermining the majority party's policy objectives. Clearly, many lawmakers would be reluctant to vote against a motion to recommit with this kind of instruction because they would likely face a barrage of campaign attack ads suggesting that they support child molestation.

If the motion to recommit with instructions is adopted, the minority proposal is incorporated into the bill. If it is rejected, as commonly occurs, the Speaker will declare, "The question is on passage of the bill." Passage of the measure, by the House in this case, marks about the halfway point in the lawmaking process. The Senate must also approve the bill, and its procedures are strikingly different from those of the House. It is an institution noted for protecting the rights of the minority, hence its reliance on the unanimous consent of all senators to accomplish much of the chamber's business.

SCHEDULING IN THE SENATE

Compared with the larger and more clamorous House, which needs and follows well-defined rules and precedents, the Senate operates more informally. And, unlike the House, where the rules permit a determined majority to make decisions, the Senate's rules emphasize individual prerogatives (freedom to debate and to offer amendments, including nonrelevant amendments) and minority rights (those of the minority party, a faction, or even a single senator). "The Senate," said one member, "is run for the convenience of one Senator to the inconvenience of 99."[56] No wonder some commentators say the Senate has only two rules (unanimous consent and exhaustion) and three speeds (slow, slower, and slowest). As former senator Byron Dorgan, D-N.D., said, "The only thing it's easy to do in the Senate is slow things down. The Senate is 100 human brake pads."[57]

The scheduling system for the Senate appears relatively simple. There is a Calendar of Business on which are listed public and private bills reported by the committees and a separate Executive Calendar for treaties and nominations. The Senate has nothing comparable to the scheduling duties of the House Rules Committee, and the majority and minority leadership actively consult about scheduling. The Senate majority leader is responsible for setting the agenda and is aided in controlling the scheduling by the priority given him when he seeks recognition on the floor. What this means is that if several senators are seeking recognition from the presiding officer and the majority leader is among them, the chair will always give preference to the majority leader.

Despite the Senate's smaller size, establishing a firm agenda of business is harder in the Senate than in the House. As a majority leader once said:

> The ability of any Senator to speak without limitations makes it impossible to establish total certainty with respect to scheduling. When there is added to that the difficulty and very demanding schedules of 100 Senators, it is very hard to organize business in a way that meets the convenience of everybody.[58]

Legislation typically reaches the Senate floor in two ways: by unanimous consent or by motion. But senators, too, can also force Senate consideration of their proposals by offering them as nonrelevant amendments to pending business. Unanimous consent agreements are of utmost importance to the smooth functioning of the Senate.

Unanimous Consent Agreements

The Senate frequently dispenses with its formal rules and instead follows negotiated agreements submitted to the Senate for its unanimous approval (see Box 8-5 on unanimous consent agreements). The objectives are to expedite work in an institution known for extended debate, to impose some measure of predictability on floor action, and to minimize dilatory activities. As a party floor leader observed:

> We aren't bringing [measures] to the floor unless we have [a unanimous consent] agreement. We could bring child-care legislation to the floor right now, but that would mean two months of fighting. We want to maximize productive time by trying to work out as much as we can in advance [of floor action].[59]

It is not uncommon for party leaders to negotiate piecemeal unanimous consent agreements—limiting debate on a specific amendment, for example—and to hammer them out in public on the Senate floor.

Unanimous consent agreements (also called time-limitation agreements) limit debate on the bill, any amendments, and various motions. Occasionally, they specify the time for the vote on final passage and typically impose constraints on the amendment process. For example, to facilitate enactment of an omnibus crime package that contained provisions with widespread Senate support, senators agreed to a unanimous consent request barring floor amendments on controversial issues such as gun control or the death penalty.[60]

The Senate's unanimous consent agreements are functional equivalents of special rules from the House Rules Committee. Both waive the rules of their respective chambers and must be approved by the members—in one case by majority vote and in the other by unanimous consent. These accords are binding contracts and can be terminated or modified only by another unanimous consent agreement. Senators and aides often negotiate and draft and circulate unanimous consent agreements privately, whereas the Rules Committee hears requests for procedural rules in public sessions.

Ways to Extract Bills from Committee

If a bill is blocked in committee, the Senate has several ways to obtain floor action. It can add the bill as a nonrelevant floor amendment to another bill, bypass the committee stage by placing the bill directly on the calendar, suspend the rules, or discharge the bill from committee. Only the first two procedures are effective; the other two are somewhat difficult to employ and seldom succeed.[61]

In recent years, however, various senators have employed motions to suspend the rules to force votes on amendments that would normally be out of order under Senate rules and precedents. The suspension rule requires one day's written notice (published in the *Congressional Record*) of the terms of the

BOX 8-5 Example of a Unanimous Consent Agreement

Ordered, That notwithstanding cloture having been invoked on H.R. 1, and following any Leader remarks on Friday, December 28, 2012, the Senate resume consideration of H.R 5949, an act to extend the FISA Amendments Act of 2008 for five years; provided, that the only first degree amendment in order to the bill be the Wyden amendment, the text of which is at the desk; provided further, that there be 30 minutes of debate equally divided on the amendment prior to the vote; further, that there be no amendments in order to the amendment prior to the vote, and that upon disposition of the amendment, the bill be read a third time and the Senate vote on passage of the bill, as amended, if amended; further that there be a 60 affirmative vote threshold for the amendment and for passage of the bill.

Ordered, That upon disposition on Friday, December 28, 2012, the Senate resume consideration of H.R. 1, an act making appropriations for the Department of Defense and other departments and agencies of the Government for the fiscal year ending September 30, 2011, and for other purposes; provided, that notwithstanding Rule XXII, the following [21] amendments be in order:

-Cardin #3393 (surety bonds),

-Grassley #3348 (DOJ—vehicles)

Ordered further, That all after the first vote be 10 minute votes; provided further, that upon disposition of the pending amendments listed, the Senate vote in relation to Amdt. No. 3395, offered by the Senator from Nevada (Mr. Reid), as amended, if amended; provided further that upon disposition of Amdt. No. 3395, the cloture motion on H.R. 1 be withdrawn, the bill be read a third time and the Senate vote on passage of H.R. 1, as amended, if amended.

Source: U.S. Senate, Calendar of Business, 112th Cong., 2d sess., December 28, 2012, 2.

Note: The unanimous consent agreement for H.R. 1 is a selected version of the provisions contained therein, while still highlighting its main features. For example, only two of the twenty-one amendments are listed.

debatable suspension motion and a high voting threshold (two-thirds) to succeed. (See the discussion below on how Sen. Harry Reid, D-Nev., foiled the minority party's use of suspension motions for message purposes.)

Because the Senate has no general germaneness (or relevancy) rule, senators can take an agriculture bill that is stuck in committee and add it as a nonrelevant floor amendment to a pending health bill. "Amendments may be made," Thomas Jefferson noted long ago, "so as to totally alter the nature of the proposition." However, unanimous consent agreements can limit or prohibit nonrelevant amendments.

Senators can also bypass the referral of measures to committee by invoking one of the chamber's formal rules (Rule XIV). Typically, when senators introduce bills or joint resolutions (or when bills or joint resolutions are passed by the House and sent to the Senate), they are referred to the appropriate committee of jurisdiction. Rule XIV specifies that those measures are to be read twice by title

on different legislative days before they are referred. If a senator interposes an objection after the first reading and again the next day after the second reading, the bill or joint resolution is automatically placed on the Senate's Calendar of Business (see Box 8-6 for how Rule XIV works). Although not used for the vast majority of measures, Rule XIV is increasingly invoked on party issues of high priority. The majority leader, for example, may employ it to circumvent committees because no time is available for a lengthy committee review, or because he wants an issue ready to be called up at his discretion. As Sen. Lamar Alexander, R-Tenn., noted, "From the 103rd to the 109th Congress, Rule XIV to bypass [committees] was used on average 24 times per Congress. This was shattered in the 110th Congress when it was used 57 times."[62]

SENATE FLOOR PROCEDURES

The Senate, like the House, often convenes at noon, sometimes earlier, to keep pace with the workload. Typically, it opens with a prayer, followed by the

BOX 8-6 Senate Rule XIV: Bypassing Committee Referral

MEASURE READ THE FIRST TIME—S. 192

Mr. BEGICH. Madam President, I understand that S. 192, introduced earlier today by Senator DEMINT, is at the desk and I ask for its first reading.

The PRESIDING OFFICER. The clerk will read the bill by title.

The bill clerk read as follows:

A bill (S. 192) to repeal the job-killing health care law and health care-related provisions in the Health Care and Education Reconciliation Act of 2010.

Mr. BEGICH. Madam President, I now ask for its second reading and object to my own request.

The PRESIDING OFFICER. Objection is heard.

The bill will be read the second time on the next legislative day.

Source: Congressional Record, January 26, 2011, S263.

MEASURE PLACED ON THE CALENDAR—S. 192

Mr. REID. Mr. President, I understand S. 192 is at the desk and is due for a second reading.

The ACTING PRESIDENT pro tempore. The clerk will read the title of the bill for the second time.

The legislative clerk read as follows:

A bill (S. 192) to repeal the job-killing health care law and health care-related provisions in the Health Care and Education Reconciliation Act of 2010.

Mr. REID. Mr. President, I object to further proceedings with respect to this legislation.

The ACTING PRESIDENT pro tempore. Objection having been heard, the bill will be placed on the calendar under rule XIV.

Source: Congressional Record, January 27, 2011, S295.

Pledge of Allegiance and then leaders' time (usually ten minutes each to the majority leader and the minority leader to discuss various issues). If neither leader wants any time, the Senate typically either permits members who have requested time to make their statements, or it resumes consideration of old or new business under terms of a unanimous consent agreement. The Senate, too, must keep and approve the *Journal* of the previous day's activities. Commonly, the *Journal* is "deemed approved to date" by unanimous consent when the Senate adjourns or recesses at the end of each day.

Normal Routine

For most bills, the Senate follows four steps:

1. The majority leader secures the unanimous consent of the Senate to an arrangement that specifies when a bill will be brought to the floor and the conditions for debating it.
2. The presiding officer recognizes the majority and minority floor managers for opening statements.
3. Amendments are then in order, with debate on each amendment regulated by the terms of the unanimous consent agreement.
4. A roll call vote takes place on final passage.

As in the House, amendments in the Senate serve various purposes. For example, floor managers might accept "as many amendments as they can without undermining the purposes of the bill, in order to build the broadest possible consensus behind it."[63] Some amendments are designed with the two Congresses in mind. Such amendments may bestow benefits to the electorate or embarrass members who must vote against them. "My amendment can be characterized as a 'November amendment,'" remarked a Republican senator, "because the vote . . . will provide an opportunity for Senators to go home and say, 'I voted to reduce Federal taxes' and 'I voted to cut Federal spending.'"[64] Senate Democrats make "vigorous use of amendments to strike a contrast with Republican policies."[65] Unless constrained by some previous unanimous consent agreement, senators generally have the right to offer an unlimited number of floor amendments.

Significantly, recent majority leaders have increasingly used their right of first recognition on the floor to "fill the amendment tree": a chart that imposes a limitation on the number of amendments to a measure that may be offered and pending at the same time. The right of first recognition brings up two points. First, the presiding officer always recognizes the majority leader first if other senators are trying to catch the eye of the chair. Second, despite Senate precedents stating that members lose the floor when they offer amendments, the first recognition principle trumps that determination, enabling the majority leader to offer amendment after amendment until the so-called amendment tree (a chart that depicts the number of permissible amendments to a measure) is filled. Majority Leader Reid has employed tree-filling far more

than his Democratic or Republican predecessors. During the 111th Congress (2009–2011), Reid used the procedural device forty-four times compared to a combined forty by the majority leaders in office from 1985 to 2008. In the 112th Congress, Reid filled the tree sixty-three times. The surge in tree-filling largely reflects two general and overlapping developments: heightened partisan conflict in the chamber and wider use of amendments by the minority party for political message-sending.

Once the amendment tree is filled, no other senator may offer amendments—that is, the amending process is frozen "until action is taken to dispose of one or more of those already pending."[66] This practice is controversial and angers many lawmakers, especially those in the minority. Regularly, GOP leader Mitch McConnell, Ky., blasts Reid for undermining the unique deliberative character of the Senate by preventing Republicans from offering their nonrelevant amendments. From Senator Reid's perspective, tree-filling is done for several specific reasons, such as blocking unwanted, nonrelevant amendments; protecting vulnerable colleagues from voting on amendments crafted to cause them electoral grief; or promoting negotiations with the opposition so an accord might be reached on the number of amendments each side is willing to vote on. If an accord is reached, the majority leader will drop some of his amendments so others may offer theirs.

A bill is brought to a final vote whenever senators stop talking. (The Senate has no motion to end debate and vote on a measure or matter.) This can be a long process, particularly in the absence of a unanimous consent agreement. On some bills, unanimous consent agreements are foreclosed because of deliberate obstructive tactics, particularly the threat or use of the filibuster (extended debate). In these instances, bills cannot be voted upon until the filibuster has ended. Every measure might face at least two primary filibusters: the first on the motion to take up the legislation and the second on the consideration of the bill. "Double filibusters" underscore the expansive scope of minority rights that characterizes Senate procedure. (A number of laws, such as trade or budget reconciliation measures, restrict a senator's right to prolong debate. As a former Senate parliamentarian noted, "We have on the books probably a couple hundred laws that set up specific legislative vehicles that cannot be filibustered or only amended in a very restricted way.")[67]

Holds, Filibusters, and Cloture

The old-style filibuster has long been associated with the 1939 movie *Mr. Smith Goes to Washington*, which featured a haggard Jimmy Stewart conducting a dramatic solo talkathon on the floor of the Senate to inform the public about political wrongdoing. In its new incarnation, the filibuster is usually threatened more than invoked to gain bargaining power and negotiating leverage. Today, the threat to filibuster is sufficient to block action on many bills or nominations, in large measure because it is so hard to mobilize sixty votes to invoke cloture (closure of debate). Moreover, cloture is a time-consuming procedure (at least two days) that impedes the Senate's ability to process its extensive workload.

Filibusters involve many blocking tactics besides extended debate in which senators might hold the floor for hours of endless speeches. In today's polarized Senate, contemporary filibusters are commonly waged by those who skillfully exploit Senate rules. For example, senators might offer scores of amendments, raise many points of order, or demand numerous and consecutive roll call votes. Holds also function as a form of silent filibuster.

Holds. Long an informal custom, a hold permits one or more senators to block floor action on measures or matters by asking their party leaders not to schedule them. A hold, explained Sen. Charles E. Grassley, R-Iowa, is "a notice by a Senator to his or her party leader of an intention to object to bringing a bill or nomination to the floor for consideration."[68] The majority leader decides whether, or for how long, to honor a colleague's hold. The power of holds is grounded in the implicit threat of senators to conduct filibusters or to object to unanimous consent agreements.

Holds have come under criticism because they often lead to delays or even the death (choke holds) of measures or nominations. Originally intended as a way for senators to get information about when the majority leader planned action on a measure, holds have become devices to kill measures by delaying them indefinitely or to gain bargaining leverage by, for example, stalling action on presidential nominees. On one occasion, so many holds on nominations were pending before the Senate that a Democratic leader felt left out. As he explained, "I'm going to have to pick out a nominee to get to know him or her a lot better because it works that way. I mean, it's 'Hello, I'm your holder . . . come dance with me.'"[69]

For years, Sens. Grassley and Ron Wyden, D-Ore., joined by Sen. Claire McCaskill, D-Mo., have tried to reform—not eliminate—the holds process. Specifically, they want to end secret holds where one anonymous senator can block bills or nominations. Some success for the trio came in 2007 when the Senate established a procedure for ending secret holds (formally called a "notice of intent to object"). However, there was no enforcement mechanism. When the 112th Congress opened, the Senate adopted a "standing order"—the functional equivalent of a formal rule—that requires every senator to make his or her hold public. If a senator does not come forward to be the claimant, then whoever objected on his or her behalf, including the two party leaders, would be identified in the *Congressional Record* as the "holder." Still, anonymous pre-floor objections to calling up measures or matters have not disappeared in the Senate. In the view of Majority Leader Reid, "We tried to do something on secret holds, but that hasn't helped [the nominations process] much at all."[70] In short, there are still secret holds in the Senate.

Filibusters and Cloture. The right of extended debate is unique to the Senate. Any senator or group of senators can talk continuously in the hope of delaying, modifying, or defeating legislation. In 1957 South Carolina senator Strom Thurmond, then a Democrat, set the record for the Senate's longest solo performance—twenty-four hours and eighteen minutes; he was trying to kill a civil rights bill.

The success of a filibuster depends not only on how long it takes but also on when it is waged. A filibuster can be most effective late in a session because there is insufficient time to break it.[71] Even the threat of a filibuster can encourage accommodations or compromises between proponents and opponents of legislation.

Defenders of the filibuster say it protects minority rights, permits thorough consideration of bills, and dramatizes issues. "In many ways," noted Sen. Robert C. Byrd, D-W.Va., "the filibuster is the single most important device ever employed to ensure that the Senate remains truly the unique protector of the rights of our people."[72] Critics contend that talkathons enable minorities to extort unwanted concessions. During most of its history, the Senate had no way to terminate debate except by unanimous consent, exhaustion, or compromise. In 1917 the Senate adopted Rule XXII, its first cloture (debate-ending) rule. After several revisions, Rule XXII now permits three-fifths of the Senate (sixty members) to shut off debate on substantive issues or procedural motions. (A two-thirds vote is required to invoke cloture on a proposal to change the rules of the Senate.)

Once cloture is invoked, thirty hours of debate time remain before the final vote occurs on the matter identified in the cloture motion. There might also be multiple cloture votes on a measure: on the motion to proceed, on the bill itself, and to amendments. If the Senate is in a procedural "hard ball" situation, opponents of the legislation will consume the entire thirty hours of post-cloture debate on each clotured item. These actions "can grind legislative business to a halt and leave the Senate in an interminable purgatory."[73]

Senators complain about the frequent use of filibusters, filibuster threats, and cloture attempts. In the past, filibusters generally occurred on issues of great national importance. Today, they occur on a wide range of less momentous topics. As one majority leader pointed out,

> Not long ago the filibuster or threat of a filibuster was rarely undertaken in the Senate, being reserved for matters of grave national importance. That is no longer the case. . . . The threat of a filibuster is now a regular event in the Senate, weekly at least, sometimes daily. It is invoked by minorities of as few as one or two Senators and for reasons as trivial as a Senator's travel schedule.[74]

Unsurprisingly, many commentators call it the "sixty-vote Senate." Or as a senator observed, "It isn't good enough to have the majority. You've got to have 60 votes."[75] Today, it is not uncommon for unanimous consent agreements to require bills or amendments to attract sixty votes for passage rather than a simple majority. The interests of both sides are served by this development. Majority advocates get a vote, and the supermajority threshold protects minority opponents. Moreover, this accord saves the Senate's time by avoiding use of the cloture procedure.

Attempts to invoke cloture also have increased, particularly in recent Congresses. For example, in the decade from 1961 to 1971 there were 5.2 cloture votes per Congress, but during the 109th Congress (2005–2007) there were fifty-two cloture votes.[76] The 110th Senate seemingly broke all records when the chamber voted on 112 cloture motions, "twice the number in the previous Congress and more than double the average number over the previous twenty years."[77] But then another new record was set in the 111th Congress—132 cloture votes.[78] If the cloture votes of the 112th Congress are counted with the totals from the 110th and 111th Congresses, there have been more than 385 cloture votes in the Senate.

Tellingly, when Majority Leader Reid forces cloture votes, he wins a majority of them by attracting sufficient GOP votes to attain the sixty required to invoke cloture.[79] Why would Republican senators force Reid to resort to the cloture process even when they plan to vote for cloture? To consume the most precious commodity in the Senate: time. As a top floor aide to Senator Reid wrote: "By requiring the cloture vote and then voting for it, the minority has been able to waste considerable time and thus reduce the amount of time available to act on other items of [President Obama's] agendas."[80] Filibustering actions frustrate the majority party's ability to govern, which might make the minority the majority party after the next election. Remember, with forty-one votes, the minority's threat of extended debate (the "silent filibuster") is often enough to prevent legislation from even reaching the floor.

Moreover, the norm of one cloture vote per measure has changed. The modern Senate reached a record of eight cloture votes (all unsuccessful) on a controversial campaign financing measure during the 100th Congress (1987–1989). Cloture is also sometimes employed for purposes unrelated to ending a filibuster. For example, if the sixty votes are obtained under Senate Rule XXII, there is the requirement that all amendments be germane to the clotured measure. Or the majority leader may schedule repeated cloture votes, knowing that they will fail, in order to tar the other party as "obstructionists" in the next election.

There is little question that contemporary senators wield their procedural prerogatives for partisan advantage. The new normal today in the Senate is that nearly everything requires sixty votes to pass. It is not surprising, then, that the two parties provide different interpretations of the circumstances that provoke their dismay and frustration with Senate proceedings. A co-chair of the Senate Democratic Policy Committee declared that there was "less cooperation and more determination to block almost anything than at any time I have seen in the 30 years I have served here." He added:

> We have a noncontroversial issue, a motion to proceed [to the consideration of] something on which there is no controversy, and it is subject to a filibuster, and then a cloture motion has to be filed. Then 2 days have to pass before it ripens. We have a cloture vote, and

> then following the cloture vote, the minority says: Well, we insist that the 30 hours postcloture be used. So 30 hours has to be burned off. Only then can you get a vote on a noncontroversial issue. Then you have a vote, and it is 98 to 1. That has happened throughout this [Congress]—continual efforts to block everything; deciding that the best strategy politically, apparently, for the minority here in the U.S. Senate is to block everything.[81]

Sen. Lamar Alexander insists that the "real obstructionists have been the Democratic majority which, for an unprecedented number of times, have used their majority advantage to limit debate, not allow amendments and bypass the normal committee consideration of legislation." He continued:

> So the real "party of no" is the majority party that has been saying "no" to debate and "no" to voting on amendments that minority members believe improve legislation and express the voices of the people they represent. In fact, the reason the majority leader can claim there have been so many filibusters is because he actually is counting as filibusters the number of times he filed cloture—or moved to cut off debate.[82]

This clash of viewpoints on which party provoked the intense parliamentary warfare led a number of mainly junior senators to try—at the start of the 112th Congress—to change the Senate rules. One reform group favored use of the so-called constitutional or nuclear option.[83] Its advocates argue that a newly elected Senate should not be bound by preexisting rules. Instead, they argued, the Senate has the constitutional right "to determine the rules of its proceedings" by majority vote at the start of a new Congress, notwithstanding any inherited (or continuing) rules from the previous Congress. Under inherited Senate rules, however, ending a talkathon on any rules change requires a supermajority vote of two-thirds, a very high hurdle for reform proposals.

In the end, the Senate adopted a series of modest changes, leaving Rule XXII (cloture/filibuster) untouched. The revisions included another attempt to end secret holds (noted earlier); elimination of the reading requirement for amendments—employed as a dilatory tactic—if they have been available to lawmakers for at least seventy-two hours; and, as mentioned in Chapter 11, agreement that the number of federal positions subject to the advice and consent of the Senate should be reduced by one-third. In addition, the two party leaders announced a nonbinding "gentlemen's agreement." GOP leader Mitch McConnell said that Republicans would restrict filibusters on the motion to proceed to consider legislation. For his part, Democratic leader Reid stated that he would exercise restraint in filling the tree to block Republican amendments. The gentlemen's agreement did not last long.[84] There was an increase in the use of tree-filling and no shortage of filibuster threats on the motion to proceed to a measure or matter.

The 112th Congress also saw the majority Democrats use a reinterpretation of the rules to mobilize a simple floor majority to crack down on Republican obstruction. In 2010 and 2011, minority Republicans began to use suspension motions as a way to circumvent germaneness requirements for amendments when cloture (closure of debate under Senate Rule XXII) was invoked by the required sixty-vote supermajority. None of the GOP's suspension motions attracted the required two-thirds vote to suspend Senate rules, but they afforded Republicans an opportunity to discuss their "message" proposals and to foil Majority Leader Reid's scheduling plans.

Upset at the GOP's delaying tactic of arranging multiple suspension motions, Senator Reid took steps on October 6, 2011, to establish a new Senate precedent to end the practice. First, he emphasized that cloture is a process to bring Senate rules to a close. Unless the Senate changes its precedents, he explained, "we will be faced with an endless series of motions to suspend the rules after the Senate has voted overwhelmingly to bring consideration to a close, and that is a result a functioning democracy cannot tolerate."[85] Second, Reid called up one of the GOP's suspension motions and raised a point of order (a parliamentary objection) against it. Although the presiding officer, following the advice of the Senate parliamentarian, overruled the point of order, Senator Reid appealed the ruling. The Senate then voted to overturn the chair's ruling and uphold Reid's point of order, creating a new Senate precedent. Under this precedent, "it will now be against the rules to seek the 67 votes needed to suspend the cloture rules and bring up an amendment that is non-germane, or unrelated, to the bill in question after a successful cloture vote."[86] Some Republicans accused Reid of "going nuclear," though establishment of new precedents by majority vote is not uncommon. Reid's maneuver, however, may have foreshadowed the more significant reform actions of the 113th Congress (2013–2015).

In January 2013, the Senate adopted bipartisan packages of new filibuster changes negotiated by the two party leaders (Reid and McConnell). Among the fundamental objectives of the revisions were to expedite Senate action on legislation by minimizing the threat of a filibuster on the motion to proceed by allowing a simple majority to take up a bill, if amendment opportunities are guaranteed to the majority and minority parties, thus inhibiting "filling the tree"; collapsing into a single debatable motion, rather than three, the process for taking a bill to conference with the House (although that single motion is still subject to a filibuster); and shortening post-cloture debate time on certain nominations.

A number of senators and outside groups criticized the changes for not going far enough. For example, some wanted majority cloture rather than the current sixty-vote requirement to shut down extended debate. However, the incremental approach to change avoided a potential parliamentary meltdown if the "nuclear option"—changing Senate rules with majority support—had been used by Senator Reid. Moreover, Senator Reid understood that Democrats would one day be in the minority and need the filibuster when the GOP

controlled the Senate. Furthermore, use of the nuclear option was viewed as a "slippery slope" that any majority could use at any time to change Senate rules. The Senate might then become more like the majoritarian House.

The recent initiatives to revise Senate rules reflect an erosion of the Senate's customary norms of collegiality, civility, and accommodation. The various explanations for this development include the election to the Senate of House members who bring with them the aggressive partisanship common to the House, heightened demands placed on senators by constituents and lobbyists, intense electoral competition, and the escalating costs of campaigns. "Daily priorities [are] shaped more by personal agendas—campaign needs, interest-group demands, personal staff, obligations to meet constituents, and off-the-Hill speeches—and less by the expectations of colleagues and the needs of Senate colleagues," wrote congressional scholar Steven S. Smith. "Pressed by constituencies and lobbyists and more strongly motivated to grab a headline, senators now more routinely and more fully exploit their procedural prerogatives than at any other time in the Senate's history."[87] The upshot of these developments is a more individualistic and partisan Senate, which means that compromises and accommodations are harder to achieve on significant substantive and procedural issues.

RESOLVING HOUSE-SENATE DIFFERENCES

Before bills can be sent to the president, they must be passed by the House and the Senate in identical form. Conference committees are the best known method used to resolve bicameral differences when the two chambers pass dissimilar versions of the same bill. Another approach is to ping-pong House and Senate amendments between the chambers until each chamber is satisfied with the product.[88] Recent Congresses have seen greater use of the ping-pong method because of the Senate's difficulty in getting to conference, largely because the procedural steps to convene a conference are subject to extended debate. If neither chamber will accept the other's changes via the exchange of amendment process, a House-Senate conference committee may be appointed to reconcile the differences. There are occasions, too, when ping-ponging is used in combination with conference committees. For example, the chambers may start out using the exchange of amendments and then convene a conference to resolve the outstanding matters in bicameral disagreement.

Worth re-emphasizing is that the ping-pong procedure has increased in importance and prominence in recent Congresses. Instead of convening a conference, there is greater use of the exchange of amendment procedure on controversial and consequential legislation. A major reason was the Senate's difficulty in convening a conference with the other chamber because of its own internal partisan disagreements. To get to conference, the Senate's majority leader makes a routine, three-part request to convene a conference with the House. He would say: "Mr. President, I move that the Senate insist on its amendments [to the House-passed bill], request a conference with the House

on the disagreeing votes thereon, and that the Chair be authorized to appoint conferees." Traditionally, the leader's motion would be quickly agreed to by unanimous consent. As explained by Robert Dove, the former parliamentarian of the Senate, "The three steps are usually bundled into a unanimous consent [request] and done within seconds. But if some senators do not want a conference to occur and they are determined, they can force three separate cloture votes to close depart [on each of the discrete parts], and that takes a lot of time. It basically stops the whole process of going to conference."[89] As noted earlier, the 113th Senate combined the three-part request into a single debatable motion to facilitate the Senate's ability to convene a conference with the House.

Most public laws are approved without conferences. Either they pass each chamber without any changes (roughly 70 percent of the time), or the House and Senate amend a bill in turn until both chambers agree on the wording (about 20 percent of laws follow this shuttle route). Only about 10 percent of the measures passed by Congress—usually the most important and controversial—are subject to bicameral reconciliation by conference committees.

Under each chamber's rules and precedents, conference committees meet to resolve the matters in bicameral dispute; they are not to reconsider provisions already agreed to, and they are not to write new law by inserting matter that neither house may have considered. However, parliamentary rules are not self-enforcing, and either chamber can waive or ignore them. It is not unusual for conference reports to contain new matter that neither chamber debated nor amended in committee or on the floor. No wonder conference committees are called the third house of Congress.

Selection of Conferees

Conferees usually are named from the committee or committees that reported the legislation. Congressional rules state that the Speaker and the Senate presiding officer select conferees. In fact, that decision typically is made by the relevant committee chairs and the ranking minority members. House and Senate party leaders commonly get involved in naming conferees on major legislation to ensure that the conferees will back leadership positions on the legislation.

House and Senate party leaders are sometimes named as conferees—a sign that they want to direct conference negotiations on high-stakes issues important to their party. The House majority leader, for example, often serves on important tax conferences. When the top majority party leaders of either chamber are named as conferees, this signals, as one senator declared, a "majority-party driven" conference.[90]

Each chamber may name as many conferees as it wants, and some conference delegations have become very large. The 1981 omnibus reconciliation conference set the record, with more than 250 House and Senate conferees working in fifty-eight subconferences to resolve more than three hundred matters in bicameral disagreement. The ratio of Republicans to Democrats on

a conference committee generally reflects the proportion of the two parties in the House and Senate.

Today's conference committees represent a sharp departure in size and composition from the pre-1980 era, when conference delegations generally ranged from five to twelve conferees from each house. And before the mid-1970s, conferees nearly always were the most senior lawmakers from the committees that reported the legislation. Although seniority frequently determines who the conferees will be, it is not unusual for junior and even first-term members to be conferees. Furthermore, conferees today commonly are chosen from several standing committees and reflect intricate selection arrangements. For example, House conferees may be named to negotiate only certain items in disagreement instead of the entire bill. Multiple referrals and megabills are the driving forces behind these two developments.

In conference each chamber has a single vote determined by a majority of its conferees, who are generally expected to support the legislation as it passes their body. But, a senator confessed, as conference committees drag on, the "individual attitudes of the various members begin to show."[91] A standard objective of conferees is to fashion a compromise product—the conference report—that will be acceptable to a majority of the membership of both chambers and that the president will sign into law.

Openness and Bargaining

Secret conference meetings were the norm for most of Congress's history. In 1975 both houses adopted rules requiring open meetings unless the conferees from each chamber voted in public to close the sessions. Two years later, the House went further, requiring open conference meetings unless the full House agreed to secret sessions. Sometimes, the Cable-Satellite Public Affairs Network (C-SPAN) televises conference proceedings.

The open conference is yet another instance of individual–institutional cleavage. Under the watchful eye of lobbyists, conferees fight harder for provisions they might have dropped quietly in the interest of bicameral agreement. And yet private bargaining sessions still permeate conference negotiations.

Senators and representatives expect certain bills to go to conference and plan their bargaining strategy accordingly. For example, whether to have a recorded vote on amendments can influence conference bargaining. In the absence of a recorded vote, amendments may be easier to drop in conference. Bargaining techniques in conference cover a range of techniques: from logrolling ("you accept my chamber's position on this provision and I'll accept yours on another provision") to threats to walk out of the negotiations unless the other side compromises. One side may fight hard for a position on which it plans to yield, so the conferees can tell their parent chamber that they put up a good battle but the other side would not relent. Conference committees are where the final version of the law is often written, sometimes making changes

or additions to legislation that neither chamber ever reviewed or considered in committee or on the floor.

The Conference Report

A conference ends when its report (the compromise bill) is signed by a majority of the conferees from each chamber. House and Senate staff then prepare the conference report and the accompanying joint explanatory statement, which summarizes the conferees' recommendations. The House and Senate then vote on the conference report without further amendment. If either chamber rejects the conference report—an infrequent occurrence—a new conference may be called or another bill introduced. Once passed, the compromise bill is sent to the president for approval or disapproval.

CONCLUSION

The philosophical bias of House and Senate rules reflects the character of each institution. Individual rights are stressed in the Senate, majority rule in the House. In both chambers, however, members who know the rules and precedents have an advantage over procedural novices in affecting policy outcomes. The late senator Byrd—the longest-serving Senate member in history—was the acknowledged procedural expert in the Senate. Byrd understood that passing measures often involved unorthodox processes and procedures (for example, forgoing committee hearings or markups or even floor debate).[92]

In addition to congressional rules, persistence, strategy, timing, compromise, and pure chance are important elements in the lawmaking process. To make public policy requires building winning coalitions at successive stages where pressure groups and other parties can advance their claims. Political, procedural, personal, and policy considerations shape the final outcome. Passing laws, as one former representative said, is like the "weaving of a web, bringing a lot of strands together in a pattern of support which won't have the kind of weak spots which could cause the whole fabric to fall apart."[93]